



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: February 05, 2024**
Judgment pronounced on: April 04, 2024

+ ITA 1385/2018
AGRA PORTFOLIO PVT. LTD.

..... Appellant

Through: Mr.Sumit Lalchandani and
Mr.Vibhu Jain Advs for
Mr.Salil Kapoor, Adv.

versus

PR. COMMISSIONER OF INCOME TAX - 1, & ANR.

..... Respondent

Through: Mr.Sanjay Kumar, Ms.Easha
and Ms.Hemlata Rawart, Advs
for I.T.Dept.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR
KAURAV

J U D G M E N T

YASHWANT VARMA, J.

1. The assessee appellant has instituted the present appeal aggrieved by the judgment rendered by the **Income Tax Appellate Tribunal¹** dated 16 May 2018 and has raised the following questions for our consideration: -

“A. Whether in view of the facts and circumstances of the case and in law, the Tribunal is right in upholding the rejection of the valuation report on the ground that the same was prepared without

¹ ITAT



any verification and upon only considering the figures supplied by the Appellant, while at the same time, ascribing no errors in the said figures?

B. Whether in view of the facts and circumstances of the case and in law, the Tribunal has erred by deciding the appeal basis the conjecture/surmise that the possibility of tailoring of data could not be ruled out?

C. Whether in view of the facts and circumstances of the case and in law, the Tribunal is right in holding that the AO was at liberty to substitute the method of valuation adopted by the Assessee (DCF Method) for his own preferred method of valuation (NAV Method)?

D. Whether in view of the facts and circumstances of the case and in law, the Revenue can reject the report of an expert merchant banker and substitute its own valuation without referring it to the DVO or an expert on the subject?

E. Whether in view of the facts and circumstances of the case and in law, the Tribunal erred by not considering that the Act does not give any scope for the AO to conduct his own valuation exercise, and in all cases where a particular valuation report was rejected, reference to DVO becomes mandatory?

F. Whether the Tribunal erred in law by failing to consider that the even if allegations of non-cooperation are levelled against the Appellant, reference for valuation purpose could have been made to the DVO, as only the DVO has appropriate powers to declare whether the information furnished was erroneous / incorrect or if some further information was required?"

2. Upon hearing learned counsels, we formally admit the appeal on the aforementioned questions.

3. The ITAT has essentially upheld the additions made by the **Assessing Officer**² in **Assessment Year**³ 2014-15 consequent to the rejection of the **Fair Market Value**⁴ evaluation as submitted by the

² AO

³ AY

⁴ FMV



appellant as contemplated under Section 56(2)(viib) of the **Income Tax Act, 1961**⁵ read along with Rule 11UA of the **Income Tax Rules, 1962**⁶. The issue of valuation had arisen in the context of the appellant having allotted 3,15,000 equity shares of a face value of INR 10/- each at a premium of INR 40/- per share and for a total amount of INR 1,26,00,000 /-.

4. For the purposes of valuation of the shares offered for subscription, the appellant had placed reliance on a Valuation Report drawn by a merchant banker, M/s SPA Capital Advisors Ltd., and wherein the value of each share was pegged at INR 9.60/-. Consequent to the rejection of that Report, the AO independently determined the value of each share to be INR 40.40/- and thus quantified the disallowance under Section 56(2)(viib) at INR 1,27,26,000/-.

5. The principal grievance of the appellant is that even if the AO had deemed it fit to reject the Valuation Report drawn on the basis of **Discounted Cash Flow Method**⁷, it could not have substituted the means and the method of valuation of its own volition. It is this principal ground of challenge which was urged by Mr. Lalchandani, learned counsel who appeared in support of the appeal.

6. Doubting the veracity of Valuation Report, the AO is stated to have placed the appellant on notice under Section 142(1) asserting as follows:-

“1. Please refer to your submission dated 07/09/2016 wherein you have submitted certificate of valuation of shares under rule 11UA.

⁵ Act

⁶ Rules

⁷ DCF Method



On perusal of the valuation report the following facts have been noticed.

