1. M/s. Ricardo UK Ltd. v. DCIT (International Taxation) (ITA Nos.3967-69/D/17) (17/02/2021)

SECTION 9 READ WITH DTAA - PERMANENT ESTABLISHMENT – ATTRIBUTION OF PROFIT – THE INDIAN SUBSIDIARY HAS BEEN SUFFICIENTLY REMUNERATED BY WAY OF COMMISSION AND REMUNERATION – THE COMMISSION AND REMUNERATION PAID TO INDIAN SUBSIDIARY HAS BEEN ACCEPTED AT ARM'S LENGTH – THERE IS NO REQUIREMENT FOR FURTHER ATTRIBUTION OF PROFIT TO PE PARTICULARLY WHEN THE COMMISSION/REMUNERATION PAID TO INDIAN SUBSIDIARY WAS SIGNIFICANTLY HIGHER THAN PROFIT ATTRIBUTED TO PE – ADDITION DELETED

Held, Hon'ble Supreme Court in case of DIT vs. Morgan Stanley and Co. Inc. (supra) upheld the order passed by the ld. AAR reached the conclusion that when transaction between two parties, PE on the one hand and domestic subsidiary company on the other hand, as in the present case, is remunerated on arm's length basis taking into account all the risk taking functions of multi-national enterprise, nothing would be left to attribute to the PE. [Para 13]

14. Even otherwise, when we examine this proposition alternatively by reducing the commission/remuneration

paid to RIPL from the profits attributed to the PE, detailed in the table extracted in preceding para 11 of the order, nothing more will be left to attribute to the PE. This proposition has been held in case of Amadeus Global Travel Distribution S.A. vs. DCIT 113 TTJ 767 (Del.) by the coordinate Bench of the Tribunal which has been affirmed by the Hon'ble Delhi High Court in ITA 689/2011 & 795-797/2011 by relying upon the decision held in case of DIT vs. Galileo International Inc. 224 CTR 251 (Del.)

15. So, we are of the considered view that when we deduct commission/remuneration from the RIPL from the profits attributed to the PE, no taxable income left in the hands of PE. Consequently, addition made by the AO/CIT (A) is not sustainable in the eyes of law.

17. In view of what has been discussed above, we are of the considered view that when RIPL, a domestic subsidiary company, has already been remunerated at arm's length, no further attribution of profit to PE would be warranted. Even otherwise, by following the order passed by the coordinate Bench of the Tribunal in assessee's own case for AY 2007-08 (supra), when we deduct the remuneration/commission paid to RIPL from the amounts of profit attributed to the PE as detailed in para 11 of this order, no taxable income left in the hands of the PE. Consequently, additions made by the AO and confirmed by ld. CIT (A) are ordered to be deleted being not sustainable in the eyes of law.

2. R. System International Ltd. V. DCIT (ITA No. 6173/Del/2015) dated 25.02.2021 (Delhi ITAT)

SECTION 10A OF THE INCOME-TAX ACT, 1961 – FOREIGN EXCHANGE FLUCTUATION – WHETHER DISALLOWANCE OF FOREIGN EXCHANGE FLUCTUATIONS FOR THE PURPOSE

OF CALCULATING DEDUCTION UNDER SECTION 10A CONSIDERING IT AS CAPITAL NATURE IS CORRECT – HELD, NO (In favour of assessee) (Para 7)

Held, we have heard the rival contentions and have also perused the material on record. The only grievance of the assessee before us is that the Assessing Officer, while allowing assessee's claim of deduction u/s 10A of the Act, has reduced an amount of Rs.4,80,613/- from the net profit of the undertaking, it being the net foreign exchange gain, for the reason that the same was capital in nature. There is no dispute that the said income is capital in nature as the Ld. CIT (A) has given a categorical finding on the same. The Department has not disputed it and neither is the assessee challenging it. The only prayer of the assessee is that if the same is not included in the net profit of the undertaking for the purposes of computation of claim of deduction u/s 10A of the Act, the same should also be excluded from the computation of business income. In this regard, we are in complete agreement with the submissions of the Ld. Authorized Representative. If the net foreign exchange of gain of Rs.4,80,613/- is excluded from the computation of claim of deduction u/s 10A of the Act for the reason that it is on capital account, the same should also not be included while computing the net profit of the assessee. The same is directed to be excluded from the computation of business income as well. Accordingly, the additional ground raised by the assessee stands allowed. **(Para 7)**

3. M/s Religare Securities Ltd. V. DCIT (ITA No. 6330/Del/2017) dated 25.02.2021 (Delhi ITAT)

SECTION 14A OF THE INCOME-TAX ACT, 1961 -

EXPENDITURE INCURRED IN RELATION TO INCOME NOT INCLUDIBLE IN TOTAL INCOME (GENERAL) - ASSESSMENT YEAR 2014-15 – WHETHER DISALLOWANCES MADE UNDER SECTION 14A READ WITH RULE 8D COULD NOT EXCEED AMOUNT OF EXEMPT INCOME EARNED BY ASSESSEE DURING YEAR - HELD, YES [Para 11.1] [Matter Remanded] [In favour of assessee]

Held, As far as the assessee's additional ground is concerned which challenges the disallowance made u/s 14A of the Act, it is seen that in Assessment Year 2008-09 in ITA No.2282/Del/2013, vide order dated 13.12.2019, on the issue of disallowance u/s 14A of the Act, the Co-ordinate Bench of the Tribunal in Para 5.4 of the said order had considered the issue of disallowance and remitted the issue back to the file of the Assessing Officer to work out of the disallowance by calculating average investments under Rule 8D(2)(ii)/(iii) by taking only those investments which have actually yielded dividend income during the relevant year and also directed that if the same exceeded the dividend income then to restrict the same to the extent of exempt income only. Similarly, in Assessment Year 2011-12 in ITA Nos.230/Del/2017 and 574/Del/2017, vide order dated 31.07.2020, vide Para 18 of the said order, the issue of disallowance u/s 14A of the Act had again restored the issue to the file of the AO with the direction to ascertain the investment which have yielded dividend income and to consider only those investments for computing the average value of investments. Therefore, on identical facts and with consent of both the parties, we deem it appropriate to restore this issue also to the file of the Assessing Officer with a direction to include only those investments which

have yielded dividend income for computing the average value of investments for the purpose of computing the amount of disallowance u/s 14A of the Act. The Assessing Officer is directed to offer reasonable opportunity to the assessee to present its case before proceeding to re-compute the disallowance. Since this ground also relates to the ground raised in the Department's appeal, the Department's ground also stands restored to the file of the AO with similar directions. Thus, assessee's as well as department's grounds stand allowed for statistical purposes. **(Para 11.1)**

4. ACIT v. ELEL Hotels and Investment Ltd. (ITA No.918/Del/2010) (16/02/21)

SECTION 37(1) – REVENUE V. CAPITAL EXPENSE – ASSESSEE WAS THE OWNER OF HOTEL WHICH WAS RUN BY ITC LTD. UNDER AN AGREEMENT - CHARGES WERE PAID TO ITC FOR OBTAINING RIGHT TO OPERATE THE HOTEL – THE PAYMENT OF CHARGES RESULTS IN ACQUISITION OF RIGHT TO RUN HOTEL AND DOES NOT RESULT IN CREATION OF ANY ASSET – THE CHARGES ARE IN THE NATURE OF REVENUE EXPENSE.

Held, An analysis of the consent terms dated 11th May, 2005 with ITC Ltd., shows that at clause iv) of point n., it is mentioned that Rs.32.42 crore was only for relinquishment of rights to operate the hotel under operating licence. The relevant clause of the agreement reads as under:-

"The sum of Rs.32.42 crore (Rupees Thirty two crores Forty two lakhs only) is and by way of relinquishment of rights to operate the hotel under the operating licence."

