

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/TAX APPEAL NO. 80 of 2023****With
R/TAX APPEAL NO. 96 of 2023**

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THE PRINCIPAL COMMISSIONER OF INCOME TAX 1, AHMADABAD
Versus
JIGAR JASHWANTLAL SHAH

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Appearance:

MR.VARUN K.PATEL, SENIOR STANDING COUNSEL WITH MR. DEV D.
PATEL, ADVOCATE for the Appellant(s) No. 1
MR B S SOPARKAR(6851) for the Opponent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE BIREN VAISHNAV
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 28/08/2023

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1 Admit. Mr.B.S.Soparkar, learned counsel for the respondent, waives service of admission on behalf of the respondent. With consent of the learned advocates appearing for the parties, these tax appeals are taken up for final hearing today.

2 Both these tax appeals are filed by the revenue arising out of the common judgement and order dated 06.05.2022, by the Income-tax Appellate Tribunal,



Ahmedabad Bench, (for short “the Tribunal”) under Sec.260-A of the Income-tax Act, 1961, (for short “the Act”) passed in ITA No. 1541/Ahd/2017 filed by the respondent- assessee and ITA No. 1643/Ahd/2017 filed by the appellant - revenue for the Assessment Year 2013-14.

3 In Tax Appeal No. 80 of 2023, arising out of common judgement and order dated 06.05.2022 in ITA No. 1541/Ahd/2017 filed by the respondent- assessee, the revenue has raised the following substantial question of law:

“(a) Whether in the facts and circumstances of the case and in law, the learned ITAT has erred in deleting the addition u/s. 56(2)(vii)(c) of the Act in respect of the additional 82,200 shares allotted to assessee due to renouncement of rights by wife & father of the assessee?”

3.1 So far as Tax Appeal No. 96 of 2023 is concerned, the same is also arising out of common judgement and order dated 06.05.2022 ITA No. 1643/Ahd/2017 filed by the appellant - revenue. The revenue has raised the following two substantial questions of law:



“(a) Whether in the facts and circumstances of the case and in law, the learned ITAT has erred in deleting the addition u/s.56(2)(vii)(c) in respect of the additional shares allotted to the assessee?”

“(b) Whether in the facts and circumstances of the case and in law, the learned ITAT has erred in adopting the valuation of shares at Rs.205 per share instead of Rs.255 per share determined by the AO as per Rule 11UA(1)(c)(b) in respect of the additional shares allotted to the assessee.?”

4 Facts in brief are as under:

4.1 The assessee filed the return of income for the Assessment Year 2013-14 declaring income of Rs.86,94,247/- which was processed under Sec.143(1) of the Act. Thereafter, during the assessment proceedings of M/s. Kintech Synergy Limited, it was noticed that the assessee was receiving salary in the capacity of Director of the said Company and the assessee was issue two lakhs right shares at face value of Rs.10 in M/s. Kintech Synergy Limited.



4.2 The Assessing Officer, therefore, issued notice under Sec.148 of the Act on the ground that the correct Fair Market Value (FMV) of shares allotted to the assessee at Rs.5,10,00,000/- far exceeded the consideration of Rs.20,00,000/- paid for receipt of shares and as per the provisions of Sec.56(2) of the Act, the same should have been taxed in the hands of the assessee. The Assessing Officer computed the FMV and the shares at Rs.255 per share and hold that the differential amount of Rs. 4,90,00,000/- has escaped assessment in the hands of the assessee.

4.3 The Assessing Officer, while framing the re-assessment order under Sec.143(3) r/w. Sec. 147 of the Act, held that under the provisions of Sec.56(2)(vii)(c) of the Act, Rs.4,90,00,000/- was taxable under the head of income for other sources.

4.4 The assessee, feeling aggrieved, preferred an appeal before the CIT(A) contending that the Assessing Officer



failed to appreciate that the shares were not “received” by transfer but allotted by way of right shares allotment and hence Sec.56(2)(vii)(c) of the Act cannot be invoked. It was also pointed out by the assessee that the Assessing Officer erroneously held that shares allotment was disproportionate and the valuation of shares at Rs.255 per share was also excessive.