- i) In its valuation report M/s SPA Capital Advisors Ltd. has given a disclaimer as under: "In preparing the Final Report, SPA has relied upon and assumed, **without independent verification, the truthfulness, accuracy and completeness of the information and the financial data provided by the company.** SPA has therefore relied upon all specific information as received **and declines any responsibility should the results presented be affected by the lack of completeness or truthfulness of such information.**"

From perusal of the report it appears that the valuation of shares is not realistic keeping in view the growth and stature of your company. Further, in the valuation report only figures have been put up without giving reasons as to how these assumptions have been made.

- ii) In the DCF method first step is to forecast expected cash flow based on assumptions regarding the company's revenue growth rate, net operating profit margin, income tax rate, fixed investment requirement, and incremental working capital requirement. The revenue growth rate as well as the net profit margin of your Company, since inception, is negative and you have been carrying forward business losses. Even in the subsequent years, for which data is available, you have incurred losses (loss of Rs. 53083/- (AY 2014-15) and Rs. 1,00,384/- (AY 2015-16). However, as per the computation of valuation, the free cash flow to equity figures are -0.98 (2013-14), 32.61 (2014-15), 34.89 (2015-16), 37.00 (2016-17), 39.22 (2017-18) which are unrealistic.

You are also requested to submit actual free cash flow (FCF) for the AY 2014-15, 2015-16 & 2016-17 till date)

- iii) Similarly with regard to calculation of Cost of Capital, it is requested to clarify whether weighted average has been taken or otherwise. Further use of BSE 500 return data in your case is uncalled for. All your investments are in the associates company only and you must have the data of their year on year growth rate to calculate the actual return in your case. Also BSE 500 return data since inception is very unusal. Practically for assumption purpose this is a very long period for a company which is incorporated a few years back. Therefore, you are requested to take the realistic figure as deduced from your associate company investments. Further, you are having investments in your associates so the



risk factor should be at a very low side. Therefore, you are requested to clarify the basis relying upon the company specific risk has been calculated at 5%. Similarly Beta figure of I and Risk premium of 6.75 may also be justified.

- iv) *Also you have taken a discounting factor @ 20.80% for a company whose returns are continuously in negative which is an unrealistic approach to calculate the value of shares. In view of the above you are also requested to give details of values which have been taken to arrive at a discounting figure @ 20.8% and also the basis behind such assumption for a company whose return have consistently been negative. Also, whether sector specific study has been carried out to reach the rate of return of growth. If, yes give a copy of the same.*
- v) *Further, you are requested to submit Financial statement of six months ended on September 30, 2013.*

In view of the above, you are requested to submit the details and explanations called for above and to explain as to why the DCF method of valuation employed by you for valuation of shares under Rule 11UA should not be rejected and, therefore, the book value method as per RULE 11UA (2)(a) should not be taken for the purpose of Section 56(2)(viib) of the I.T. Act, 1961.”

7. Noticing that the appellants had failed to satisfactorily answer the queries which stood raised, the AO proceeded to issue further notices referable to Sections 144 and 142(1) of the Act. It was in terms of the aforesaid notices that the AO took the position that the shares were liable to be valued at INR 9.60/- as against INR 50.60/- which had been adopted by the assessee.

8. The decision of the AO ultimately came to be affirmed by the **Commissioner of Income Tax (Appeals)**⁸ and both have essentially proceeded on a perceived failure on the part of the appellant assessee to substantiate the basis of valuation as adopted in the Valuation Report. They also appear to have held against the appellant on the ground that it had failed to provide any evidence in support of the figures which

⁸ CIT(A)



formed part of the Valuation Report. The AO as well as the CIT(A) also appear to have drawn adverse inference from the disclaimers which stood introduced in the Valuation Report drawn by the merchant banker and which had clearly divulged that the Report had come to be drawn solely based on the data provided by the appellant without “*independent verification*” with respect to the truthfulness, accuracy and completeness of the information.

9. The ITAT on the basis of the above came to hold that since the AO was deprived of any satisfactory explanation, it was left with no option but to reject the Valuation Report and independently evaluate the face value of the shares. While doing so, however, the AO has chosen to depart from the DCF Method which was adopted by the assessee and has independently ascertained the face value of the shares by adopting the **Net Asset Value Method**⁹.

10. Assailing the view so taken, Mr. Lalchandani submitted that in terms of Section 56(2)(viib), the option of choosing a method of valuation stands vested exclusively in the assessee. According to learned counsel, even if a valuation as submitted were to be doubted, it would not be permissible for the respondents to adopt a method different from the one chosen by the assessee. Mr. Lalchandani contended that the aforesaid position would clearly flow from the language in which Section 56(2)(viib) stands couched read along with Rule 11UA. Learned counsel contended that Rule 11UA(2) in unambiguous terms employs the expression “*at the option of the assessee*” and this being evidence of the choice of a valuation method

⁹ NAV Method



being one placed in the hands of the assessee alone.

11. In support of his submission, Mr. Lalchandani also drew our attention to the following pertinent observations as rendered by a Division Bench of the Bombay High Court in **Vodafone M-Pesa Limited vs. Principal Commissioner of Income Tax and Others**¹⁰:-

“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. Infact, 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. Appearing for the respondents, Mr. Kumar, learned counsel, submitted that Section 56(2)(viib) places the assessee under an obligation to submit a report depicting the FMV of shares and which can be duly substantiated to the satisfaction of the AO. According to learned counsel, since the appellant, despite adequate opportunities having been provided failed to establish the correctness of the

¹⁰ 2018 SCC OnLine Bom 21317



valuation, the AO became entitled to undertake an independent exercise for the purposes of determining the FMV of the unquoted equity shares. It is these rival submissions which fall for our determination.

13. In order to appreciate the submissions which have been addressed, we deem it apposite to firstly extract Section 56(2)(viib) which reads as follows:-

“Section 56. Income from other sources.

XXXX

XXXX

XXXX

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

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

- (i) by a venture capital undertaking from a venture capital company or a venture capital fund [or 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 income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of Section 270-A 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;

- [(aa) “specified fund” means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or a Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) [or regulated under the [International Financial Services Centre Authority (Fund Management) Regulations, 2022 made under the] International Financial Services Centres Authority Act, 2019];
- (ab) “trust” means a trust established under the Indian Trusts Act, 1882 (2 of 1882) or under any other law for the time being in force;]
- (b) “venture capital company”, “venture capital fund” and “venture capital undertaking” shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of [Explanation] to clause (23-FB) of Section 10;]”

14. As is manifest from the above, the explanation placed in clause (viib) postulates that the FMV of shares shall be the value determined in accordance with the methods as may be prescribed or as may be substantiated by the company to the satisfaction of the AO, whichever be higher. The methods for valuation stand enumerated in Rule 11UA which reads as follows: -

“Determination of fair market value.

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,-



- (a) valuation of jewellery,-
- (i) the fair market value of jewellery shall be estimated to be the price which such jewellery would fetch if sold in the open market on the valuation date;
 - (ii) in case the jewellery is received by the way of purchase on the valuation date, from a registered dealer, the invoice value of the jewellery shall be the fair market value;
 - (iii) in case the jewellery is received by any other mode and the value of the jewellery exceeds rupees fifty thousand, then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date;
- (b) valuation of archaeological collections, drawings, paintings, sculptures or any work of art,-
- (i) the fair market value of archaeological collections, drawings, paintings, sculptures or any work of art (hereinafter referred as artistic work) shall be estimated to be price which it would fetch if sold in the open market on the valuation date;
 - (ii) in case the artistic work is received by the way of purchase on the valuation date, from a registered dealer, the invoice value of the artistic work shall be the fair market value;
 - (iii) in case the artistic work is received by any other mode and the value of the artistic work exceeds rupees fifty thousand, then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date;
- (c) valuation of shares and securities,-
- (a) the fair market value of quoted shares and securities shall be determined in the following manner, namely,-
 - (i) if the quoted shares and securities are received by way of transaction carried out through any recognized stock exchange, the fair market value of such shares and securities shall be the transaction value as recorded in such stock exchange;
 - (ii) if such quoted shares and securities are received by way of transaction carried out other than through any recognized stock exchange, the fair market value of such shares and securities shall be,-



- (a) the lowest price of such shares and securities quoted on any recognized stock exchange on the valuation date, and
 - (b) the lowest price of such shares and securities on any recognized stock exchange on a date immediately preceding the valuation date when such shares and securities were traded on such stock exchange, in cases where on the valuation date there is no trading in such shares and securities on any recognized stock exchange;
- [(b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:-
- the fair market value of unquoted equity shares = $(A+B+C+D - L) \times (PV)/(PE)$, where,
- A= book value of all the assets (other than jewellery, artistic work, shares, securities and immovable property) in the balance-sheet as reduced by,-
- (i) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any; and
 - (ii) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;
- B =the price which the jewellery and artistic work would fetch if sold in the open market on the basis of the valuation report obtained from a registered valuer;
- C =fair market value of shares and securities as determined in the manner provided in this rule;
- D =the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of the immovable property;
- L= book value of liabilities shown in the balance sheet, but not including the following amounts, namely:-
- (i) the paid-up capital in respect of equity shares;
 - (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before



the date of transfer at a general body meeting of the company;

- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PV = the paid up value of such equity shares;

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

(c) the fair market value of unquoted shares and securities other than equity shares in a company which are not listed in any recognized stock exchange shall be estimated to be price it would fetch if sold in the open market on the valuation date and the assessee may obtain a report from a merchant banker or an accountant in respect of which such valuation.]

- (2) Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (1), the fair market value of unquoted equity shares for the purposes of sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), at the option of the assessee, namely:-

(a) the fair market value of unquoted equity shares=
$$\frac{(A-L)}{(PE)} \times (PV),$$

where,

A= book value of the assets in the balance sheet as reduced by any amount of tax paid as deduction or



collection at source or as advance tax payment as reduced by the amount of tax claimed a refund under the Income-tax Act and any amount shown in the balance sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

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

- (i) the paid up-capital in respect of equity shares
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

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

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

- (b) the fair market value of the unquoted equity shares determined by a merchant banker [***] as per the Discounted Free Cash Flow Method.]”

15. A perusal of Rule 11UA(2) would indicate that the assessee is enabled to determine the FMV of the unquoted equity shares either in



accordance with the formula prescribed in clause (a) or on the basis of a report drawn by a merchant banker who may have determined the FMV as per the DCF Method.

16. In our considered opinion, the language of Rule 11UA(2) indubitably places a choice upon the assessee to either follow the route as prescribed in clause (a) or in the alternative to place for the consideration of the AO a Valuation Report drawn by a merchant banker as per the DCF method. However, and as is manifest from a conjoint reading of Section 56(2)(viib) read along with Rule 11UA(2), the option and the choice stands vested solely in the hands of the assessee.

17. While it would be open for the AO, for reasons so recorded, to doubt or reject a valuation that may be submitted for its consideration, the statute clearly does not appear to empower it to independently evaluate the face value of the unquoted equity shares by adopting a valuation method other than the one chosen by the assessee. It is this aspect which was duly acknowledged by the Bombay High Court in *Vodafone M-Pesa*.

18. We note that the view as taken by the Bombay High Court in the aforementioned judgment appears to have been consistently followed by Tribunals of different regions as would be evident from the discussion which ensues. We, in this regard, firstly take into consideration the judgment rendered by the Mumbai Bench of the ITAT in **DCIT, Circle 13(2)(2), Mumbai vs. Sodexo Facilities Management Services**¹¹ where it was held as under:-

¹¹ ITA No. 2945/Mum/2022



“18. On the other hand, Ld. Counsel for the assessee submitted that the AO has not accepted the method of valuation which was furnished by the assessee. The valuer computed the FMV by averaging the valuation as per PECV method as well as net asset value method. He submitted that when the legislation has conferred an option on the assessee to choose a particular method of the valuation, the AO cannot find fault in the said recognized method and adopting the method of his own choice. In support of this, he relied on the decision of the Hon’ble Jurisdictional High Court in the case of *Vodafone M-Pesa Ltd. v PCIT* (2018) 164 DTR 257/ 256 Taxman 240 (Bom)(HC). As far as the worth of food division is concerned, the Ld. Counsel for the assessee submitted that assessee has followed the method prescribed under section 50B(3) of the Act alongwith Explanation (2). He submitted that in the net worth computed by the assessee and in the AO, there is only one difference. It was submitted that the assessee following the Explanation-2 below section 50B(3) of the Act has adopted written down value of the block asset in case of the depreciable asset as per the proviso to section 43 of the Act, which the AO has omitted.

19. We have heard rival submissions on the issue in dispute and perused the material on record. We find that computation of LTCCG on the transfer of undertaking as the slump sale consists of two components. First component is sale consideration and the second component is the net worth or cost of acquisition. When the net worth of division is subtracted from the sale consideration, which results into LTCCG on the slump sale. In the case of the assessee, the AO has taken FMV at Rs. 7,20,32,509/- which was worked out by the valuer following the PECV method, whereas the assessee has followed average value of PECV method as well as NAV method to justify the sale consideration actually received. We are of the opinion that Id Assessing Officer has not carried out valuation by an independent valuer and merely chosen a part of the valuation report submitted by the assessee. Therefore, we restore back the issue to the AO for referring the matter to a valuation expert by way of the issue of commission and thereafter, determining the FMV of the undertaking of the food division of the assessee.”

19. Proceeding along similar lines, the Hyderabad Bench of the ITAT in **Joint Commissioner of Income Tax vs. M/s MLR Auto Limited**¹² had held as follows:-

¹² ITA No. 115/Hyd/2021



“17.1. The conjoint reading of Section 56(2)(viib) and Rule 11U and 11UA makes it abundantly clear that in case assessee exercised his option for determination of the fair market value of the shares and exercise then such decision of the assessee shall be final and binding on the assessing officer. The option was given by the Act to the assessee either to apply the DCF method or net asset valuation method, this option is not available to the assessing officer. Rule 11UA provides the method of determining the FMV of a property other than the immovable property. Rule 11UA(2) reproduced hereinabove provides the method of providing the FMV of unquoted shares to be determined at the option of the assessee.

17.2. Once the assessee applied particular method of valuation, (in the present case DCF method), then it is the duty of the Assessing Officer / Id.CIT(A) to scrutinize the valuation report within the four corners or parameters laid down while making the valuation report under DCF method only. It is not permissible for the Assessing Officer to reject the method opted by the assessee and apply a different method of valuation and the Assessing Officer can definitely reject the valuation report but not the method. In case, the AO rejected the valuation report, then the AO has to carry out a fresh valuation report by applying the same valuation method and determine the fair market value of the unquoted shares.

18. Therefore, in our view, the Assessing Officer was incorrect in concluding that the DCF method is “quite unrealistic and inapplicable” to the terms of the Income Tax Act. On the contrary, the DCF method is quite applicable and was required to be applied by the Assessing Officer to determine the FMV of the unquoted shares.”

20. A more detailed discussion on the issue which confronts us in this appeal is found in the judgment rendered by the Mumbai Bench of the ITAT in **Dy. Commissioner of Income Tax 6(2)(1) vs. Credtalpha Alternative**¹³ and the relevant parts whereof are reproduced hereunder:-

“15. Thus, the fair market value of the share shall be higher of the value as determined in accordance with the provisions of rule 11 UA or any other method, which can be substantiated by the assessee before the Assessing Officer. For the purpose of determining “fair

¹³ (2022) 94 ITR (Trib) 596



market value” of unquoted shares provisions of rule 11 UA (2) applies which gives an option to the assessee to either value the shares as per prescribed formula given in clause (a) or clause (b) which provides for the determination of the fair market value based on discounted cash flow method as valued by a merchant banker or a chartered accountant (till 24th of May 2018). In the present case the assessee has valued the shares according to one of the “options” available to assessee by adopting discounted cash flow method. Therefore, such an option given to the assessee cannot be withdrawn or taken away by the learned Assessing Officer by adopting different method of valuation i.e., net asset value method. The method of valuation is always the option of the assessee. The learned Assessing Officer is authorised to examine whether assessee has adopted one of the available options properly or not. In the present case, the learned Assessing Officer has thrust upon the assessee, net asset value method rejecting discounted cash flow method for only reason that there is a deviation in the actual figures from the projected figures. It is an established fact that discounted cash flow method is always based on future projections adopting certain parameters such as expected generation of cash flow, the discounted rate of return and cost of capital. In hindsight, on availability of the actual figures, if the future projections are not met, it cannot be said that the projections were wrong. To prove that the projections were unreliable, the learned Assessing Officer must examine how the valuation has been done. In a case future cash flow projections do not meet the actual figures, rejection of discounted cash flow method is not proper. If projected future cash flow and actual result matches, such situation would always be rare. For projecting the future cash flow certain assumptions are required to be made, there needs to be tested and then such exemptions becomes the base of estimation of such projected future cash flows. If there are no assumptions, there cannot be an estimate of future projected cash flows and then discounted cash flow method becomes redundant. For exercise of valuation, assumption made by the valuer and information available at the time of the valuation date are relevant. As the exercise of valuation must be viewed as on the date of the valuation looking forward and cannot be reviewed in retrospect. Further, the valuation is always made based on review of historical data and projected financial information provided by the management. Further report of expert will always include limitation and responsibilities but that does not make his report incorrect. Of course, if there are errors in the working of projected cash flow, estimating the projected revenue and projected expenditure as well as in adoption of cost of equity and discount factor, the learned Assessing Officer is within his right to correct it after questioning the same to the assessee. The learned



Assessing Officer can also question the basic assumptions made by the valuer. If they are unreasonable or not based on historical data coupled with the management expectation, the learned Assessing Officer has every right to question it and adjust the valuation so derived at. However, if he does not find any error in those workings, he could not have rejected the same. Further the reason given by the learned Assessing Officer that the net asset value method and the discounted cash flow method for valuation of the shares of the company gives a wide variation between them, we do not find any reason to find fault with the assessee in such cases. Both these methods have different approaches and methodologies therefore there are bound to be differences, but it does not give any authority to the learned Assessing Officer to pick and choose one of the method and make the addition. It is the assessee who has to exercise one of the options available under the provisions of the law for valuing the shares. The learned Assessing Officer needs to examine that method. Naturally, if the discounted cash flow method and net asset value method gives the same result, where would have been the need to prescribe the two methods in the law. In view of above facts, we do not find any infirmity in the order of the learned Commissioner of Income-tax (Appeals) in deleting the addition of Rs. 69,000,000 made by the learned assessing officer u/s 56 (2) (viib) of the act. Accordingly, ground Nos. 3 and 4 of the appeal of the learned Assessing Officer are dismissed.”

21. We deem it apposite to lastly take note of the following pertinent observations as appearing in a decision rendered by the ITAT Bench at Bangalore in **Taaq Music Pvt. Ltd. vs. Income Tax Officer**¹⁴:-

“11. The law provides that, the fair market value may be determined with such method as may be prescribed or the fair market value can be determined to the satisfaction of the Assessing Officer. The provision provides an Assessee two choices of adopting either NAV method or DCF method. If the Assessee determines the fair market value in a method as prescribed the Assessing Officer does not have a choice to dispute the justification. The methods of valuation are prescribed in Rule 11UA(2) of the Rules. The provisions of Rule 11UA(2)(b) of the Rules provides that, the Assessee can adopt the fair market value as per the above two methods i.e., either DCF method or fair market value of the unquoted equity shares determined by a merchant banker. The choice of method is that of the Assessee. The Tribunal has followed the judgment of Hon'ble

¹⁴ 2020 SCC OnLine ITAT 9482



Bombay High Court rendered in the case of *Vodafone M-Pesa Ltd. v. Pr. CIT* (supra) and has taken the view that the 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 decision of ITAT, Delhi in the case of *Agro Portfolio Ltd.* 171 ITD 74 has also been considered by the ITAT, Bangalore in the case of *VBHC Value Homes Pvt. Ltd.* (supra).

12. In view of the above legal position, we are of view that the issue with regard to valuation has to be decided afresh by the AO on the lines indicated in the decision of ITAT, Bangalore in the case of *VBHC Value Homes Pvt. Ltd., Vs ITO* (supra) i.e., (i) the 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. (ii) 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. 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. The order of Id. CIT(A) is accordingly set aside and this issue is remanded to the AO for decision afresh, after due opportunity of hearing to the Assessee.”

22. Accordingly, and for all the aforesaid reasons, we allow the instant appeal and set aside the order of the ITAT dated 16 May 2018. The Questions of Law as framed, namely, Question A and C are answered in the negative and in favor of the appellant assessee. In light of the answers rendered in respect of the aforementioned two questions, the additional questions which are framed would not merit an independent examination. The matter shall in consequence stand remitted to the AO which shall undertake an exercise of valuation afresh in accordance



with the DCF method.

23. We also accord liberty to the AO to determine the FMV of the shares bearing in mind the DCF Method by having the same independently determined by a Valuer appointed for the aforesaid purpose.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 04, 2024

neha