

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ ITA. No.325/JP/2021

निर्धारण वर्ष / Assessment Years : 2014-15

M/s Prakash Chand Sharma HUF C-42, Kaladeep, Vaishali Nagar, Gokul Path, Jaipur.	बनाम Vs.	ITO, Ward-3(5), Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AADHP 4019 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (C.A.)
राजस्व की ओर से / Revenue by : Shri A.S. Nehra (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 24/03/2022
उदघोषणा की तारीख / Date of Pronouncement : 06/04/2022

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal by the assessee is directed against the order of the Id. CIT(A), National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the AY 2008-09.

2. At the outset of hearing, the Bench observed that there is delay of 180 days in filing the appeal by the assessee for which the Id. AR of the assessee filed a condonation application dated 30.12.2021 along with affidavit of CA of the assessee dated 30.12.2021 mentioning therein that delay in filing the appeal by the assessee is occurred due to lockdown and not functioning of the income tax side. Thus, the Id. AR of the assessee prayed that the assessee is prevented

by sufficient cause in late filing the appeal before ITAT and the delay occurred may kindly be condoned.

3. During the course of hearing, the ld. DR has no objection to assessee application for condonation of delay and prayed that court may decide the issue as deem fit and proper in the case.

4. We have heard the rival contentions and perused the materials available on record. The prayer as mentioned by the assessee for condonation of delay of 180 days has merit and we concur with the submission of the assessee. Thus the delay of 180 days in filing the appeal by the assessee is condoned.

5. The assessee has raised the following grounds:-

“1. The Ld. CIT(A), NFAC has erred on facts and in law in confirming the addition of Rs. 4,56,000/- u/s 56(2)(vii)(c)(ii) of the Act by not accepting the contention of assessee that :-

(i) section 56(2)(vii) is not applicable as it is applied to tax those receipts which are received without consideration or for inadequate consideration whereas the present case is allotment of shares which cannot be equated with receipt of shares.

(ii) even if section 56(2)(vii)(c) is applicable, the same would not be subject to tax in view of Explanation (e) of said section

2. The appellant craves to alter, amend and modify any ground of appeal.”

6. Brief facts of the case are that the assessee is an existing shareholder of M/s Prakash Deep Finance Co. Ltd. (in short PDFCL) having 99,500/- shares of Rs. 10/- each amounting to Rs. 9,95,000/- since 2007. During the year PDFCL allotted 3,00,000 shares to the assessee at face value of Rs. 10/- each for Rs. 30 lakhs on 31.03.2014. The AO however held that FMV of shares u/s 56(2)(vii)(c) read with rule 11UA as on 31.03.2014 is Rs. 11.52 per share and this shares were allotted at a value lower by Rs. 1.52 per share. Accordingly, he

made addition of Rs. 4,56,000/- (3,00,000*1.52) by holding that the contention of assessee that section 56(2)(vii)(c) (ii) is applicable only when an assessee receives any movable property at lower than FMV but the allotment of shares by the company cannot be equated with receipt of shares is not correct as change of name or words will not deter the applicability of legal provisions.

7. The AO arrived the findings as held that provisions of section 56(2)(vii)(c)(ii) of the IT act read with provisions of Rule-11UA of the IT Act, 1962 are clearly applicable in this case. Therefore, an amount of Rs. 4,56,000/- is hereby added to total income of the assessee. Total income of the assessee is recommended as under:-

Assessed income u/s 143(3) r.w.s 153A dated 30/11/2018	Rs. 42,51,380/-
Add:- Addition u/s 56(2)(vii)(c)(ii) as discussed above	Rs. 4,56,000/-
Total income	Rs. 47,07,380/-

Assessed u/s 144/147 of the I.T. Act, 1961 at total income of Rs. 47,07,380/-. Issued copy of order and demand notice to the assessee. Penalty proceedings U/s 274 r.w.s. 271(1)(c) is being initiated separately for concealing income by the assessee.

8. Being aggrieved by the assessment order, the assessee preferred an appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee has reiterated its arguments in written submission of the order. The Id. CIT(A) for the reasons stated in his order has rejected the arguments and submissions made by the assessee.

9. The Id. CIT(A) decided this issue in para 5.3 & 5.3.1 are as under:-

“5.3 I have carefully considered the matter. Assessee is advancing two-pronged arguments to advance its cause. First is that in case of allotment of shares, there was no existing share. Rather the shares came into existence after allotment and that there is no transfer of shares from one person to another. This argument of the assessee is not satisfactory in my considered view. The shares of PDFCL had face value of Rs.10. Buy a system of valuation prescribed under rule 11UA of the Rules, the value of shares were found to be Rs. 11.52. The value is more than what was paid by assessee. The assessee is trying to distinguish between initial allotment and secondary sale of shares. But the attempted distinction has no relevance for the present purpose. Assessee's case is not that of issue of bonus shares. The company which allotted the share had its authorised number of shares which it could allot. Some of the authorised shares have been allotted to assessee. Hence, this leg of assessee's argument is rejected. Second facet of assessee's argument is that 95.350 of shares in PDFCL were owned by members covered within exception prescribed in provision to section 56(2)(vii)(c)(vii) of the Act. Instead of allotting shares to all existing shareholder who were relatives, the shares were allotted to assessee and it was in the nature of transfer of rights to assessee. Hence, the provision of section 56(2) vii (g) would not get attracted. Reliance was placed on decision in case Assistant Commissioner of Income Tax Vs. Venkanna Choudary (2020) 180 ITD 166. But in this connection, it is seen that in the case relied upon by the appellant, all the other shareholders were covered within the exemption provided in provision to the section. In case of present assessee, some of the shareholders in PDFCC were companies who had

legal existence of their own. All shareholders of PDFCL were not exempted entities. Hence, reliance on the case law does not help assessee's case. In view of the above ground Nos. 2 and 3 are dismissed.”

10. Aggrieved by the CIT(A) order, the assessee is in appeal before us. Before the CIT (A), the assessee has reiterated that his submissions, which was not taken on record by the CIT(A). Before us, the ld. AR for the assessee submits a detailed written submissions which are as under:-

“1. At the outset it is submitted that section 56(2)(vii) applies where an individual/HUF received any sum of money or any immovable property or any movable property without consideration or for a consideration less than the FMV. Thus the intent of this section is to tax the receipts of those moveable properties which are received without consideration or for inadequate consideration. However in the present case, the company has allotted the shares to an existing shareholder. This is not akin to receipt of shares in as much as there is a distinction between allotment of shares and receipt of shares. Receipt is the action of receiving something or the fact of its being received whereas allotment is defined as the portion or share of something. For receipt of share there should be shares in existence and a person holding such share transferring it to another person. As against this in case of allotment of shares, it comes into existence after it is allotted and there is no transfer of shares from one person to another person. Therefore allotment of shares cannot be equated with receipt of shares because in case of receipt of shares the property is already in existence whereas in case of allotment of shares the property comes into existence after it is allotted.

It may also be noted that section 56(2)(vii) is a deeming provision which creates an artificial fiction by deeming certain receipt in the hands of recipient as income. A deeming fiction has to be construed literally. Casus omissus cannot be supplied to a deeming provision. Therefore the word ‘receives’ used in the section cannot be equated to ‘allotment.

Hence, allotment of shares will not fall under the ambit of section 56(2)(vii)(c) & consequently addition made by AO is not as per law.

2. Without prejudice to above, even if it is held that allotment of shares is covered by section 56(2)(vii)(c), then also the addition made by AO is uncalled for in as much as the entire share capital of PDFCL as on 27.09.2013 i.e. just before fresh allotment of shares to the assessee was held by its relatives being the members of the HUF as defined in Explanation (e) to this clause as per the following details:-

Shareholder Name	Relation with assessee	Number of Shares	Percentage of Holding
Prakash Chand Sharma	Members of the HUF	21,26,000	44.20%
Kalawati Sharma		9,30,500	19.35%
Shruti Sharma		4,78,000	9.94%
Saurabh Sharma		4,78,000	9.94%
Himanshu Sharma		4,74,000	9.85%
Prakash Chand Sharma HUF	Self	99,500	2.07%
Shubdeep Finance Company Pvt. Ltd	Karta is Director	24,000	0.49%
Kaladeep Developers Pvt. Ltd	Karta is Director	2,00,000	4.16%
Total		48,10,000	100%

Thus from the above it can be noted that 95.35% shareholding of the company is with the assessee or the persons who fall under the definition of relative as mentioned in proviso to Explanation (e) of

section 56(2)(vii). In the present case the shares has been allotted on 31.03.2014 to the assessee instead of allotting shares to all the existing shareholders and thus even if it is assumed that the shareholders to whom shares were not allotted have given up their right of allotment in shares to other shareholders, it is a case of transfer of right in shares by one relative to another relative and therefore also section 56(2)(vii)(c) would not get attracted. Reliance in this connection is placed on the decision of Hon'ble ITAT Visakhapatnam Bench in case of ACITVs. Y. Venkanna Choudhary(2020) 180 ITD 166.

In view of the said decision, even if section 56(2)(vii)(c) is applied, because of explanation (e) of section 56(2)(vii) which provides that in case of HUF, any member thereof falls in the definition of relative, as the shares allotted to the assessee to the extent of 95.35% was from the interest of his relatives, the same ought not be subject to tax. The Ld. CIT(A) has observed that since the company which allotted the share has its authorized number of shares which it could allot and therefore, he rejected the argument of assessee that shares which are allotted were not in existence. This observation is not correct. This is because the shares have a distinctive number. The authorized share capital has no distinctive number. Only when it is issued/ allotted, a distinctive number is given to the shares. Hence, having authorized share capital would not mean that the shares which are subsequently issued/ allotted are existing. Further even if the observation of Ld. CIT(A) that some of the shareholders of PDFCL are companies who do not fall in the definition of relatives is accepted, then also 95.35% of shares which are held by relatives of the assessee, to that extent the shares allotted to the assessee cannot be charged to tax u/s 56(2)(vii)(c).

10.1 The Id. AR of the assessee submitted a clarification application with reference to the query raised by this Hon'ble Bench which reads as under:-

“It is with reference to the query raised by Hon'ble Bench regarding filing of evidence of renunciation of the allotment of shares by existing shareholder to the assessee. In this connection it is submitted that during the year Prakash Deep Finance Co. Ltd. (PDFCL) issued 33 lakhs

shares of Rs.10 each to its existing shareholders. However, except Sh. Prakash Chand Sharma and Prakash Chand Sharma HUF, all other shareholders renounce their rights in the shares in favour of these two persons. Smt. Kalawati Sharma who was entitled to 6,38,550 shares renounced 78,056 shares in favour of assessee and balance in favour of Sh. Prakash Chand Sharma. Shubhdeep Finance Company Pvt. Ltd. and Kaladeep Developers Pvt. Ltd. renounced all 16,466 shares and 1,37,214 shares in favour of the assessee. All other shareholders renounced the shares in favour of Sh. Prakash Chand Sharma. Thus, from the relative specified in Explanation (e) to section 56(2)(vii), assessee was allotted 78,056 shares. Therefore, to the extent of allotment of these shares, the value of which @ Rs.1.52 per share comes to Rs.1,18,645/-, there would not arise any taxability in the hands of assessee in case section 56(2)(vii) is held applicable.”

11. On the other hand, the ld. CIT-DR only relied on the order of ld. CIT(A) and stated that ld. CIT(A) has passed exhaustive order explaining the provisions of the Act.

12. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We are of the considered view that in the present case the question arises:

A. whether Tax to be paid by the shareholders or the company?

In the present case since the explanation (e) of section 56(2)(vii) which provides that in case of HUF, any member thereof falls in the definition of relative, as the shares allotted to the assessee to the extent of 95.35% was from the interest of his relatives, the same ought not be subject to tax and the company since it is Private Limited company and holding the majority of shares by the relatives , where the assessee himself the karta is Director and member of HUF holding major shares in the company. The shares have been

allotted on 31.03.2014 to the assessee instead of allotting shares to all the existing shareholders and thus even if it is assumed that the shareholders to whom shares were not allotted have given up their right of allotment in shares to other shareholders, it is a case of transfer of right in shares by one relative to another relative and therefore also section 56(2)(vii)(c) would not get attracted.

B. whether there is a difference between allotment of shares and receipt of shares ?

We appreciate the view and argument placed by the Ld AR for assessee that the company has allotted the shares to an existing shareholder. This is not akin to receipt of shares in as much as there is a distinction between allotment of shares and receipt of shares. Receipt is the action of receiving something or the fact of its being received whereas allotment is defined as the portion or share of something. For receipt of share there should be shares in existence and a person holding such share transferring it to another person. As against this in case of allotment of shares, it comes into existence after it is allotted and there is no transfer of shares from one person to another person. Therefore allotment of shares cannot be equated with receipt of shares because in case of receipt of shares the property is already in existence whereas in case of allotment of shares the property comes into existence after it is allotted.

C. Whether assessee comes under the definition of Relative?

The definition of close relative given in the act under section 56(2)(vii)(c) of the act in Explanation is as under:

- (e) "relative" means,-
 - (i) in case of an individual-
 - (A) spouse of the individual;

- (B) brother or sister of the individual;
- (C) brother or sister of the spouse of the individual;
- (D) brother or sister of either of the parents of the individual;
- (E) any lineal ascendant or descendant of the individual;
- (F) any lineal ascendant or descendant of the spouse of the individual;
- (G) spouse of the person referred to in items (B) to (F); and
- (ii) in case of a Hindu undivided family, any member thereof;]

There is no dispute in the contention of the assessee is that all the shareholders are relatives and 95% of the shares have been within the relatives . The transaction between the close relatives is not taxable under the head 'income from other sources u/s 56(2) of the Act. We are of the opinion that the section 56(2)(vii)(c) has no application and the company is liable to be taxed . The opinion and well known facts that in a private limited company major percentage of shares are held by the relatives only.

Whether it is fresh allotment of shares or existing allotment of shares?

The contentions of the Ld AR for the assessee is that the company has allotted the shares to an existing shareholder. Where the receipt of shares in as much as there is a distinction between allotment of shares and receipt of shares. Receipt is the action of receiving something or the fact of its being received whereas allotment is defined as the portion or share of something. For receipt of share there should be shares in existence and a person holding such share transferring it to another person. There is no dispute that existing shareholders prior to fresh allotment was the assessee and his relatives and the provisions

of section 56(2)(viii)(c)(ii) shall not apply in case of money or any property received from any close relative .In the present case it is fresh allotment of shares.

13. We are of the opinion discussing the above issues and respectfully following the view taken by the Coordinate Bench of ITAT in case of ACIT vs. Venkanna Choudhary [2020] 180 ITD 166 (Visakhapatnam-Trib.) dated 30-09-2019 facts and submissions are also identical to the facts and submissions and the relevant paras are as under:-

