**आयकर अपीलीय अधिकरण, हैदराबाद पीठ में**
**IN THE INCOME TAX APPELLATE TRIBUNAL**
**HYDERABAD BENCHES "A", HYDERABAD**

**BEFORE**
**SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER**
**&**
**SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

आ.अपी.सं / **ITA Nos. 67 & 76/Hyd/2018**
(निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15)

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| VITP Private Limited,<br>Hyderabad<br>[PAN No. AACCV2672G] | Vs. | Deputy Commissioner<br>of Income Tax,<br>Circle-17(2),<br>Hyderabad |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती द्वारा/Assessee by: Shri Percy Pardiwala, AR
राजस्व द्वारा/Revenue by: Shri Solgy Kottaram, CIT-DR

सुनवाई की तारीख/Date of hearing: 28/07/2022
घोषणा की तारीख/Pronouncement on: 03/08/2022

आदेश / **ORDER**

**PER K. NARASIMHA CHARY, JM:**

Aggrieved by the order(s) passed by the Learned Commissioner of Income Tax (Appeals)-5, Hyderabad ("Ld. CIT(A)") in the case of VITP Private Limited ("the assessee") for the AYs. 2013-14 & 2014-15, assessee filed these appeals. Since the grounds and question of fact and law are

identical in both the appeals, we dispose of these appeals by way of this common order, taking the appeal for the assessment year 2013-14 as a lead case.

2. Brief facts relevant for the disposal of this appeal are that, the assessee is a company and engaged in the business of providing infrastructural facilities which inter alia include developing, operating and maintaining industrial parks. During the financial year 2012-13, the assessee bought back its own 28 Lakh shares at face value, namely, Rs. 100/- per equity share from its parent company i.e., Ascendas Property Fund (India) Pvt. Limited (APFI), who is the shareholder, in accordance with the provisions of section 77A of the Companies Act, 1956 and also created Capital Redemption Reserve amounting to Rs. 28 Crores being the sum equal to the nominal value of the shares that were brought back by transferring the amount from the surplus available in the Profit & Loss Account (P&L Account).

3. During the course of assessment proceedings, learned Assessing Officer asked the assessee as to why the provisions of section 56(2)(viia) of the Act cannot be invoked in this case to bring the difference between the Fair Market Value (FMV) of the shares and the consideration paid when they are bought back. Assessee explained that the provisions under section 56(2)(viia) of the Act have no application to the buy back of the shares, for the reasons that, -

> *As the company would not be holding the shares, post buy-back, it would be inferred that it did not 'receive' the shares, hence the taxability of same under section 56(2)(viia) does not arise.*
>
> *Section 56(2)(viia) of the Act requires three elements to be involved in a transaction i.e., 'transferor', closely held 'receipt' company and 'shares' of*

*another closely held company. In the instant case, the company has bought back its own shares and not the shares of an another closely held company, therefore, the provisions of section 56(2)(viia) of the Act shall not be applicable.*

*Since the shares bought back do not have any value, it cannot be said to be a property received having money's worth under the provision of Section 56(2)(viia) of the Act. Accordingly, the provision of Section 56(2)(viia) of the Act are not applicable for the buy-back transactions.*

*Future saleability of shares, an essential condition to invoked Section 56(2)(viia) read with Section 49(4) of the Act. Given that shares bought back are extinguished immediately, the provision of Section 56(2)(viia) of the Act are not applicable for such transaction.*

*There is no benefit which is accruing to the company on account of buy-back, whether real or notional, hence there cannot be any question of taxability under the provisions of the Act.*

4. Learned Assessing Officer, however, did not agree with the assessee and held that,-

*nowhere under section 56(2)(viia)(ii) of the Act or any other section of the Income Tax Act, it is stated that the provisions of section 56(2)(viia)(ii) of the Act are not applicable in the case of buy-back of shares;*

*the gist of section 56(2)(viia)(ii) of the Act is that if a closely held company, on or after 01/06/2010 receives shares of another closely held company, for a consideration which is less than the FMV of such shares, then the difference between the FMV and the consideration paid should be brought to tax as 'income from other sources';*

*in this case, the assessee is a closely held company and it received 18 Lakh shares of another closely held company i.e., APFI for a consideration of Rs. 18 Crores at Rs. 100/- per share which is less than FMV of Rs. 146.817 per share and, therefore, the provisions under section 56(2)(viia)(ii) of the Act are applicable; and*

*the contention of the assessee that the shares so bought back were destroyed/extinguished and, therefore, there is no future saleability of such shares and on that score, the provisions under section 56(2)(viia)(ii) of the Act are not applicable, does not hold any merit because the fact of the retention or destruction of the shares subsequent to the buying back is immaterial.*

5. Learned Assessing Officer, therefore, applied the provisions under section 56(2)(viia)(ii) of the Act to make an addition of Rs. 13,10,87,600/- to tax.

6. Aggrieved by such an action of the learned Assessing Officer, the assessee preferred an appeal before the Ld. CIT(A) and reiterated similar contentions as raised before the learned Assessing Officer. Ld. CIT(A) also, however, did not agree with the contentions of the assessee and dismissed the appeal holding that the exceptions to the applicability of section 56(2)(viia)(i) of the Act are that the allotment of rights shares or bonus shares to the shareholders, but the buying back of shares is not excluded under section 56(2)(viia) of the Act. According to the Ld. CIT(A) also, the destruction/extinction of the bought back shares is an irrelevant consideration, inasmuch as section 46A of the Act taxes the capital gains arising to a shareholder on buy-back of the shares by the company and section 115QA of the Act taxes the profits arising to a shareholder out of buy-back of shares by a domestic un-listed company. Ld. CIT(A) further held that even the reduction of the liability is also a property and, therefore, buy-back of its own shares by the assessee cannot escape the clutches of section 56(2)(viia) of the Act. According to the Ld. CIT(A), even the legislative intent is also immaterial when the written letter of law is clear and unambiguous.

7. Assessee is, therefore, before us in this appeal reiterating the contention that for application of the provisions under section 56(2)(viia) of the Act there must be three ingredients, namely, the recipient must receive the shares of a company in which the public are not substantially interested; property, being shares received, must have money's worth,

and the subject shares must belong to another closely held company. According to the learned AR, in buying back of company's own shares, the third ingredient, namely, 'the shares of another closely held company' is missing because assessee is not purchasing another company's shares but purchasing its own shares. He placed reliance on the decision of a Co-ordinate Bench of Mumbai Tribunal in the case of Vora Financial Services (P) Ltd., vs. ACIT (2018) 96 taxmann.com 88 (Mumbai Trib.) in support of its contention that no property the bought back shares are not property in the hands of the company, whose shares are bought back and they will be property when they belong to some other company.

8. Learned DR placed heavy reliance on the orders of the authorities below and submitted that there is nothing in Income Tax Act to exempt the buying back of company's own shares from the provisions of section 56(2)(viia) of the Act.

9. We have gone through the record in the light of the submissions made on either side. Facts are undisputed. APFI, the holding company of the assessee-company made investments in the equity shares of the assessee-company. During the year under consideration the assessee bought back its equity shares consisting of 28 Lakh equity shares of Rs. 100/- each from its holding company. The said equity shares bought back by the assessee at the face value (Rs. 28,00,00,000/-) whereas the book value of such shares was Rs. 41,10,87,600/-i.e., @ 146.817 per share.

10. The question for consideration is the applicability of section 56(2)(viia) of the Act to the instances where the company buys back its own shares from the shareholders whereby the liability is reduced. This

aspect has been considered by a Co-ordinate Bench of Mumbai Tribunal in the case of Vora Financial Services (P) Ltd., (supra) in the light of the provisions section 56(2)(viia) of the Act and the legislative intent. For the sake of ready reference and completeness, we deem it appropriate to extract the relevant portion which is as under, -

> *…….Accordingly the Ld A.R submitted that the above said provisions only deal with the case of buy back of shares and hence the AO was not correct in invoking the provisions of sec. 56(2)(viia) of the Act in the instant case. In this regard, the Ld A.R placed reliance on the Memorandum Explaining the provisions in Finance Bill, 1999 available in (1999) 236 ITR (St.) 155.*
>
> *26. He submitted that the provisions of sec.56(2)(vii) were introduced as counter evasion mechanism as explained in the Memorandum Explaining the provisions in the Finance Bill, 2010 (2010)(321 ITR (St.) 110)", which is extracted below:—*
>
> > *"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."*
>
> *The Ld A.R submitted that the above said explanations squarely apply to the provisions of sec. 56(2)(viia) of the Act also. He submitted that the primary condition for invoking the provisions of sec. 56(2)(viia) was that the shares should become a "Capital asset" and property in the hands of recipient….*
>
> *… … …*
> *… … …*
>
> *30. We have heard rival contentions on this issue and perused the record. The provisions of sec. 56(2)(viia) reads that "where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the*

*1st day of June, 2010, any property, being shares of a company not being a company in which the public are substantially interested" The words "firm or a company" "any property, being shares of a company" are important here. In this regard, we may refer to the Memorandum explaining the insertion of Provisions of sec. 56(2)(viia) by the Finance Act, 2010, which reads as under:—*

> *"Under the existing provisions of section 56(2)(vii), any sum of money or any property in kind 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.*
>
> *These are anti-abuse provisions which are currently applicable only 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)."*

*31. A combined reading of the provisions of sec. 56(2)(viia) and the memorandum explaining the provisions would show that the provisions of sec. 56(2)(viia) would be attracted when "a firm or company (not being a company in which public are substantially interested)" receives a "property, being shares in a company (not being a company in which public are substantially interested)". Therefore, it follows the shares should become "property" of recipient company and in that case, it should be shares of any other company and could not be its own shares. Because own shares cannot be become property of the recipient company.*

*32. Accordingly we are of the view that the provisions of sec. 56(2)(viia) should be applicable only in cases where the receipt of shares become property in the hands of recipient and the shares shall become property of*

> *the recipient only if it is "shares of any other company". In the instant case, the assessee herein has purchased its own shares under buyback scheme and the same has been extinguished by reducing the capital and hence the tests of "becoming property" and also "shares of any other company" fail in this case. Accordingly we are of the view that the tax authorities are not justified in invoking the provisions of sec. 56(2)(viia) for buyback of own shares.*

11. It is, therefore, clear that the shares should become property of the recipient company in order to apply the provisions under section 56(2)(viia) of the Act and in that case, such shares should be the shares of other company and cannot be its own shares, because a company cannot hold its own shares in order that such shares become its property. It is also clear from the above that the provisions under section 56(2)(viia) of the Act should be applicable only in cases where the receipt of shares become property in the hands of the recipient and the shares shall become property of the recipient only if those are 'shares of any other company'. With reference to the buying back of own shares by a company which become extinguished by reducing the capital, it is clear that the test of 'becoming property' and also 'shares of any other company' fails thereby rendering the provisions under section 56(2)(viia) of the Act inapplicable to the cases of buyback of own shares.

12. No other view of any higher fora is brought to our notice. We, therefore, while respectfully following the view taken by a Co-ordinate Bench of Mumbai Tribunal in the case of Vora Financial Services (P) Ltd., (supra), hold that the addition made by invoking the provisions under section 56(2)(viia) of the Act cannot be sustained. We accordingly allow the appeal of the assessee.

13. Since the facts of ITA No. 76/Hyd/2018 for the assessment year 2014-15 are identical to one as decided by us in ITA No. 67/Hyd/2018(supra) for the assessment year 2013-14 and, therefore, our findings in the said appeal, mutatis mutandis, would apply to this appeal as well. Hence, this appeal of assessee is also allowed.

14. To sum-up, both the appeals of assessee are allowed.

Order pronounced in the open court on this the 3rd day of August, 2022.

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| Sd/- | Sd/- |
| **(RAMA KANTA PANDA)** | **(K. NARASIMHA CHARY)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Hyderabad,
Dated: 03/08/2022

*TNMM*

Copy forwarded to:

1. VITP Private Limited, Plot No.17, Admin Block, Mariner, Software Units Layout, Madhapur, Hyderabad.
2. Deputy Commissioner of Income Tax, Circle-17(2), Hyderabad.
3. The CIT(Appeals)-5, Hyderabad.
4. The Pr.CIT-5, Hyderabad.
5. DR, ITAT, Hyderabad.
6. GUARD FILE

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