IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA No.1187/Hyd/2018		
Assessment Year: 2014-15		
ACIT,Circle-10(1) Room No.515, 5th Floor, A-Block, I.T.Towers, A.C.Guards, Hyderabad.	Vs.	Vertex Projects LLP (formerly M/s.Vertex Projects Ltd.) #156-159, Paigah House S.P.Road, Next to PG College. Secunderabad-500 026. PAN : AANFV0232C
(Appellant)		(Respondent)
Assessee by:	Shri Sriram Seshadri, CA	
Revenue by:	Shri Rajendra Kumar,CIT-DR	
Date of hearing:	15.03.2023	
Date of pronouncement:	28.04.2023	

O R D E R

Per Shri Laliet Kumar, J.M.

This is an appeal filed by the Revenue, feeling aggrieved by the order passed by the Learned Commissioner of Income Tax (Appeals)-5, dated 16.03.2018 for the AY 2014-15, on the following grounds :

1. The Ld.CIT (Appeals) erred in restricting the disallowance u/s.14A to RS.14,00,0000/- without appreciating the provisions of section 14A(3) of the Income-tax Act (Act).

2. The LdCIT (Appeals) erred in holding that the shares received by the assessee company on account of amalgamation, for a price lower than the FMV of the shares, does not attract provisions of the section 56(2)(viia) of the Act.

3. The Ld.ClT (Appeals) erred in holding that provisions of sec.56 (2) (viia) are not applicable to the transactions defined u/s.47(vi), even though the proviso to section 56(2)(viia) does not specify the transactions defined u/s.47(vi) as exception to section 56(2)(viiia)

4. The Ld.CIT (Appeals) erred in holding that the shares purchased by the assessee company for a price lower than the FMV of the shares, does not attract provisions of section 56(2)(viia) and accordingly deleting the addition of Rs.5, 14,80,879/-.

5. Any other ground that may be urged at the time of hearing."

2. The brief facts of the case are that assessee is a public company registered under the Companies Act, 1956 and engaged in investment business. The assessee filed return of income for the AY 2014-15 on 29.09.2014, declaring income of Rs. 20,64,350/-. The case was selected for scrutiny by issuing notice u/s. 143(2) dated 28.02.2015. Subsequently, notice u/s. 142(1) and letters were issued on various dates. In response, AR appeared and furnished the details called for. After examination of the details so furnished by the assessee, the Assessing Officer had made the disallowance of expenditure u/s 14A of the Act for an amount of Rs.82,72,958/- and had further added Rs.5,59,249,590/- under section 56(2)(viia) of the Act to the income of the assessee on protective basis as the assessee received unquoted shares during the year under consideration. Besides the above, the Assessing Officer had also made the addition of Rs.5,14,80,879/- towards the deemed gift received by the assessee on account of shares.

3. Feeling aggrieved by the order passed by the assessing officer, revenue filed appeal before the Ld. CIT(A), who granted partial relief to the assessee. The ld.CIT(A) had mentioned in the order at page 65 to 67 with respect to the disallowance u/s 14A of the Act as under :

"….As regard the ground no. 1 regarding disallowance u/s. 14A it is seen that the AO has disallowed a sum of Rs. 82,72,958/ -. It is seen from the P & L account of the appellant that only a sum of Rs. 68,26,342/ - has been debited and out of which the sum of Rs. 49,94,540/- being rates and taxes has been disallowed by the appellant itself and further during the course of assessment proceedings a sum of Rs. 4,30,245/ - has been further disallowed on account of repairs and maintenance for which the appellant has not agitated in appeal, this leaves the sum of Rs. 14,01,557/- which has been claimed by the appellant. Therefore, the disallowance cannot exceed the sum of Rs. 14,01,557/-. Therefore, on principles of section 14A the ground no. 1 (iii) is allowed, subject to the quantification in ground no.1(i).

It is observed that the appellant is basically an investment entity and most of the income is generated out of investments, which being dividend is exempt in nature.

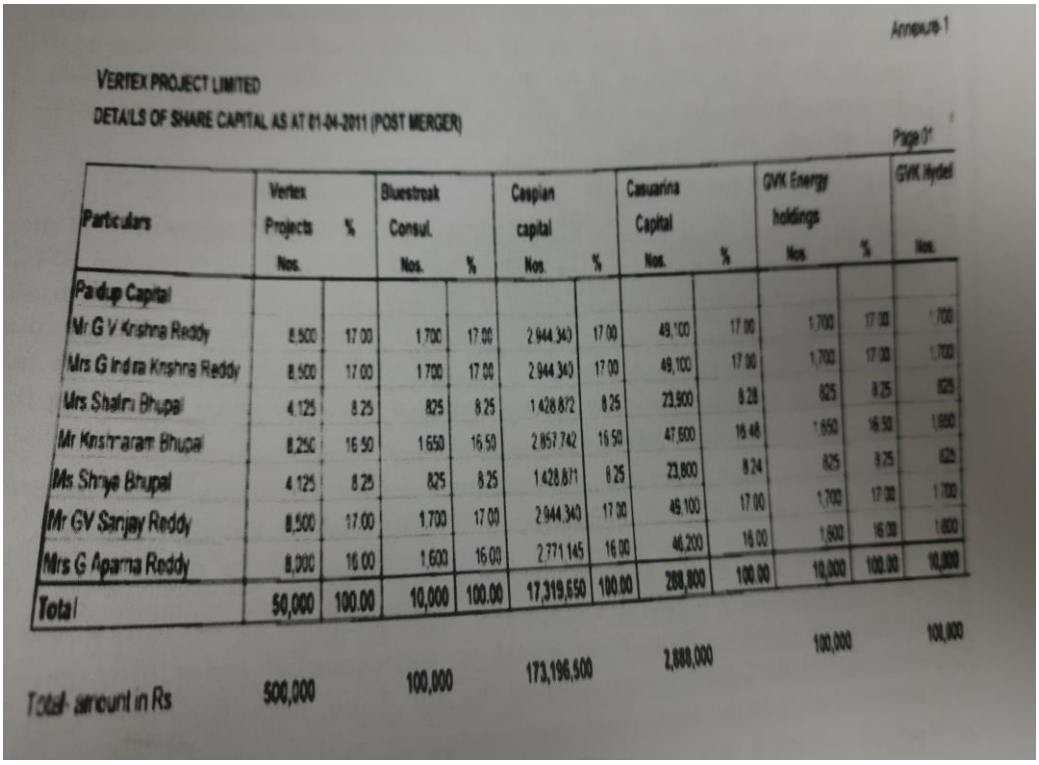
The total investments as on 31.03.2014 and 31.03.2013 stood at Rs. 185.47 crores and there is no other major activity of the company. During the course of hearing the AR stated that the appellant has no objection to the disallowance u/s. 14A to the extent of Rs. 14,00,000/-. In view of the above the disallowance is restricted to a sum of Rs. 14,00,000/- and the ground no.l (i) is partly allowed.

As regards ground no. l(ii) regarding the addition made to the book profit to the extent of disallowance u/ s. 14A, it is seen that as per clause(f) to explanation to section 115JB, the amount of expenditure relatable to the exempt income as specified in that clause has to be added back. There is no ambiguity in that regard, therefore, the disallowance u/s. 14A to the extent of the amount confirmed above of Rs. 14,00,000/- has to be added back to the computation of book profit u/s. 115JB therefore, the ground no. 1 (ii) is dismissed accordingly to the extent of quantification above.

The ground no. 4 relates to the claim of the appellant that the income tax refund should have been reduced while computing the book profit u/ s. 115JB. The section 115JB does not leave any room for discretion or interpretation and the items mentioned in clause (i) to (viii) to the explanation to section 115JB can only be reduce from only book profit. The income tax refund so credited does not fall in the said clause and therefore no deduction can be given as income tax refund is not either deferred tax as mentioned in clause (viii) or falling under any of the clauses. Therefore, the ground no. 4 is dismissed accordingly."

4. With respect to the addition of Rs.5,59,249,590/- and addition of Rs.5,14,80,879/- under section 56(2)(viia) of the Act, the ld.CIT(A) had held at pages 58 to 65 as under :

> *The facts of the case are that 11 companies amalgamated with the appellant vide the order of High Court dated 10.10.2013 w.e.f 01.04.2011. The amalgamating companies had identical shareholders and shareholding. The said fact is brought out as under in the chart below:*



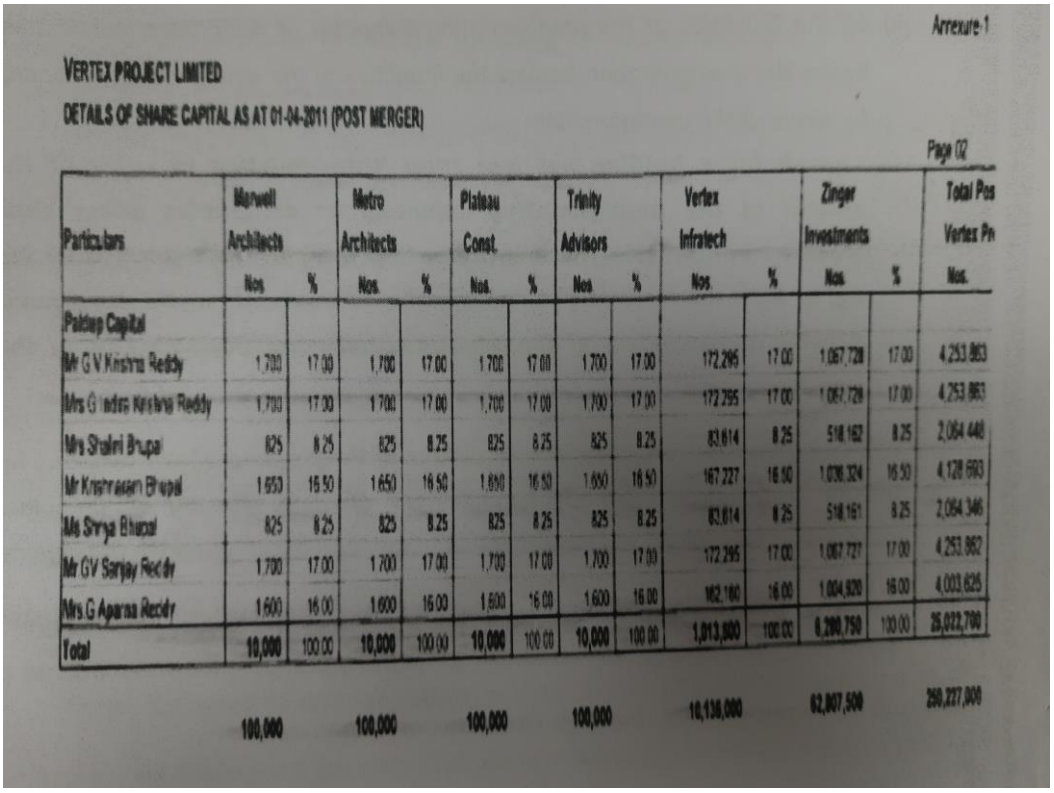
Annexure-1

VERTEX PROJECT LIMITED

DETAILS OF SHARE CAPITAL AS AT 01-04-2011 (POST MERGER)

Page 01

Particulars	Vertex Projects Nos.	%	Bluestreak Consul. Nos.	%	Caspian capital Nos	%	Casuarina Capital Nos.	%	GVK Energy holdings Nos.	%	GVK Hydel Nos.
Paidup Capital											
Mr G V Krishna Reddy	8,500	17.00	1,700	17.00	2,944,340	17.00	49,100	17.00	1,700	17.00	1,700
Mrs G Indira Krishna Reddy	8,500	17.00	1,700	17.00	2,944,340	17.00	49,100	17.00	1,700	17.00	1,700
Mrs Shalini Bhupal	4,125	8.25	825	8.25	1,428,872	8.25	23,900	8.28	825	8.25	825
Mr Krishnaram Bhupal	8,250	16.50	1,650	16.50	2,857,742	16.50	47,600	16.48	1,650	16.50	1,650
Ms Shriya Bhupal	4,125	8.25	825	8.25	1,428,871	8.25	23,800	8.24	825	8.25	825
Mr GV Sanjay Reddy	8,500	17.00	1,700	17.00	2,944,340	17.00	49,100	17.00	1,700	17.00	1,700
Mrs G Aparna Reddy	8,000	16.00	1,600	16.00	2,771,145	16.00	46,200	16.00	1,600	16.00	1,600
Total	50,000	100.00	10,000	100.00	17,319,650	100.00	288,800	100.00	10,000	100.00	10,000
Total amount in Rs	500,000		100,000		173,196,500		2,888,000		100,000		100,000



Arrexure-1

VERTEX PROJECT LIMITED

DETAILS OF SHARE CAPITAL AS AT 01-04-2011 (POST MERGER)

Page 02

Particulars	Marwell Architects		Metro Architects		Plateau Const.		Trinity Advisors		Vertex Infratech		Zinger Investments		Total Pos Vertex Pr
	Nos	%	Nos	%	Nos	%	Nos	%	Nos	%	Nos	%	Nos
Paidup Capital													
Mr G V Krishna Reddy	1,700	17.00	1,700	17.00	1,700	17.00	1,700	17.00	172,295	17.00	1,067,728	17.00	4,253,863
Mrs G Indira Krishna Reddy	1,700	17.00	1,700	17.00	1,700	17.00	1,700	17.00	172,295	17.00	1,067,728	17.00	4,253,863
Mrs Shalini Bhupal	825	8.25	825	8.25	825	8.25	825	8.25	83,614	8.25	518,167	8.25	2,064,448
Mr Krishnaiah Bhupal	1,650	16.50	1,650	16.50	1,650	16.50	1,650	16.50	167,227	16.50	1,036,324	16.50	4,128,693
Ms Shriya Bhupal	825	8.25	825	8.25	825	8.25	825	8.25	83,614	8.25	518,167	8.25	2,064,346
Mr GV Sanjay Reddy	1,700	17.00	1,700	17.00	1,700	17.00	1,700	17.00	172,295	17.00	1,067,727	17.00	4,253,862
Mrs G Aparna Reddy	1,600	16.00	1,600	16.00	1,600	16.00	1,600	16.00	162,160	16.00	1,004,920	16.00	4,003,625
Total	10,000	100.00	10,000	100.00	10,000	100.00	10,000	100.00	1,013,800	100.00	6,280,760	100.00	25,022,700
	100,000		100,000		100,000		100,000		10,138,000		62,807,500		250,227,000

Thus, the share holding and the shareholders were identical and even post amalgamation the shareholders were same and the shareholding was in the same ratio. The above is only a peculiar fact for this amalgamation. However, the outcome of the shareholding could be different post amalgamation as per the clause (iii) of the definition of amalgamation in section 2(lB). The amalgamation as per the Income Tax Act is defined as under:

[(lB)J "amalgamation" in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that -

(i) All the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) All the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) Shareholders holding not less than [three-fourths} in value of the shares in the amalgamating company or companies (other than shares already held there in immediately before the amalgamation by, or by a nominee for, the amalgamated company

or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

Otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first mentioned company;]

Therefore, the amalgamation in the present appellant company was as per law and was approved by the High Court accordingly.

In the Income Tax Act, the amalgamation process which as defined above results in the amalgamation of assets also and thus the property are vested with the entity in which all the companies have merged. This transfer of property or assets as specified in the clause (i) of the definition u/s. 2(18) is now with the new entity and such transfer is not considered as transfer as specified u/s. 47 of the Income Tax Act.

The relevant sub clause (vi) of section 47 is reproduced as under:

(vi) any transfer in the scheme of amalgamation of capital asset by the amalgamating company to the amalgamated company, if that amalgamated company is an Indian company.

The plain reading of the above implies that all capital assets which includes shares, property, movable assets, immovable assets etc., of the amalgamating companies becoming the property of amalgamated company is not considered a transfer within the meaning of Income Tax Act.

So, as the same is not considered as a transfer, therefore neither the capital gain will arise nor any deeming charge u/s. 56 of the receipt of property / assets / shares etc., can be attributed for improper consideration.