4.5 The CIT(A) partly allowed the appeal of the assessee holding that to the extent that assessee was allotted right shares proportionate to not existing holding, the provisions of Sec.56(2)(vii)(c) were not applicable and the Fair Market Value for the remaining shares was held to be Rs.205.55 per share. The current share holding of the assessee of 1,03,000 shares are not covered by provisions of sec.56(2) but in respect of additional shares received by the assessee on renunciation of right shares by wife and father of the assessee, remaining 82,200 shares and also 14,800 shares allotted to the assessee as a result of third party share-holder renunciation in favour of the

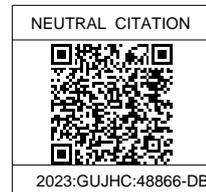


assessee, the disallowance on the ground that allotment of additional shares was disproportionate to person share holding of the assessee and hence the provisions of Sec.56(2)(vii)(c) of the Act were not made applicable.

4.6 Both, the assessee and the revenue, therefore, filed appeals challenging the order of the CIT(A) before the Tribunal.

4.7 The Tribunal, dismissed the appeal filed by the revenue on both counts i.e. firstly, Sec.56(2)(vii)(c) not being applicable to the right shares proportionate to not existing holdings and secondly Fair Market Value of shares were Rs.205.55 per share.

4.8 The Tribunal partly allowed the appeal of the assessee holding that the issue of right shares proportionate to holding of wife and father was not taxable under Sec.56(2)(vii)(c). The Tribunal, further held that the provisions of Sec.56(2)(vii)(c) would be applicable in respect of 14,800 shares which were allotted to the



assessee as a result of third party declining to apply for the same.

5. The Tribunal, after considering the facts of the case and the order passed by the CIT(A), raised the following issues for consideration:

- 1) Whether section 56(2)(vii)(c) of the Act can be invoked in respect of allocation of 1,03,000 rights shares allotted to the assessee proportionate to his shareholding in the company?
- 2) Whether section 56(2)(vii)(c) of the Act can be invoked in respect of additional 82,200 shares received by the assessee since the assessee's wife and father did not exercise the rights issue and renounced the same in favour of the assessee?
- 3) Whether section 56(2)(vii)(c) of the Act can be invoked in respect of 14,800 shares allotted to the assessee as a result of third party shareholders renouncing their right to apply for rights shares in favour of the assessee?



4) Whether Ld.CIT(Appeals) erred in accepting the valuation of shares proposed by the assessee?

6. Sec.56(2)(vii)(c) of the Act, reads as under:

“56....

XXX

XXX

XXX

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

XXX

XXX

XXX

(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009 but before the 1st day of April, 2017,—

XXX

XXX

XXX

(c) any property, other than immovable property,—

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :



Provided that where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of [section 50C](#), the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of [section 50C](#) and sub-section (15) of [section 155](#) shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

Provided further that this clause shall not apply to any sum of money or any property received—

- (a) from any relative; or
- (b) on the occasion of the marriage of the individual; or
- (c) under a will or by way of inheritance; or
- (d) in contemplation of death of the payer or donor, as the case may be; or
- (e) from any local authority as defined in the Explanation to clause (20) of [section 10](#); or
- (f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of [section 10](#); or
- (g) from any trust or institution registered under [section 12AA](#); or
- (h) by way of transaction not regarded as transfer under clause (vib) or clause (vid) or clause (vii) of [section 47](#).

Explanation.—For the purposes of this clause,—

- (a) "assessable" shall have the meaning assigned to it in the Explanation 2 to sub-section (2) of [section 50C](#);
- (b) "fair market value" of a property, other than an immovable property, means the value



determined in accordance with the method as may be prescribed;

(c) "jewellery" shall have the meaning assigned to it in the Explanation to sub-clause (ii) of clause (14) of [section 2](#);

(d) "property" means the following capital asset of the assessee, namely:—

(i) immovable property being land or building or both;

(ii) shares and securities;

(iii) jewellery;

(iv) archaeological collections;

(v) drawings;

(vi) paintings;

(vii) sculptures;

(viii) any work of art; or

(ix) bullion;"

7. The aforesaid provision of Sec.56(2)(vii)(c) of the Act was inserted vide amended Act with effect from 01.07.2010. Explanatory notes explaining the provisions of Finance Bill reads as under:

“Taxation of certain transactions without consideration or for inadequate consideration

Under the existing provisions of section 56(2)(vii), any sum of money or any property in ind which is received without consideration or for inadequate consideration (in excess of the prescribed limit of Rs.50,000) by an individual or an HUF is chargeable to income-tax in the hands of recipient under the head ‘income from other sources’. However, receipts



from relatives or on the occasion of marriage or under a will are outside the scope of this provision.