26. We, therefore, find merit in the arguments advanced by the ld. Counsel that when there was no addition to the capital asset and no change in the capital structure and there

was no asset of any enduring nature involved, but, only an alteration in the mode of earning the money from the hotel, therefore, such compensation paid had arisen out of business necessity and should be allowed as revenue in nature. The assessee, in our opinion, in the instant case, has acquired nothing new of enduring nature as it always held the asset of enduring nature. It was not a case where the assessee was acquiring for the first time something which it did not otherwise own or possess. It was, thus, a change in the method of earning profits from the hotel and not a transfer of any asset. We find merit in the argument of the ld. Counsel that the agreement was terminated on business considerations and as a matter of commercial expediency.

5. Manoj Kumar Vs ACIT (ITA No- 1628 /Del/2016) (11.02.2021)

SECTION 37 - NO ADHOC DISALLOWANCE CAN BE MADE WITHOUT POINTING OUT ANY DISCREPANCY IN THE BOOKS OF ACCOUNTS OF THE ASSESSEE WHICH WERE AUDITED UNDER THE PROVISIONS OF ACT, WITHOUT REJECTING THE BOOKS OF ACCOUNTS

6. We have gone through the record in the light of the submissions made on either side. Insofar as the commission of the assessee is dealing with the supply of contract labourers remains undisputed. It is also not in dispute that the assessee produced the books of accounts, bills, vouchers and muster rolls before the Assessing officer and the Assessing officer verified the same. Is also not in dispute that the Direct Expenses include the employer's contribution to PF, ESI and Labour Welfare Fund in respect of which the learned Assessing Officer did not find any discrepancy. Insofar as the cash payments made by the

assessee are concerned, learned Assessing Officer himself recorded that the assessee explained that such amounts were paid to the labourers in cash because they fall in the exempted income slab and no tedious was required to be deducted. Payment of petty amounts to labourers cannot be expected to be through banking channels. If on verification of the material produced by the assessee, the learned Assessing Officer still requires any further details, it is always open for the assessing officer to require the same to be produced. Is not so in this case.

7. It is, therefore, clear that neither the auditors who audited the accounts of the assessee under section 44 AB of the Act no the learned Assessing Officer find out any specific discrepancy in respect of books of accounts and is only on the examination of the payment sheets and the muster rolls the learned Assessing Officer suspected that the actual payments may be in variance with the payments contained in the books. However, in such event also, the assessing officer should have considered the quantum involved in the payment of the employer's contribution to PF, ESI, and labour welfare fund to the government authorities and there should not have been any disallowance on ad hoc basis.

8. In Paradise Holidays (supra) the Hon'ble jurisdictional High Court held that the accounts which are regularly maintained in the course of business and are duly audited, free from any qualification by the auditors, should normally be taken as a correct unless there are adequate reasons to indicate that they are incorrect and unreliable, in which case the onus is upon the Revenue to show that either the books of accounts maintained by the assessee were incorrect or incomplete or method of accounting adopted by him was such that true profits of the assessee cannot be deduced there from.

9. On a careful consideration of all these facts we are of the

considered opinion that without pointing out any serious discrepancy with the books of accounts of the assessee which were audited under the provisions of Act, without rejecting the books of accounts, the assessing officer should not have resorted to ad hoc disallowance. We therefore, direct the learned Assessing Officer to impugned by the assessee in this appeal.
10. In the result appeal of the assessee is allowed.

6. M/s. Glencore India Pvt. Ltd. Vs ACIT (ITA No.6369/Del/2016) (Dated: 09.02.2020)

SECTION 37 - NO DISALLOWANCE OF BUSINESS PROMOTION EXPENSES CAN BE MADE WHERE NO DISCREPANCIES FOUND WITH THE BOOKS OF ACCOUNTS OF THE ASSESSEE AS TO THE INCURRING OF THESE EXPENSES OR TO SHOW THAT THERE IS ANY ILLEGALITY OF PURPOSE OF THIS EXPENSES AND ALSO THERE IS NO SPECIFIC FINDING THAT THE EXPENSES WERE NOT EXCLUSIVELY AND FULLY FOR THE PURPOSE OF BUSINESS

16. At this stage there is no dispute that the assessee produced the details and documents like sample invoices, copy of Ledger, summary mentioning the category of gifts and the list of people to whom gifts were given etc were furnished before the authorities and no discrepancies are specifically pointed out with any of these documents. Further AO himself admitted that it is customary under Indian tradition to offer gifts on the festive occasions like Diwali Festival. Ld. CIT(A) held that maintenance of cordial relations with customers are required for obtaining

the market information which is for the furtherance of the assessee's business. By no stretch of imagination could be said that offering of gifts by a businessman to is customers is barred by any law for the time being in force.

17. Now coming to the quantum of disallowance learned Assessing Officer made it at 60% whereas the Ld. CIT(A) restricted the same to 20%. As observed by is about, no discrepancies found with the books of accounts of the assessee as to the incurring of these expenses or to show that there is any illegality of purpose of this expense. In the absence of any concrete basis to determine the disallowance of the expense and in the absence of a specific finding that the expenses were not exclusively and fully for the purpose of business, we find it difficult to sustain the disallowance year at 60% or 20%. With this view of the matter we delete the addition made by disallowing the business promotion expenses. Ground No. 4 of Revenue's appeal is dismissed and grounds of C.O. No are allowed.

7. Harish N. Salve . V. ACIT (ITA No. 1007&1008/Del/2018) dated 25.02.2021 (Delhi ITAT)

SECTION 37(1) OF THE INCOME-TAX ACT, 1961 - BUSINESS EXPENDITURE - ALLOWABILITY OF (ADVERTISEMENT EXPENSES) - ASSESSMENT YEAR 2011-12 - ASSESSEE, A LEADING ADVOCATE, ENTERED INTO A SCHOLARSHIP AGREEMENT WITH UNIVERSITY OF OXFORD WHEREIN HE PAID CERTAIN AMOUNT TOWARDS SCHOLARSHIP OF TWO INDIAN STUDENTS - ASSESSEE HAD SET UP THIS

SCHOLARSHIP FOR CREATING HIS VISIBILITY IN INTERNATIONAL ARENA AND HIS SOCIAL STANDING - ASSESSEE HAD SPECIFICALLY SUBMITTED THAT IT HAD INCREASED LOT OF VALUE IN HIS CV AND WHICH HAD LED HIM TO BE APPOINTED ON CERTAIN COMMITTEES OF REPUTE BY GOVERNMENT OF SINGAPORE - FURTHER, ASSESSEE HAD ALSO SHOWN THAT ONE OF THESE STUDENTS TO WHOM SCHOLARSHIP WAS GRANTED HAD HELPED HIM IN A FAMOUS CASE REPRESENTED BY HIM AND THESE STUDENTS MIGHT JOIN HIS CHAMBERS SOMETIME IN FUTURE - WHETHER, ON FACTS, EXPENDITURE INCURRED BY ASSESSEE WAS IN FURTHERANCE OF HIS BUSINESS AND SAME WAS TO BE ALLOWED UNDER SECTION 37(1) - HELD, YES [PARA 9] [IN FAVOUR OF ASSESSEE]

Held, We have gone through the records in the light of submissions made on either side. On perusal of the orders, we are satisfied that the facts and questions of law involved in these two assessment years on hand are identical to the ones involved for earlier assessment years and by order dated 13.08.2019 in ITA Nos. 2285 and 2392/Del/2016 for assessment year 2011-12, a coordinate Bench observed as follows :

"13. We have carefully considered the rival contention and perused the orders of the lower authorities. Issue involved in this appeal is whether the expenditure incurred by the assessee is allowable u/s 37 (1) of the act or not. Allowability of an expenditure incurred by the assessee u/s 37(1) of the act is required to be tested in accordance with

nature and scale of the business/ profession of the assessee. It may be a case that in case of one assessee, particular expenditure is " wholly and exclusively" incurred for the purposes of business and in another case it may not be so. Undoubtedly, assessee is a noted international lawyer who has set up a scholarship for creating his visibility in international arena and his social standing. The assessee has specifically submitted that it has increased lot of value of the CV of the assessee and the government of Singapore has appointed him on certain committees of repute. Even otherwise, it is not open to the revenue to adopt a subjective standard of reasonable as and decide whether the type of the expenditure of the assessee should incur and in what circumstances. The opinion of the learned assessing officer that attending the conferences et cetera would have added more weightage to the professional profile of the assessee is devoid of any merit. It is not the AO but the assessee is carrying on the profession. He knows better that what kind of expenditure he should incur for furtherance of his business. To judge allowability of an expenditure, the learned assessing officer should put himself into the shoes of the assessee and then decide that whether the expenditure incurred by the assessee is necessary or not for the business of the assessee. Thus, allowability of expenditure should always be judged from the mindset of the assessee. The AO cannot put his thinking to say that the expenditure incurred by the assessee is not wholly and exclusively incurred for his profession, unless, he brings his level of thinking to the level of the professional, like assessee. The requirement of incurring the expenditure by a professional/businessman changes by the changes in the dynamics of the business, its complexities and its uniqueness. The level at which the assessee is carrying on the profession, perhaps, he might

not have thought it proper to increases visibility by attending the conferences, seminars et cetera. He has different vision of carrying himself in the professional field to increases visibility and social status. He thought fit to set up a scholarship to Indian students in Oxford University. Thus, in the present case definitely there is a nexus between the expenditure incurred by the assessee and the professional services rendered by the assessee. He has also shown that the student to moving the scholarship has been granted has helped him in famous case of Vodafone represented by him. Therefore, we are of the opinion that the assessee has incurred the above expenditure wholly and exclusively for the purposes of the business. In the professional field there are innovative ways visualized by the professional to make themselves visible in the professional circle and to build their own professional profile for generating higher and value added business. It may be, sponsoring a seminar, becoming knowledge partners, setting up the prizes and awards, creating the competitive award ceremonies, hosting vibrant summits of various states. Therefore, it is apparent that at least in the case of the professionals, the way they promote themselves, is changing very fast and the benefits of such expenditure are huge and wide. Therefore according to us the impugned expenditure incurred by the assessee is a revenue expenditure allowable u/s 37 (1) of the income tax act. We do not subscribe to the view of the learned CIT – A these expenditure is capital in nature. The expenditure incurred by the assessee is the routine day-to-day expenditure incurred by the assessee for promoting his professional profile. These expenditure cannot be held to be capital expenditure in nature as no fresh new fixed assets is created by paying the scholarship sum. Further merely because in the agreement it is mentioned as an annual gift in the form

of scholarship, it does not become a gift. In fact, it is the expenditure incurred by the assessee in furtherance of his business. While issue arose before coordinate bench in case of another professional firm in ITA number 1382/Del/2012 for assessment year 2009 – 10 wherein substantial contribution was made for a building of an association which promotes the study of taxation. The coordinate bench held that such expenditure incurred by the assessee is wholly and exclusively incurred by the assessee for the purpose of its profession. Revenue carried the matter before the honourable Delhi High Court, which upheld the order of the ITAT in ITA number 50/2014 dated 11/8/2015. The facts of the present case are on the far better footing. Hence, we reverse the order of the lower authorities, and direct the learned assessing officer to delete the above disallowance. In view of this, we allow ground number 1 of the appeal of the assessee and dismiss ground number 1 of the appeal of the learned assessing officer."

10. For the assessment year 2012-13 also in ITA No. 2505/Del/2017, such a view was followed by Tribunal. On the parity of facts of the cases on hand with the facts of earlier years, we are of the considered opinion that the consistent view taken by the Tribunal for earlier assessment years cannot be disturbed. While respectfully following the same, we direct the Assessing Officer to delete the addition.

8. ACIT Vs M/s GTM Builders & Promoters Pvt. Ltd. (ITA No. 3982/Del/2015) (Dated: 08.02.2021)

SECTIO 37 – BOGUS PURCHASE - NO DISALLOWANCE OF PURCHASE CAN BE MADE ON ACCOUNT OF NON-PRODUCTION OF

PARTIES WHERE AO HAS NOT REASONED THAT THE BILLS OR THE CERTIFICATE OF THE ARCHITECTS ARE BOGUS AND WRONG ON FACTS AND AO HAS NOT REJECTED THE BOOKS OF ACCOUNTS AND ACCEPTED THE BOOK PROFITS

6. We find that the AO has disallowed the purchases made from the four parties namely, M/s Meet Enterprises, M/s Suman Enterprises, M/s Durga Enterprises and M/s Bharat Trading. Primarily, we find that the AO has relied on the information collected by the Investigation Wing and no opportunity to cross examine the parties has been afforded which is a violation of principles of natural justice. The assessee has provided copies of purchase bills, weightage bills and architect certificates. The AO has not reasoned that the bills or the certificate of the architects are bogus and wrong on facts.

7. As per accounting standards AS-7, the purchases and working progress have to be reconciled along with architect report. The AO has not rejected the books of accounts and accepted the book profits while making the addition. The Assessing Officer's observation that none of the architects can find out the actual material, steel bars used construction of any building of 2 to 3 years cannot be accepted as the consumption of the material can be well estimated from the drawings and the site books. In the case of M/s Suman Enterprises, the statement of Amit Vashisht indicates that the firm has been registered and run by Shri Deepak, no further enquiries have been conducted. In the case of M/s Meet Enterprises, the statement of Shri Sunil Kumar was recorded but nowhere it reveals or confirms that the purchases were bogus or inflated. There was no doubt

about the payments made by the assessee to these parties and no evidence of cash withdrawals have been brought on record. The Assessing Officer contentions that non-production of parties can give credence to the bogus nature of the purchases cannot be accepted. In this regard, reliance is placed on the decision of Hon'ble High Court of Bombay in the case of B.C. Borana Vs ITO 282 ITR 252. In the case of M/s Suman Enterprises, the Inspector report cannot be given credence as the party was found to be genuine on enquiry. The better way for the AO could be to enquire about the amounts received from the assessee and from such amounts, if any, purchases of material have been made which in turn supplied to the assessee. The non-purchase of material/non-utilization of the amounts for purchase of material by the suppliers would be an appropriate evidence to disallow this purchases but the same has been wanting. Reliance is placed on the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs Rajesh Kumar 172 taxmann.com 74 wherein it was held that failure to follow principles of natural justice vitiate the proceedings. Reliance is placed on the order of Hon'ble High Court of Bombay in the case of CIT Vs Nikunj Eximp Pvt. Ltd. 2013 TIOL 04 wherein it was held that no addition is warranted based on the fact that the suppliers have not appeared before the AO.

8. Hence, keeping in view the entire facts and circumstances of the case, evidence on record, we decline to interfere with the order of the ld. CIT (A) in deleting the addition.

