IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER

ITA Nos.1357 & 1358/Bang/2018
Assessment years : 2009-10 & 2010-11

M/s. Information Technology Park Ltd., 1st Floor, Innovator Building, International Technology Park, Whitefield Road, Bangalore – 560 066. **PAN: AAACI 7042R**	Vs.	The Income Tax Officer, Ward 3(1)(4), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, CA
Respondent by	:	Shri Rajesh Kumar Jha, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	16.08.2022
Date of Pronouncement	:	24.08.2022

O R D E R

Per Padmavathy S., Accountant Member

These two appeals are against the order of the CIT(Appeals)-3, Bengaluru dated 27.12.2018 for the assessment year 2009-10 & dated 26.12.2018 for assessment year 2010-11. The issues raised are common in both these appeals. Hence these appeals are heard together and disposed of by this common order for the purpose of convenience and brevity.

2. The order of the CIT (Appeals) for AY 2009-10 is against the order of the AO u/s. 143(3) r.w.s.147 and for AY 2010-11 is against the order of the AO u/s. 143(3) r.w.s. 144C(13). The AO re-opened the assessment for AY 2009-10 based on the TPO's order making adjustment and therefore we will first consider the appeal relating to AY 2010-11 for adjudication.

3. The assessee is a public limited company incorporated in the year 1994. The assessee is engaged in the business of developing, operating and maintaining industrial parks / Special Economic Zones. The assessee is a subsidiary of Ascendas Property Fund (India) Pte Ltd. [APFI]. The assessee has issued 0.5% redeemable non-cumulative preference shares on 6th January 2003 and the same is subscribed by APFI. The preference shares are issued at a face value of Rs.100 per share and are redeemable at any time after 24 months but not later than 9 months from the date of allotment.

4. The assessee filed its original return of income for AY 2010-11 on 28.09.2010 declaring NIL income, after set off of brought forward business loss of Rs.65,66,55,271. The return was processed u/s. 143(1) and subsequently the case was selected for scrutiny under CASS and notice u/s. 143(2) & 142(1) were issued. During the assessment proceedings a reference was made to the Transfer Pricing Officer (TPO) for determination of the Arm's Length Price (ALP) of this international transaction assessee entered into with AFPI. The assessee has during the previous year relevant to AY 2010-11 redeemed some

of the preference shares at a premium based on the valuation done the expert valuer by adopting the Net Asset Value (NAV) method. The TPO accepted the method of valuation adopted by the assessee i.e., NAV method, but reworked the redemption value based on book value of assets. The TPO arrived at the redemption value at Rs.286.80 per share which resulted in an adjustment of Rs.29,95,66,000 that arose out of the difference between the redemption value adopted by the assessee and the TPO. The AO passed the final assessment order giving effect to the TP adjustment based on the letter filed by the assessee that the assessee would not be filing objections before the DRP and would prefer appeal with the CIT(Appeals).

5. The CIT(Appeals) held that the TP adjustment made by the TPO determining the value at which the preference shares should have been redeemed cannot be treated as income in the hands of the assessee by relying on the decision of the Mumbai High Court in the case of Vodafone India Services Ltd (2015) 53 taxmann.com 286 (Bombay). However since the ALP of the share price determined by the TPO is lesser than the price determined by the assessee, the CIT(Appeal) proposed to make addition to the extent of the same amount by treating it as deemed dividend. In this regard the CIT(Appeals) relied on the decision of coordinate bench of the Tribunal in the case of Fidelity Business Services India (P) Ltd v ACIT (2017) 80 Taxmann.com 230 (Bang – Trib). The assessee filed its response to the show cause notice before the CIT(Appeals) by submitting that the premium of redemption of preference shares cannot be considered as deemed dividend as per

the provisions of section 2(22) of the Act and revenue authorities cannot re-characterize the transaction as deemed dividend. The assessee made detailed submissions before the CIT(Appeals) in this regard which were rejected by the CIT(Appeals) who proceeded to treat the premium on preference shares as deemed dividend. Aggrieved the assessee is in appeal before the Tribunal.

6. For AY 2010-11, the TPO determined the Arm's length The common issue for these two years is the treatment of difference between issues in grounds raised for the assessment year 2010-11 is listed below:-

(i) Ground No.1 – General.
(ii) Ground No. 2 – Levy of Dividend Distribution Tax [DDT] on share redemption.
(iii) Ground Nos. 3 to 5 – Valuation methodology of preference shares.
(iv) Ground No.6 – Consideration for redemption does not constitute 'deemed dividend'.
(v) Ground 7 – Applicability of section 115O(6).
(vi) Grounds 8 to 12 – Alternative conclusion of deemed dividend u/s. 2(22)(e).
(vii) Grounds 13 to 15 – Alternate grounds raised without prejudice to the above grounds.

7. The assessee raised 15 grounds and several sub-grounds on issues listed above and presented arguments with regard to the same during the course of hearing. Though we heard the rival submissions with regard to all the grounds, for the purpose of adjudication, we would consider only ground Nos. 3 to 5 with regard to valuation methodology of preference shares as the rest of the arguments would

become academic once we decide on these grounds. The relevant grounds are extracted as under:-

"Valuation methodology of preference shares

3. The learned CIT(A) has erred in law and facts in:

(a) adopting the value of preference shares at Rs.270.10 as against Rs.900 per share (in case of 5,90,000 shares).

(b) arriving at the above value ignoring the fair value (guidance value) of land and building adopted by the appellant.

(c) arriving at the above value by taking only the book value of the land and building.

(d) rejecting the alternative contention of the appellant that, based on the facts of the case, Discounted Cash Flow Method is the most appropriate method to be followed for valuation of shares.

4. The learned CIT(A) has erred in not appreciating that the redemption of preference shares by Ascendas Property Fund (India) Pte Limited, a Foreign Venture Capital Investor was at a price in accordance with the prescribed exchange control regulations.

5. The learned CIT(A) has erred in concluding that consideration paid by appellant on redemption of preference shares is artificially inflated and is a colourable device for transfer of funds to associated enterprise avoiding payment of taxes (DDT)."

8. The ld. AR submitted that

(i) The method of valuation is undisputed since TPO has accepted the method of valuation i.e. NAV method but has considered the book value of the land and building instead of guideline value which resulted in the

TP adjustment towards excess payment of premium on redemption of shares.

(ii) The ld. AR also submitted that the valuation of preference shares is done in accordance with Rule 11UA(1)(c)(b) of the I.T. Rules and accordingly shares of the assessee have been valued by an independent Chartered Accountant under the NAV method.

(iii) Rule 11UA(1)(c)(b) deals with valuation of unquoted equity shares which requires that while valuing an equity share the value land held by the company should be valued at guidance value. Press release dated 5.5.2017 issued by CBDT clarifies that immovable property (including land) should be valued at stamp duty value or guidance value while computing the value of shares. Extending these sentiments, the land in the impugned case should be valued at guidance value. To adopt book value of land & building for determining the quantum of premium when the land & building were acquired quite some time back and are continuously appreciating thereafter, would be ignoring the commercial realities

(iv) The Revenue authorities cannot reject, substitute or alter the valuation prepared by an independent expert (Chartered Accountant in the present case). In this regard, reliance is placed on the ruling of the Delhi High Court in *CIT v. Vibhu Talwar (11 taxmann.com 419)* and the Supreme Court in *CIT v. Bharti Cellular Ltd. (330 ITR 239).*

(v) As per Notification No. FEMA 32 /2000-RB dated 26th December 2000 and Notification No. FEMA 20 /2000-RB dated 3rd May 2000 [Page 956-980 of PB] which was in force during the year provides that a Foreign Venture capital investor (`FVCI') may acquire shares/debentures or any other investment in an Indian Venture Capital Undertaking (`IVCU') at a price that is mutually agreed between the buyer and the seller. Relevant extracts are reproduced below:

"4. Valuation of Investments

The FVCI may acquire by purchase or otherwise or sell shares/convertible debentures/units or any other investment held by it in the IVCUs or VCFs or schemes/funds set up by the VC'Fs at a price that is mutually acceptable to the buyer and the seller/issuer. The FVCI may also receive the proceeds arising of the liquidation of VCFs or schemes/funds set up by the VCFs."

(vi) Therefore, FEMA regulations do not mandate a valuation exercise. It allows for a mutually agreed price for purchase/sale of shares. Further, the valuation guidelines were amended only from 1.4.2010 onwards [Page 9 of CIT(A) order]. For this reason, also, the price agreed between APFI, and the assessee should be considered as the arm's length for the purpose of redemption of preference shares

9. The ld. DR relied on the order of the CIT(Appeals). He also submitted that Rule 11UA(1)(c)(b) is amended only with effect from 01/04/2018 and prior to amendment the fair market value of the unquoted shares are to be arrived at basis the book value of assets and liabilities. The ld DR therefore contented that the amended rules cannot be applied in assessee's case for the relevant assessment year.

10. The ld. AR, in rebuttal, relied on the decision of the Supreme Court in the case of *CIT v. Shravan Kumar Swamp & Sons [1994] 210 ITR 886 (SC)* to state that amendment to Rules is retrospective and therefore the amended rules of Rule 11UA(1)(c)(b) would be applicable in the assessee's case also.

11. We have considered the rival submissions and perused the material on record. Before going into the issue under consideration we

will look at the provisions contained in Rule 11UA(1)(c)(b) which is extracted below:-

"**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*) ******

(*b*) ******

(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)× (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.

12. As per rule 11UA(1)(c)(b) it is clear that for the purpose of arriving at the fair market value of the unquoted equity shares the immovable property should be considered at guideline value. Further rule 11UA(1)(c)(c) as extracted above states that the unquoted shares other than equity shares should be valued basis the price it would fetch if sold in the open market on the date of valuation as certified by an accountant. Though the rule 11UA(1)(c)(b) is applicable specifically to equity shares the spirit of the rule should be looked into. A combined reading of the said rule with rule 11UA(1)(c)(c) can be taken to mean that for the purpose of valuation of preference shares also the immovable properties to be considered at guideline value since the value based on the guidance note represents the economic and commercial value of the preference shares on the date of valuation. In the given case the assessee has obtained the valuation report from the Chartered Accountant (CA) which is placed on record in page 198 of the paper book thereby complying with the requirement of the rule (1)(c)(c). In the certificate, for the purpose valuation of Equity and Preference shares, the guideline value of the land and building is considered by the CA which in our view is correct. In the light of these discussions, we see no fault in the approach of the assessee in considering the guideline value of land building to arrive the fair value of preference shares that it would fetch in the open market on the valuation date and arriving at the premium value for redemption of the preference shares.

13. The method of valuation adopted as NAV is not disputed as the TPO has also applied the same method and impugned addition has arisen only due to the value of land and building considered by the TPO for arriving at the NAV. We have in the above para held that considering the guideline value of land and building for the purpose of valuation of preference shares under NAV method is the right. Therefore the addition made by the TPO computing the differential premium basis the book value of assets is not sustainable. Since we have held that there cannot be any addition made towards the premium on redemption of the preference shares, the addition made by the CIT(Appeals) considering the same as deemed dividend u/s.2(22)(e) also will not survive. The appeal for the assessment year 2010-11 is allowed in favour of the assessee.

ITA Nos.1357/Bang/2018

14. We will now take up the appeal for the assessment year 2009-10. The assessee raised 19 grounds including the legal ground challenging the jurisdiction of reassessment proceedings u/s. 147 (Ground no.2 to 5).

15. The assessee filed its original return of income for AY 2009-10 on 30.9.2010 and subsequently filed revised return on 18.3.2010 declaring NIL income, after set off of brought forward business loss of Rs.25,57,11,432. The return was processed u/s. 143(1) on 29.3.2011. The case was selected for scrutiny under CASS and notice u/s. 143(2) & 142(1) was issued. Assessment was concluded on 29.12.2011

determining total income of the assessee at NIL, after set off of brought forward unabsorbed depreciation of Rs.38,79,20,733.

16. Subsequently notice u/s. 148 dated 7.3.2014 was issued and the reasons recorded for reopening the assessment were as follows:-

A. Non-disclosure of redemption of preference shares in Form 3CEB for AY 2009-10.

B. Redemption of capital gains translate to a transfer chargeable under the head 'capital gains' and thus the non-resident is exigible to tax.

C. Section 93 is applicable to the facts of the case and hence income is deemed to be income of the assessee chargeable tot tax.

17. The AO concluded the reassessment by placing reliance on the order of the TPO for the AY 2010-11. The AO computed the value of preference shares at Rs.270.10 per share and the made an addition of Rs.37,16,41,000 being the difference between the actual premium of Rs.900 per share and premium as computed by the AO @ Rs.270.10 per share. The AO stated that the as per the India – Singapore Double Taxation Avoidance Agreement, the capital gain arising to a resident of Singapore from alienation of shares in an Indian Company is taxable only in Singapore and therefore proceeded make the addition u/s.93 of the Act. Aggrieved, the assessee preferred an appeal before the CIT(Appeals). The CIT(Appeals) held that addition made by AO u/s. 93 cannot survive. However, the CIT(A) proceeded to retain the addition by stating that excess premium paid by the assessee on redemption of preference shares would constitute deemed dividend u/s.

2(22) and therefore the assessee is liable to pay DDT u/s. 115O of the Act. Aggrieved, the assessee is in appeal before the ITAT.

18. With regard to the valuation of preference shares, the ld AR reiterated the submission earlier made for AY 2010-11. Without prejudice the ld AR submitted that the premium of redemption of preference shares, cannot be treated as deemed dividend u/s.2(22). The ld AR submitted that for the purposes of redemption, the assessee has utilised the securities premium as defined in section 78 of the Companies Act, 1956 [refer balance sheet entry at Page 76, indicating debit to securities account] which is not part of accumulated profits as defined in explanation 2 to section 2(22). In this regard, the ld AR relied on the decision of the Delhi ITAT in DCIT vs. MAIPO India Ltd [2008] 24 SOT 42 (Delhi) wherein while dealing with the provisions of section 78 of the Companies Act it is held that section 78 places a statutory bar on the usage of securities premium whereby the same can be utilised only for the purposes mentioned therein and not for any other purposes. It was submitted that one of the purposes envisaged is the payment of premium on the redemption of shares [Para 8 Page 573] and the payment of dividend from securities premium is prohibited by Companies Act. The ld AR drew our attention to the fact that the accounting entries in the books of accounts of the assessee reflect that the payment was made from a specific reserve and not a free reserve as envisaged under section 2(22) and owing to the limited usage of securities premium granted by the Companies Act, any declaration of dividend from such specific reserve is not permitted under the

Companies Act. Therefore the ld AR submitted that, the payment made to APFI cannot be considered as dividend and hence cannot be deemed as dividend under section 2(22) of the Act.

19. In connection with the contention that the payments to AFPI is dividend under section 2(22)(d) the ld AR submitted that section 2(22)(d) states that any distribution made to the shareholders of the company on reduction of capital shall be considered as deemed dividend to the extent of its accumulated profits. The ld AR also submitted that there is a distinction between the terms-'redemption of shares' and 'reduction of shares' and two different sections of the Companies Act deals with them. Therefore it was submitted that redemption of preference shares cannot be considered as 'reduction' of share capital. Reliance in this regard is placed on the decision of the Mumbai Tribunal in Parle Biscuits Pvt Ltd. v ACIT in ITA no. 5318 & 5319/Mum/2006 & 447/Mum/2009 and Shri Uday K. Pradhan vs. ITO in ITA No. 4669/Mum/2014 [Page 415-435 & Page 436-444 respectively]. Further the ld AR submitted that even otherwise, Item (i) of the exceptions to section 2(22) state that a distribution made in accordance with clause (d) of section 2(22) shall not apply to distributions of share, the holder of the which is not entitled to a share in the surplus assets on liquidation and a preference shareholder is not entitled to participate in the surplus assets on liquidation. Therefore, the provisions of section 2(22)(d) of the Act is not applicable and hence no DDT is payable.

20. The CIT(Appeals) alternatively invoked provisions of section 2(22)(e) for treating the premium on redemption of preference as deemed dividend and in this regard the ld AR drew our attention to the provisions of section 2(22)(e) which deals with payment by a closely held company by way of advance or loan to a shareholder and requires payment of a 'repayable' amount to shareholders. Such payment to the extent of accumulated profits of the company shall constitute dividend and this is subject to the recipient shareholder being a beneficial owner of shares holding not less than 10% of voting power. The ld AR submitted that in the present case, the impugned payment is towards consideration for redemption and is not an amount in nature of loan or advance which is repayable in future. It is further submitted that there would be no occasion for APFI to repay or return the amounts received on redemption. The ld AR also submitted that section 2(22)(e) entails a distribution from free reserves and as discussed earlier, securities premium cannot be utilised for the payment of dividend under the Companies Act. In addition to the above submissions the ld AR submitted that section 2(22) provides instances where distribution of accumulated profits would not constitute dividend and that a distribution to a shareholder who is entitled to a fixed rate of dividend with or without a right to participate in the profits cannot be considered as deemed dividend. In assessee’s case since APFI is a preference share holder who is entitled to a fixed rate of dividend, any distribution made to them cannot be considered as dividend under section 2(22)(e) for the purposes of the Act.

21. Without prejudice to the above submissions, ld AR submitted that the assessee is engaged in developing, operating and maintaining a SEZ and therefore would be covered by section 115-0(6) which states that no DDT shall be paid by an assessee engaged in developing, developing and operating or developing, operating and maintaining a Special Economic Zone (SEZ) on any profits distributed or paid on or after 1st April 2005 out of current year income either in the hands of the developer or the person receiving it. In the present case the assessee's profits for the year is less than the excess premium sought to be taxed is less than the profits of the year [Profit and loss account on Page 76 of paperbook] and therefore the amount paid or distributed by the Appellant is covered by section 115-0(6) of the Act and there would be no liability to pay DDT. The ld AR also presented arguments distinguishing the case of Fidelity Business Services (P.) Ltd (2017) 164 1TD 270 relied on by the CIT(A) by submitting that in the case of Fidelity (supra)the shares under consideration were equity shares.

22. We have while considering the appeal for AY 2010-11 in para 12 and 13 have held that the considering the guideline value of land and building for the purpose of valuation of preference shares under NAV method is the right and therefore there cannot be any addition made towards the difference the premium amount. For the year under consideration, the facts and the issue are the same. The AO has re-opened the assessment, on the basis of the valuation done by the TPO for AY 2010-11 and the AO has adopted the same approach of considering the book value of land and building for the purpose of

computing the value per preference shares. Therefore our decision for AY 2010-11 is applicable for AY 2009-10 also.

23. On the issue of whether the excess premium paid is taxable u/s.2(22)(d) or 2(22)(e), we will look at the provisions first

(22) "dividend" includes—

(a) *******
(b) *******
(c) ********
(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not ;
(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;
****

24. From the plain reading of the above provisions, it is clear that sub-clause (d) is applicable when there is any distribution by the company to its shareholders by a company on the reduction of its capital and in order to attract clause (d), the payment should be by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares. In the given case, the payment made by the

assessee towards premium of redemption of preference shares is neither towards reduction of share capital nor towards advance or loan. We are therefore in agreement with the various arguments put forth by the ld AR in this regard. We are of the considered view that the excess premium paid to APFI by the assessee on redemption of preference shares cannot be taxed u/s.2(22)(d) or 2(22)(d) and delete the addition made by the CIT(Appeals).

25. For both the assessment years the ld AR made submissions with regard to all the grounds including legal grounds for AY 2009-10. In the light of our decision on valuation of the preference shares and treatment of excess premium as deemed dividend, the rest of arguments have become academic and therefore the grounds pertaining to the same do not warrant separate adjudication

26. In result the appeal for AYs 2009-10 and 2010-11 are allowed in favour of the assessee.

Pronounced in the open court on this 24th day of August, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 24th August, 2022.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.