The existing definition of property for the purposes of section 56(2)(vii) includes immovable property being land or building or both, shares and securities, jewellery, archeological collection, drawings, paintings, sculpture or any work of art.

A. These are anti-abuse provisions which are currently applicable onl if an individual or an HUF is the recipient. Therefore, transfer of shares of a company to a firm or a company, instead of an individual or an HUF, without consideration or at a price lower than the fair market value does not attract the anti-abuse provision.

In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, it is proposed to amend section 56 to also include within its ambit transactions undertaken in shares of a company (not being a company in which public are substantially interested) either for inadequate consideration or without consideration where the recipient is a firm or a company (not being a company in which public are substantially interested). Section 2(18) provides the definition of a company in which the public are substantially interested.

It is also proposed to exclude the transactions undertaken for business reorganization, amalgamation and demerger which are not regarded as transfer under clauses (via), (vic), (vicb), (vid) and (vii) of section 47 of the Act.

Consequential amendments are proposed in-

(I) section 2(24), to include the value of such shares in the definition of income;

(ii) section 49, to provide that the cost of



acquisition of such shares will be the value which has been taken into account and has been subjected to tax under the provisions of section 56(2).

These amendments are proposed to take effect from 1st June 2010 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

B. The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift Tax Act. The provisions were intended to extend the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. It is, therefore, proposed to amend the definition of property, so as to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient.

C. In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a taxable differential. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property.

These amendments are proposed to take effect



retrospectively from 1st October, 2009 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.

D. It is proposed to amend the definition of 'property' as provided under section 56 so as to include transactins in respect of 'bullion'.

This amendment is proposed to take effect from 1st June, 2010 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

E. It is proposed to amend section 142A(1) to allow the Assessing Officer to make a reference to the Valuation Officer for an estimate of the value of property for the purposes of section 56(2).

This amendment is proposed to take effect from 1st July, 2010."

8 Conjoint reading of the provision as well as the explanatory note of the said provision, it is clear that only when an individual or a HUF receives any property for consideration which is less than the FMV, the provisions of Sec.56(2)(vii)(c) would be attracted. In the facts of the case, the shares had come into existence only when the allotment is made by the company as right shares cannot be said to be "received from any person". The shares which have been allotted to the assessee were not "received from any person" which is the fundamental



requirement for invoking sec.56(2)(vii)(c). In other words, the property must pre-exist for application of Sec.56(2)(vii)(c), which is clear from the intention of the legislature.

9. The Tribunal, applying the above reasoning, relied upon the decisions in the case of ***Sudhir Menon (HUF) vs. A.C.I.T, Mumbai.***, dated 12.03.2014 of the ITAT Mumbai 'A' Bench, and on a decision of the Hon'ble Supreme Court in the case of ***Ms.Dhun Dadabhoy Kapadia vs. CIT*** reported in ***63 ITR 651 (SC)***. The Tribunal, also relied on a decision in the case of ***H. Holck Larsen Vs. Commissioner of Inome-tax***, reported in ***85 ITR 285 (BOM.)***, to hold that as long as there is no disproportionate allotment of shares, there was no scope of any property being received by them on the said allotment of shares, as there was only an apportionment of the value of their existing share holding over a large number of shares and hence no addition under Sec.56(2)(vii)(c) would arise. It was, therefore, held



that if the shares are allotted strictly on proportionate basis based on existing shareholding, then though the provisions per se are applicable, but will not operate adversely because the gain accruing on allotment of fresh shares will be offset by the loss in value of existing shares.

10. The Tribunal, in support of its finding relied upon the decision in the case of ***Deputy Commissioner of Income Tax, Circle-2, Jaipur Vs. Smt. Veena Goyal***, reported in ***119 taxmann.com 362 (Jaipur - Trib.)*** and on a decision in the case of ***Income-tax Officer Vs. Rajeev Ratanlal Tulshyan***, reported in ***136 taxmann.com 42 (Mumbai - Trib.)***. The Tribunal, therefore held that the provisions of sec.56(2)(vii)(c) would not apply in respect of allocation of 1,03,000 right shares allotted to the assessee proportionate to its share holding in the company.

11. With regard to the issue whether the section



56(2)(vii)(c) of the Act can be invoked in respect of additional 82,200 shares received by the assessee since the wife and father of the assessee did not exercise the rights issued and renounced the right in favour of the assessee, reliance was placed on a settled principle of law that what cannot be done directly cannot be done indirectly as well. The Tribunal, therefore, held that had the wife and father of the assessee directly transferred their shares in favour of the assessee, provisions of Sec.56(2)(vii)(c) of the Act could not have been invoked since both of them are falling in the definition of “relatives” which are excluded from within the purview of operation of Sec.56(2)(vii)(c) of the Act. As a consequence it was held that the renunciation of right shares by wife and father of the assessee by not exercising the right to subscribe would not attract the provisions of Sec.56(2)(vii)(c) of the Act. The Tribunal relied upon the decision in the case of ***Kumar Pappu Singh v. Deputy Commissioner of Income-tax, Circle-1, Andhra Pradesh***, reported in ***101 taxmann.com 122***



(Visakhapatnam - Trib.) and in the case of **Assistant Commissioner of Income-tax, Circle - 4(1), Visakhapatnam Vs. Y. Venkanna Choudary**, reported in **112 taxmann.com 71 (Visakhapatnam - Trib.)**. The Tribunal, therefore, held that the provision of Sec.56(2)(vii)(c) of the Act cannot be invoked in respect of additional 82,800 shares received by the assessee.

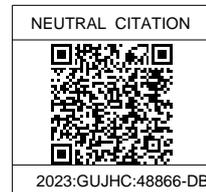
12. With regard to the application of Sec.56(2)(vii)(c) of the Act for the balance 14,800 shares allotted to the assessee as a result of third party share-holder declining to apply for right shares in favour of the assessee, the Tribunal held against the assessee because renunciation of rights in favour of the assessee by third party who are not related does lead to disproportionate allocation of shares in favour of the assessee.

13. With regard to the reduction in valuation of shares to Rs.205.55 per share by computing the FMV per share on date of allotment, taking into consideration the book value as on 31.03.2012 and adding further



consideration received on account of issuance of additional shares, the Tribunal upheld the decision of the CIT(A) holding that the CIT(A) has not erred in facts and in law in computing the FMV of shares on the above lines. The Tribunal relied on a decision in the case of **ACIT Vs. Y.Venkanna Choudary** reported in **[2019] 112 taxmann.com 71 (Vishakhapatnam -Trib)** and in the case of **Sadhvi Securities (P) Ltd v. Asstt. CIT** reported in **[2019] 109 taxmann.com 245/179 ITD 197 (Delhi - Trib.)**, wherein, it is held that in case the balance sheet was not drawn on the date of allotment, the previous balance-sheet which was approved in the AGM has to be considered for valuation of FMV of the shares. The Tribunal, therefore, held that since the shares were allotted before balance-sheet for A.Y 2013-14, the CIT(A) did not erred in computing the FMV per share considering the previous balance-sheet approved in AGM for valuation of FMV of the shares.

14. Mr.Varun Patel, learned Senior Standing Counsel



appearing with Mr.Dev D. Patel, learned advocate for the revenue, would submit that the CIT(A) erred in law in holding the addition under Sec.56(2)(vii)(c). He would further submit that the CIT(A) erred in law and on facts adopting the valuation of shares at Rs.205 per share instead of Rs.255 per share determined by the Assessing Officer as per Rule 11UA(1)(c)(b).

15. Mr.B.S.Soparkar, learned counsel appearing for the assessee would support the order of the CIT(A) holding that the provisions of Sec.56(2)(vii)(c) cannot be invoked as was rightly held by the appellate authority, as what was found by the appellate authority that the additional 82,200 shares received by the assessee were as a result of the fact that the assessee's father and wife did not exercise to opt for the issue and renounced the rights in favour of the assessee. Consequently, such renunciation of right shares by way of not exercising the right to subscribe to them in favour of the assessee, as held by the CIT(A) and confirmed by the ITAT would not attract



the provisions of Sec.56(2)(vii)(c).

16. Mr.Soparkar, learned counsel, in support of his submission, relied on the following decisions:

(I) **Miss Dhun Dadabhoy Kapadia Vs. Commissioner of Income-Tax**, reported in **63 ITR 651 (SC)**.

(ii) **H. Holck Larsen Vs. Commissioner of Inome-tax**, reported in **85 ITR 285 (BOM.)**.

(iii) **Sudhir Menon HUF Vs. Assistant Commissioner of Income-tax -21(2), Bandra Mumbai**, reported in **45 taxmann.com 176 (Mumbai - Trib.)**.

(iv) **Kumar Pappu Singh v. Deputy Commissioner of Income-tax, Circle-1, Andhra Pradesh**, reported in **101 taxmann.com 122 (Visakhapatnam - Trib.)**

(v) **Sadhvi Securities (P.) Ltd. Assistant Commissioner of Income-tax, Central Circle-5, New Delhi**, reported in **109 taxmann.com 245 (Delhi - Trib.)**.



(vi) ***Assistant Commissioner of Income-tax, Circle - 4(1), Visakhapatnam Vs. Y. Venkanna Choudary***, reported in ***112 taxmann.com 71 (Visakhapatnam - Trib.)***.

(vii) ***Deputy Commissioner of Income Tax, Circle-2, Jaipur Vs. Smt. Veena Goyal***, reported in ***119 taxmann.com 362 (Jaipur - Trib.)***.

(viii) ***Income-tax Officer Vs. Rajeev Ratanlal Tulshyan***, reported in ***136 taxmann.com 42 (Mumbai - Trib.)***.

(ix) ***Prakash Chand Sharma HUF Vs. Income-tax Officer***, reported in ***139 taxmann.com 286 (Jaipur - Trib.)***

17. The Tribunal, therefore, has not committed any error in answering all the four issues which are raised by it holding that sec.56(2)(vii)(c) of the Act cannot be invoked in respect of allocation of 1,03,000 right shares allotted to the assessee proportionate to his share holding in the company as it cannot be said that the assessee has



received as there is transfer of the shares which pre-existed prior to the issuance of shares by the Company as there is vital difference between “creation” and “transfer of shares”. The words “allotment of shares” having used to indicate the creation of shares by appropriation out of the unappropriated share capital to a particular person who has right to choose for such allotment. Therefore, there is a difference between issue of a share to a subscriber and the purchase of a share from an existing shareholder as in the first case, because, the first case is that of creation, whereas, the second is that of “transfer” entitle to the right in action.

18. In view of the above, the provisions of Sec.56(2) would not be applicable to the issue of new shares which is also submitted by the explanatory note to the Finance Bill, 2010, wherein, it is clarified that sec.56(2)(vii)(c) of the Act ought to be applied only in the case of transfer of shares. It is trite law that allotment of new shares cannot be regarded as transfer of shares. Therefore, in order to



apply the provisions of sec.56(2)(vii)(c), there must be an existence of property before receiving it. As per advanced Law Lexicon Dictionary, the term “receive” has been defined as “ To receive means to get by a transfer, as to receive a gift , to receive a letter or to receive money and involves an actual receipt.” Issu of new shares by company as a right shares is creation of property and merely receiving such shares cannot be considered as a transfer under Sec.56(2)(vii)(c) and accordingly, such provision would not be applicable on the issuance of shared by the Company in the hands of the allottee.

19. The Apex Court in the case of ***Khoday Distilleries Ltd. vs. CIT*** reported in ***[2008] 307 ITR 312 (SC) (176 Taxmann 142)***], after referring to the decision in the case of ***Shri Gopal Jalan & Co. vs. Calcutta Stock Exchange Association Ltd.***, reported in ***1964 (3) SCC 698***, noted the question arose as to the amendment of the word “allotment” held that the word “allotment” means appropriation out of previously unappropriated



capital of a company, of a certain number of shares to a person and till such allotment, the shares do not exist as such". Therefore, it is only on allotment that the shares come into existence. In every case, the words "allotment of shares" having used to indicate the creation of shares appropriation out of unappropriated share given to a particular person which is also referred to in the notice of clause to the Finance Bill 2010. Therefore, the aim and intention behind amending the provision of Sec.56 is to prevent the practice of transferring unutilized shares at a price which are allotted for the first time by way of right shares. The amendment is therefore never meant to aim the "fresh issue" or "fresh allotment" of shares by a company.

20. With regard to issue of 82,200 shares, the name of wife and father of the assessee would also not be hit by provision of Sec.56(2)(viii)(c) as both of them would be covered by definition of relative covered in the exemption of relative, and therefore, the provision of section 56



would not be applicable at all. The findings recorded about valuation of shares to Rs.205.55 is concerned, there are concurrent findings of fact which do not require any interference as the CIT(A) has rightly computed the FMV on the basis of the balance sheet which was available on record for the previous year and which was approved in AGM.

21. In view of the foregoing reasons, we are of the opinion that no question of law, much less any substantial question of law would arise from the impugned common judgement and order passed by the Tribunal. Both the appeals are accordingly, dismissed with no orders as to costs.

(BIREN VAISHNAV, J)

(BHARGAV D. KARIA, J)

BIMAL