The appellant presents a scheme to the High Court along with the valuation and the method in which the same is done and once the same is approved, the amalgamation order is passed accordingly, the same has been order u/ s. 394 of the companies Act by the court and the amalgamation has been ordered w.e.f 01.04.2011 accordingly.

Thus, the year of amalgamation is now deemed to be 01.04.2011 and all the properties/liabilities as specified and ordered by the High Court are now part of the appellant entity.

The AO while passing the assessment order noted that the order of the High Court was delivered during the financial year 2013-14 i.e. on 10.10.2013 relevant to the present assessment year under consideration i.e. A.Y. 2014-15 and therefore proceeded to consider the issue of transfer of property/shares of amalgamating companies into the appellant entity w.e.f 01.04.2011 for the taxability under present year.

The AO calculated the market value of the shares held by the amalgamating companies and stated that the same now belong to the new entity and they have not paid the price as per market value and therefore the difference in consideration has to be taxed u/ s. 56(2)(viia) of the Income Tax Act to the tune of Rs.55,92,79,590/- for the equity unquoted shares and a sum of Rs. 5,14,80,879/- for the preference shares which came to the new entity on amalgamation respectively, for this year under consideration even though as per the High Court order, the same was effected retrospectively from 01.04.2011.

The order of the High Court grants amalgamation is w.e.f 01.04.2011 and therefore the transfer of property happened in 01.04.2011 i.e. F.Y. 2011- 12 relevant to A.Y. 2012-13. The AO has held that, there were the transfer of shares of the amalgamating company with the appellant entity and therefore the same has to be taxed protectively during the year under consideration. The primary observation of the AO is wrong as for a transfer, which has happened w.e.f 01.04.2011 cannot be taxed in this assessment year even as a protective addition. As there is no ambiguity, regarding the date of transfer and the year of taxability, in case such transfers are taxable in the Income Tax Act, 1961. As there is no doubt regarding the same, just because the High Court order has been passed on 10.10.2013 cannot invoke the taxability in this year by any stretch of imagination or can be considered doubtful for the arising of the transfer and the consequent chargeability for the present year under consideration.

Therefore, the addition invoked by the AO for the transfer of property in the appellant entity by the amalgamating companies is completely wrong and out of jurisdiction, therefore, the protective addition made by the AO in the assessment order is hereby deleted on the basic reasons that there is no case for a protective addition for the year under consideration at all.

Further, as already discussed above that as per provisions of section 47(vi), the amalgamation as defined u/s. 2(IB) of the Income Tax Act would not be considered a transfer [or the purpose of taxation. The definition of capital asset is as per section 2(14) of the Income Tax Act which includes any property of any kind held by the appellant, whether or not connected with his business or profession. The shares whether quoted or unquoted, equity or preference or capital assets without any ambiguity. Therefore, as section 47(vi) does not consider the transfer of capital asset on account of amalgamation, therefore the provisions of transfer cannot be attracted in such case.

The AO has invoked section 56(2)(viia) [or the purpose o[taxation. The section 56(2)(viia) reads as under:

[(viia) Where a firm or a company not being a company in which the public are substantially interested, receives, in any previous years, 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, -

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 this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vic b) or clause (clause vid) or clause (vii) of section 47.*

Explanation:- For the purpose of this clause, "fair market value" of a property being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause(vii);]

The above section considers the word receives which happens on account of transfer but as amalgamation is not a transfer, therefore the above section cannot be invoked at all. The section 47(vi) speaks of capital asset in all forms whereas, 47(via) deals with the foreign company, 47(vic) deals with resulting foreign company, 47(vicb) deals with business re organization of a bank as defined in section 47(vidb), 47(vid) is specific to under taking, 47(vii) deal with transfer of shares pursuant to scheme of amalgamation. The above are specific and are not explicitly covered by the definition of amalgamation as the section 2(lB). There is no mention of the provision 47(vi) and 47(vib) which is amalgamation and demerger as they include all capital assets including no doubt shares from the purview of transfer. However, in case where the entity are not Indian and it relates to status of restructuring, undertaking etc., there has been a specific mention to exempt the same from the purview of taxation u/s. 56 of the Income Tax Act.

Therefore, on the basis of discussion above, the AO did not have any basis to make the protective addition in the case of the appellant on account of the unquoted shares and preference shares received pursuant to amalgamation. Therefore, the ground no. 2(i) is allowed accordingly.

Further, as 47(vi) exempts the amalgamation from the purview of transfer, therefore section 56(2)(viia) cannot be invoked, as this is not a case of receipt of shares in isolation but the merger of all property irrespective of shares and also 56(2)(viia) is not applicable for such amalgamation, therefore the invocation of the said section in the case of appellant is incorrect and therefore, the ground no. 2(ii) is allowed accordingly.

The ground no.2(iii) pertaining to invocation of Rule 11 VA becomes academic as the relief has already been granted on ground no. 2(i) and 2(ii) therefore there is no need of adjudication to ground no. 2 (iii) accordingly. Further, the ground no. 3(i) and 3(ii) also becomes academic and therefore needs no adjudication in view of the relief already granted.

Therefore, the addition made of Rs. 55,92,49,590/- with respect to the addition made in paragraph 3 of the assessment order and addition of Rs. 5,14,80,6791- in para 4 of the assessment order is hereby deleted accordingly.

The ground no. 5 pertains to grant of TDS credit, the AO is directed to verify and allow TDS credit as per law. The above ground is allowed to that extent accordingly.

The Ground nos. 6 & 7 are consequential to the grounds adjudicated above, therefore needs no separate adjudication.

To sum up the appeal is partly allowed."

5. Feeling aggrieved by the order passed by the ld.CIT(A), the Revenue is now in appeal before us on the grounds mentioned hereinabove.

GROUND NO.1

6. The first ground raised by the Revenue is with respect to deletion of disallowance u/s 14A of the Act and restricting it to Rs.14 lakhs only.

7. In this regard, the ld.DR had submitted that the assessee had non-current investment of Rs. 185,47,85,154/- and had received during the assessment year a dividend of Rs.1,11,18,323/-. The Assessing Officer had issued show cause notice and after examining the reply had made the addition of Rs.82,72,958/- by invoking the Rule 8D of the Act. In appeal, the ld.DR had submitted that the ld.CIT(A) had restricted the disallowance to 1401557/-. It was the contention of the ld.DR that the order passed by the ld.CIT(A) is without any basis and he relied upon the following judgments :

1. *CIT Vs. Smt. Leena Ramachandran - (2011) 10 taxmann.com 109 Kerala.*
2. *PCIT Vs. Delhi International Airport Pvt. Ltd – (2022) 138 taxmann.com 113 (SC).*
3. *CIT-LTU Vs. Canara Bank – (2022) 142 taxmann.com 362 (SC).*
4. *CIT Vs. Sociedade De Fomento Industrial Pvt. Ltd – (2021) 130 taxmann.com 428 (SC)*
5. *PCIT Vs. Karnataka State Financial Corporation Ltd - (2022) 137 taxmann.com 195 (SC)*
6. *PCIT Vs. Delhi International Airport Pvt. Ltd (2022) 143 taxmann.com 209.*
7. *PCIT Vs. Bombay Stock Exchange Ltd (2021) 129 taxmann.com 87 (SC).*

8. Per contra, the ld.AR had submitted that in the Profit and Loss account, the assessee had only debited a total sum of Rs.68,26,342/- as expenses and out of the said amount, the assessee suo motu itself had disallowed the amount of Rs.49,94,540/- and further, had disallowed an amount of Rs.4,30,245/-. It was submitted that in these facts, the ld.CIT(A) had restricted the disallowance for Rs.14,01,557/-. He also relied upon various decisions :

1. *Aamby Valley Ltd Vs. ACIT – (2019) 102 taxmann.com 385*
2. *M.N. Chhaya Vs. P.R.S. Mani – (2005) 63 SCL 509 (High Court of Bombay).*
3. *IRM Limited Vs. DCIT – (2016) 72 taxmann.com 288 (High Court of Gujarat)*
4. *Dalmia Power Limited Vs. ACIT – (2019) 112 taxmann.com 252 (SC).*

9. We have heard the rival contentions of the parties and perused the material available on record. Admittedly, the total expenditure incurred by the assessee which wad debited to the Profit and Loss account was Rs.68,26,342/- and out of the said amount, the assessee had suo motu disallowed the amount of Rs. 49,94,540/- and further disallowed an amount of Rs.4,30,245/-. Now the dispute before us is whether the ld.CIT(A) was right in restricting the disallowance to an amount of Rs.14,01,557/- or it should be restricted to the difference of Rs.82,72,958/- (-) Rs. 49,94,540/- (-) Rs.4,30,245/- which is equivalent to Rs.28,48,173/-. In this regard, the contention of both the parties were examined by us and we are of the opinion that the disallowance made by the revenue authority cannot be more than the expenditure incurred by the assessee for earning the exempt income. For the above said purposes, we may fruitfully rely upon the decision of the Special Bench in the case of ACIT Vs. Vireet Investment P. Ltd., reported in (2017) [165 ITD 27] (Delhi) (SB), wherein it was held as under :

> ***"11.6*** *In the backdrop of these facts the Tribunal's order was upheld by the Hon'ble High Court and Hon'ble Supreme Court. The Hon'ble Supreme Court, inter alia, held that it is the purpose of the expenditure that is relevant in determining the applicability of section 57(iii) and that purpose must be making or earning of income. It was further held that section 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of section 57(iii) to suggest that the purpose, for*

which the expenditure is made, should fructify into any benefit by way of return in the shape of income.

11.7 *Thus, in both the decisions viz. in the case of Cheminvest Ltd. (supra), and in the case of Rajendra Prasad Moody (supra), the issue related to allowability of expenditure which had direct nexus with the earning of income. The borrowing in both the cases has not been disputed being for acquiring shares. Hon'ble Delhi High Court has specifically held in para 21 as under:—*

> *"21. There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in* Rajendra Prasad Moddy *(*supra*) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is for the purpose of making or earning such income'. Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income.' The decision in Rajendra Prasad Moody (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act. "*

11.8 *In the case of Holcin India (P) Ltd. (supra) the facts were that the respondent- assessee was a subsidiary of Holderind Investments Ltd., Mauritius, which was formed as a holding company for 'making downstream investments in cement manufacturing ventures in India. In the return of income filed for the Assessment Year 2007-08, the respondent-assessee declared loss of Rs. 8.56 Crores approximately. The respondent-assessee had declared revenue receipts of Rs. 18,02,274/- which included interest of Rs. 726/- from Fixed Deposit Receipts and profit on sale of fixed assets of Rs. 16,52,225/-. As against this, the respondent assessee had claimed administrative and miscellaneous expenditure written off amounting to Rs. 8.75 Crores. For the Assessment Year 2008-09, the assessee had filed return declaring loss of Rs. 6.60 Crores approximately. The assessee had declared revenue receipts in the form of foreign currency fluctuation difference gain of Rs. 12,46,595/-. It had claimed expenses amounting to Rs. 7.02 Crores as personal expenses, operating and other expenses, depreciation and financial expenses.*

11.9 *In both the assessment orders, the Assessing Officer held that the respondent-assessee had not commenced business activities as they had not undertaken any manufacturing activity or made downstream investments. It was observed that the respondent- assessee, after receiving approval of Foreign Investment Promotion Soard (FIPS) dated 20.12.2000 acquired shares capital of Ambuja Cement India Ltd. This, the Assessing Officer felt, was not sufficient to indicate or hold that the respondent-assessee had started their business. He, accordingly, disallowed the entire expenditure of Rs. 8.75 Crores for the Assessment Year 2007-08 and Rs. 7.02 Crores for the Assessment Year 2008-09.*

11.10 *Ld. CIT(A) did not agree with the findings of Assessing Officer that the business of the respondent- assessee had not been set up or commenced. The CIT(A) observed that the respondent-assessee had been set up with the business objective of making investment in cement industry after due approval given by the Government of India, Ministry of Commerce and Industry vide letter dated 18.12.2002 and 20.12.2012. It was observed that in fact, the respondent-assessee was not to undertake any manufacturing activity themselves. After considering the FIPS approval and the purchase of shares in the said company of Rs. 1850.91 crores, ld. CIT(A), inter alia, observed that the assessee was engaged in the business of holding of investment and was entitled to claim expenditure provided. There was a direct connection between expenditure incurred and business of the assessee company. However, he pointed out that since the business of the respondent-assessee was to act as a holding company for downstream investment and as it was an accepted fact that they had incurred expenses to protect their business and explore new avenues of investment, the provisions of section 14A were applicable.*

11.11 *The Hon'ble High Court observed that the reasoning given by the CIT(A) was ambiguous and unclear and on clarity being sought from the Revenue it was pointed out that "the stand of the assessee contained a contradiction to the extent that on the issue of setting up of business, it was stated that the assessee had incurred expenditure on acquiring the shares, therefore, the assessee could not now take different stand than the one taken in the first issue".*

11.12 *The Hon'ble High Court, after considering in detail the decision of ld. CIT(A) finally observed in para 13 as under:*

> *"13. We. are confused about the stand taken by the appellant-Revenue. Thus, we had asked Sr. Standing Counsel for the-Revenue, to state in his own words, their stand before us. During the course of hearing, the submission raised was that the shares would have yielded dividend, which would be exempt income and therefore, the CIT(A) had invoked Section 14A to disallow the entire expenditure. The aforesaid submission does not find any specific and clear narration in the reasons or the grounds given by the CIT(A) to make the said addition. Possibly, the CIT(A), though it is not argued before us, had taken the stand that the respondent-assessee had made investment and expenditure was incurred to protect those investments and this expenditure cannot be allowed under Section 14A."*

11.13 *Thus, Hon'ble Delhi High Court primarily decided the issue regarding applicability of section 14A even if no dividend income was earned. The Hon'ble High court in paras 14 to 16 of its decision observed as under:*

> *'14. On the issue whether the respondent-assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the*

different High Courts directly on the issue and against the appellant-Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad *v.* M/s. Lakhani Marketing Incl, *ITA No. 970/2008, decided on 02.04.2014, made reference to two ' earlier decisions of the same Court in CIT* v. *Hero Cycles Limited, [2010] 323 ITR 518 and CIT vs. Winsome Textile Industries Limited, [2009] 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner of Income Tax-I* v. *Corrtech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj.). The third decision is Of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax II Kanpur,* v. *M/s. Shivam Motors (P) Ltd. decided on 05.05.2014. In the said decision it has been held:-*

"As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the C1T(A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of law. Hence, the deletion of the disallowance of Rs. 2,03,752/- made by the Assessing Officer was in order"

15. Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether Income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term, capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax: It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not all improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.

> *16. what is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the respondent-assessee for conducting business. The CIT(A) has positively held that the business was set up and had commenced. The said finding is accepted. The respondent-assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A).'*
>
> ***11.14*** *Now the position of law as stands is that the decision of Hon'ble Jurisdiction High Court is directly on the point in dispute whereas the decision of Hon'ble Supreme court in the case of Rajendra Prasad Moody (supra) has been rendered in the context of section 57(iii), the applicability of which has been ruled out by Hon'ble Delhi High Court in the case of Cheminvest (supra).*

10. Similarly, on the same issue, the Hon'ble Karnataka High Court in the case of J.J. Glastronics (P.) Ltd. reported in [2022] 139 taxmann.com 375 (Karnataka) has held as under :

> *"9. Having regard to this decision, the decision cited by the revenue in the case of Sobha Developers (supra) has been considered. At this juncture, it would be beneficial to refer to the co-ordinate bench decision of this Court in the case of Karnataka State Industrial and Infrastructure Development Corporation Ltd. v. Dy. CIT [2021] 125 taxmann.com 221/278 Taxman 126/431 ITR 255 (Kar.), wherein the computation of book profit with reference to sections 14A and 115JB has been considered and it is held that Explanation 1 in section 115JB(2) has been inserted so as to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added to the net profit as shown in the profit and loss account for the purpose of computation of book profit. Any disallowance computed under section 14A pertains to computation of income under the normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to computation of book profits for levy of minimum alternate tax. Amounts disallowed under section 14A cannot be added to the book profits computed under section 115JB.*

10. Similarly, in the case of CIT v. Gokaldas Images (P.) Ltd. [2020] 122 taxmann.com 160/276 Taxman 420/429 ITR 526 (Kar.), having regard to clause (f) of Explanation 1 to section 115JB(2) of the Act, it has been observed that additions made by the assessing officer determining book profit under section 115JB of the Act cannot be sustained. Any disallowance computed under section 14A of the Act pertains to computation of income under the normal provisions of the Act and cannot be read into the provisions of section 115JB of the Act pertaining to levy of minimum alternate tax and there is no express provision in clause (f) of Explanation 1 to section 115JB of the Act to that extent.

11. The Co-ordinate bench of this Court in Pr. CIT v. Mphasis Software and Services (India) (P.) Ltd. [IT Appeal No. 244 of 2021, dated 25-10-2021] where one of us Hon'ble SSJ was member, while considering the applicability of section 154 of the Act has held that invoking of section 154 would be untenable when there is no mistake apparent on the face of the record i.e., when the matter requires adjudication upon the issue which is a debatable issue.

12. In the light of these judgments, the finding given by the Tribunal on the points inasmuch as invoking of section 154 and Explanation 1 (f) to section 115JB being squarely covered, the same cannot be found fault with. We are of the considered view that the Miscellaneous Petition filed by the revenue under section 254(2) of the Act was wholly misconstrued. The Tribunal has distinguished the case of Sobha Developers (supra) relied upon by the revenue with VireetInvestment (P.) Ltd. (supra) and has rightly come to the conclusion that the judgment of the VireetInvestment (P.) Ltd. (supra) rendered by the Special Bench consisting of three Hon'ble Members prevail over the Regular Bench consisting of two Hon'ble Members. Moreover, this view considered in the VireetInvestment (P.) Ltd. (supra) was the subject matter before this Court in the judgments referred to supra. Hence, no exception can be found with the orders impugned.

10.1 In the light of the above, we do not find any merit in Ground No.1 raised by the Revenue pertaining to section 14A of the Act. **Accordingly, ground No.1 raised by the Revenue is dismissed.**

GROUNDS 2 TO 4

11. Ground nos. 2 to 4 raised by the Revenue are inter-connected and are with respect to the shares received by the assessee company on account of amalgamation, for a price lower than the Fair Market Value (F.M.V) of the shares, does not attract provisions of the section 56(2)(viia) of the Act and Ld.ClT (Appeals) erred in holding that provisions of Section 56(2)(viia) are not applicable to the transactions defined u/s.47(vi), even though the proviso to section 56(2)(viia) does not specify the transactions defined u/s.47(vi) as exception to section 56(2)(viiia) of the Act.

12. The ld.DR had submitted that the order passed by the ld.CIT(A) deleting the addition of Rs.55,92,49590/- and Rs.5,14,80,879/- were without any basis and contrary to law. The ld.DR had submitted that the ld.CIT(A) had dealt with the issue in Para 6 at page 58 to 65 of his order. The gist of the finding of the ld.CIT(A) is as under :

> *A. The Ld. CIT(A) concluded that since there is no doubt regarding the date of transfer and the year of taxability, just because the HC Order has been passed on October 10, 2013 cannot invoke the taxability in the impugned AY and held that the protective addition made by Ld. AO is deleted on the basic reasons that there is no case for a protective addition for the impugned Assessment Year.*
>
> *B. Ld. CIT(A) held that definition of section 2(IB)(iii) of the Act is satisfied in the instant case as the shareholding and shareholders were identical and even post amalgamation the shareholders were same as well as the shareholding was in the same ratio and therefore, no transfer took place in the eyes of law.*
>
> *C. The Ld. CIT (A) further held that since merger is not treated as transfer under section 47 of the Act, neither the capital gain will arise nor any deeming charge under section 56 for the receipt of property / assets / shares etc. can be attributed for improper consideration.*

13. With respect to the above said issues, the ld.DR relied upon the order of the Assessing Officer. It was the further contention of the ld. DR that the definition of amalgamation provided under section 2(IB) cannot be read into by reference in section 56(2)(viia) of the Act. It was the contention that if on account of amalgamation of the company / companies, a company or a firm receives any property being the share of a company for a consideration which is less than the aggregate fair market value of the shares then such income shall deemed to be chargeable to Income Tax under the head 'Income from other sources' under section 56(2)(viia) of the Act.

13.1. Further it was submitted that the finding recorded by the ld.CIT(A) that no addition can be made in the hands of the assessee for the year under consideration on protective basis was incorrect. It was submitted that as per the case of the assessee, that as on August, 19, 2015, the Vertex Projects Limited was converted into a limited liability partnership (LLP) under the name and style "Vertex Projects LLP". It was also the contention of the ld. DR that in the assessment year 2012-13, M/s. Vertex Projects LLP did not exist and therefore, the additions cannot be made in the hands of Vertex Projects LLP in the A.Y. 2012-13. He has drawn our attention to VII of Page 6 of the Written Submissions filed by the assessee wherein it was mentioned as under :

> *"vii. The Respondent would like to submit that reassessment proceeding for AY 2012-13 were initiated and the reasons for reopening issued along with the approval under section 151 dated March 31, 2019, clearly states that reopening is done for AY 2012-13 on a substantive basis to bring to tax the impugned addition under section 56(2)(viia) with respect to shares received pursuant to amalgamation (Refer Pg 356 of Paperbook). A notice under section 148 dated March 31, 2019, was issued, directing the Assessee to furnish a return within 30 days (Refer Pg 362 of Paper book),* ***The same was duly responded by the Appellant vide letter dated April 29, 2019, stating that since Vertex Projects LLP did not exist in AY 2012-13,*** *the Assessee*

furnished the revised return again manually for AY 2012-13 on April 29, 2019 (Refer Pg 863 of Paper book], Subsequently, the Ld. AO dropped the reassessment proceedings for AY 2012-13."

13.2. The ld.DR had submitted that the reliance on provisions of section 47 of the Act by the ld.CIT(A) was incorrect as the income which is not chargeable to Income Tax under any of the heads specified in section 14 items A to E shall be charged to Income Tax under the head 'income from other sources'. It was submitted that section 47 falls within Chapter IV of the Income Tax Act wherein various transactions have been mentioned which are not considered as transfer in the eyes of law. It was the submission of the ld.DR that section 47(vi), (via), (vib) are not applicable in the present set of facts.

13.3. The ld.DR had submitted that the decision in the case of Marshall Sons Vs. ITO reported in 89 taxmann.com 619 decided on 27.11.1996 was rendered in accordance with the applicable laws for the A.Y. 1984-85. The said judgment of the Hon'ble Supreme Court has no bearing on the facts of the case as there is a change in law thereafter, by way of amendment in the form of section 56(2)(viia) which was inserted by the Finance Act, 2010, w.e.f. 1-6-2010. Section 56(2)(viia) is applicable as on 01.04.2015 which provides as under :

"Income from other sources.

***56. (1)** Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.*

***(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 :—*

.....

.....

> ***[(viia)*** *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,—*
>
> *(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 this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.*
>
> *Explanation.—For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);]"*

13.4 The ld.DR had submitted that the order passed by the ld.CIT(A) is perfunctory and without any basis and therefore, the same is required to be set aside and the order of the Assessing Officer is required to be upheld.

14. Per contra, the ld.AR for the assessee had made oral submissions and also filed written submissions. The relevant portion of the written submissions are as under :

> *"B. ADDITION UNDER SECTION 56(2)(viia) OF THE ACT WITH RESPECT TO SHARES RECEIVED BY THE RESPONDENT ON ACCOUNT OF AMALGAMATION (GROUND NO.2 AND 3 OF REVENUE APPEAL)*
>
> *1. Brief facts*
>
> *i. During the relevant IT 2013-14, the Assessee received the order of Hon'ble High Court of Andhra Pradesh dated October 10, 2013, read with the amended order dated December 31,2013 (Refer- Py 60 of Paperbook), approving the scheme of amalgamation (Refer Pg 116 (if Paperbook), pursuant to which various Companies ('hereafter referred as 'amalgamating companies') merged with the Assessee with effect from April 01, 2011 (Refer Pg 118 (if the Paperbook). BY virtue of the scheme, there was a statutory vesting of the business of amalgamating companies together with all the*

assets and liabilities including the investments held in various other companies (listed/ unlisted) with the Respondent.

ii. As provided in the rationale of the scheme, the amalgamated company (i.e. the Assessee) and the amalgamating companies are engaged in the business of finance and investment. To achieve greater integration, greater financial strength and flexibility, consolidated asset base, simplify the group holding's structure, reduce the investment companies, reduce regulatory compliances and etc., 11 amalgamating companies were merged into the Assessee.

iii. The shares in each of such companies were held by Dr. GVK Reddy and his family members, broadly divided in 3 groups, Mr. GVK Reddy and his wife ('Group A '); Mrs. Shalini Bhupal, daughter of Mr. GVK Reddy, and her family members ('Group B') and Mr. Sanjay Reddy, son of Mr. GVK Reddy, and his family members ('Group C') (Refer to Pg 366 of Paper book). The beneficial/ultimate percentage of shareholding held by each of such Group in such companies were identical [i.e. Group 1 held 34 percent stake; Group 2 held 33 percent stake; and Group 3 held 33 percent stake]. Considering the same, no separate valuation was obtained for determining the swap ratio for amalgamation of the amalgamating companies into Vertex Projects Limited. One Equity Share of Vertex Projects Limited were allotted to the respective shareholders for every one share held by them in amalgamating companies, on the rationale that the ultimate group-wise shareholdings in all the amalgamating companies vis-a-vis the shareholding in the amalgamated company would remain the same (Refer Pg 36- of Paperbook],

iv. The Ld. AO contended that the Assessee (i.e. amalgamated company) received such investment in such closely held companies for inadequate consideration and the same is taxable under section 56(2)(viia) of the Act for AY 2012-13 which is the AY relevant to the date of transfer being April 01, 2011. Further the Ld. AO contended that since the order of High Court is delivered during FY 2013-14, the deemed gift is brought to tax in the impugned AY 2014-15 on protective basis and the assessment for AY 2012-13 will be reopened and addition under section 56(2)(viia) will be made on substantive basis separately for AY 2012-13 .

v. On appeal before the Ld. CIT(A), the Ld. CIT(A) held that definition of section 2(lB)(iii) of the Act is satisfied in the instant case as the shareholding and shareholders were identical and even post amalgamation the shareholders were same as well as the shareholding was in the same ratio.

vi. The Ld. CIT (A) further held that since merger is not treated as transfer under section 47 of the Act, neither the capital gain will arise nor any deeming charge under section 56 for the receipt of property / assets / shares etc. can be attributed for improper consideration.

vii. The Ld. CIT(A) concluded that since there is no doubt regarding the date of transfer and the year of taxability, just because the HC Order has been passed on October 10, 2013 cannot invoke the taxability in the impugned AY and held that the protective addition made by Ld. AO is deleted on the basic reasons that there is no case for a protective addition for the impugned AY.

2) Gist of contentions

a) Additions made on protective basis is bad-in-law

i. An assessment which is made from an abundance of caution by the tax officer is called protective assessment. It is well settled that that such assessment can be made by the tax officer, onlv when there is a doubt as to which person amongst two is liable to be assessed (or) in which year such income is taxable. Reliance in this regard can be placed on the decision of Hon'ble Apex Court in the case of Lalji Haridas» [S.No.6 - Pg. 45 of the Case Law Compilation).

ii. The tax officer should first necessarily determine the question of taxability by considering the entire evidence available before him, and it is only when the tax officer is in doubt (i.e. the evidence is insufficient or is otherwise contradictor, from which, reasonable conclusion cannot be drawn as to who is to be taxed or in which year the relevant income is to be taxed), then only protective assessment can be made.

iii. The Assessee submits that a substantive assessment must precede the protective assessment.

In simple words there must be some substantive assessment/addition first which enables the tax officer to make a protective assessment/addition. In this regard, reliance can be placed on the decision of the Hon 'ble Mumbai Tribunal in the case of M.P. Ramachandran» [S.No.7 - Pg. 51 of the Case Law Compilation]:

"22 .... We have noted above about the validity and presumption of the protective assessment in general. ***Protective assessment cannot be independent of substantive assessment. Thus protective assessment is always successive to the substantive assessment. There may be a substantive assessment without any protective assessment, but there cannot be any protective assessment without there being a substantive assessment****. In simple words there has to be some substantive assessment/addition first which enables the Assessing Officer to make a protective assessment/addition."*

(Emphasis Supplied)

iv. The mere reason that the Ld. AD provided is that, since the Hon'ble He order approving the merger is received in the FY relevant to the impugned AY, additions has been made on protective basis in the impugned AY. The Ld. AD himself did not have any doubt that the addition of the same amount should be done in AY 2012-13 and not AY under consideration. If the tax officer restores to another AY to tax certain amount, then, the provisions of reassessment proceedings, the timelines for assessment and etc. would be redundant. Therefore, the said addition made on protective basis needs to be deleted as the basic requisites for making protective assessment has not been fulfilled.

v. First there must be a substantive assessment and further the same should precede the protective assessment. In the instant case, no substantive assessment has been carried out with regard to the income under question and hence no additions can be made on protective assessment.

vi. Given that the Ld. AD himself has stated in the assessment order that the deemed gift on transfer of unquoted shares by the above companies to the Assessee company is brought to tax in the relevant year on protective basis and the assessment for AY 2012-13 will be reopened and the income under section 56(2)(viia) will be brought to tax on substantive basis separately, it is clear that the Ld. AD had no doubt that the said income, even if the same were to be taxed, can only be taxed in the AY 2012-13·

vii. The Respondent would like to submit that reassessment proceeding for AY 2012-13 were initiated and the reasons for reopening issued along with the approval under section 151 dated March 31, 2019, clearly states that reopening is done for AY 2012-13 on a substantive basis to bring to tax the impugned addition under section 56(2)(viia) with respect to shares received pursuant to amalgamation (Refer Pg 356 of Paperbook). A notice under section 148 dated March 31, 2019, was issued, directing the Assessee to furnish a return within 30 days (Refer Pg 362 of Paper book), The same was duly responded by the Appellant vide letter dated April 29, 2019, stating that since Vertex Projects LLP did not exist in AY 2012-13, the Assessee furnished the revised return again manually for AY 2012-13 on April 29, 2019 (Refer Pg 863 of Paper book], Subsequently, the Ld. AO dropped the reassessment proceedings for AY 2012-13·

viii. It is accordingly clear that no substantive assessment has been made on this issue in the hands of the Assessee. When there is no substantive addition, there can be no protective addition as well. When the very basis of the income 'goes', the addition in this Assessee's hands, which was treated as 'protective' in the impugned AY 2014-15, would also not survive.

Without prejudice to our argument in regard to maintainability of the additions made under protective assessment. the Respondent would like to submit that the provisions of section 56(2)(viia) of the Act is not applicable in the instant case:

b) Merger transactions are outside the purview of section 56(2)(viia) of the Act

i. The purpose / context for which this provision was introduced can be understood by reference to the Explanatory Memorandum to Finance Bill 2010. The relevant extracts are reproduced below:

" ... 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). 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.
……".

ii. Thus, it can be seen that the intention of the Legislature has been very clear that the section has been introduced as an anti-abuse provision and is not intended to tax a transaction which is otherwise not taxable, because, the above clearly provides that section 56(2)(viia) does not apply to transaction undertaken for business reorganization, amalgamation and demerger etc.

iii. Further, reference can be drawn from the newly introduced section 56(2)(X) of the Act which is effective from April 01, 2017, as against the existing provisions viz. section 56(2)(vii) and section 56(2)(viia) of the Act. The new section which has subsumed both the erstwhile sections, is intended to widen its scope to cover the definition of property and also the type of recipient to be covered. However, while widening the scope of the section, transaction of amalgamation covered under clause (vi) of section 47 has been specifically excluded from the purview of section 56(2)(X) of the Act. This also re-enforces the fact that the intent of the legislature was never to cover the business re-organization (like tax neutral amalgamation) within its scope.

iv. The Assessee places reliance on the decision of the Hon'ble Delhi Tribunal in the case of Aamby Valley Ltd (enclosed as Annexure-2) held that section 56(2)(viia) does not apply to underlying investments received by the amalgamated entity on account of merger. The relevant extracts are as follows:

"10.8.2 .... In our view, the said Section can be applied if there is a transfer of shares in favour of a Firm or a Company. For the transfer of shares, we agree with the assessee that there must be a transferor and transferee and transferred assets i.e., shares. In the case of amalgamation, it cannot be said that there is a transfer of shares as there is only statutory vesting of the assets by virtue of the Scheme. Section 56(2)(viia) is applicable only if assessee being a Company receives shares of a Company either without consideration or for a consideration which is less than the aggregate fair market value. In the instant case, due to Composite Scheme of Arrangement and Amalgamation, it cannot be said that there is no consideration or inadequate consideration ....

110 .... We, therefore, hold that provisions of Section 56(2)(viia) cannot be applied in respect of this transaction as it is a case where the transfer in the case of assessee falls under section 47(vii) of the Income- Tax Act. We, accordingly, delete the addition under Section 56(2)(viia) also."

(emphasis supplied)

v. Reliance is also placed on the decision of the Hon'ble Ahmedabad Tribunal in the case of Ozone India Ltd: [S.NO.12 - Pg. 83 of the Case Law Compilation], which although passed in the context of section 56(2)(viib) of the Act, has upheld the view that issue of shares at face value by an amalgamated company to shareholders of the amalgamating company in pursuance to a scheme of amalgamation would not fall under the anti-abuse provisions of the Act.

vi. Further, if section 56(2)(viia) of the Act are made applicable in such cases, the transaction of merger/ amalgamation satisfying the conditions of section 2(1B) would not be tax-neutral, thus, defeating the intent of the legislature not to tax such transaction.

*c) **The charging provisions fails. since there is no transfer of shares but statutory vesting of assets pursuant to merger***

1. The primary condition for invoking the provisions of section 56(2)(viia) of the Act is that there should be transfer of shares of a closely held company for a consideration at a value less than the value prescribed/ computed as per Rule 11UA of the Rules.

ii. In the instant case, the receipt of shares of various group companies along with other assets and liabilities cannot be considered in isolation as merely a receipt of 'individual shares of group companies' but it has to be considered as transfer of the assets and liabilities due to a statutory vesting as a result of merger and the transfer of shares is incidental to such statutory vesting. The same is evident from the scheme of the amalgamation as approved by the Hon'ble High Court. The relevant extract of the

scheme of amalgamation is reproduced below [clause 4.1 of Part III of the Scheme] (Refer Pg 134 of Paper book):

*"**4. TRANSFER OF UNDERTAKINGS /ASSETS AND LIABILITIES OF THE TRANSFEROR COMPANIES.***

4.1. With effect from the Appointed Date. the entire business and whole of the Undertakings of the Transferor Companies** including all assets whether movable or immovable, tangible or intangible, real or personal, in possession or reversion, corporeal or incorporeal of whatsoever nature, wheresoever situated including buildings, offices, marketing offices, liaison offices, furniture, fixtures, office equipment, appliances, accessories, Inventories together with all present and future liabilities (including contingent liabilities) and all cash and bank balances appertaining or relatable to the Transferor companies and all permits, rights, entitlements, registrations for carrying on business operations and activities and other licenses including approvals, permissions, consents from various authorities including municipal/ statutory bodies (whether granted or pending), receivables, benefit of any deposits, assets, properties or other Interests, financial assets including investments made by way of equity by the Transferor & Transferee Companies in other Body Corporates which are not party to this scheme, all kinds of funds belonging to or utilized for the Transferor Companies, bank accounts, privileges, all other rights and benefits including any tax, direct or indirect including advance tax paid or any tax deducted in respect of any Income received, exemptions, tenancies in relation to office and/ or residential properties for the employees, memberships, lease rights, powers and facilities of every kind, nature and description whatsoever, rights to use and avail of telephones, Internet servers, facsimile connections and installations, utilities, electricity, and other services, provisions, funds, benefits of all agreements, contracts and arrangements, letters of Intent, memoranda of understanding, expressions of interest whether under agreement or otherwise and all other Interests in connection with or relating to the Transferor Companies **shall, under the provisions of Sections 391 to 394 of the Act. and pursuant to the orders of the High Court or any other appropriate authority sanctioning this Scheme and without further act. Instrument or deed. but subject to the charges affecting the same as on the Effective Date. be transferred and / or deemed to be transferred to and vested in the Transferee Com an so as to become the properties and assets of the Transferee Company."

(Emphasis supplied)

iii. As it was a case of transfer of business undertaking including all assets and liabilities due to a statutory vesting by virtue of amalgamation, there was no separate consideration determined (or for that matter can be determined) for transfer of such shares individually and in absence of specific consideration for each such shares received on amalgamation, the computation mechanism would also fail.

iv. Based on the above, since it is case of receipt of business undertaking per se due to a statutory vesting and cannot be viewed as receipt of individual shares and also since the computation mechanism under section 56(2)(viia) would fail in absence of specific individual consideration of each share receipt, the action of Ld. AO in invoking the provision of section 56(2)(viia) of the Act is bad in law and hence should be deleted.

d) No change in the ultimate group-wise ownership of the Company

i. The Respondent would like to submit that in the instant case, since the ratio of the 3 family group's shareholding in the amalgamated company (i.e. the Assessee) were the same, no party was better off in the manner the consideration was discharged by the amalgamated company (i.e. the Assessee) to the shareholders of the amalgamated entities (who were the same set-of shareholders holding in the same ratio). Nor did the amalgamated company benefit by issuing shares in the ratio of 1:1.

ii. The Assessee submits that for the purpose of section 56(2)(viia), there must be a 'gain' (in a real sense) in the hands of the Assessee - so as to hold that 'income' has resulted to him and thereby, tax is attracted as a statutory consequence. A 'gain is conceivable when some enrichment results to the Respondent from a transaction. In short, there must be betterment in the wealth position of the Respondent by the transaction.

iii. Further, reliance can be placed on the decision of Delhi Tribunal in the case of Smt. Mamta Bhandari" [S.NO.11 - Pg. 74 of the Case Law Compilation], wherein it was held that section 56(2)(vii) would not be applicable in the cases where there is neither increase or decrease in the wealth of the shareholder.

iv. The section 56(2)(viia) of the Act was introduced to avoid transactions resulting in change of property in the group's hands and the avoidance of tax during the change of transfer of ownership within the group. In the instant case there is no intentional avoidance of tax but the transaction is incidental as a result of amalgamation of various companies with the amalgamated company which is undertaken to avoid running costs of 11 companies and to obtain operational synergies and the same is approved by the Hon'ble High Court vide order dated October 10, 2013 read with amended order dated December 31, 2013, section 56(2)(viia) cannot be applied in the given case.

e) The underlying investment held by Amalgamating company. Zinger Investments Pvt Ltd. was the preference shares of GVK Projects & Technical Services Limited and not equity shares

i. The underlying investment held by amalgamating company, Zinger Investments Pvt Ltd, was 0.001% non-convertible redeemable preference shares of GVK Projects & Technical Services Limited (refer pg. 290 of Paper Book. Therefore, pursuant to merger, the Assessee received the preference shares of GVK Projects and Technical Services Limited. However, the Ld. AD erroneously considered the same as equity shares and computed the addition under section 56(2)(viia) applying NAV method provided under Rule 11UA(l)(C)(b) of the Income Tax Rules, 1962 ("the Rules).

ii. As per Rule 11UA of the Rules, the computation mechanism of equity shares is different from the computation mechanism for preference shares. For your ready reference the relevant provisions of Rule 11UA(l) of the Rules is reproduced below:

"11UA. (1) .

(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 Respondent may obtain a report from a merchant banker or an accountant in respect of such valuation."

iii. However, the Ld. AD erroneously considered the same as equity shares and computed the addition under section 56(2)(viia) applying NAV method provided under Rule 11 UA(l)(C)(b) of the Rules, as against Rule 11UA(l)(C)(C) of the Rules. Therefore, the addition made by the AD in the case of preference shares of GVK Projects and Technical Services Limited amounting to INR 46.38 crores does not sustain.

iv. Given the above, without admitting and only for sake of argument, if provisions of section 56(2)(viia) of the Act are considered to be made applicable, the FMV should be taken considering Rule 11UA(l)(C)(C) of the Rules in case of preference shares and then also no addition is warranted under section 56(2)(viia) of the Act since the FMV is INR 10 which is same as the investment value. (refer Handout)

f) ***Section 56(2)(viia) is not applicable in respect of underlying investment in quoted shares and underlying investment in other amalgamating companies as they get cancelled upon merger***

i. The provisions of section 56(2)(viia) is not applicable in respect of the underlying investments held by the following amalgamating companies, as the underlying investments are either quoted shares or they are also one of the amalgamating companies (refer chart in 1'9 368 o]' paper/wok/ Annexure- 3 to this written submission):

(1)Metro Architects & Contractors (P.) Limited, had the following underlying investments (refer pg. 247 of paperbook) -(ii equity shares of Vertex Infratech Private Limited which is also an amalgamating company and (ii) quoted shares of GVK Power & Infrastructure Ltd.

(2) Trinity Advisors Private Limited had the following underlying investments (refer pg. 256 of paper book) -(i) equity shares of Vertex Infratech Private Limited and (ii) equity shares of GVK Energy Holdings Pvt Ltd, both of which are amalgamating companies

(3) Vertex Infratech Private Limited, had the following underlying investments (refer pg. 267 of paperbook) -(i) equity shares of GVK Energy Holdings Pvt Ltd - which is also an amalgamating company and (ii) quoted shares of GVK Power & Infrastructure Ltd.

ii. AO in its order stated that the Amalgamated company i.e. the Assessee received shares of such companies pursuant to merger, without, appreciating the fact such companies got amalgamated with the amalgamated company resulting in cancellation of shares. Further the provisions of section 56(2)(viia) is not applicable to quoted shares. Based on the above submissions, the Assessee submits that the addition under section 56(2)(viia) in respect of the underlying investment in Metro Architects & Contractors (P.) Limited, Trinity Advisors Private Limited and Vertex Infratech Private Limited does not sustain.

iii. Without admitting and only for sake of argument, if provisions of section 56(2)(viia) of the Act are considered to be made applicable, it is submitted that the FMV of shares held by Vertex Infratech (P) Ltd in GVK Energy Holdings was wrongly calculated as INR 135.32 by AO instead of INR 13·53 by erroneously considering total amount of paid up equity shares as INR 5 lakhs instead of INR 50 lakhs. Consequently, the addition u/s 56(2)(viia) as computed by AO will reduce from INR 3.22 crores to INR 12.321akhs (refer handout).

C. ADDITION UNDER SECTION 56(2)(viia) OF THE ACT WITH RESPECT TO INVESTMENT IN PREFERENCE SHARES (GROUND NO.4 OF REVENUE APPEAL)

1) Brief facts

i. During the financial year relevant to the AY under consideration, the Assessee made investment of INR 3.39 crores by way of subscription to 7% redeemable non-cumulative preference shares (redeemable at par) of Mis Gold Green Land Holdings (P) Limited.

ii. The Ld. AO made an addition of INR 5,14,80,879 under section 56(2)(viia) of the Act contending that the fair market value (INR 25) of 7% redeemable non-cumulative preference shares of Mis Gold Green Land Holdings (P) Limited exceeded the acquisition cost (INR 10).

iii. Further, while computing the fair market value of such preference shares at INR 25 per share, the Ld. AO erroneously applied Rule 11UA(l)(C)(b) instead of applying the method as provided in Rule 11UA(l)(C)(C) of the Rules which is applicable for preference shares.

iv. On appeal before the Ld. CIT(A), the Ld. CITCA) granted relief with respect to this issue.

2) Gist of contentions

a) Provision of the section .56(2)(viia) of the Act is applicable only in the case of transfer of shares; not in the case of allotment of shares

i. As per the provision of section 56(2)(viia) of the Act, where a firm or closely-held company receives shares of a closely-held company for inadequate consideration from any person(s), then, the fair market value of such shares as exceeds the consideration paid, shall be taxable under section 56(2)(viia) of the Act in the hands of the recipient. The Assessee submits that the said section is applicable only in the case of receipt of shares pursuant to 'transfer' and not in the case of receipt of shares pursuant to "allotment of shares" to recipient of shares by an investee company. The investee company is never the owner of the shares it creates on allotment. Therefore, there can never be a 'transfer' of shares from the company to an allottee on allotment.

ii. The Assessee submits that one would need to ascertain the real meaning of this term while keeping the "context" of section 56(2)(viia) in mind. Generally, the term "receive" indicates 'to acquire' or 'come into possession of or 'to get.'

iii. The Assessee submits that the said provision applies when a firm or a company receives shares of another closely-held company. The act of 'receiving' implies that there is an act of 'giving' on the other side. In short, there must be a transaction in which there is a 'giver' and a 'receiver' involved. The 'giving' and 'taking' further implies that there must a 'passage' of the property from one hand to another i.e. a 'transfer'. In other words, there is a 'transfer' of the property impliedly envisaged in the provisions of section 56(2)(viia) of the Act. This means that if there is no 'transfer' involved in the transaction, the provisions of section 56(2)(viia) of the Act will not come in to play.

iv. The legal position, as predominantly held by Courts in company law cases, is that there is 'no transfer' involved on allotment of shares by the Company. In this regard, the Assessee wishes to place reliance on the decision of Hon'ble Supreme Court in the case of Khoday Distilleries Ltd.v wherein the Hon'ble Apex Court has held that 'allotment of right shares by the Company involves no transfer'. The relevant extracts are reproduced below:

"There is a vital difference between "creation" and "transfer" of shares. As stated hereinabove, the words "allotment of shares" have been used to indicate the creation of shares by appropriation out of the unappropriated share capital to a particular person. A share is a chose in action. A chose in action implies existence of some person entitled to the rights in action in contradistinction from rights in possession. There is a difference between issue of a share to a subscriber and the purchase of a share from an existing shareholder. The first case is that of creation whereas the second case is that of transfer of chose in action."