“10. We have heard both the sides and perused the material placed on record. In the instant case, the assessee has acquired fresh allotment of shares from M/s Sardar Projects (P) Ltd. The company has allotted the shares of 4,25,000 @ 10 each on 5th April, 2013 and 9,05,000 shares @ 10 each on 26th March, 2014. The net book value of the assets as on 5th April, 2013 was Rs. 1.35 crores. The company had issued 38,30,560 shares @ 10 each to the assessee and 28 others on 5th April, 2013. Similarly, on 26th March, 2014, the company had issued 46,53,700 shares @ 10 each to the assessee and 14 others. In the allotment, the assessee had been allotted 4,25,000 shares on 5th April, 2013 and 9,05,000 shares on 26th March, 2014. The FMV of each share was worked out by the AO at Rs. 676.55 as on 5th April, 2013 as against the book value of assets of Rs. 1,35,30,903. Similarly on 26th March, 2014, the AO had worked out the value of the same shares at Rs. 14.48 without any increase in the value of the assets from 5th April, 2013 to 26th March, 2014. The FMV of the shares has been worked out by the AO at Rs. 676.55 on 5th April, 2013 and Rs. 14.48 per shares on 26th March, 2014. If the share value as on 5th April, 2013 is to be adopted @ Rs. 676.55 the book value of the assets would be increase to astronomical figure of 260 crores for 38,50,560 which is nowhere near the actual value of assets. According to the learned Authorised Representative, the valuation date means, the date on which the property or consideration as the case may be received by the assessee. Thus, argued that for arriving FMV fresh allotment of shares also required to be included in the existing paid up share capital and to arrive at FMV of the shares by dividing the

book value of the assets with paid up capital of the shares including fresh allotment. However, during the appeal hearing, learned Authorised Representative submitted that prior to 5th April, 2013 there were only two shareholders in the company i.e., assessee and his brother Mr. Y. Ramesh Chandra, therefore argued that any excess consideration passed on by the assessee from his brother is exempt under s. 56(2)(viii)(c)(ii) of the Act and for this purpose, the assessee has relied on the decision in the case of Kumar Pappu Singh (supra). Therefore, argued that as on 5th April, 2013, s. 56(2)(viii)(c)(ii) has no application to the assessee's case. We consider the argument of the learned Authorised Representative and find that there are only two shareholders in the company i.e. assessee and his brother Mr. Y. Ramesh Chandra in company and both the shareholders are brothers as defined in the Act under the close relatives. The transaction made between close relatives are excluded for the purpose of deeming income under s. 56(2)(viii)(c)(ii) of that Act. This view is upheld by the decision of this Tribunal in the case of Kumar Pappu Singh (supra). For the sake of convenience and clarity, we extract the relevant part of the order this Tribunal in para 14 which reads as under:-

"14. The assessee has only applied for shares which were allotted by the company. The contention of the Revenue is that since there is no relation between the company and the assessee there is no case for invoking the explanation of relative to exempt the assessee from taxing the excess fair market value under the head 'Income from other sources'. Whereas, the contention of the assessee is that all the shareholders are relatives. The transaction between the close relatives is not taxable under the head 'Income from other sources' under s. 56(2) of the Act and hence, the s. 56(2)(vii)(c) has no application. We have gone through the provisions of 56(2)(vii)(c) and this provision was brought as an anti-abuse measure, seeks to tax the understatement of consideration as the income in the hands of the recipient (of the corresponding asset) as against the donor in the case of GT Act. The transactions between close the relatives are outside the scope of application of 56(2)(vii)(c). The legislature in its wisdom excluded the transaction of close relatives for the purpose of taxation under the income from other sources. Even the gifts received from the close relatives under s. 56(2)(v) are outside the scope of 56(2). Though the shares are allotted to the assessee, the entire shareholding of the company is retained by the family and no share was allotted to the