9. Rockland Diagnostics Services Pvt. Ltd. V. ITO (ITA No. 316/Del/2019) dated 25.02.2021

SECTION 56 OF THE INCOME-TAX ACT, 1961

READ WITH RULE 11UA OF THE INCOME-TAX RULES, 1962 - INCOME FROM OTHER SOURCES - CHARGEABLE AS (SHARE PREMIUM) - ASSESSMENT YEAR 2015-16 - WHETHER ASSESSEE HAS AN OPTION TO DO VALUATION OF SHARES AND DETERMINE FAIR MARKET VALUE EITHER ON DCF METHOD OR NAV METHOD AND ASSESSING OFFICER CANNOT EXAMINE OR SUBSTITUTE HIS OWN VALUE IN PLACE OF VALUE DETERMINED – HELD, YES - ASSESSING OFFICER HAD NOT DISPUTED DETAILS OF PROJECTS, REVENUES, COST INCURRED AND MANNER IN WHICH IT WAS SUBSTANTIATED BY ACTUAL REVENUE - IN FACT, PROJECTED REVENUE WOULD REALLY COMMENSURATE WITH ACTUAL STATE OF AFFAIRS BASED ON SUBSEQUENT YEAR FINANCIALS - WHETHER ON FACTS, APPROACH AND FINDING OF ASSESSING OFFICER AND ADDITION MADE BY ASSESSING OFFICER COULD NOT BE APPROVED - HELD, YES [PARA 5.3] [IN FAVOUR OF ASSESSEE]

Held, Similarly, it has been held that where a valuation report is to be rejected, the authority should pinpoint any specific inaccuracies or short comings in the DCF valuation report. In the case of **Intelligrape Software Pvt. Ltd., vs. ITO in ITA No.3925-Del- 2018 (Delhi Trib.)**, it has been held as under:

"23. The AO was not able to pinpoint any specific inaccuracies or short comings in the DCF valuation report of the Chartered Accountant/Valuer other than stating that year-wise results as projected are not matching with the

actual results declared in the final accounts. Before the Id. CIT (A), reasons for variation between projected and actuals were duly explained. The Ld. CIT (A) has accepted such explanation but rejected the DCF valuation report as submitted by the assessee. Accordingly, in the absence of any defect in the valuation of shares arrived by the assessee on the basis of DCF method, impugned addition as made on the basis of net asset value method is liable to be deleted. The rejection is unjustified as the valuation report is required under Rule 11UA of The Income Tax rules is based on the future aspects of the company at the time of issuing the shares, it may vary from the actual figures depending on the market condition at the present point of the time. Thus, keeping in view the entire facts of the case, the reports of the valuer, the comparison of the actual and projected revenues, provisions of Section 56(2)(viib) and keeping in view the order of Co-ordinate Bench of ITAT in the
case of Cinestaan Entertainment Pvt. Ltd. 177 *ITD 809 wherein it has been held that the Assessing Officer cannot substitute his own value in place of the value determined either on DC*" *method or NAV method, the appeal of the assessee is hereby allowed."*

5.2 Thus, it has been held by the Co-ordinate Bench of the Tribunal that in absence of any specific inaccuracies or short comings in the DCF valuation report other than stating that yearwise results as projected are not matching with the actual results declared in the final accounts, the Assessing Officer cannot substitute his own value in place of the value determined either on DCF method or NAV method. Therefore, we are of the considered opinion that the Lower Authorities were not justified in rejecting the valuation report as submitted by the assessee in this regard.

We also note that the observation of the Ld. CIT (A) that the Chartered Accountant has relied on the data supplied by the assessee in this regard is irrelevant in as much as the Chartered Accountant has carried out the valuation in accordance with the prescribed method as per Rule-11UA of the Income Tax Rules, 1962 and, therefore, such valuation report, in absence of specific defects being pointed out, has a binding value. We note that neither the Ld. CIT (A) nor the Assessing officer have evaluated the valuation report in light of the relevant material but have only rejected the same on assumptions and presumptions and the same cannot be upheld. In our considered view the Assessing officer should examine the issue afresh after giving due opportunity to the assessee to present its case in this regard. Thus, this ground is allowed for statistical purposes. **(Para 5.2-5.3)**

10. Mantram Commodities Pvt. Ltd. Vs ITO (ITA No.6170/Del/2019) (Dated: 12.02.2021)

SECTION 56(2)(viib) READ WITH RULE 11UA NO ADDITION CAN BE MADE UNDER SECTION 56(2)(viib) BY REJECTING THE VALUATION METHOD TAKEN BY ASSESSEE WHERE THE ASSESSEE HAS ISSUED THE SHARES AT FAIR MARKET VALUE COMPUTED IN ACCORDANCE WITH RULE 11UA(a) OF THE IT RULES 1962 AND NO FAULT HAS BEEN FOUND IN THE METHOD APPLIED BY THE ASSESSEE AND THE AO HAVE MADE THE ADDITION U/S 56(2)(viib) PURELY ON PRESUMPTIONS AND SURMISES

WHEN THE STATUTE PROVIDES FOR A PARTICULAR PROCEDURE, THE AUTHORITY

HAS TO FOLLOW THE SAME AND CANNOT BE PERMITTED TO ACT IN CONTRAVENTION OF THE SAME.

16. A combined reading of section 56(2)(viib) read with Rule 11UA states that for the purpose of section 56(2)(viib) of the Act the valuation of the shares has to be done in accordance with Rule 11UA and the fair market value of unquoted equity shares for the purpose of sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be determined under clause (a) or clause (b), at the option of the assessee. We find, in the instant case the assessee has valued its shares at Rs.82.07 as per the valuation certificate issued by the chartered accountant. Although the said valuation report was submitted before the AO to justify that the shares issued by the assessee was at fair market value, it was computed in accordance with Rule 11UA(a) of IT Rules, 1962, however, I find, the AO rejected the same holding that the assessee is not having any worth of receiving any share premium. He has ignored the various assets shown by the assessee in the balance sheet such as cash and cash equivalent of Rs.6,18,035/-, short-term loans and advances of Rs.2,38,07,381/- and other current assets of Rs.1,16,534/-. The AO did not apply the formula provided in Rule 11UA and did not make any attempt to compute the value of shares of the assessee in accordance with Rule 11UA of IT Rules, 1962 which has been upheld by the ld.CIT(A). In my opinion, when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been held by Hon'ble Supreme Court in the case of A.K. Roy vs. State of Punjab AIR 1986 2160 that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or

not at all. Other methods or mode of performance are impliedly and necessarily forbidden.

17. So far as the decision of the Tribunal in the case of Agro Portfolio Private Ltd. (supra) relied on by the Ld. CIT(A) is concerned, the same in my opinion is not applicable to the facts of the present case. In that case, the shares were valued on the basis of discounted cash flow method and it was found by the Tribunal that the assessee did not produce any evidence to substantiate the basis of projections in cash flow but relied on the valuer's report contending that such a report cannot be disturbed by the AO and at no point of time the assessee tried to explain where did the AO went wrong in his comments in the figures reflected in the valuation report. However, in the instant case, the assessee has issued the shares at fair market value computed in accordance with Rule 11UA(a) of the IT Rules 1962 and no fault has been found in the method applied by the assessee and the lower authorities have made the addition u/s 56(2)(viib) purely on presumptions and surmises. Therefore, in my considered opinion, such action of the lower authorities being not in accordance with law is unsustainable. I, therefore, set aside the order of the CIT(A) and direct the AO to delete the addition. The grounds raised by the assessee are accordingly allowed.

11. ACIT Vs M/s. S.P. Singla Construction P. Ltd. (ITA.No.5163/Del/2016) (Dated: 17.02.2021)

SECTION 68 NO ADDITION CAN BE MADE UNDER SECTION 68 WHERE ASSESSEE DISCHARGED ITS

INITIAL ONUS TO PROVE THE IDENTITY OF THE INVESTORS, THEIR CREDITWORTHINESS AND GENUINENESS OF THE TRANSACTION ALSO AO DID NOT MAKE ANY FURTHER ENQUIRY ON THE DOCUMENTS FILED BY THE ASSESSEE AND ALSO DID NOT MAKE ANY INQUIRY FROM THE INVESTORS DIRECTLY OR INDIRECTLY.

6. We have considered the rival submissions and perused the material available on record as regards Departmental appeal. In the present case the A.O. noted that assessee has received share capital/premium from 35 Parties/Group. The assessee was directed to file the evidences to prove identity of the Investors, their creditworthiness and genuineness of the transaction. The assessee in respect of these investors filed their confirmation, PAN, ITR and bank statements and wherever applicable filed the copies of the balance-sheet of the Investor companies. The A.O. did not doubt the documentary evidences filed by assessee. No Investor was asked to appear before A.O. for recording their statements regarding genuineness of the transaction in the matter. No cash was found to have been deposited in the accounts of the Investors before making investment in assessee company. The A.O. did not make any investigation or enquiry with regard to worth of the Investors, whether they are able to make investment in assessee-company. Merely because low income have been declared in the return of income by the Investor is no ground to reject the explanation of assessee and documentary evidences, particularly when no enquiry or investigation have been made with regard to worth of the Investor companies. Merely because credits were appearing in the bank accounts of the Investors through banking channel before making investment in assessee company is no ground to

discard the explanation of assessee. Therefore, whatever reasons have been given by the A.O. to differ with the explanation of assessee are not relevant to decide the matter in issue. It is a case of no enquiry by the A.O. either directly from the Investors or on the documentary evidences filed by the assessee. No incriminating material is also found during the course of search related to receipt of share capital /premium so as to show if assessee received any bogus share capital or premium in the matter. There were sufficient funds available in the bank accounts of the Investors to make investment in assessee-company. The Investors who are assessed to tax and have filed their return of income and all the transactions are carried-out through banking channel. It is well settled Law that A.O. cannot ask the assessee to prove source of the source. We rely upon the following decisions :

1. Dwarkadhish Investment P. Ltd., [2011] 330 ITR 298 (Del.) (HC)
2. Rohini Builders 256 ITR 360 (Guj).
3. Zafar Ahmed & Co. 30 taxman.com 269 (All.)

6.1. Therefore, initial onus upon the assessee to prove identity of the Investors, their creditworthiness and genuineness of the transaction have been discharged by the assessee. The A.O. has, however, did not bring any evidence on record to discredit the documentary evidences filed by the assessee to invoke Section 68 of the I.T. Act, 1961 or to prove that the share capital/premium money came from the coffers of the assessee. The Ld. CIT(A) considered the issue in detail and found the explanation of assessee to be correct for the purpose of deleting the part addition. The Ld. CIT(A) was, therefore, justified in holding that assessee proved identity of the remaining

Investors, their creditworthiness and genuineness of the transaction in the matter. We rely upon the following decisions.

…….

6.13. Considering the facts of the case in the light of material evidence on record which is produced before the authorities below, it is clear that assessee produced sufficient documentary evidences before A.O. to prove the ingredients of Section 68 of the I.T. Act. The A.O. however, did not make any further enquiry on the documents filed by the assessee and also did not make any inquiry from the Investors directly or indirectly. The A.O. thus, failed to conduct scrutiny of the documents at assessment stage and merely suspected the transaction between the Investors and the assessee. The A.O. has also not brought any evidence on record that even if the share applicants did not have the means to make the investments, the investments made by them actually emanated from the coffers of the assessee so as to enable it to be treated as undisclosed income of the assessee. Considering the totality of the facts and circumstances of the case, it is clearly proved that assessee discharged its initial onus to prove the identity of the Investors, their creditworthiness and genuineness of the transaction in the matter. The Ld. CIT(A), therefore, rightly deleted the part addition in respect of 26 creditors with reference to the present Departmental Appeal. The decisions relied upon by the Ld. D.R. are distinguishable on facts because in these cases assessee failed to prove the creditworthiness of the creditors. However, in the present case of the assessee, assessee has been able to prove creditworthiness of the Investors and genuineness of the transaction in the matter relevant to Department Appeal. We, therefore, do not find any infirmity in the Order of the Ld. CIT(A) in deleting the

part addition of Rs.11,30,50,000/. The Departmental Appeal fails and is dismissed.

12. ACIT V. Hermes India Retails & Distributors Pvt. Ltd. (ITA No. 4315/Del/2014) dated 23.02.2021 (Delhi ITAT)

SECTION 92C OF THE INCOME-TAX ACT, 1961 - TRANSFER PRICING - COMPUTATION OF ARM'S LENGTH PRICE (ADJUSTMENT - BENEFIT FROM TRANSACTION/ALLOWABILITY OF EXPENDITURE) - ASSESSMENT YEAR 2011-12 - ASSESSEE-COMPANY ENTERED INTO A SERVICE AGREEMENT WITH ITS AE FOR CERTAIN INTRA-GROUP SERVICES - IN TERMS OF SAID AGREEMENT,
ASSESSEE REIMBURSED EXPENDITURE INCURRED BY ITS AE TO PROVIDE SAID SERVICES TO ASSESSEE - TRANSFER PRICING OFFICER (TPO) OBSERVED THAT ASSESSEE WAS UNABLE TO ESTABLISH THAT IT HAD RECEIVED ANY BENEFIT DUE TO SUCH EXPENSES INCURRED BY ITS AE - ACCORDINGLY, HE DETERMINED ARM'S LENGTH PRICE OF SUCH TRANSACTION AS NIL - IT WAS NOTED THAT IN ASSESSEE'S OWN CASE FOR EARLIER ASSESSMENT YEARS, TRIBUNAL WHILE DECIDING IDENTICAL ISSUE OBSERVED THAT WHETHER ASSESSEE BENEFITED BY AVAILING SERVICES OF AES WAS NOT AN ISSUE TO BE EXAMINED BY TPO AND, ACCORDINGLY, TRIBUNAL DELETED ADJUSTMENT MADE TO ALP OF TRANSACTION OF PAYMENT

TOWARDS REIMBURSEMENT OF EXPENSES - WHETHER, ON FACTS, IMPUGNED ADJUSTMENT MADE BY TPO WAS TO BE DELETED - HELD, YES [PARA 6.5] [IN FAVOUR OF ASSESSEE]

Held, we have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. There is no dispute on the fact that only sample bills of expenses reimbursed to the AEs were produced before the learned TPO during original transfer pricing proceedings and therefore the learned TPO proposed adjustment in respect of the expenses for which bills/invoices were not produced before her. During appellate proceedings before the Learned CIT(A), the assessee has produced entire details of expenses reimbursed along with bills/invoices as additional evidence, which were forwarded by the Learned CIT(A), to the learned TPO for his comments. The Learned TPO objected to the admission of the additional evidences and abstained from giving his comments on the evidences of expenses, which shows that he was unable to point out any defect in the evidences of the assessee. Before us, the Ld. DR has also not pointed out any defect or irregularity in analysis of the CIT(A) on the issue of expenses reimbursed. In such circumstances, no useful purpose will be served by sending the matter back to Ld. TPO. We, accordingly, reject the arguments of the Ld. DR and dismiss the ground No. 3 of the appeal. **(Para 6.5)**

13. XL India Business Services Pvt. Ltd. Vs ACIT (ITA No.6602/Del/2017) (Dated 17.02.2021)

SECTION 92C - WHEN THE ASSESSEE HAS ALREADY TAKEN IN TO ACCOUNT THE IMPACT

OF OUTSTANDING RECEIVABLES ON PROFITABILITY WHILE MAKING WORKING CAPITAL ADJUSTMENT OF THE TAX PAYER VIS-À-VIS OF ITS COMPARABLES, THEN ANY FURTHER ADJUSTMENT ON ACCOUNT OF DELAY PAYMENT OUTSTANDING TO AE CANNOT BE RECHARACTERIZED AS UNSECURED LOAN.

11. Before us, Learned AR has pointed to the fact that in the TP study report, the outstanding receivable arising from intercompany service transactions have been duly benchmarked by undertaking working capital adjustment. We find that Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra) has observed that when the assessee has already factored in the impact of the receivables in the working capital adjustment and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and recharacterized the transaction which was clearly impermissible in law. To arrive at the aforesaid conclusion, Hon'ble High Court also referred to the decision of Delhi High Court in the case of CIT V. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi). The relevant observation of the High Court are as under:

…….

12. We further find that against the order of Delhi High Court in the case of Kusum Healthcare (supra) Revenue preferred SLP before the Hon'ble Apex Court and the same was dismissed in SLP No.5239/2019. In view of the aforesaid decision of Delhi High Court, we are of the view that when the assessee has already taken in to account the impact of outstanding receivables on profitability while making working capital adjustment of the tax payer vis-à-

vis of its comparables, then any further adjustment on account of delay payment outstanding to AE cannot be recharacterized as unsecured loan.

13. From the perusal of the audited Balance sheet of the assessee which is placed in the paper book filed we find that assessee has no debts on account of secured or unsecured loans meaning thereby that it is a debt free company. We find that Hon'ble Delhi High Court in the case of PCIT vs. Bechtel India Pvt. Ltd. (supra) has upheld the order of ITAT wherein the Tribunal had held that when the assessee is debt free company the question of receivable does not arise.

15. Before us, Revenue has also not pointed to any contrary binding decision in its support. We therefore, relying on the decision cited and for the reason stated hereinabove hold that the Revenue was not justified in making the addition. We therefore set aside the action of AO/TPO. Thus the ground of the assessee is allowed.

14. ACIT V. Late Smt. Bhawna Gupta (ITA No. 517/Del/2017 dated 17.02.2021 (Delhi ITAT)

SECTION 153A, READ WITH SECTION 132, OF THE INCOME-TAX ACT, 1961 - SEARCH AND SEIZURE - ASSESSMENT YEAR 2012-13 - WHERE NO INCRIMINATING EVIDENCE WAS FOUND DURING COURSE OF SEARCH AND CAPITAL GAIN THAT AROSE FROM THE SALE OF SHARES ARE ALREADY RECORDED IN THE BOOKS OF ACCOUNTS, ASSESSING OFFICER WAS NOT JUSTIFIED IN ADDITIONS ON ACCOUNT OF GAIN ON SALE OF INVESTMENT [IN FAVOUR OF

ASSESSEE] (PARA 7) (IN FAVOUR OF ASSESSEE)

Held, we have heard both the parties and perused the material available on
record. It is pertinent to note that in assessee's case for Assessment Year 2011- 12 the Tribunal has deleted these very additions as per the search and seizure conducted at Jackson Group of cases. The Tribunal in case of Son of the assessee herein held as under :-

"24. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case has filed his original return of income on 30th March, 2012 declaring total income of Rs. 3,92,11,220/-. In response to notice u/s 153A of the IT Act, the assessee filed return in response to notice u/s 153A on 5th January, 2015 declaring the same income. The assessee in his return of income had claimed exemption of long term capital gain of Rs. 5,62,61,726/-. The assessment order was passed u/s 143(3) read with section 153A by making addition of the long term capital gain as bogus. From the order of the assessing officer, we find nowhere it is mentioned that any incriminating material was found during the course of search. The entire addition made by the AO is based on post search inquiries. There is also no ground by the revenue that any such incriminating material was found other than the statement of Shri Sundeep Gupta at the time of search. Under these circumstances, we have to adjudicate as to whether the CIT(A) has erred in deleting the addition made by the AO in absence of any incriminating material.

25. We find the Id. CIT(A) while deleting the addition has relied on various decisions including the decision of the Hon'ble Jurisidictional High Court in the case of CIT vs. Kabul Chawala reported in 21 taxman.com 412 (234 taxman 300). Finding of the CIT(A) on this issue has already been reproduced in the presiding paragraphs. So far as the reliance by the Ld. DR in the case of Smt. Dayawanti vs. CIT (supra) is concerned, we find the facts of that case are completely different from that of the facts of the present case. In that case the son of the assessee had categorically admitted that there were unaccounted purchase and sale of various items in Supari from different parties. He had also admitted that certain purchases are unaccounted and accordingly he had surrendered certain income. However, in the present case there is no unaccounted transaction found during the course of search. The capital gain that arose from the sale of shares are already recorded in the books of accounts and no incriminating material whatsoever was found during the course of search . Therefore, the said decision in our opinion is not applicable to the facts of the present case.

26. It has come to our notice subsequent to the hearing that the Hon'ble Delhi High Court in the case of Pr. CIT vs. Meeta Gutgutia reported in 2017 (5) TMI 1224 has held that addition cannot be made in absence of any Incriminating material and the decision in the case of Smt. Dayawanti Gupta has been duly considered. So far as the decision of Hon'ble Kerala High Court in the case of E. N. Gopal Kumar (supra) relied by the Ld. Dr is concerned, we find the said decision is of a non-jurisdictional High Court and the Tribunal is bound by the decision of the Jurisdictional High Court. Since the Hon'ble High Court in a number of cases recently has held that addition cannot be

made in order passed u/s. 153A r.w.s. 143(3) in absence of any incriminating material found during the course of search in the case of completed assessments, therefore, we do not find any infirmity in the order of the CIT(A) deleting the addition in absence of any incriminating material found during the course of search.

27. We further find the revenue has not challenged the vital legal ground on which the Ld. CIT(A) has deleted the addition. Since the Hon'ble JurisdictionalHigh Court has clearly held that addition in order passed u/s 143(3)/ 153A cannot be made In absence of any incriminating material and since in the instant case, there is no evidence whatsoever on record that any incriminating material was found during the course of search and since the addition was made on the basis of certain inquiries conducted subsequent to the search on the basis of return already filed, therefore, on this issue itself addition has to be deleted. We, therefore, uphold the order of the CIT(A) and dismiss the ground raised by the revenue."

The Hon'ble High Court in the said case held as under :-

"In this case the search took place in the premises on 03.10.2013. A notice under Section 153A was issued to the assessee which re-affirmed its earlier returns. The Assessing Officer completed the Section 153A assessment by adding amounts under Section 60A to the tune of 5,62,61,726/- for AY 2011-12. The CIT (A) and the ITAT concurrently granted relief to the assessee in the appellate proceedings holding that no fresh incriminating material was seized warranting the additions during the search. Both the appellate authorities relied upon the judgment of this Court in CIT v. Kabul Chawla, 380 ITR 573. In these

circumstances, the Court is of the opinion that no question of law arises as the ratio in Kabul Chawla (supra) applied. The appeal is, therefore, dismissed."

In the present case also there is no unaccounted transaction found during the course of search. The capital gain that arose from the sale of shares are already recorded in the books of accounts and no incriminating material whatsoever was found during the course of search. Since the Hon'ble Jurisdictional High Court has clearly held that addition in order passed u/s 143(3)/ 153A cannot be made In absence of any incriminating material and since in the instant case, there is no evidence whatsoever on record that any incriminating material was found during the course of search and since the addition was made on the basis of certain inquiries conducted subsequent to the search on the basis of return already filed, therefore, on this issue itself addition has to be deleted. The issue in the present case is identical with that of the decision given by the Tribunal as the same is son of the assessee herein. In fact, now the son is representing the assessee after her death. The CIT(A) has taken proper cognizance of the same and allowed the appeal of the assessee on legal issues as well as on merit. Thus, appeal of the Revenue is dismissed. **(Para 7)**

15. DLF Commercial Enterprises v. ACIT (ITA No.2530/Del/2018) (16/02/2021)

SECTION 271(1)(b) – PENALTY FOR NON-COMPLIANCE TO NOTICE U/S 142(1)– THE ASSESSMENT COMPLETED U/S 143(3), WHICH MEANS THE ASSESSING OFFICER WAS SATISFIED WITH THE SUBSEQUENT COMPLIANCE BY ASSESSEE – NO PENALTY COULD BE LEVIED

Held, (D) We find on perusal of the assessment order that in paragraph 2 of the assessment order, that the Assessing Officer has expressed satisfaction with the compliances made by the assessee. To quote from the assessment order, the observation of the Assessing Officer is: "In compliance to the notices, Sh. Gaurav Jindal, CA & authorized representative of the assessee attended for and on behalf of the assessee from time to time and furnished written submissions and details called for. These were examined and the case was discussed with the authorized representative." It can be readily inferred from this observation of the Assessing Officer that the Assessing Officer was, on the whole, satisfied with the overall compliances made by the assessee during the assessment proceedings. The satisfaction of the Assessing Officer with the compliances made by the assessee is also evidenced by the fact that no addition was made by the Assessing Officer, and the returned income was accepted in the order passed u/s 143(3) IT Act. We are of the view that penalty levied by the Assessing Officer u/s 271(1)(b) of the IT Act deserves to be cancelled if there are materials to suggest on conclusion of the proceedings before the Assessing Officer; that the Assessing Officer was, on the whole, satisfied with the overall compliances made by the assessee during proceedings before the Assessing Officer.

(E) In view of foregoing, and in the facts and circumstances of the present appeal before us, we hereby cancel the penalty amounting to Rs. 10,000/- levied by the Assessing Officer u/s 271(1)(b) of Income Tax Act.

16. ITO v. Unibros Manufacturing Co. Ltd. (ITA No. 3862/D/17) (17/02/2021)

SECTION 271C – PENALTY FOR NON DEDUCTION

OF TDS – WHERE SUBSEQUENT TO THE TRANSACTION , THE ASSESSEE SOU MOTO DEPOSITED TDS WITH GOVERNMENT ALONGWITH INTEREST – NO CONTUMACIOUS CONDUCT COULD BE ATTRIBUTABLE TO THE ASSESSEE – THE LEVY OF PENALTY WAS HELD TO BE UNJUSTIFIED

Held, Undisputedly, assessee company has failed to deduct tax at source of Rs.51,28,950/- on due date of 20.08.2010. It is also not in dispute that subsequently, tax was deducted at source on 31.03.2011 and the same was deposited in the Government account on 29.09.2011 prior to due date of filing of income-tax return. It is also not in dispute that tax deducted at source has been deposited by the assessee company on its own account without intervention of the Revenue Department. [Para 5]

6. In the backdrop of the aforesaid undisputed facts, we are of the considered view that when the assessee company has suo motu deposited the tax deducted at source along with interest in the Government account to settle the dispute with the Revenue, no malafide to the assessee company can be attributed.

9. In view of what has been discussed above, we are of the considered view that when, in the undisputed facts and circumstances of the case, assessee company has voluntarily on its own deducted the tax and deposited the same with Government exchequer along with interest well prior to date of filing of incometax return, it shows its bonafide creating a reasonable cause to be covered u/s 273B of the Act, hence penalty imposed by the AO is not sustainable. So, finding no illegality or perversity in the impugned order passed by the ld. CIT (A), present appeal filed by the Revenue is hereby dismissed.

17. DCIT Vs M/s. SSP Aviation Ltd. (ITA. No. 3439/Del./2013) (Dated: 17.02.2021)

SALE OF DEVELOPMENT RIGHTS DOES NOT CONSTITUTE THE INCOME OF THE ASSESSEE ON THE DATE OF SIGNING OF THE AGREEMENT WHEN THE HAS ALREADY OFFERED THE AMOUNT IN QUESTION FOR TAXATION IN SUBSEQUENT YEARS

6. We have considered the rival submissions and perused the material on record. We have also perused the agreements in question Dated 28.04.2006 and 21.07.2006. The Ld. CIT(A) has also reproduced the relevant paras of both the agreements in his findings as reproduced above. It is, therefore, clear from these agreements in question that the development rights were acquired by the assessee vide agreement Dated 28.04.2006 from PCL etc., for execution of the project which were incomplete. The income from such rights was to accrue only on conduct and completion of the project and not otherwise. The development rights with the assessee are also contingent because if due to any reason there is no sale, no amount will accrue to the assessee company, therefore, the income of the assessee will depend on the contingency when the sale of the property would start. The assessee through the impugned agreement agreed to develop the project based on various terms and conditions mentioned in the agreement. M/s. PCL was the owner of the land in question and had incurred initial expenses on obtaining various approvals/licenses from Government Authorities. The revenue from this project was to accrue to the assessee as well as PCL based on the sale proceeds receivables coming out from the

project to be deposited in Escrow Account. After compensating PCL to the extent of Rs.24 crores initially, the funds in Escrow account as accruing from the sale of the project were to be utilized for construction and development to the extent of 1/3rd and the balance was to share amongst the parties in equal proportions. The agreement find mentioned the fact with respect to initially compensating PCL to the extent of Rs.24 crores and utilising the balance amount in Escrew account, therefore, it is not a case of outright transfer of land by PCL and purchased by the assessee. Therefore, the agreement was not in absolute term but, was a conditional one. Similar is the agreement between assessee and EMMAR. The various clauses of the agreement clearly stipulate that assessee was to perform various acts and duties in order to become eligible for its share of revenue. The right of the assessee was inchoate and incomplete unless all such acts and responsibilities were duly fulfilled like assisting PCL in resolving their pending disputes pertaining to land, payment of additional compensation to the parties, preparation of the project report, approval by various authorities, supervising construction activity and completion. The assignment agreement Dated 21.07.2006 did not provide that the assessee will be eligible to the impugned consideration for conditional transfer of its rights without fulfilling its obligations under original agreement Dated 28.04.2006. What was transfer by the assessee was, what it got and not anything which it never acquired or owned. No amount was paid in assessment year under appeal for transfering the development right. The rights assigned through agreement Dated 21.07.2006 was conditional in nature. It was also agreed that all the terms and conditions of the agreement Dated 28.04.2006 shall apply to the assignment agreement also. It was also agreed

that what was being paid by EMMAR was a refundable/adjustable security deposit which was to be adjusted only according to terms and conditions mentioned in the agreement Dated 28.04.2006. In case EMMAR would not have perform its obligation, the said security deposit would have stood forfeited. Therefore, the fulfillment of the obligation to construct and develop the project within the stipulated time was a condition precedent for the assessee to the satisfaction of the PCL as mentioned in the assignment agreement Dated 21.07.2006. Therefore, the security deposit received by the assessee for conditional transfer could never be treated as an income of the assessee. All the conditions of the original agreement shall have to be satisfied and completed by EMMAR only. Then income would accrue to the assessee. The assessee also explained that it has followed POCM method and in A.Ys. 2009-2010, 2010-2011 and 2011-2012 assessee has recognized the income and offered for taxation. In A.Y. 2009-2010 even the A.O. has accepted the similar explanation of assessee in scrutiny assessment under section 143(3) of the I.T. Act. It is also interesting to note that in A.Y. 2009-2010 the same A.O. passed the same assessment order under section 143(3) of the Act in the case of the assessee on the same day. The A.O. accepted the explanation of assessee after recognizing the income based on both the agreements and accepted the explanation of assessee without making any addition. But, in assessment year under appeal, the same A.O. on the same day took a different view against the assessee which is not permissible in Law. It is well settled Law that Income Tax Authorities shall have to follow the Rule of Consistency. But, in the present case, the A.O. did not do so. The Ld. CIT(A) on consideration of the Clauses of both the agreements in question rightly found that they are inextricably linked with

each other in view of the conditions attached to these agreements. The Ld. CIT(A), therefore, going through the Clauses of both the agreements, rightly found that money become due to the assessee not on the date of signing of the agreements, but, it becomes payable/due only on satisfying the conditions namely (1) on the successful completion of the project by EMMAR and (2) on completion of the project within the time bound period. Therefore, the income of Rs.86 crores to the assessee would accrue only when both the conditions are cumulatively fulfilled. The Ld. CIT(A), therefore, considering the totality of the circumstances and the fact that agreements in question was not registered, rightly taken a view that impugned amount on the sale of development right by assessee to EMMAR does not constitute the income of the assessee on the date of signing of the agreement. The Ld. CIT(A), therefore, rightly deleted the addition. We, therefore, do not find any infirmity in the Order of the Ld. CIT(A) in deleting the addition, particularly when the assessee has already offered the amount in question for taxation in subsequent years. The decisions relied upon by the Ld. D.R. would not support the case of the Revenue as the same are distinguishable on facts of the case. In view of the above discussion, we do not find any justification to interfere with the Order of the Ld. CIT(A) in deleting the addition. The Departmental Appeal is accordingly stands dismissed.

18. Dabur Invest Corp Vs JCIT (ITA No. 8058/Del/2018) (Dated: 11.02.2021)

OPTION PRICE IS A CAPITAL RECEIPT IN THE YEAR OF RECEIPT AS THERE WAS UNCERTAINITY ABOUT THE QUANTIFICATION

OR REFUND PARTICULARLY WHEN SUCH CLAIM STOOD ACCEPTED BY REVENUE IN EARLIER YEARS

69. Therefore, only issue before the Coordinate bench in that case was in which year the income accrues. It was not the issue before the coordinate bench that whether the money received by the assessee as an option price is a revenue receipt or a capital receipt. In the facts of case relied up on before us, both the parties agreed that the option price received in that particular case is an income of the assessee and only dispute was about the year of taxability of such income. In the facts of that case, the coordinate bench decided that it is income of the assessee in the year in which it is received. The coordinate bench also considered the accounting standard issued u/s 145 (2) of The Income Tax Act as well as the Accounting Standard AS -9 issued by ICAI on Revenue Recognition. In that particular case, the income was received by the assessee without any uncertainty involved about the quantification or refund of such sum. Further as mentioned in para number 4.4 of the decision where the relevant provisions of that agreement were considered. Agreement clause number 7.3 before the coordinate bench considered the affirmative vote of a foreign party in the board resolution as well as in general meeting. Therefore, there was a veto available only to one shareholder i.e. foreign party in that agreement. In the agreement before us, both the parties are required to pass resolution unanimously. Further in that agreement Mahindra (assessee wherein) agreed to vote all its shares in conformity with foreign parties votes on all matters presented to the shareholders by the board. Further as per clause number 9 of agreement before the coordinate bench, with respect to the buyback of shares, the buyback of

Mahindra shares shall be equal to the option price. That means whatever is the option price already received by the assessee in that case was final sale consideration of the shares. Sale of such shares was never linked with the market value of shares. There is no mechanism for deriving any market value at the time of transfer of those shares. In case before us, the price at which the shares are to be transferred by Dabur to the other shareholder is at market value and Dabur is also entitled to increase in market value of those shares above total of option price and subscription price. Further, according to clause number 7.4 of that agreement, the failure of Mahindra to support AT & T shall constitute a breach under that agreement. In Case before us, Dabur has right of veto and there is no clause that failure of Dabur to support CUIH constitutes a breach of the agreement. Further on termination of the agreement by foreign party, in that case the Mahindra was required to sale all its shares at their parvalue and in case of termination of agreement by Mahindra, Mahindra was to offer all its shares to AT & T at the option price. Thus, the shares were to be transferred by Mahindra in that decision to AT&T at option price only and any increase therein is only with respect to a predefined rate. Whereas in case before us it is linked to the market value of those shares. Coordinate bench further made a definite observation that shareholding of Mahindra or the rights of the shareholder of AT&T were qualitatively different, such case is missing in case before us and, the shareholder agreement says that both have right according to their subscription value in the company. Further there was no doubt or uncertainty with regard to the realization or the ultimate collection of option price on transfer of shares in that case, in the present case before us the option price was to be refunded back to CUIH in certain circumstances. In fact, it has been refunded by assessee

when 23 % shareholding was transferred from Dabur to CUIH. In view of above distinguishing feature between the decision of the coordinate bench cited before us in case of Mahindra Telecommunications Investment Private Limited (supra) and issue before us, we do not find any similarity for determination of the option price received by the assessee whether income or a capital receipt. Therefore, that decision does not cover the issue before us.

70. It is also interesting to note in the case before us is that assessee is receiving the option price since financial year 2002 – 03. The assessment for the assessment year 2005 – 06, 2006 – 07, 2008 – 09, 2011 – 12, 2013 – 14 and 2014 – 15 were completed as a scrutiny assessment u/s 143 (3) of The Act, wherein during the course of assessment proceedings the queries relating to the joint-venture agreement were raised. Along with the return, the copies of the annual accounts were also available wherein the notes on account also appear. In the notes on accounts, the appellant had duly disclosed about the joint-venture agreement and had disclosed that the interest paid on borrowed funds for acquisition of shares had been capitalized and included in the cost of investment. In the notes on account the disclosure was also made about the receipt of option money from CUIH and its adjustment would be made at the time of reduction of shareholding in Aviva life insurance Co Ltd by Dabur in favour of CUIH and the adjustment would be made and accounted for in the year of the transfer of shares. The learned assessing officer for all those years, after verifying the terms and conditions of the agreement as well as notes on accounts, have never taxed the option money so received as income of the assessee. Thus, revenue has accepted stand of assessee about considering option price to be taxed under the head capital gains at the time of transfer of Dabur shares. Such

assessment orders are placed before us at page number 212 onwards of the paper book. The assessment for assessment year 2013 – 14 and 2014 – 15 were subjected to revision by The Principal Commissioner of Income Tax – 16, New Delhi. On appeal before the coordinate bench against that order, the coordinate bench as per order dated 11 March 2019 has quashed assumption of jurisdiction by CIT u/s 263 of The Income Tax Act. Further, for assessment year 2011 – 12 and 2012 – 13 the action u/s 147/148 of the income tax act has been initiated by reopening of the assessment. The appeals of those years are pending before the CIT – A. However, up to assessment year 2011 – 12 i.e. For eight assessment years, consistently this position is maintained by assessee as well as the income tax authorities. Now revenue has changed its stand. Principles of Estoppels and Resujudciata do not apply to the tax matters is an established principle, but principle of consistency does. The principle of consistency is also cardinal principle of taxation as held by the honourable Supreme Court in Radhasoami Satsang v. Commissioner of Income-tax 193 ITR 321 and 358 ITR 295. Further, saying that there was an error in earlier acceptance of the order/stand of the assessee, therefore revenues stand is changed stating that there is no heroism in perpetuating an error, there is no quarrel with that principle but the revenue must point out what is the error in the consistently adopted methodology acceptable to revenue and the assessee for such a long time. In the present case the only pillar on which changed stand of revenue stands is the decision of the coordinate bench in case of Mahindra Telecommunications Investment Private Limited (2016) 69 taxmann.com 431 (Mum) which we have already held to be on different facts and different issue. In view of principle of consistency, also appeal of the assessee deserves to

succeed.

71. In view of this, ground number 1 and 2 of the appeal of the assessee is allowed holding that the option money received by the assessee is capital receipt which requires an adjustment only at the time of transfer of the shares by Dabur to CUIH while working out resultant capital gain thereon.