(Emphasis Supplied)

v. One cannot interpret the term "receive" in section 56(2)(viia) of the Act without reference to the "context" in which it was created. The purpose/ context for which this provision was introduced can be understood by reference to the Explanatory Memorandum to Finance Bill 2010, which states that section 56(2)(viia) of the Act is an anti-abuse measure, introduced with an objective to prevent "practice of transferring" unlisted shares at a value less than the fair value. Thus, the Memorandum has understood, "receive" as synonymous to the term, "transfer." The relevant extracts from the Explanatory Memorandum are reproduced below:

"These are anti-abusive provisions which are currently applicable only if an individual or HUF is the resident. Therefore, transfer of shares of a company to a firm or a company, instead of an individual of an HUF, without consideration or at a price lower than the fair market value does not attract the anti-abusive provision. In order to prevent the practice of transferring unlisted shares at price which is below their fair market value, it is proposed to amend section 56 to also include within its ambit transaction undertaken in shares of a company (not being a company in which the 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 the public are substantially interested)"

vi. Reliance can also be placed on the CBDT Circular NO.1 of 2011, explaining the provisions of Finance Act 2010. At para 13.2, the Circular explicitly refers to the term "transfer" while explaining the scope of s. 56(2)(viia). The relevant extracts from the Circular are reproduced below:

"13.2. These are anti-abuse provisions which were 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 was not attracted by the anti-abuse provision. In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, section 56 was amended 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) "

vii. The above clearly provides that section 56(2)(viia) seeks to apply only to cases of "transfer." Thus, the term "receive" is required to be interpreted in a narrow manner.

viii. In view of the above, the provisions of section 56(2)(viia) of the Act should apply only where there is a 'transfer' of property involved from a 'giver' to a 'receiver', which feature is absent in an allotment of shares. Accordingly, the action of the Ld. AO to invoke the said provisions in the instant case is bad-in-law and the entire addition made should be deleted.
b) Existence or three distinct parties
i. For the applicability of section 56(2)(viia), there should exist three parties: (1) the company which is receiving the shares; (2) the person transferring the shares and (3) the company whose shares are being transferred.
ii. In the instant case, there exists only two parties i.e. the company which is receiving the shares and the person transferring the shares. Accordingly, in the absence of transfer of shares of another company, section 56(2)(viia) of the Act should not apply.

c) Existence of a distinct property

i. The Assessee submits that section 56(2)(viia) applies only when there is a receipt of property "being shares" from any person.

ii. Given the same and from the donor's perspective, shares must be a "property" in the donors' hands. The allotment of shares by issuing company to the shareholder, viz, the "property" of the company i.e., shares getting transferred to the shareholder", is clearly erroneous, as for the issuing company, shares are never its property, but in fact, a liability as held by the Hon'ble Ahmedabad Tribunal in the case of Hollyhock Engineering (P) Ltd. Accordingly, issue! allotment of shares is outside the purview of section 56(2)(viia) of the Act. Furthermore, the term "being" shares clearly indicates that the same should be in existence and not something which is created afresh.

iii. If the word "property" is read in totality along with the terms, receives, being, etc., then property should be "existing" property and not something which comes into existence. The Hon'ble Apex Court in the case of R. Cawasjee Cooperv has clarified that shares are not property in the hands of the issuing company.

iv. Further, the Hon'ble Apex Court in the case of R D Goyal -vs.- Reliance Industries Limited has held that shares before their allotment are not goods. Thus, shares are not goods for the allotting! issuing company and by analogy, they are not "property" for the purposes of section 56(2)(viia).

v. In this connection, the Assessee would like to also refer to the following extracts from the Hon'ble Apex Court decision in the case of Khoday Distilleries Ltd. '3:

"There is a vital difference between "creation" and "transfer' of shares. As stated hereinabove, the words "allotment of shares" have been used to indicate the creation of shares by appropriation out of the unappropriated share capital to a particular person. A share is a chose in action. A chose in action implies existence of some person entitled to the rights in action in contradistinction from rights in possession. There is a difference between issue of a share to a subscriber and the purchase of a share from an existing shareholder. The first case is that of creation whereas the second case is that of transfer of chose in action."

(Emphasis Supplied)

vi. In case of fresh issue of shares, the issuing company creates or brings into existence a new asset which did not exist earlier. Clearly, therefore, the issuing company is not the donor neither does the fresh issue involve existing property. Accordingly, in the absence of a donor, section 56(2)(viia) of the Act should not apply.

vii. While it is true that for a receipt, there must be two parties viz. giver and receiver, for section 56(2)(viia) to apply, the subject matter of the receipt should be 'shares'. The Hon'ble Apex Court in the case of Sri Gopal Jalan & Co vs. Calcutta Stock Exchange Association Ltd14 has clarified that a company allotting shares cannot be regarded as giving shares, since, shares come into existence for the first time in the process of allotment. The relevant extract is reproduced below:

*" Mr. Wynn Parry endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription in the usual way. I am unable to accept that view. A share is a chose in action. A chose in action implies the existence of some person entitled to the rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between creation and the transfer of a chose in action…… **Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence."***

(Emphasis Supplied)

viii. The Assessee further submits that Rule 11UA(c)(c) of the Rules provides that FMV of unquoted shares and securities (other than equity shares) shall be estimated to be the price it would fetch if sold in the open market on the valuation date. Further, this strengthens the argument that what is intended to be covered is a share which is capable of being sold and not a share which is not in existence prior to its allotment and hence not capable being sold. Further, the word 'sold' suggests that it has to be seen from the "donor's" perspective. Hence, if the share is such that the donor (transferor) cannot sell it, the provision may not be applicable.

d) Without prejudice to the above. FMV of preference shares has to be computed as per Rule 11 UA(l)(c)(c).

i. In this regard, the Respondent would like to submit that the valuation of unquoted preference shares has to be made in accordance with Rule 11UA(l)(C)(C) of the Rules which provides that:

"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 such valuation."***

ii. However, while computing the fair market value of such preference shares for the purpose of section 56(2)(viia) of the Act, the Ld. AO erroneously applied valuation mechanism as per Rule 11UA(l)(C)(b) of the Rules as against Rule 11UA(l)(C)(C) of the Rules. Further the valuation methodology adopted by the Assessee cannot be rejected by the tax authorities. NAV method is not at all a method prescribed for shares and securities other than equity shares, in which category preference shares falls. The method applicable in the present case is as contained in Rule 11UA(c)(c). Hence the AO's adoption of the method as per Rule 11UA(l)(C)(b) [i.e. NAV method] does not have the sanction of law. Reliance in this regard is placed on the decision of the Hon'ble Mumbai Tribunal in the case of Kilitch Healthcare India Ltd.

iii. Without prejudice to the above, the Assessee submits that even if section 56(2)(viia) is considered to be applicable, then also addition is not warranted since the FMV of such preference share as per the valuation report obtained from an accountant is the face value of such preference shares (i.e. INR 10) which is equal to the consideration paid for acquisition of such shares. Hence there is no inadequate consideration, warranting addition under section 56(2)(viia) of the Act.

ANNEXURE-1

The Hon'ble Bench during the course of the hearing held on January 11, 2023, sought certain clarifications in relation to Ground No. 2 and 3 of Revenue appeal, and the response for the same is furnished as Annexure -I to this written submission.

1) ***Whether the appointed date which is the date of transfer as per the scheme/Companies Act same under the provisions of Income Tax Act. 1961 as well?***

i. The Assessee submits that the scheme of amalgamation becomes effective from the appointed date, even if the High Court (Later NCLT) approves the scheme later and the appointed date is therefore the date of transfer. Reliance is in this regard is placed on the decision of the Hon'ble Apex Court in the case of Marshall Sons & Co. (India) Limited [S.No.4 - Pg. 14 of the Case Law Compilation]. The relevant extracts are reproduced below:

"12. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide, viz., 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it as has happened in this case - it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as 'the transfer date'. It cannot be otherwise. It must be remembered that before applying to the Court under section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. ***The proceedings before the Court may take some time; indeed, they are bound to take some time because several steps provided by sections 391 to 394A and the relevant Rules have to be followed and complied with. During the period, the proceedings are pending before the Court, both the amalgamating units, i.e., the transferor company and transferee company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the transferor company (subsidiary company) shall be deemed to have carried on the business for and on behalf of the transferee company (holding company) with all attendant consequences****. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme."*

(Emphasis Supplied)

ii. Further, the provisions of sub-section (6) of section 232 of Companies Act, 2013 provides that the scheme of amalgamation shall indicate an 'appointed date' from which the scheme shall be deemed to be effective and that the scheme will be effective from that date and not at a date subsequent to the appointed date.

iii. Even under the scheme in the present case, there is a similar clause which states the following (clause 2 of Part I of the scheme) (Refer pg 121 of Paperbook)

"2. EFFECTIVE DATE AND OPERATIVE DATE
The scheme though operative from the Effective Date shall be effective from the Appointed Date."

iv. Drawing analogy from the above decision of the Hon'ble Apex Court, the scheme of amalgamation in the present case further provides a similar clause with respect to the transferor company carrying on the business on behalf of the transferee company with effect from the appointed date, until the merger gets sanctioned by the Hon'ble High Court. The relevant clause 10 of Part -IV of the scheme is extracted here (Refer Pg 141 of Paperbook):

*"**10. CONDUCT OF BUSINESS BY THE TRANSFEROR COMPANIES TILL THE EFFECTIVE DATE:***

With effect from the appointed date and till transferor companies are dissolved, they shall be deemed to have been carrying on and to be carrying on their business for and on behalf of and in trust for the transferee company.

10.1 With effect from the appointed date and upto and including the effective date, all the Transferor Companies:

a) Shall be deemed to have been carrying on and shall carry on all business and activities stand possessed of the properties so to be transferred, for and on account of and in trust for the transferee company, including but not limited to, operating and marketing activities, advance tax instalments of income tax, sales tax, excise and other statutory levies etc.

b) All profits or income accruing to transferor companies or losses or expenditure (including payment of penalty, damages, or such litigations) arising or incurred by them shall, for all purposes, be treated as the profits or income or losses or expenditure as the case may be of the transferee company."

v. Reliance is also placed on the decision of the Hon'ble Bombay High Court in the case of M N Chhaya v. PHS Mani17 (refer Annexure-4), wherein the Hon'ble Court held that scheme of amalgamation will be effective from the appointed date and not from the date of sanction of the scheme by the High Court. The relevant extracts are reproduced below:

"11. Insofar as the second issue is concerned, I am of the opinion that the scheme must come into effect not from the date when the scheme is sanctioned by the Court but from the appointed date which is prescribed under the scheme itself and I am also fortified in my aforesaid views by the judgment of the Apex Court in the case of Marshall Sons & Co. (India) Ltd. v. ITO [1997] 88 Compo Cas. 528 and in which it has been held as under: ....

It is, thus, clear that once a scheme is sanctioned by a Court by passing an order under sections 391 and 394, the said sanction relates back to the date on which the scheme was to come into operation as provided in the scheme. In the present case, the sanction granted to the scheme specifically provide the date 1-4-1993 as an appointed date and, thus, the said scheme would be effective and in operation from 1-4-1993. Thus, consequently, the

settler-company stood dissolved and ceased to be in existence with effect from 1-4-1993."

(Emphasis Supplied)

vi. The Hon'ble Gujarat High Court in the case of IRM Ltd. IS (refer Annexure-5), held that when a scheme of amalgamation had been sanctioned by High Court same would be from appointment date and therefore the claim of carried forward unabsorbed depreciation and loss of amalgamating company would be allowed from the appointed date itself. The relevant extracts are reproduced below:

"13 .... However, the moment the scheme was sanctioned as per the decision of Supreme Court in case of Marshall Sons & Co. (India) Ltd. (supra), it would relate back to the appointed date as envisaged under the scheme unless of-course the High Court shifts such date while approving the scheme"

(Emphasis Supplied)

vii. In the case of National Organic Chemical Industries Ltd. v. State of Maharashtra'9 (refer Annexure-6), the Hon'ble Division bench of the Bombay High Court observed that in law, the transferor company carries on business as agent or trustee of company from the appointed date. It cannot be said that it is carrying on business as a separate entity. Once the High Court passes an order approving the scheme of amalgamation, the corporate personality of transferor company is destroyed from the 'appointed date' as ordered by the High Court.

viii. The Hon'ble Apex Court in the case of Dalmia Power Ltd.so (refer Annexure—7), held as follows:

"4.7 As a consequence, when the companies merged and amalgamated into another, the amalgamating companies lost their separate identity and character, and ceased to exist upon the approval of the Schemes of Amalgamation Pr. CITv. Maruti Suzuki India Ltd. [2019]107 taxmann.com 375/265 Taxman 515/416 ITR 613.

4.8 Every scheme of arrangement and amalgamation must provide for an Appointed Date. The Appointed Date is the date on which the assets and liabilities of the transferor company vest in, and stand transferred to the transferee company. The Schemes come into effect from the Appointed Date, unless modified by the Court."

(Emphasis Supplied)

ix. There is a statutory vesting of all the assets and liabilities of the transferor company as a consequence of the scheme of merger being approved by the Hon'ble High Court. This view was upheld by the Hon'ble Delhi Tribunal in the case of Aamby Valley Ltd21, where on an identical fact pattern, the Hon'ble Tribunal held that section 56(2)(viia) does not apply to underlying investments received by the amalgamated entity on account of merger. The relevant extracts are reproduced below:

"In our view, the said Section can be applied if there is a transfer of shares in favour of a Firm or a Company. For the transfer of shares, we agree with the assessee that there must be a transferor and transferee and transferred assets i.e., shares. In the case of amalgamation, it cannot be said that there is a transfer of shares as there is only statutory vesting of the assets by virtue of the Scheme. Section 56(2)(viia) is applicable only if assessee being a Company receives shares of a Company either without consideration or for a consideration which is less than the aggregate fail' market value. In the instant case, due to Composite Scheme of Arrangement and Amalgamation, it cannot be said that there is no consideration or inadequate consideration"

(Emphasis Supplied)

x. Based on the above submissions, the Assessee submits that there is no separate definition of appointed date under the provisions of the Act and hence by virtue of the ratio held by the Hon'ble Apex Court in Marshall Sons (supra), the legal date of transfer under all laws is only the appointed date. Unless the Income Tax Act provides a different date for the definition of appointed date, the position is that we should go by the general law as laid down by the Hon'ble Apex Court. The Assessee further reiterates that the decisions of Dalmia (SC) and IRM Ltd (Gujarat HC) are rulings rendered in the context of Income Tax Act, where this position of appointed date as laid in Marshall Sons (supra) has been recognized and followed.

2) What is the status of reassessment proceedings for A Y 2012-13?

i. The Assessee submits the status of the reassessment proceedings, which shows that the reassessment proceeding is dropped for AY 2012-13 (refer Annexure-8).

15. We have heard the rival contentions of the parties and perused the material available on record. First we will deal with the issue of making the addition on a protective basis by the Assessing Officer for A.Y. 2014-15 on account of amalgamation of 11 companies by the order of the Hon'ble High Court dt.10.10.2013.

15.1. The ld.AR had relied upon the decision in the case of Lalji Haridas Vs. ITO and another reported in 43 ITR 387, wherein the Hon'ble Supreme Court had held as under :

"The main argument which is urged by Mr. Nambiar in support of this appeal is that respondent No. 1, the Income-tax Officer, who has issued the impugned notice, has no jurisdiction to assess the appellant for the income in question, because he contends that even according to respondent No. 1 the said proposed assessment would be in the nature of a precautionary or protective assessment, and Mr. Nambiar's case is that this concept of a precautionary or protective assessment is not recognized by the Act and as such any attempt to levy such assessment would be illegal. In support of this argument Mr. Nambiar strongly relied on the finding recorded against the appellant's brother, Lalji, in the ex parte assessment order which had originally been passed against him. It is no doubt true that the said ex parte order had held that Lalji was liable to pay the tax on the amount of income in question ; but the said order has been subsequently set aside, and, as we have already seen, fresh proceedings against Lalji have been commenced at Jamnagar. Mr. Nambiar also relied on the admission made by the respondent in his statement of the case before this court, and he contended that the respondent himself seems to concede that the assessment proposed to be made against the appellant is no more than precautionary. It is true that paragraph 3 of the statement avers that " steps are being taken against the appellant for taxation of income in his hands only as a precautionary measure against the eventuality of its being finally held that the income is not liable to be taxed in his brother's hands ", and it was added that "the appellant's contention that such a procedure is not warranted under the Act is entirely untenable" ; but in appreciating the effect of this statement it would be necessary to consider the other relevant statements made by the respondent in his statement of the case. In paragraph 4, for instance, it is added that until the question of liability to pay tax in respect of the income in question is finally determined it may not be possible to safely predicate that it is the income of one and not of the other, and the respondent's case appears to be that in such circumstances protective assessments have to be made so that the income may not escape taxation altogether. In other words, the respondent's case clearly is that the notices issued against the two brothers by their respective Income-tax Officers are intended to determine who is responsible to pay tax for the income in question; now though Mr. Nambiar wanted to argue that protective or precautionary assessment of tax is not justified by any of the provisions of the Act he did not seriously contest the position that at the initial stage it would be open to the income-tax authorities to determine by proper proceedings who is in fact responsible for the payment of tax, and that is all that is being done at the present stage. ***In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B.*** *That being so, we do not think that Mr.*

> *Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No. 1 in pursuance of the impugned notice issued by him against the appellant. Under these circumstances we do not propose to deal with the point of law sought to be raised by Mr. Nambiar.*
>
> *We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old.* ***In the proceedings taken against Lalji the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings****. Proceedings against Chhotalal may also be taken by the Income-tax Officer and continued and concluded,* ***but until the proceedings against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal****. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal. If, however, in the said proceedings Lalji is not held to be liable to pay tax or it is found that Lalji is liable to pay tax along with Chhotalal it may become necessary to pass appropriate orders against Chhotalal. When we suggested to the learned counsel that we propose to make an order on these lines they all agreed that this would be a fair and reasonable order to make in the present proceedings.*

15.2 In our considered opinion, the Hon'ble Supreme Court has held that the protective / precautionary assessment of tax is justified under the provisions of the Act.

15.3 Thereafter, he had also relied upon the decision in the case of M.P. Rama Chandran Vs. DCIT (Mumbai Tribunal reported in 32 SOT 592) dealing with substantive / protective agreement u/s section 147 / 148 of the Act, the coordinate Bench had held as under :

> *"22. Coming back to our point we have to examine whether protective assessment/addition is possible under section 147 in respect of the same person and for the same period. When a regular assessment is made and later on it comes to the notice of the Assessing Officer that some income chargeable to tax has escaped assessment, he can resort to these provisions for reassessment. But if, as is the case under consideration, after the passing of the regular assessment order, the Assessing Officer has passed a block assessment order under section*

158BC pursuant to search and seizure proceedings under section 132 and included one income in the block assessment, is he empowered to include the same income, on protective basis, in the reassessment of the original regular assessment for the year, which is included in the block period? Before answering this question, it will be relevant to see the effect of the answer in positive or negative. If the answer is given in affirmative it will mean that the Assessing Officer is empowered to include it in the reassessment on the protective basis. Thus there will be presumption that though the Assessing Officer had included such income in the block assessment, but he still has the reason to believe that this income is also taxable in the regular assessment. This presumption will belie the concept of reassessment which is always there to tax an income which is chargeable to tax but has escaped assessment. In order to give a different colour, the ld. DR. contended that this disallowance was made on protective basis only and hence cannot be equated with the substantive disallowance. We have noted above about the validity and presumption of the protective assessment in general. Protective assessment cannot be independent of substantive assessment. Thus protective assessment is always successive to the substantive assessment. There may be a substantive assessment without any protective assessment, but there cannot be any protective assessment without there being a substantive assessment. In simple words there has to be some substantive assessment/ addition first which enables the Assessing Officer to make a protective assessment/addition. Substantive addition/ assessment is made in the hands of the person in whose hands the Assessing Officer prima facie holds the opinion that the income is rightly taxable. Having done so and with a view to protect the interest of the revenue, if the Assessing Officer is not sure that the person in whose hands he had made the substantive addition rightly, he embarks upon the protective assessment. ***Thus the protective assessment is basically based on the doubt of the Assessing Officer as distinct from his belief which is there is the substantive assessment. Obviously there is no place for 'doubt' in the scheme of reassessment,*** *as it has to be belief of the Assessing Officer about the escapement of income, which is the foundation for assessment or reassessment under section 147. Even if for a moment we agree with the ld. DR that the protective addition is different from substantive addition and hence the reassessment proceedings be upheld, we find that ultimately the same conclusion will follow if the substantive addition is struck down at a place where it was made. In such a scenario the protective addition will get converted into substantive addition in the reassessment.* ***That will also run contrary to the format of reassessment, being to tax an income which has escaped assessment. In that case again it will tantamount to reopening assessment on the basis of an item of income or disallowance, which has already been made in block assessment of the assessee, thereby leaving no income escaping assessment.*** *Under these circumstances we are satisfied that having made addition of Rs. 527.85 lakhs in the block assessment, the Assessing Officer* ***was not justified in forming the belief, either on substantive or protective basis, that the same income has escaped assessment in the instant year****. In Wipro Finance Ltd.'s case (supra) there was*

search action on the assessee. Some income was assessed as undisclosed income for the block period. The Assessing Officer made addition for the same in regular assessment on protective basis. When the matter came up before the Hon'ble High Court, it was held that the same income which was assessed as the undisclosed income for the block period, could not have been assessed even on protective basis in regular assessments under section 143 for those years. In the instant case we are concerned with the reassessment, in which there are more restraints on the power of the Assessing Officer. We, therefore, hold that the initiation of reassessment proceedings on this count cannot be upheld."

16. The coordinate Bench in the case of Ramachandran (supra) had mentioned the facts in Para 2, which are to the following effect :

"2. The first grievance of the assessee is against the initiation of reassessment. Briefly stated the facts of the case are that the original assessment was completed under section 143(3) on 25-2-2000. A search action was taken upon the assessee and M/s. Jyothy Laboratories Ltd. on 3-11-2000. The Assessing Officer recorded reasons for escapement of income on 21-3-2003 and issued notice under section 148 dated 26-3-2003 which was served on the assessee on 31-3-2003. In response to that the assessee filed return declaring the same income of Rs. 21,51,960/- which was declared in the original return with the remarks that such return was filed under protest. After filing the return the assessee requested for a copy of the reasons recorded for the reopening of the assessment and the same was provided to the assessee. The assessee objected to the initiation of reassessment vide its letter dated 7-11-2003 stating that all the relevant information and documents were filed with the Assessing Officer during the course of original assessment proceedings in which an addition of Rs. 10,84,523 was made. It was claimed that there was no failure on the part of the assessee to disclose all the relevant facts and hence the reassessment be not made. Considering the provisions of section 147 and other relevant sections, the Assessing Officer came to the conclusion that his action was valid. One of the issues which weighed heavily with the Assessing Officer for issuing notice under section 148 was that the assessee had claimed expenditure on advertisement and publicity to the tune of Rs. 99.46 lakhs and as per the agreement entered into between the assessee and Jyothy Laboratories Limited (hereinafter referred to as "JLL"), the assessee was entitled to the reimbursement of the advertisement expenses incurred by it from the company. It was noted from the analysis of the advertisement expenditure that the maximum amount was debited by the assessee in his books of account, whereas JLL had debited only the barest minimum amount. The Assessing Officer noted in the reasons that this issue was also taken up during the block assessment proceedings and it was found that the assessee was actually incurring huge expenditure on advertisement and publicity and only a part of it was reimbursed by JLL resulting into lower income in the hands of the

assessee. During the previous year relevant to the assessment year under consideration, the assessee got a reimbursement of Rs. 55.86 lakhs from the company. The assessee did not furnish the basis of reimbursement of expenses. The Assessing Officer compared advertisement expenses claimed by the assessee in his personal books of account and JLL. After a detailed analysis the Assessing Officer observed that the assessee had debited Rs. 583.71 lakhs as expenditure relatable to JLL whereas only reimbursement to the tune of Rs. 55.86 lakhs was made leaving a balance of Rs. 527.85 lakhs which was not reimbursed. It was held that the advertisement expenditure to this extent was not related wholly and exclusively for the business activities of the assessee. He, therefore, disallowed such expenditure and made addition of Rs. 527.85 lakhs in the order passed under section 147 on protective basis. The Assessing Officer further observed on page 12 of the assessment order that the block assessment was completed for the block period from 1-4-1990 to 3-11-2000 vide order dated 30-11-2002 in the case of the assessee in which the similar addition of Rs. 527.85 lakhs was also made. The said addition was deleted by the learned CIT(A) on the ground that such disallowance of expenditure was not covered within the ambit of Chapter XIV-B of the Act. The Assessing Officer opined that since this substantive addition was made in the block assessment which was deleted by the learned first appellate authority and the appeal was yet to be decided by the Tribunal, the addition in the present assessment order was also called for on protective measure. Apart from that one of the reasons for reassessment was that the assessee had purchased a land for Rs. 53,000 in the previous year relevant to the assessment year 1990-91 and had built a building on the same land for which construction cost was paid at Rs. 4,80,015. Depreciation was found to have been claimed on the composite cost including the land, which was not permissible. During the assessment proceedings, the assessee was called upon to file the bifurcation of the land cost and building cost which was not furnished. The assessee placed reliance on the judgment of the Hon'ble Supreme Court in the case of CIT v. Alps Theatre [1967] 65 ITR 377 as per which the assessee was entitled to depreciation on building and land appurtenant to it. The Assessing Officer noted that the assessee had not furnished the area of land which was purchased in 1990 and the area on which building was constructed. He, therefore, estimated the depreciation claimed on the excess land held by the assessee at 50 per cent of the regular rate of depreciation of 10 per cent. Disallowance of Rs. 2,650 was made on this count and added to the total income. Another reason recorded by the Assessing Officer for reassessment, was that a sum of Rs. 5,057 was the amount of interest on refund received by the assessee from the Income-tax department on 21-6-1996, which was not offered for taxation in the return filed by the assessee. The Assessing Officer made addition for this sum also with a narration "Previous year expenditure debited to Profit & Loss Account". Resultantly the total income was computed at Rs. 5.60 crores and odd as against the originally computed income at Rs. 32.36 lakhs."

17. From the combined reading of facts mentioned in Para 2 and the conclusion in Para 22, it is clear that the Tribunal had held in the facts of that case that there cannot be a protective addition in the absence of the substantive addition. However, what weighed in the minds of the Tribunal was that neither substantive nor protective addition can be made once the said addition was already made in the block assessment. Therefore, the decision of the Co-ordinate Bench is not applicable.

18. In our view, the decision of the Hon'ble Supreme Court had categorically held in the case of Lalji Haridas (supra) that the protective / precautionary addition can be made. Further, if the substantive additions are deleted either on law or on facts, then the protective addition would be converted into substantive addition.

19. In the present case, the return of income was filed by the assessee and during the scrutiny assessment, the Assessing Officer noticed that the order was passed by the Hon'ble High Court on 10.10.2013 which was subsequently amended on 31.12.2013. In the scheme of amalgamation approved by the Hon'ble High Court provides the date of transfer as 01.04.2011. By virtue of order of Hon'ble High Court, assessee receives shares of 11 companies which were merged with the assessee along with the other underlined properties. As per our understanding, there is a distinction between "receive of property being the shares of the amalgamating companies" and "underlying assets and transfer of said assets to the amalgamated company. For the purpose of attracting the rigours of section 56(2)(viia) of the Act, the crucial date is the date of receive of any property being the shares of the amalgamated

companies. Undoubtedly, the assessee received the property on account of approval of the scheme of amalgamation in the year under consideration and therefore, the income is required to be charged in the year under consideration.

20. The Assessing Officer was not certain about the year of chargeability i.e., whether it is to be charged on the year of receipt of property or it is to be charged in the year of the transfer of property pursuant to the scheme of amalgamation and therefore, in Para 3.8 of his order, the Assessing Officer had mentioned as under :

> *"3.8 However, as the order of the Hon'ble High Court is delivered during the relevant year, the deemed gift on transfer of unquoted shares by the above companies to the assessee company is brought to tax in the relevant year on protective basis. The assessment for A.Y. 2012-13 will be reopened and the income u/s 56(2)(viia) will be brought to tax on substantive basis separately."*

20.1. As mentioned hereinabove, the year of chargeability would be the year in which the assessee received the properties i.e., the assessment year under consideration and therefore, the Assessing Officer had rightly charged the income under section 56(2)(viia) of the Act.

21. The contention of the ld.AR that there has to be substantive addition then only the protective addition can take place. In this regard, we are of the opinion that the above said principle is not universally applicable and is required to be applied with caution and on case to case basis. In the present case, the Assessing Officer was wrongly harboring the view that the additions were required to be made on substantive basis in the year of transfer i.e., A.Y. 2012-13. Admittedly no proceedings were pending at the time of passing of assessment order dt.31.12.2016, therefore it is not possible to make the addition on substantive basis for A.Y. 2012-13. If we hold the same, then

the Bench would be asking the Assessing Officer to do the impossible. Further, there is a time limit provided under the Act for the completion of assessment under section 143(3) for A.Y. 2014-15 and the assessment proceedings for A.Y. 2014-15 ,on the basis of protective addition, cannot be put in abeyance till the additions are made on substantive basis for A.Y. 2012-13. In view of the above, we are not in agreement with the contention of the ld.AR that the substantive addition should precede the protective addition.

21.1 We may further point out that though the assessee had made the plea on the submission that section 148 proceedings initiated against the assessee for A.Y. 2012-13 had been dropped, which were initiated on substantive basis, but the said contention was not dealt by the ld.CIT(A) while passing the impugned order. However, we may point out the submission of the assessee, at page 6 to the following effect :

> *"vii. The Respondent would like to submit that reassessment proceeding for AY 2012-13 were initiated and the reasons for reopening issued along with the approval under section 151 dated March 31, 2019, clearly states that reopening is done for AY 2012-13 on a substantive basis to bring to tax the impugned addition under section 56(2)(viia) with respect to shares received pursuant to amalgamation (Refer Pg 356 of Paper book). A notice under section 148 dated March 31, 2019, was issued, directing the Assessee to furnish a return within 30 days (Refer Pg 362 of Paper book), The same was duly responded by the Appellant vide letter dated April 29, 2019, stating that since Vertex Projects LLP did not exist in AY 2012-13, the Assessee furnished the revised return again manually for AY 2012-13 on April 29, 2019 (Refer Pg 863 of Paper book], Subsequently, the Ld. AO dropped the reassessment proceedings for AY 2012-13."*
>
> *(emphasis supplied by us)*

21.2. From the perusal of the above said noted written submissions, it is clear that M/s. Vertex Project LLP did not exist in the assessment year 2012-13. Therefore, no addition can be made in the hands of a non-est entity i.e., assessee before us , for the Assessment Year 2012-13 as it was not in existence in that assessment year. Moreover if the contention of the assessee is accepted that the substantive additions were dropped for the assessment year 2012-13, then the protective addition made in the assessment year 2014-15 are required to be converted into substantive addition.

22. The other submission made by the assessee is that there is no transfer on account of amalgamation and therefore, it will not attract the rigours of section 56(2)(viia) of the Act. In this regard, the ld.CIT(A), had referred to the definition of amalgamation mentioned in section 2(IB) of the Act. It was the finding of the ld.CIT(A) that because the share holding and shareholders were identical prior to and post amalgamation i.e., in the same ratio, and further, the transfer of property / assets as defined in clause (i) of the definition u/s 2(IB) of the Act to the new entity, the same would not be a transfer within the meaning of section 47(vi) of the Act. At this stage, it is relevant to reproduce section 47(vi) of the Act which provides as under :

> *[(vi) any transfer, in a scheme of amalgamation, of a **capital asset** by the amalgamating company to the amalgamated company if the amalgamated company is an Indian company;]*

23. The capital asset has been defined under the Income Tax in section 2(14) which provides as under :

(14) capital asset" means—

(a) ***property of any kind held by an assessee, whether or not connected with his business or profession****;*

(b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992),

but does not include—

(i) any stock-in-trade [other than the securities referred to in ……..

…….

24. Section 56(2) provides as under :

56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(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 :—

(viia) 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,—*

(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 this clause shall not apply to any such property received by way of a transaction not regarded as transfer under ***clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47****.*

Explanation.—For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);]

24.1 Section 56(2) is an exception to section 56(1) of the Act and it has provided, in particular certain income to be charged as income under the head 'income from other sources'.

24.2 The Act has included the income mentioned in clause (viia) of section 56 as an income chargeable under income from other sources. The proviso to section 56(2)(viia) has provided an exception to its applicability. It had only excluded such properties received by way of transaction not regarded as transfer which are mentioned in clause **(via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii)** of section 47 of the Act.

24.3 On the basis of the plain reading of the above mentioned provisions, we can safely conclude that the transfer as contemplated under section 47(vi) will be forming part of section 56(2) of the Act and therefore, transfer / receive of shares of a company in which public are not substantially interested will be chargeable as income from other sources in the hands of recipient.

24.4 It may be mentioned that section 47(vi) of the Act, is an exemption of income arising on account of capital gain, on account of amalgamation of company, in the hands of the amalgamating companies, whereas section 56(2)(viia) is chargeable in the hands of the recipient of shares, if the consideration paid for "receive" of shares is below the fair market

value, then the same is chargeable in the hands of 'amalgamated company'.

24.5 The deemed income on account of receive of any property being the shares of the company had been specifically included as "income from other sources". The law of interpretation of statute is quiet clear which provides that if an income is chargeable under specific provision [56(2)(viia)] then the general provision exempting such income [47(vi)] shall not be applicable. Even otherwise, the clause (vi) of section 47 is not excluded from the purview of section 56 of the Act.

25. At this stage, it is essential to reproduce relevant portion of the Explanatory notes to the provisions of the FINANCE ACT, 2010 forming part of CIRCULAR NO.1/2011 [F.NO. 142/1/2011-SO(TPL)], DATED 6-4-2011, which reads as under :

> *13.Taxation of certain transactions without consideration or for inadequate consideration*
>
> *13.1 Under the previously 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, archaeological collection, drawings, paintings, sculpture or any work of art.*
>
> *13.2 These are anti-abuse provisions which were 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 was not attracted by the anti-abuse provision.* ***In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, section 56 was amended 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). It is also provided 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. (emphasis supplied by us)

13.3 Applicability -This amendment has been made effective from 1st June, 2010 and accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

13.4 The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income. 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. Therefore, the definition of property has been amended 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.

13.5 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. Therefore clause (vii) of section 56(2) has been amended 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.

13.6 Applicability - These amendments have been made effective retrospectively from 1st October, 2009 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.

13.7 The definition of 'property' as provided under section 56 has been amended to include transactions in respect of 'bullion' . This amendment has been made effective from 1st June, 2010 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

13.8 Section 142A(1) has been amended 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 has been made effective from 1st July, 2010 and accordingly, apply in relation to the assessment year 2011-12 and subsequent years.

26. From the conjoint reading of section 56(2)(via), section 47(vi) and section 2(IB) of the Act and explanatory notes reproduced above, it is abundantly clear that the transactions which are falling within the purview of sections / clauses of (via) or (vic) or (vicb) or (vid) or (vii) of section 47 of the Act are

excluded from the purview of section 56(2) (viia) of the Act. In case, any transaction for transfer which has taken place within the purview of section 47(vi), then the same would be subject matter of scrutiny and chargeability u/s 56(2)(viia) of the Act.

27. Section 56(2)(viia) being the specific charging provision inserted in the Finance Act w.e.f. 01.06.2010 would have overriding effect and will prevail vis-à-vis section 47(vi) of the Act which was inserted in the Finance Act w.e.f 01.04.1967. The law is fairly settled that when the specific charging provision deals with the income of the assessee, then the general provision shall not be applicable and will give way to the specific provision. As mentioned hereinabove, the transfer on account of amalgamation, demerger or business organization or transfer by shareholder in a scheme of amalgamation which are mentioned in clauses of (via) or (vic) or (vicb) or (vid) or (vii) of section 47 of the Act are excluded from the purview of section 56 of the Income Tax Act. In all these clauses of (via) or (vic) or (vicb) or (vid) or (vii) of section 47 of the Act, there is a transfer either by way of amalgamation or merger. However, the statute had only excluded these transfers and had retained the other transfers on account of amalgamation, within the purview of section 56(2)(viia) of the Act. In the present case, the scheme of amalgamation was approved by the Board of Directors of each transferor company and the transferee company in their meeting on 06.11.2012 and the said scheme of amalgamation was approved by the Hon'ble High Court. Under the scheme of amalgamation, approved by the Hon'ble High Court, the shares were received by the assessee company from the 11 transferor companies. From the perusal of the scheme of amalgamation, it is abundantly clear on account of the consideration as mentioned in clause 5 of the transfer scheme, that the transfer of shares took place from 11 amalgamating companies to the amalgamated

company namely, "M/s. Vertex Projects Limited" and the amalgamated company in consideration of receive of the shares of the transferor company had allotted its shares to the members of the amalgamating company. For all purposes, the transfer of shares of the transferor company have taken place in favour of the assessee company. Undoubtedly, the transfer of shares precedes the receive of shares. The bare reading of provisions of section 56(2)(viia) of the Act, makes it abundantly clear that the receive of any property without or inadequate consideration or a consideration less than the fair market value is sine qua non for attracting this provision. The language used in the section does not stipulate transfer of shares. In our view, the word 'receive' used in the section includes the receive by way of transfer of shares also. The meaning of the word 'receive' as per Oxford Dictionary is "to get or accept something that is sent or given to you".

28. In the light of the above, if we examine clause 4.1 of the Scheme of Amalgamation, whereby it is provided that pursuant to the order of high court or any other appropriate authority sanctioning the scheme the assets be transferred and are deemed to be transferred to and vested in the transferee company. Undoubtedly, the transfer of shares (assets) have taken place and therefore, it would be wrong to say that on the part of the assessee there were no transfer of shares. In fact, as mentioned in the scheme of amalgamation, the transfer of shares had preceded the receipt of shares by the transferee company. In view of the above, the finding recorded by the ld.CIT(A) that the Assessing Officer has wrongly invoked the provision of section 56(2)(viia) of the Act was incorrect and the view of the Assessing Officer was in accordance with the law.

29. As mentioned hereinabove, the ld.AR had mentioned in the written submissions that the mere merger transactions are outside the purview of section 56(2)(viia) of the Act and he had relied upon the decision of the Hon'ble Supreme Court in the case of Marshal and sons (supra), Delhi Tribunal in the case of Aamby Vally Ltd (supra) and also on the decision of Ahmedabad Tribunal in the case of Ozone India Limited.

30. Before we deal with these decisions cited by the ld.AR, it is essential to briefly give the details of the scheme of amalgamation which is placed on page 116 of the paper book. In the said scheme of amalgamation under provisions of sections 391 to 394 of the Companies Act, 1956, it is provided for transfers and mergers of the 11 companies namely, M/s. Blue Streak Consultants Pvt. Ltd and others with M/s. Vertex Projects Limited. The "Transferor Company" has been defined in clause 1.17 of the Scheme of Amalgamation, which provides as under :

> *1.17 "Transferor Companies" means and include collectively "Blue Streak", "Caspian". "Casuarina", "GVK Energy", "GVK Hyder", "Marvel", "Metro", "Plateau", "Trinity", "Vertex Infra", "Zinger".*

31. The share capital of all the 11 companies as per the Scheme of Amalgamation is as under :

The present Share Capital of blue Streak / 1st Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
10,000 Equity Shares of Rs. 10/- each	*1,00,000*
Issued, Subscribed and paid-up	
10,000 Equity Shares of Rs. 10/- each fully paid-up	*1,00,000*

The present Share Capital of Casplan / 2nd Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
1,80,00,000 Equity Shares of Rs. 10/- each	*18,00,00,000*
Issued, Subscribed and paid-up	
1,73,19,650 Equity Shares of Rs. 10/- each fully paid-up	*17,31,96,500*

The present Share Capital of Casuriana / 3rd Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
60,000 Equity Shares of Rs. 1000/- each	*6,00,00,000*
Issued, Subscribed and paid-up	
2888 Equity Shares of Rs. 1000/- each fully paid-up	*28,88,000*

The present Share Capital of GVK Energy / 4th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
2000000 Equity Shares of Rs. 10/- each	*2,00,00,000*
Issued, Subscribed and paid-up	
5,00,000 Equity Shares of Rs. 10/- each fully paid-up	*50,00,000*

The present Share Capital of GVK Hydel / 5th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
1,00,000 Equity Shares of Rs. 10/- each	*10,00,000*
Issued, Subscribed and paid-up	
10,000 Equity Shares of Rs. 10/- each fully paid-up	*1,00,000*

The present Share Capital of Marwell / 6th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
50,000 Equity Shares of Rs. 10/- each	*5,00,000*
Issued, Subscribed and paid-up	
10,000 Equity Shares of Rs. 10/- each fully paid-up	*1,00,000*

The present Share Capital of Metro /7th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
20,00,000 Equity Shares of Rs. 10/- each	*2,00,00,000*
Issued, Subscribed and paid-up	
10,000 Equity Shares of Rs. 10/- each fully paid-up	*1,00,000*

The present Share Capital of Plateau / 8th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
1,00,000 Equity Shares of Rs. 10/- each	*10,00,000*
Issued, Subscribed and paid-up	
10,000 Equity Shares of Rs. 10/- each fully paid-up	*1,00,000*

The present Share Capital of Trinity / 9th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
1,00,000 Equity Shares of Rs. 10/- each	*10,00,000*
1,90,000 preference shares of Rs.100/- each	*1,90,00,000*
Total	*2,00,00,000*
Issued, Subscribed and paid-up	
10,000 Equity shares of Rs.10/- each fully paid-up	*1,00,000*

The present Share Capital of Vertex Infra / 10th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
3,30,00,000 Equity Shares of Rs. 10/- each	*33,00,00,000*
2,00,000 preference shares of Rs.100/- each	*2,00,00,000*
Total	*35,00,00,000*
Issued, Subscribed and paid-up	
3,04,00,000 Equity shares of Rs.10/- each fully paid-up	*30,40,00,000*

The present Share Capital of Zinger / 11th Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
65,00,000 Equity Shares of Rs. 10/- each	*6,50,00,000*
Issued, Subscribed and paid-up	
62,80,750 Equity Shares of Rs. 10/- each fully paid-up	*6,28,07,500*

The present Share Capital of VPL / Transferor company is as under:-

Particulars	*Amount in Rupees*
Authorized	
30,00,000 Equity Shares of Rs. 10/- each	*3,00,00,000*
Issued, Subscribed and paid-up	
50,000 Equity Shares of Rs. 10/- each fully paid-up	*5,00,000*

31.1. In Part III of the Scheme of Amalgamation, Transfer of undertakings / Assets and liabilities of the Transferor Companies are mentioned in Para 4.1 to 4.5 as under (Page 134 and 135 of the paper book) :

"4. TRANSFER OF UNDERTAKINGS/ ASSETS AND LIABILITIES OF THE TRANSFEROR COMPANIES

4.1 With effect from the Appointed Date, the entire business and whole of the undertakings of the Transferor Companies including all assets whether movable or immovable, tangible or intangible, real or personal, in possession or reversion, corporeal or incorporeal of whatsoever nature, wheresoever situated including buildings, offices, marketing offices liaison offices, furniture, fixtures, office equipment, appliances, accessories, inventories together with all present and future liabilities (including contingent liabilities) and all cash and bank balances appertaining or relatable to the Transferor Companies and all permits, rights, entitlements, registrations for carrying on business operations and activities and other licenses including approvals, permissions, consents from various authorities including municipal/statutory bodies(whether granted or pending), receivables, benefit of any deposits, assets, properties or other interests, financial assets including investments made by way of equity by the Transferor & Transferee Companies in other body corporates which are not party to this scheme, all kinds of funds belonging to or utilized for the Transferor companies, bank accounts privileges, all other rights and benefits including any tax, direct or indirect including advance tax paid or any tax deducted in respect of any income received, exemptions, tenancies in relation to office and/or residential properties for the employees, memberships, lease rights, powers and facilities of every kind, nature and description whatsoever, rights to use and avail of telephones, internet servers, facsimile connections and installations, utilities, electricity and other services, provisions, funds, benefits of all agreements, contracts and arrangements, letters of intent memoranda of understanding, expressions of interest whether under agreement or otherwise and all other interests in connection with or relating to the Transferor Companies shall, under the provisions of sections 391 to 394 of the Act, and pursuant to the orders of the High Court or any other appropriate authority sanctioning this Scheme and without further act, Instrument or deed, but subject to the charges

affecting the same as on the effective Date, be transferred and/or deemed to be transferred to and vested in the Transferee company so as to become the properties and assets of the Transferee Company.

4.2 All the movable assets of the Transferor companies or assets otherwise capable of transfer by manual delivery or by endorsement and delivery, including cash in hand, shall be physically handed over by manual delivery or by endorsement and delivery, to the Transferee Company to the end and intent that the property therein passes to the Transferee company on such manual delivery or endorsement and delivery without requiring any deed or Instrument of conveyance for the same and shall become the property of the Transferee Company accordingly.

4.3 With effect from the Appointed Date, all debts, liabilities, contingent liabilities, duties and obligations of the Transferor Companies, as on the Appointed Date whether provided for or not in the books of accounts of the Transferor Companies, and all other liabilities which may accrue or arise after the Appointed Date but which relates to the period on or upto the Effective Date, shall, pursuant to the orders of the High Court or such other competent authority as may be applicable under section 394 and other applicable provisions of the Act and without any further Act or deed, be transferred or deemed to be transferred to and vested in and assumed by the Transferee Company, so as to become, as from the Appointed Date the debts, liabilities, contingent liabilities, duties and obligations of the Transferee Company on the same terms and conditions as were applicable to the Transferor companies.

4.4 It is hereby clarified that all assets and liabilities of the Transferor companies shall be transferred at values appearing in the books of account of the Transferor Companies as on the Appointed Date which are set forth in the closing balance sheet of the Transferor Companies as of the close of business hours on the date immediately preceding the Appointed Date.

4.5 Part III of the Scheme has been drawn up to comply with the conditions relating to "Amalgamation" as specified under section 2(1B) of the Income-tax Act, 1961. If any terms or provisions of the Scheme is/are inconsistent with the provisions of section 2(1B) of the Income tax Act, 1961, the provisions of section 2(1B) of the Income-tax Act, 1961 shall prevail and the Scheme shall stand modified to the extent necessary to comply with Section 2(1B) of the Income-tax Act, 1961. Modifications will however, not affect the other parts of the Scheme.

32. As per clause 5 of the Scheme of Amalgamation, the transferee company namely, Vertex Projects Limited in consideration of transfer undertaking had agreed to allot the equity shares @ Rs.10/- to the shareholders of the transferor company, in the following manner :

The summary of consideration is mentioned as under :

Blue Streak"/ 1st First Transferor Company	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in "Blue Streak"/ 1st First Transferor Company*
Caspan/2nd Transferor company.	*M/s. Vertex projects Limited shall allot 17319650 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members*
Casuarina/3rd Transferor company)	*M/s. Vertex Projects Limited shall allot 288800 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Casuarina/3rd Transferor company)*
GVK Energy/4th Transferor company).	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members*
GVK Hydel/5th Transferor Company).	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in GVK Hydel/5th Transferor Company).*
Marwell/5th Transferor company	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Marwell/5th Transferor company*
Metro/7th Transferor company	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Metro/7th Transferor company*
Plateau/8th Transferor company	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Plateau/8th Transferor company*
Trinity/9th Transferor company	*M/s. Vertex Projects Limited shall allot 10000 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Trinity/9th Transferor company*
Vertex Infra/10th Transferor company	*M/s. Vertex Projects Limited shall allot 1013500 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Vertex Infra/10th Transferor company*
Zinger/11th Transferor company	*M/s. Vertex Projects Limited shall allot 6280750 equity shares of Rs.10/- each fully paid up in proportion to the shares held by the members in Zinger/11th Transferor company*

"5.1 Every member of the transferor company shall surrender their share certificate to the transferee company and obtain new share certificate.

5.2 The issue and said allotment of equity shares by the transferee company to the members of the transferor companies shall be done after cancellation of cross holding of investments made amongst the Transferor and Transferee Companies and further such issue of shares shall be carried out in accordance with the provisions of the Act.

5.3 Such equity shares to be issued and allotted by the transferee company to all the members of the respective transferor companies in term of clause 5 above shall rank parl passu in all respects, with the existing shares of the transferee company.

5.4 Upon this scheme becoming effective, the authorized share capital of Transferee company shall automatically stand increased without any further act, instrument or deed, by the authorised equity share capital of Transferor companies amounting to Rs.74,67,00,000 comprising of equity shares of Rs.10/-(Rupees Ten only) each.

5.5 The memorandum and articles of association of Transferee Company (relating to authorised share capital) shall without any further act, instrument or deed, be and stand altered, modified and amended, and the consent of the shareholders to the Scheme shall be deemed to be sufficient for the purpose of effecting this amendment, and no further resolution(s) under section 16, and section 94 and section 31 or any other applicable provisions of the Act would be required to be separately passed, as the case may be and for this purpose the stamp duty and fees paid on the authorised capital of Transferor Companies shall be utilised and applied to the increased authorised share capital of Transferee company and there would be no requirement for any other further payment of stamp duty and/or fee by Transferee Company for increase in the authorized share capital to that extent. Pursuant to the Scheme becoming effective and consequent upon the amalgamation of Transferor Companies into Transferee Company, the authorised share capital of Transferee Company will be as under:-

AUTHORISED SHARE CAPITAL	***(Amount in Rs.)***
7,46,70,000 Equity shares of Rs.10/- each	*74,67,00,000*

33. Shares held by various companies of which FMV was calculated by Assessing Officer as mentioned by the Assessing Officer in the order was to the following effect:-

3.9 The fair market value of shares should be determined in accordance with such method as may be prescribed. Rule 11UA prescribed the procedure for valuation of shares. The relevant portion of the Rule is reproduced as under:-

[(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-L) X(PV) (PE)

Where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

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 tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, 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;

PE=total amount of paid up equity share capital as shown in the balance sheet;

PV= the paid up value of such equity shares;

(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 such valuation.]

3.10 Accordingly, the fair market value of un-quoted shares held by Casurina Capital and Finance(P) Ltd is worked out as under:-

S.No.	*Name of the company*	*FMV of shares (A-L)/PEXPV*	*No.*	*Amount*	*Value*	*Difference in value*	*Difference in amount*
1	*Accura Constructions(P) Ltd.*	*48.95*	*74,000*	*8,88,000*	*12.00*	*36.95*	*27,34,331*
2	*Accura Estates(P.) Ltd.*	*46.85*	*70,000*	*8,92,500*	*12.75*	*34.10*	*23,87,313*
3	*Allied Estates(P.) Ltd.*	*42.96*	*70,000*	*8,92,500*	*12.75*	*30.21*	*21,15,023*
4	*Amtran Constructions(P) Ltd.*	*46.00*	*74,000*	*8,88,000*	*12.00*	*34.00*	*25,16,076*
5	*Anchor Estates(p) Ltd.*	*34.29*	*85,000*	*10,92,250*	*12.85*	*21.44*	*18,22,548*
6	*Bonanza Real Estates(P) Ltd*	*23.02*	*84,000*	*10,79,400*	*12.85*	*10.17*	*8,54,517*
7	*Classic Land Holdings(P) Ltd.*	*42.97*	*85,000*	*10,92,250*	*12.85*	*30.12*	*25,60,176*
8	*Consolidated Real Estates(P) Ltd.*	*67.00*	*40,000*	*5,10,000*	*12.75*	*54.25*	*21,70,104*
9	*Eagle Land Holdings(P) Ltd.*	*31.57*	*68,000*	*8,67,000*	*12.75*	*18.82*	*12,79,450*
10	*Fair Value Holdings(P) Ltd.*	*55.83*	*35,000*	*4,37,500*	*12.50*	*43.33*	*15,16,716*
11	*Fortune Real Estates(P) Ltd.*	*46.04*	*85,000*	*10,83,750*	*12.75*	*33.29*	*28,29,577*
12	*Mallikarjuna Estates(P) Ltd*	*50.36*	*68,000*	*8,84,000*	*13.00*	*37.36*	*25,40,518*
13	*Mallikarujna Finance(P) Ltd.*	*15.98*	*85,000*	*10,83,850*	*12.75*	*3.23*	*2,74,204*
14	*Marriot Land Holdings(P) Ltd.*	*37.03*	*84,000*	*10,71,000*	*12.75*	*24.28*	*20,39,908*
15	*Midas Estates (P) Ltd.*	*20.26*	*85,000*	*10,92,250*	*12.85*	*7.41*	*6,29,590*

16	*Oxford Land Holdings(P) Ltd.*	*95.10*	*10,000*	*1,25,000*	*12.50*	*82.60*	*8,25,991*
17	*Pace constructions (P) Ltd.*	*22.43*	*1,54,000*	*18,48,000*	*12.00*	*10.43*	*16,06,909*
18	*Pace Estates (P) Ltd.*	*30.19*	*83,000*	*10,58,250*	*12.75*	*17.44*	*14,47,110*
19	*Pinnacle Land Holdings(P) Ltd.*	*65.22*	*39,000*	*4,91,400*	*12.60*	*52.62*	*20,52,005*
20	*Raghavendra Land Holdings (P) Ltd.*	*28.50*	*84,000*	*10,79,400*	*12.85*	*15.65*	*13,14,292*
21	*Sheraton Estates(P) Ltd.*	*36.77*	*84,000*	*10,79,400*	*12.85*	*23.92*	*20,09,009*
22	*Vulcon Constructions (P) Ltd.*	*45.22*	*74,000*	*8,88,000*	*12.00*	*33.22*	*24,58,296*
					Total		*399,83,664*

3.11 The fair market value of un-quoted shares held by Metro Architects & Contractors(P) Ltd, is as under:-

Name of the company	*Vertex Infratech (P) Ltd.*
	As on 31-03-2013
Book Value of assets in the balance sheet reduced by TDS/tax paid(A)	*13247,55,484*
	1324766909-11425
Book value of liabilities excl capital/reserves/provision/contingent liabilities(L)	*9979,97,227*
	1324766909- (304000000+22769682)
Total amount of paid up equity shares(PE)	*3040,00,000*
Paid up value of shares(PV)	*10.00*
FMV of shares=(A+L/PE X PV	*10.75*
Share price fixed	
No.	*155,04,000*
Amount	*1547,29,920*
Value	*9.98*
Difference in value	*0.77*
Difference in amount	*119,16,791*
Amount to be considered	*119,16,791*

3.12 The fair market value of un-quoted shares held by Trinity Advisors(P) Ltd., is as under:-

Name of the company	*Vertex Infratech (P) Ltd.*		*GVK Energy Holdings Ltd.*
	As on 31-03-2013		*As on 31-03-2013*
Book Value of assets in the balance sheet reduced by TDS/tax paid(A)	*13247,55,484*		*5138,43,899*
	1324766909-11425		*5138,43,899*
Book value of liabilities excl	*9979,97,227*		*5070,78,075*

capital/reserves/provision/contingent liabilities(L)			
	1324766909-(304000000+22769682)		*513843899-(5000000+1765824)*
Total amount of paid up equity shares(PE)	*3040,00,000*		*50,00,000*
Paid up value of shares(PV)	*10.00*		*10.00*
FMV of shares=(A+L/PE X PV	*10.75*		*13.53*
Share price fixed			
No.	*138,82,500*		*2,35,000*
Amount	*1388,25,000*		*23,50,000*
Value	*10.00*		*10.00*
Difference in value	*0.75*		*3.53*
Difference in amount	*103,92,813*		*8,29,937*
Amount to be considered	*103,92,813*		*8,29,937*
Total	***112,22,750***		

3.13 The fair market value of un-quoted shares held by Vertex Infratech(P) Ltd., is as under:-

Name of the company		*GVK Energy Holdings Ltd.*
		As on 31-03-2013
Book Value of assets in the balance sheet reduced by TDS/tax paid(A)		*5138,43,899*
		5138,43,899
Book value of liabilities excl capital/reserves/provision/contingent liabilities(L)		*5070,78,075*
		513843899-(5000000+1765824)
Total amount of paid up equity shares(PE)		*50,00,000*
Paid up value of shares(PV)		*10.00*
FMV of shares=(A+L/PE X PV		*135.32*
Share price fixed		
No.		*2,55,000*
Amount		*22,18,499*
Value		*8.70*
Difference in value		*126.62*
Difference in amount		*322,87,203*
Amount to be considered		***322,87,203***

3.14 The fair market value of un-quoted shares held by Zinger Investments (P) Ltd., is as under:-

Name of the company		*GVK Projects & Technical Services*
		As on 31-03-2013
Book Value of assets in the balance sheet reduced by TDS/tax paid(A)		*142774,68,418*
		142774,68,418
Book value of liabilities excl capital/reserves/provision/contingent liabilities(L)		*128823,76,313*
		5114277468418-(401603000+993489105)

Total amount of paid up equity shares(PE)		*4016,03,000*
Paid up value of shares(PV)		*10.00*
FMV of shares=(A+L/PE X PV		*34.74*
Share price fixed		
No.		*187,50,000*
Amount		*1875,00,000*
Value		*10.00*
Difference in value		*24.74*
Difference in amount		*4638,39,182*
Amount to be considered		***4638,39,182***

3.15 As per the working, the fair market value of the shares acquired by the assessee is as under:-

S.No.	*Name of the company*	*Amount (Rs.)*
1	*Casurina Capital and Finance (P) Ltd.*	*3,99,83,664*
2	*Metro Architects & Contractors (P) Ltd.*	*1,19,16,791*
3	*Trinity Advisors(P) Ltd.*	*1,12,22,750*
4	*Vertex Infratech (P) Ltd.*	*3,22,87,203*
5	*Zinger Investments (P) Ltd.*	*46,38,39,182*
	Total	*55,92,49,590*

34. Undoubtedly, before amalgamating the companies, the separate valuation of the amalgamating companies has not been taken place or carried out by the assessee and if there was any such valuation, the same was not brought to our notice. The shareholders of the amalgamating companies are holding the individual shares in the said companies at face value Rs.10/- each and the shareholders of the said amalgamating companies, were allotted shares of the amalgamated company at face value of ₹ 10. The shares of the amalgamating companies along with the underlying assets (including quoted and unquoted shares, preferential shares etc.,) have been received as per the transfer scheme by the amalgamated company. The amalgamated company had not paid any fair market value of the assets received by it in the form of shares to the amalgamating companies.

35. In the present case, due to the scheme of amalgamation, the assessee received the shares of 11 amalgamating companies along with underline properties including the shares of various companies and in consideration thereof, had allotted the number

of shares at face value of Rs.10/- to various shareholders of the said 11 amalgamating companies. In this way / practice, not only, the transfer of 11 amalgamating companies have taken place but also the transfer of unlisted / listed shares / preferential shares below the market rate have taken place. The argument of the ld.AR is that there is no transfer of shares in the eyes of law, as there is absence of transferor and transferee and there is no receive of shares, whatever transfer of receive of shares happened that was in pursuance to the statutory approved scheme of amalgamation done by the Hon'ble High Court can not be accepted and is rejected for the reasons mentioned hereinabove and also for the reasons mentioned hereinbelow.

36. Under the scheme of section 56(2)(viia) of the Act, the requirement of law is that

a) there must be a company in which the public are not substantially interested;
b) the said company had received any property, being shares of a company in the previous year, in which public are not substantially interested.

37. The reading of section 56(2)(viia) makes abundantly clear that there is no requirement of transfer as argued by the ld. AR. The requirement under the provision is the receive of any property being the share of a company without or inadequate consideration which is less than the Fair Market Value.

38. Admittedly, the assessee is a company in which public are not substantially interested. Further, the assessee had received "any property" being shares of a company during the previous year relevant to the assessment year below the fair market value.

39. The ld.CIT(A) has misunderstood and misread the statutory provisions mentioned in section 56(2)(viia) of the Act. The ld.CIT(A) has wrongly concluded that the word “receive” used in section 56 only happens on account of transfer. Further, the ld.CIT(A) had held that the amalgamation is not a transfer and therefore, it will not form part of section 56(2)(viia) of the Act. The ld.CIT(A) has lost his sight to the writing on the wall specially mentioned in section 56(2) whereby it has specifically mentioned as under :

> ***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",***

40. By providing the above said, the statute sought to charge the income mentioned in section 56(2), without prejudice to the generality of sub-section (1). In fact, before introduction of section 56(2)(viia), the provisions were only applicable to the instances mentioned in section 56(2)(vii). By amendment, section 56(2)(viia) was introduced by the legislature thereby expanding the scope of statute and bringing the chargeability of any property being the shares, without in adequate consideration or consideration which is less than the fair market value within its purview. The intention of the legislature was manifest when it had only excluded clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47 of the Act. The legislature had deliberately not excluded section 47(vi) from the applicability of section 56(2)(viia) of the Act.

41. The ld.CIT(A) without applying his mind had come to the conclusion that the shareholding and shareholders were identical and even post amalgamation, the holders were the same and the shareholding was in the same ratio. The ld.CIT(A) has lost his sight to the provision of section 56(2)(vii) which contemplates that the receipt of any property being shares of an unlisted company in which public are not substantially interested by a company in which public are not substantially interested. It has nothing to do with the shareholding patterns by the shareholding companies and amalgamated companies. The ld.CIT(A) should have examined the applicability of section 56(2)(viia), in the light of the criteria laid down therein. In the present case, the assessee received the property being the shares of the "amalgamating companies" along with the shares held by these amalgamating companies. As mentioned hereinabove, the assessee company had received the property being the shares of amalgamating companies in which the public are not substantially interested, without consideration or a consideration which is less than the fair market value of such shares. In view of the above, the conclusion drawn by the ld.CIT(A) was without any basis.

42. The ld.AR for the assessee had relied upon the decision of Delhi Tribunal in the case of Aambey Valley (supra) Para 108.2 in support of its case. In our considered opinion, the said decision is not applicable to the facts of the present case and is clearly distinguishable. The Co-ordinate Bench of the Tribunal has not considered the scope of section 56(2) in its right earnest and have failed to considered the exceptions mentioned in the proviso to 56(2)(viia) of the Act. Once the statute unequivocally provides the inclusion of the income which falls within the purview of section 56(2)(viia), then the same cannot be excluded by interpreting that the transfer on account of amalgamation will not fall within the

purview of the said provision. What has been excluded from the applicability of section 56(2)(vii) have been succinctly mentioned in proviso which had only excluded clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47 of the Act. The addition of any other clause of section 47 in the exception of section 56(2)(viia) would amount to legislation. Undoubtedly, the Tribunal being the creation of statute cannot expand the scope of the charging provision by including or excluding any income which has not been stipulated by the Act. Further, in the said case of Aambe Vally (supra), the detailed valuation of the assets have been mentioned in the said order, however, in the present case, no such valuation has been brought to our notice which has been undertaken prior to amalgamation. In view of the above, the decision of the Tribunal in the case of Aambey Valley(supra) is of no use to the assessee.

42.1 The assessee had also relied upon the decision of the Ahmedabad Bench of the Tribunal in the case of Ozone India Limited reported 121 taxmann 192 which in our opinion is distinguishable and is not applicable to the facts of the present case. Firstly, the said decision is not on the issue before us and issue therein was covered on account of transaction excluded from the purview of section 56(2)(viia) by virtue of explanation and proviso to it. Lastly, the decision in the case of Marshall and Company (supra) is also not applicable as it was not rendered in the context of section 56(2)(viia) of the Act. In view of the above the finding of the ld.CIT(A) are set aside and the order of Assessing Officer invoking the provision of section 56(2)(viia) of the Act is restored. **Thus, ground No.2 of Revenue's appeal is allowed.**

GROUND NOS.3 AND 4

43. Having held that the Assessing Officer was right in invoking the provision of Section 56(2)(viia), we have to determine whether the amount charged by the Assessing Officer on account of receive of shares, was in accordance with law or not ? In this regard, the ld.DR had submitted that the ld.CIT(A) had granted the relief to the assessee on the technical grounds and has not given any finding as to the basis for making the deduction of Rs.55,92,49,590/- and Rs.5,14,80,679/- as the ld.CIT(A) refrained from deciding ground Nos.2(i), 2(ii), 3(i) and 3(ii) of the assessee's grounds of appeal before him. It was submitted that the ld.CIT(A) was duty bound to decide the grounds raised by the assessee.

44. Per contra, the ld.AR had drawn our attention to the written submissions filed before us which were reproduced elsewhere and it was submitted that the Assessing Officer had wrongly invoked the provisions of Rule 11UA(i)(c)(c) of the Rules.

45. We have heard the rival contentions of the parties and perused the material available on record. Admittedly, the ld.CIT(A) has not decided the grounds of the assessee on merit and had granted the relief to the assessee on technical ground. As is clear from our finding, hereinabove, the Assessing Officer was within his jurisdiction to invoke the provision of section 56(2)(viia), therefore, we deem it appropriate to remand back the present appeal to the file of ld.CIT(A) with a direction to decide the grounds raised by the assessee on merit. Needless to say that while deciding the grounds of the assessee on merit, ld.CIT(A) shall keep in mind the legal and factual submissions raised by the

assessee before us in support of its case. The ld.CIT(A) may, if necessary, seek the remand report from the Assessing Officer in accordance with law. **Thus, ground nos. 2 to 4 are allowed for statistical purposes.**

46. In the result, the appeal of Revenue is partly allowed for statistical purposes.

Order pronounced in the Open Court on 28th April, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, dated 28th April, 2023.
Yamini / SPS

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3	Pr.CIT-5, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order