outsiders. In this case, though the assessee had received the excess shares, renouncement was from the close relatives and the assessee is at liberty to transfer the shares to other relatives or shareholders at any point of time without attracting the taxation under s. 56(2)(vii)(c). Therefore, surrender of the rights of the close relatives in favour of the another close relative is covered for exemption under s. 56(2)(vii)(c) of the Act. In the decision rendered by the Hon'ble Madras High Court in the case CIT vs. Kay Arr Enterprises &Ors. (2008) 215 CTR (Mad) 244 : (2008) 3 DTR (Mad) 205 : (2008) 299 ITR 348 (Mad) and in the decision of the Hon'ble Karnataka High Court in the case CIT vs. R. Nagaraja Rao (2013) 352 ITR 565 (Kar) : (2012) 207 Taxman 236 (Kar) it has been categorically held that 'where there are transactions involving family arrangement with respect to transfer of shares, the corporate veil of the company has to be lifted and inferred that there is no transfer of shares and accordingly capital gain tax is not exigible.' From the above it is apparent that even when there are transfer of shares physically, in the event of family arrangements, the Hon'ble High Courts have held that the entire transactions have to be viewed lifting the corporate veil and treat the transaction as if there is no transfer of shares and hence capital gain tax is not attracted. The transaction between the closer relatives should not be seen as introducing black money or evasion of the tax. Therefore, we are of the considered opinion that the transaction is within the family and close relatives and covered by the proviso to s. 56(2)(vii)(c) of the Act and there is no application of the said section for taxing the income under the head 'Income from other sources'. The Co-ordinate Bench of Tribunal Chennai in the case of Vani Estates (P) Ltd. vs. ITO 98 taxman.com 92 (Chennai) also taken the similar view in respect of excess share premium for the transactions between the relatives which required to be taxed under s. 56(2)(vii)(b) of the Act."

11. In the instant case, there is no dispute that existing shareholders prior to fresh allotment was the assessee and his brother Mr. Y. Ramesh Chandra and whatever excess benefit was passed on to the assessee was out of the interest of share holding held by his brother Mr. Y. Ramesh Chandra, hence, the provisions of s. 56(2)(viii)(c)(ii) shall not apply in case of money or any property received from any close relative. The

definition of relative as mentioned in proviso to Expln. (e) of s. 56(2)(vii) as under :

"(e) 'relative' means,—

(i) in case of an individual—

(A) spouse of the individual;

(B) brother or sister of the individual;

(C) brother or sister of the spouse of the individual;

(D) brother or sister of either of the parents of the individual;

(E) any lineal ascendant or descendant of the individual;

(F) any lineal ascendant or descendant of the spouse of the individual;

(G) spouse of the person referred to in items (B) to (F)."

12. There is no dispute that the assessee and other shareholders are close relatives, therefore the consideration received rather excess consideration passed on from the share of his brother is exempt from taxation under s. 56(2)(viii)(c)(ii) of the Act. Thus, we hold that the difference in FMV of the shares and the consideration paid by the assessee is squarely covered by the exemption clause provided under s. 56(2)(vii) of the Act and case law relied on by the assessee in the case of Kumar Pappu Singh (supra) is squarely applicable in the assessee's case. The learned Departmental Representative argued that the shares were not only allotted to the assessee but also allotted to others and submitted that the case law of Kumar Pappu Singh has no application in this case. We are unable to accept the argument of the learned Departmental Representative, since, prior to the allotment of shares on 5th April, 2013 the shareholders are only the assessee and his brother. In the fresh allotment apart from the assessee some applicants were allotted the shares. Therefore whatever the shares allotted to the assessee was from the interest of his brother who is a close

relative. Hence, to the extent of shares allotted to the assessee the same is covered by the decision of this Tribunal. Thus, we hold that there is no case for making any addition for allotment of shares allotted on 5th April, 2013. Accordingly, we set aside the orders of the authorities below on this issue and delete the addition made by the AO.”

Taking into consideration the facts, circumstances of the case and also the decision in the case of ACIT vs. Venkanna Choudhary (Supra) we allow the appeal of the assessee and set aside the order of CIT(A) and addition confirmed by the CIT(A) is deleted.

In the result, the appeal of the assessee is allowed

Order pronounced in the open Court on 06/04/2022.

Sd/-

(राठोड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-

(एस.सीतालक्ष्मी)
(Dr. S. Seethalashmi)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 06/04/2022.

***Santosh**

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Prakash Chand Sharma HUF, Jaipur.
2. प्रत्यर्थी / The Respondent- ITO, Ward-3(5), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 325/JP/2021 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar