

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI**

श्रीमहावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: **3171/CHNY/2019**

निर्धारण वर्ष/Assessment Year: 2011-12

The DCIT,
Corporate Circle 3(2),
Chennai.

Venture Lighting India Ltd.,
Vs. Plot A-30, D5, Phase II,
Zone-B, MEPZ,
Tambaram,
Chennai – 600 045.

(अपीलार्थी/Appellant)

PAN: AAACA 9284H
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri P. Sajit Kumar, JCIT
: Shri N. Arjun Raj, CA

सुनवाई की तारीख/Date of Hearing

: 12.12.2022

घोषणा की तारीख/Date of Pronouncement

: 14.12.2022

आदेश / O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the Revenue is arising out of the order of the Commissioner of Income Tax (Appeals)-11, Chennai in ITA No.95/15-16 dated 19.08.2019. The assessment was framed by the DCIT, Corporate Circle 3(2), Chennai for the assessment year 2011-

12 u/s.143(3) of the Income Tax Act, 1961, (hereinafter 'the Act') vide order dated 19.03.2015.

2. The first issue in this appeal of Revenue is as regards to the order of CIT(A) deleting the addition made by AO in regard to payment of commission and claiming the same as expenses. For this, Revenue has raised ground Nos.3 to 5, which are argumentative, hence need not be reproduced.

3. Brief facts are that the assessee is engaged in the business of manufacture and export of Metal Halide Lamps. The assessee company claimed to have paid commission to the extent of Rs.23,21,665/-. The AO during the course of assessment proceedings asked the assessee to submit the details of expenses relating to commission paid like agreement, proof of services rendered by the parties to whom commission is paid along with bills and vouchers. The assessee did not submit any evidence except the break-up of commission paid and hence, the AO disallowed the entire commission. Aggrieved, assessee preferred appeal before CIT(A). The assessee before CIT(A) submitted the details of commission paid i.e., agreement, payment of commission through banking channels, deduction of TDS on this commission, identity of

the parties to whom commission paid, invoices and computation of commission based on the said invoices. The CIT(A) called for 'Remand report' from the AO but the AO did not submit any report. Accordingly, the CIT(A) accepted the explanation of the assessee and deleted the disallowance of commission of Rs.23,21,665/-. Aggrieved, now Revenue is in appeal before the Tribunal.

4. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the assessee before CIT(A) submitted the complete details in regard to payment of commission and even TDS was deducted on the above said commission. The assessee also filed agreements, details of service rendered, payment made in regard to each sale i.e., calculation of commission based on invoices of sales. Even now before us, the Id. Senior DR could not controvert the above stated fact. Hence, we confirm the order of CIT(A) deleting the disallowance. Therefore, this issue of Revenue's appeal is dismissed.

5. The second issue in this appeal of Revenue is as regard to the order of CIT(A) deleting the addition made by AO on the basis of taking fair market value of buy back of shares by assessee from its holding company M/s. Advance Lighting Technology Inc, a company

incorporated in USA, as valued by assessee at Rs.89/- per share as against fair market value adopted by AO at Rs.115.59 per share by invoking the provisions of section 56(2)(viia) of the Act.

6. The brief facts are that the assessee company has brought back shares from its holding company M/s. Advance Lighting Technology Inc., during the year ending 31.03.2011 numbering 15,56,500 shares of Rs.10/- each i.e., face value, out of total shares of 19,38,71,760 at a price of Rs.89/- per share amounting to Rs.13,85,28,500/-. According to AO, the assessee has purchased the shares for a consideration which is less than the fair market value in term of provisions of section 56(2)(viia) of the Act r.w.Rule 11UA of the Income Tax Rules (hereinafter the 'Rules'). According to AO, the value per share as per Rule 11UA of the Rules is Rs.115.59 as against fair market value declared by assessee at Rs.89.11, thereby he added the differential amount of Rs.4,13,87,867/- to the returned income of the assessee. Aggrieved, assessee preferred appeal before CIT(A).

6.1 The CIT(A) noted that the buyback of shares does not attract the provisions of section 56(2)(viia) of the Act, because the assessee had only brought back its own share from its shareholder and

reduced the share capital by such buyback would not tantamount to purchase of any property as envisaged in section 56(2)(viiia) of the Act and therefore, according to CIT(A), the provisions of section 56(2)(viiia) of the Act will not apply to the scheme of buyback of the assessee. According to CIT(A), buyback of shares are in compliance with the provisions of Section 77A of the Companies Act and even it would not attract provisions of section 2(22)(b) of the Act. The CIT(A) noted that the assessee has filed the compliance report u/s.77A of the Companies Act and necessary Form 23 before ROC on 20.04.2011 itself. Accordingly, the CIT(A) deleted the addition. Aggrieved, now Revenue is in appeal before the Tribunal.

7. Before us, the Id. Senior DR first narrated the facts that during the year, the assessee company bought its own share from its parent company. The market value, applying Rule 11UA of such shares purchased was found to be Rs. 115.59 whereas the assessee company purchased it for Rs.89/- per share. The AO invoked the provisions of section 56(2)(viiia) and treated the difference in price as deemed income under the head 'Other Sources'. In appeal, the CIT(A) held that the provisions of section 56(2)(viiia) does not get attracted in buyback of shares and also accepted the arguments of the assessee that, on account of buyback of its share, it had not

received any 'property'. The Id. Senior DR submitted that on applicability of section 56(2)(viiia) with respect to buyback of shares, the sub-clause (viiia) does not differentiate between shares. It also does not differentiate from whom it is being received. It can be from anybody. It does not specify the colour of the giver as to whether it is parent company or Sister Company or altogether external person. The wording of the act is `...from any person or persons....". Further, share is a share. It can be of any external company or of one's own. A share once issued to another person does not give an automatic lean to the issuing company a right to get it back. It is the discretion of the holder of such share to sell whether to a totally different person or to the person from whom it had originally purchased/obtained. He further submitted that secondly, the provisions of the section do not speak whether the transaction has to be a 'purchase', The wording of the act is "...receives...". The word 'receive' could include through purchase/buyback/redemption or in any form one may obtain. The provision does not exclude receiving one's own share. Meaning to terminologies which the law has not factored cannot be introduced or attributed to exclude transaction from the purview of the law which the law in the first instance has not factored through some explanation or through exclusion provisions. This aspect is very evident from the sub-clause itself by

legislation factoring to exclude specifically certain transactions from the purview of applicability of the section through introduction of a 'proviso'. The Id. Senior DR, on the assessee had not received any 'property' on account of buyback of its share, stated that for the purpose of sub-clause (viiia), the law has not provided any meaning for the word 'property'. Whereas for a similar sub-clause within section 56, i.e. 56(2)(vi), the law has clearly defined what constitute a property for attracting deeming income provision. By receiving shares of its own, the subscribed number of shares of the company has come down without effecting its overall liability or prima facie the asset value. By receiving a share of its own for a consideration lesser than the book value, the assessee has earned a 'hidden asset' from the parent company by it giving up its right to obtain the true value for its shares transferred. Thus, profiting the sister concern to that extent of difference in book value and the actual consideration transferred. The transfer pricing officer has not bothered to factor any adjustment to this transaction since it is a reverse transfer pricing by which an Indian entity has been indirectly profited and the provisions of transfer pricing are not applicable where the Indian entity is benefited with indirect profit, be it a present or future profit. The assessee company thus obtained an asset to sell such bought

back shares to any other third party for book value which is invariable higher than the value for which it received the same.

8. On the other hand, the Id.counsel for the assessee relied on the decision of Co-ordinate Bench of Mumbai Tribunal in the case of Vora Financial Services (P.) Ltd., vs. ACIT, [2018] 171 ITD 646 (Mumbai), wherein it is held that the provisions of section 56(2)(viib) of the Act are applicable only in cases where shares become property in the hands of recipient and shares shall become property of recipient only if it is shares of any other company. The Id.counsel for the assessee relied on para 30 to 32 of the order of the Tribunal. He argued that the buy-back of shares would only amount to reduction/redemption of the existing share capital and the Assessee receiving shares as contemplated in Section 56(2) (viiia) of the Act does not arise. Further, the other condition namely a property being shares of a company is also not fulfilled in the context of buy-back of shares since the shares of the assessee's own case by no stretch of imagination be treated as property in its own hands. Hence, both the pre-requisite conditions contemplated in Section 56(2) (viiia) of the Act is not attracted thereby fortifying the factual findings rendered by the First Appellate Authority in the impugned order. He

also argued that there cannot be any asset accretion in the hands of the company arising out of the buy-back of its own shares since the adjustment would be effected only between its share capital and reserves and surplus. The benefit/gain if any out of the buy-back of shares would arise only in the hands of the shareholder and not in the hands of the company. In any event, the reduced share capital after buy-back would still be shown as a liability in the hands of the Assessee as per the prescription of law as per the Schedule III of Companies Act, 1956 thereby negating the presumption of accretion of asset / hidden asset in the hands of the company while if any such accretion would only benefit the shareholders and not the Assessee company. In order to bring the said gain/benefit in the hands of the shareholder within the tax ambit, the provisions of Section 115QA of the Act was introduced in Finance Act, 2019 wherein the companies are liable to deduct tax at source for the gains accrued in the hands of the shareholder and which provision is applicable from 05.07.2019 and not for the assessment year under consideration.

9. We have heard rival contentions and gone through facts and circumstances of the case. There is no dispute about the facts of the case. Admittedly, the assessee company has adopted the fair

market value of buyback of shares at Rs.89.11 per share and as against the same, the AO has revalued the shares at Rs.115.59 by applying Rule 11UA of the Rules and invoking the provisions of section 56(2)(viiia) of the Act for making addition of differential deemed consideration and taxed the amount. Now, the question arises, whether the provisions of section 56(2)(viiia) of the Act can be invoked in the case of buyback of shares or not. We have gone through the provisions of section 56(2)(viiia) of the Act and from plain reading of section, it is clear that the same can be invoked only where the assessee receives a property for an inadequate consideration and in the present case before us, the assessee company only brought back its own shares from its shareholder and there is reduction of share capital by such buyback and hence, this would not tantamount to purchase or acquire of any property as envisaged u/s.56(2)(viiia) of the Act. As argued by Id. Senior DR, that by receiving the shares of its own i.e., buyback for a consideration less than the book value, the assessee has earned hidden asset from the parent company by giving up its right to obtain the true value of its shares transferred, we do not agree because the provisions of section 2(22)(d) r.w.s.1150 of the Act would not apply in the hands of the assessee, since the shareholders

have received the money in lieu of buyback of shares by assessee of the parent company. According to us, said provision would not apply in the hands of the assessee who has brought back this shares and in any eventuality, the very provision of section 2(22)(d) of the Act also craved out exception i.e., "dividend". In our view, the assessee has not received any property being shares in a company and once, there is no property of recipient company it should be share of any other company and could not be its own share, because any share cannot become property of recipient company on buyback. Exactly identical view is taken by the Co-ordinate Bench of this Tribunal in the case of Vora Financial Services (P) Ltd., *supra*, wherein the Tribunal held in para 30 to 32 as under:-

30. We have heard rival contentions on this issue and perused the record. The provisions of sec. 56(2)(viiia) 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)(viiia) 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 M/s. Vora Financial Services P. Ltd. 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 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)(viiia) and the memorandum explaining the provisions would show that the provisions of sec. 56(2)(viiia) 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)(viiia) 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)(viiia) for buyback of own shares.

9.1 In the given facts and as arguments made by Id. Senior DR i.e., the assessee has earned hidden asset, we do not agree that on the issue of buyback of shares, assessee has acquired any share of any other company which would become property of the recipient company. Actually it will be reduction in capital and nothing more. Hence, we affirm the order of CIT(A) and this issue of Revenue's appeal is dismissed.

10. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 14th December, 2022 at Chennai.

Sd/-
(मनोज कुमार अग्रवाल)
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 14th December, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त) अपील(/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |