<u>आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।</u>
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 4887/Mum/2013
(**निर्धारण वर्ष /** Assessment Year: 2010-11)
&

SA No. 192/Mum/2013
(Arising out of ITA No.4887/Mum/2013)
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

Sudhir Menon HUF 501, Swapnalok, Marve Road, Malad (West), Mumbai-400 064	**<u>बनाम</u>**/ Vs.	Asst. CIT-21(2), Bandra, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAPHS 2147 R		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri S. E. Dastur & Ms. Aarti Vissanji
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Surinder Jit Singh

सुनवाई की तारीख / **Date of Hearing**	:	19.12.2013
घोषणा की तारीख / **Date of Pronouncement**	:	12.03.2014

<u>आदेश / O R D E R</u>

<u>Per Sanjay Arora, A. M.:</u>

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-32, Mumbai ('CIT(A)' for short) dated 21.05.2013, dismissing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2010-11 vide order dated 14.01.2013.

The issue

2. The principal; rather, the sole issue arising in the instant appeal; the assessee not pressing its ground no.1 assailing the impugned assessment on the question of jurisdiction (which we find to have been, though assumed, not pressed even before the first appellate authority, withdrawing the objection vide letter dated 07.01.2013), is the validity in law of the assessment as income of the difference between the value of the shares allotted to the assessee and the consideration paid by it in respect thereof.

The facts

3. We may, to begin with, brief the facts, which are simple and undisputed. The assessee, holding 15,000 shares (as on 01.04.2009, the beginning of the relevant previous year) in a company by the name Dorf Ketal Chemicals Pvt. Ltd. ('DKCPL' for short), the entire (or almost the whole) capital in which is held by the family members of the assessee's karta's family, representing 4.98% of the share capital (3,01,316 shares), was offered 3,13,624 additional shares (which works to about 21 shares for each share held) at the face value rate of Rs.100/- each, on a proportionate basis. It subscribed to and was accordingly allotted 1,94,000 of those shares, on 28.01.2010, i.e., along with the other shareholders, who were allotted - on the same terms, not only the shares similarly offered to them but also that not subscribed to by the other shareholder/s, as 1,19,624 (313624 – 194000) shares by the assessee. The shares, as stated, were received by the assessee on 10.02.2010. As the book value of the shares of DKCPL as on 31.03.2009 was Rs.1,538/- per share, which is to be adopted as a measure of their fair market value (FMV) under the applicable rules (Rule 11U and r. 11UA), the Assessing Officer (A.O.), treating the difference of Rs.1,438/- per share as the extent of the inadequate consideration, i.e., in terms of section 56(2)(vii)(c) read with the relevant rules, toward the acquisition of additional shares, brought the same to tax there-under. The same being confirmed in appeal, the assessee is in second appeal before us.

Section 56(2)(vii)(c) – A Discussion

4.1 The issue is principally legal. The relevant provisions, inserted by Finance (No.2) Act, 2009 w.e.f. 01.10.2009, in their relevant part, read as under:

a) Section 2(24)(xv) of the Act reads as under:

'CHAPTER I
PRELIMINARY

Definitions.

2. In this Act, unless the context otherwise requires,—

(1) …………

(2) …………

(24) "income" includes—

(i) …………

(ii) …………

(xv) any sum of money or value of property referred to in clause (vii) of sub-section of section 56;'

b) Section 56(2)(vii) reads as under:

'CHAPTER IV
COMPUTATION OF INCOME FROM OTHER SOURCES
F.—Income from other sources

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:—

(i) …….

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

(*a*) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;

(*b*) any immovable property, without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

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

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

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

Provided that where the stamp duty value of immovable property ……

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

(*a*) from any relative; or

(*b*) on the occasion of the marriage of the individual; or

(*c*) under a will or by way of inheritance; or

(*d*) in contemplation of death of the payer or donor, as the case may be; or

(*e*) from any local authority as defined in the *Explanation* to clause (20) of section 10; or

(*f*) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(*g*) from any trust or institution registered under section 12AA.

Explanation. - For the purposes of this clause, -

(b) "fair market value" of a property, other than an immovable property, means the value determined in accordance with the method as may be prescribed.

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

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

(*ii*) shares and securities;

(*iii*) jewellery;

(*iv*) archaeological collections;

(*v*) drawings;

(*vi*) paintings;

(*vii*) sculptures; or

(*viii*) any work of art;'

Further, section 49 also stands simultaneously amended by inserting a new sub-section (4), providing that for the purpose of computing capital gains, if the transaction of receipt of an asset is subject to tax under clause (vii) of sub-section (2) of section 56, then the cost of acquisition of the asset shall be the stamp duty value or the FMV, where the asset is an immovable property or movable property as the case may be. This would avoid double taxation, i.e., on the same amount, on the transfer of the relevant capital asset.

Clearly, therefore, the section gets attracted whenever an individual or Hindu undivided family (HUF) receives without consideration a property (as defined) the FMV of which is in excess of Rs.50,000/-, or where at a consideration the difference between the FMV and such consideration exceeds the said amount. The first issue that confronts us is if the provision/s is at all applicable to a transaction as the one under reference; the assessee contending it to be only an issue of right shares by the issuing-company (DKCPL). *How could, it is asseverated, a provision brought on the statute to check bogus capital building or money laundering possibly apply to a case as a present one which is only a case of a rights issue, i.e., the issue of shares on rights basis, and which are ordinarily issued at a discount*? It would, going by the argument, be equally applicable to bonus shares, and which is ludicrous indeed, the ld. Authorized Representative (AR) would continue. Reference in this regard was made by him to the Budget Speech for 2004-05 on the insertion of section 56(2)(v) (reported at [2004] 268 ITR (St.) 22); Press Note No. 402/92/2006-MC (21 of 2009) issued on the insertion of section 56(2)(vii) (reported at [2009] 317 ITR (St.) 51); CBDT Circular No. 5 of 2010 dated 03.06.2010, explaining the provision of clause (vii) of section 56(2) inserted by Finance (No.2) Act, 2009 (reported at [2010] 324 ITR (St.) 293 at 319); Explanatory Memorandum of the Finance Bill, 2010 inserting clause (vii)(a) to section 56(2) (reported at [2010] 321 ITR (St.) 110 at pg.123); and CBDT Circular No.1 of 2011 dated 06.04.2011 explaining the said clause, which is effective from 01.06.2010. It was, according to him, a fit case for applying the ratio and the principles laid down by the hon'ble apex court in the case of *K.P. Varghese vs. ITO* [1981] 131 ITR 597 (SC) inasmuch as the apex court took into account all the relevant factors, including the purpose for which the relevant provision of section 52 was brought on the statute, as clarified by the official pronouncements preceding it or in this regard, invoking the rule of *contemporanea expositio* as well as the principles of construction. It, after noting, as pointed out by Lord Denning, that language is at best an imperfect instrument for the expression of human thought, referred to the words of Learned Hand that it must always be remembered that statutes have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning (at pg. 604).

4.2 We shall, before proceeding further, need to first resolve if the provision of section 56(2)(vii) includes the property under reference, i.e., as received by the assessee. This is as the word 'property' occurring therein is defined to mean capital assets as specified therein (vide *Explanation* to the provision). Though the same lists 'shares and securities', one of the objections raised by the assessee is that the shares come into existence only on their allotment. However, the right to acquire the shares at a concessional rate, which is what is sought to be annexed or targeted by the Revenue through the said provision, comes into effect on the passing of the necessary resolution by the Board of Directors (BOD) of the issuer-company. This is also pressed to support the argument of the provision being never intended to cover a transaction of this nature, i.e., where the shares are offered to the existing shareholders – though below their market value, on rights basis.

True, the shareholders get the right to acquire the additional shares on the passing of the board resolution, but the receipt of the property is only on their allotment, on which date the shares, a specified property, is in existence [refer: *Shree Gopal and Company vs. Calcutta Stock Exchange Ltd.* [1963] 32 Comp. Cas. 862 (SC) and *Khoday Distilleries Ltd. vs. CIT* [2008] 307 ITR 312 (SC) (176 Taxmann 142)], wherein it has been explained that allotment is generally neither more nor less than the acceptance by the company of the offer to take shares. All it means is appropriation out of the previously un-appropriated capital of a company of a certain number of shares to a particular person. Till such allotment the shares do not exist as such, and in a sense come into existence on their allotment. In this view of the matter, the plea of the rights under reference being not a property specified under the provision or the provision being sought to be applied by the Revenue to a non-existing property, is without basis. In fact, before us even the date of receipt - which itself implies that the property exists, i.e., whether on allotment (28.01.2010) or the receipt of shares (10.02.2010), was a bone of contention. This is rendered inconsequential inasmuch as both the dates fall during the relevant previous year; and being separated by a small time lag, even the valuation would not alter to any material extent, and which becomes a relevant consideration inasmuch as the valuation date under r. 11U(j) is the date of the receipt of the property. In our view though, the shares are received on their allotment. What stands received by the assessee subsequently on 10.02.2010 are the share certificates, i.e., the document evidencing its title thereto. The two are different, and the shares as well as the property therein vest in the assessee on the allotment of the shares, whereat the same stand constructively received; the payment of which has also been made by that date.

Coming back to the question posed, i.e., as to how could a transaction as the present one be possibly covered by section 56(2)(vii)(c), in our view the correct and the proper question to be asked in the matter instead is: *The transaction per se being ostensibly covered by the clear and unambiguous language of the provision, what is its import in a case as a present one*? Does it, for example, lead to any unintended or absurd results which, though apparently should not arise, given the clear and precise mandate of the provision, i.e., to treat gains by way of receipt of property, which are not explicable in terms of normal human conduct, as income from other sources of the year of receipt (of the relevant asset). The question being asked, on the other hand, rather than eliciting a correct answer – which is the purport of any question, obfuscates the issue. The section without doubt seeks to substitute the FMV as the normative basis for transactions involving the receipt of property by a person, being an individual or HUF. That is, it deems the same to be a proper measure of the arm's length price, which principle ought to guide or obtain in case of a transaction between two unrelated parties. Exceptions for transactions between relatives; on inheritance; on the occasion of marriage; in contemplation of death, etc. are provided, where this rule may not apply in the normal course, i.e., of human conduct, inasmuch as no consideration is predicated in such cases or, put differently, considerations other than financial/monetary come into play. To that extent the provision is well-founded and adequately excepted. The provision, beginning with section 56(2)(v) by Finance (No.2) Act, 2004, which had a threshold limit of Rs.25,000/-, as against the present Rs.50,000/-, has been gradually enhanced in scope over time to include gifts-in-kind and immovable property as well, with section 56(2)(vii) taking effect from 01.10.2009 onwards, phasing out sections 56(2)(v) and 56(2)(vi) by limiting their application to specified periods in the interregnum. In fact, developments continue unabated, and the provision is further strengthened and broadened, with Finance Act, 2010 including a firm/company among the eligible recipients, i.e., where the property involved is shares in unlisted companies, i.e., in which the public is not substantially interested, as the present one, excluding transactions of business reorganization, amalgamation, demerger, etc. per clause (viia). The same are explained as an anti-abuse measure, following the abolition of the Gift Tax Act, 1958, which it is well-settled, as also explained by the apex court in *Khoday Distilleries Ltd.* (supra), to, together with the Wealth Tax Act, 1957 and the Act, form an integrated code. While the Gift Tax Act had sought to bring to tax the shortfall in consideration in the hands of the donor, the present provision/s seek to bring the same to tax as income in the hands of the recipient of the relevant assets. The Revenue in view of the law providing for the FMV as the normative basis for the acquisition of the property, absolved of proving, a formidable, if not an impossible task by any standards, that the shortfall in the consideration is sourced by or on behalf of the recipient of the property, and is thus his income. It is in fact not difficult to visualize situations where through the medium of additional shares the controlling interest in a company or business or interest in property – movable or immovable, is passed on to another at considerations far below the going rate of the relevant or the underlying assets/interest. *Only a pro-rata allotment or, where not so, one that is adequately priced, would effectively ensure an exchange of the assets or interest therein at par values*. The provision, thus premised, is on a firm, cogent and sound footing.

We may, before we conclude our discussion on this aspect of the matter, dilate on the application of the provision to the transaction of the nature under reference. The provision, firstly, would not apply to bonus shares, and the argument alluding thereto arises only on account of misconception in respect thereof. Though the shares under reference are admittedly not bonus shares, we consider it relevant to dwell thereon, not only to meet the argument in their respect, made emphatically before us, but also to demonstrate the wholesomeness of the provision, which is in fact what was being sought to be impugned. Issue of bonus shares is by definition capitalization of its profit by the issuing-company. There is neither any increase nor decrease in the wealth of the shareholder (or of the issuing company) on account of a bonus issue, and his percentage holding therein remains constant. What in effect transpires is that a share gets split (in the same proportion for all the shareholders), as for example by a factor of two in case of a 1:1 bonus issue. Reference in this regard may be made to the decision in *CIT vs. Dalmia Investment Co. Ltd.* [1964] 52 ITR 567 (SC) as well as in *Khoday Distilleries Ltd.* (supra), wherein reference stands made to the former, also quoting there-from, besides *inter alia* to *Hunsur Plywood Works Ltd. vs. CIT* [1998] 229 ITR 112 (SC), where the same were referred to as 'capitalization shares'. *In other words, there is no receipt of any property by the shareholder, and what stands received by him is the split shares out of his own holding*. It would be akin to somebody exchanging a one thousand rupee note for two five hundred or ten hundred rupee notes. There is, accordingly, no question of any gift of or accretion to property; the share-holder getting only the value of his existing shares, which stands reduced to the same extent. The same has the effect of reducing the value per share, increasing its mobility and, thus, liquidity, in the sense that the shares become more accessible for transactions and, thus, trading, i.e., considered from the holders' point of view. We may though add a note of caution. There could be a case of bonus issue coupled with the release of assets (of the issuing company) in favour of the shareholders. The same would fall to be considered as dividend u/s. 2(22)(a) of the Act.

Findings

4.3 We may next examine if the provision, being ostensibly applicable, leads to any addition in the hands of the assessee whose shareholding gets – as a result of the transaction, in fact reduced from 4.98% to (as stated) 3.17%. The argument as well as the premise on which we found the issue of bonus shares as not applicable would, to the extent *pari materia*, apply in equal measure to the issue of additional shares, i.e., where and to the extent it is proportional to the existing share-holding. We may though, at the outset, clarify that the instant issue cannot be called a rights issue. Section 81 of the Companies Act, 1956 is not applicable to a private company (s.81(3)), so that it is firstly not obliged to issue shares to the existing shareholders only, and again, even so, on a proportionate basis. That apart, we state so as the scheme does not have a provision for the renunciation of rights by the existing shareholders. The same could thus at the option of the issuing company be offered for allotment to any other, i.e., whether existing shareholder or not. Thus, though the issue has elements of a right issue inasmuch as the offer is made in the first instance to the existing shareholders on the basis of their share-holding on proportional basis, the same cannot be strictly termed as one; the company appropriating that right, which could be offered to another. A rights issue, as informed by the ld. AR upon enquiry by the Bench, stands not defined either under the Companies Act or under the Securities Contracts (Regulation) Act, 1956. The company has, accordingly, correctly termed the issue, not satisfying all its parameters, as akin to a rights issue, before the ld. CIT(A), which the ld. AR was before us at pains to dislodge. Nothing, however, turns on the same, as would apparent from the foregoing discussion, and as we shall presently see in more detail. We say so as to the extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The Revenue argues otherwise, contending that the fall in the value of the existing holding, if any, is not to be taken into account or reckoning. The argument is equally misconceived, i.e., as that by the assessee *qua* the applicability of the provision to bonus shares. It fails to take into account the nature of the transaction. To exemplify, shares in the ratio (say) 1:1 are offered for subscription at the face value of Rs.100/- as against the current book value of Rs.1,500/- (say). The moment a right share is allotted, the book value shall fall to Rs.800/- per share. It is easy to see that the new share partakes a part of the value of the existing share, which is only on the basis of the underlying assets on the company's books. The excess (over face value), or Rs.1,400/-, gets apportioned over two shares as against one earlier, which is already the shareholders' property. This is also the basis and the premise of the decisions in the case of *Dhun Dadabhoy Kapadia vs. CIT* [1967] 63 ITR 651 (SC) and *H. Holck Larsen vs. CIT* [1972] 85 ITR 285 (Bom), relied upon and referred to by the parties before us. As long as, therefore, there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. There is, accordingly, no question of section 56(2)(vii)(c), though *per se* applicable to the transaction, i.e., of this genre, getting attracted in such a case. A higher than proportionate or a non-uniform allotment though would, and on the same premise, attract the rigor of the provision. This is only understandable inasmuch as the same would only be to the extent of the disproportionate allotment and, further, by suitably factoring in the decline in the value of the existing holding. In the context of the example cited, by taking the difference at Rs.700/- per share for such shares. We emphasize equally on a uniform allotment as well. This is as a disproportionate allotment could also result on a proportionate offer, where on a selective basis, i.e., with some shareholders abstaining from exercising their rights (wholly or in part) and, accordingly, transfer of value/property. Take, for example, a case of a shareholding distributed equally over two shareholder groups, i.e., at 50% for each. A 1:1 rights issue, abstained by one group would result in the other having a $2/3^{rd}$ holding. A higher proportion of 'rights' shares (as 2:1, 3:1, etc.) would, it is easy to see, yield a more skewed holding in favour of the resulting dominant group. We observe no absurdity or unintended consequences as flowing from the *per se* application of the provision of s. 56(2)(vii)(c) to right shares, which by factoring in the value of the existing holding operates equitably. It would be noted that the section, as construed, would apply uniformly for all capital assets, i.e., drawing no exception for any particular class or category of the specified assets, as the 'right' shares. *No addition u/s. 56(2)(vii)(c) would thus arise in the undisputed facts of the instant case, and the assessee succeeds*.

4.4 The foregoing arguments and premises would also meet and state the basis for our not accepting the Revenue's argument toward no cognizance being taken of the existing shareholding – on the strength of which only the additional shares are allotted to the assessee or the decline in their value consequent to the issue of additional shares in-as-much as the same are not the subject matter of receipt, i.e., to which the provision pertains and is restricted to. It stood further contended before us that the ratio of the decision in the case of *Dhun Dadabhoy Kapadia* (supra) would be no longer applicable, i.e., even in principle, so that the said decline would be of no consequence in view of the specific provisions being since incorporated under section 55 of the Act, providing for the cost of shares under such situations, as for example a nil cost for bonus shares. The capital asset received by the assessee (shares in the present case), it may be appreciated, are to be valued as on the date of its receipt. That is, it is only the asset received that is to be valued. In-as-much as therefore the value of the additional shares is derived - if only in part - from that of the existing shares, the decline in the value thereof cannot be excluded or ignored – though only by following the valuation method prescribed under the rules – in arriving at the property by way of additional shares received by the assessee. The provision of section 55(2)(aa) provides for the cost of a capital asset, being a share or security, which the assessee becomes entitled to subscribe to by virtue of his holding such a capital asset. In our view, the same, on the contrary, provides statutory support, i.e., in principle, to our decision in-as-much as it clarifies that the values of the two, i.e., the original and the additional financial assets (which is how the same are referred to in the said provision) are interlinked and, accordingly, a gain cannot be computed independent of each other. It is in fact in acknowledgment thereof that the Legislature has considered it proper and necessary to provide for determination of cost in such cases, i.e., for uniform application. The same though would operate for the purpose of computing capital gains, which would arise on the subsequent transfer of such assets. We have already noted an internal consistency between the two sets of provisions in-as-much as section 49(4) stands simultaneously incorporated to deem the value adopted or taken for the purpose of section 56(2)(vii) (or (viia)) as the cost of acquisition of the relevant asset (refer para 4.1). In fact, the argument becomes irrelevant in view of our decision holding that section 56(2)(vii) shall not have effect, irrespective of the value at which the additional shares are allotted, where and to the extent they are so on the strength of and against the existing shareholdings, made uniformly or subject to adequate pricing. Much was made before us of the Revenue not treating the transaction as a rights issue of shares, as well as of the power of the tribunal in entertaining such a plea, even where taken before it for the first time, including *qua* the admission of additional evidence. We have already clarified the same to be not a rights issue, i.e., in the strict sense of the term, also stating our reasons, on the basis of admitted facts, therefor. The plea is also rendered inconsequential in view of our afore-said decision. This would also meet the assessee's argument of it becoming, as a result of the transaction, poorer in-as-much as the value of his holding witnesses a decline after taking into account the payment made for the acquisition of the additional shares. The said argument thus, rather than detracting from lends further support to our decision. The assessee's argument, with reference to the shares in the resulting company received by a shareholder on demerger, which is without consideration, would thus also be of no moment. The same is again misconceived in-as-much as the shareholder only receives the value of his existing holding in the form of the shares in the resulting company. We have in fact already noted that these provisions, i.e., clause (vii), together with clauses (v) and (vi) preceding it, and clauses (viia) and (viib) following it, of section 56(2), exclude transactions of business reorganization, merger, demerger, etc. (refer para 4.2). As shall be noted, it is only the shares or interest in a company in which public is not substantially interested, arbitrage or leveraging of interest in which, being largely outside the public domain, that the provision/s seek to capture for tax purposes. A demerger stands, further, also specifically excluded from the definition of dividend per clause (v) of section 2(22).

4.5 We may next meet the various arguments advanced by either side. The assessee claims of section being not *per se* applicable as neither is there any transfer in its favour nor is the issuer-company the owner of the shares, which stand acquired by way of subscription. We are unable to appreciate the argument. *How else, we wonder, is the issued capital in a company supposed to be acquired*? The section nowhere stipulates 'transfer' as the prescribed mode of acquisition. The transfer of a capital asset is even otherwise a relevant consideration in respect of income by way of capital gains, chargeable u/s.45. A parallel, if at all, in-as-much as the provision, which is to be considered as valid, was required to be placed in perspective and within the scheme of the Act, could be drawn to the deeming provisions of its Chapter VI titled 'Aggregation of income and set off or carry forward of loss'. An investment or asset found not recorded, wholly or partly, in the books of account maintained by the assessee (for any source of income), and in respect of acquisition or ownership of which he is unable to furnish a satisfactory explanation, i.e., as to the nature and source of acquisition, the value thereof or the excess (unrecorded) value, as the case may be, is deemed as the assessee's income. The apex court in *Chuharmal vs. CIT* [1988] 172 ITR 250 (SC) explained that the provision of section 110 of the Indian Evidence Act, 1872, raising a presumption of ownership in favour of the person in possession (in-as-much as possession is a *prima facie* proof of ownership) is applicable under tax jurisprudence as well, so that the onus to show that he was not the actual owner is upon such a person. It, accordingly, found nothing amiss in the charge to tax as income, the assets, properly valued, where unexplained (or not satisfactorily explained) in terms of the nature and source of their acquisition. The principle stands in fact dwelt with and explained at length by it over a number of decisions even prior thereto. The receipt of money, speaking in the context of a credit entry appearing in the assessee's books of account, even as there was no provision corresponding to section 68 of the Act in the earlier 1922 Act, it explained, is itself an evidence against the assessee of being in receipt of income, so that the onus to show that it is not so is upon him (refer: *A. Govinda Rajulu Mudaliar v. CIT* (1958) 34 ITR 807 (SC); *Sreelekha Banerji vs. CIT* [1963] 49 ITR 112 (SC); *Kale Khan Mohammad Hanif vs. CIT* [1963] 50 ITR 1 (SC); *CIT v. Durga Prasad More* (1971) 82 ITR 540 (SC)). Section 68, on one hand, and sections 69/69A/69B/69C on the other are *pari materia*, both seeking explanation for the assets, being recorded in the first case and not or only partly so in the other. No doubt, the onus under the latter category of sections is on the Revenue. However, the onus on the Revenue is limited only to showing the assessee to be the owner or in possession of the relevant asset. In fact, even this is to be regarded as discharged where it is able to exhibit circumstances that lead to the inference of the assessee being the owner, even as clarified by the apex court in *K.P. Varghese* (supra) (also refer *C.K. Sudhakaran vs. ITO* [2005] 279 ITR 533 (Ker)). The receipt of an asset by the assessee, and in his own right, is, on the other hand, the very basis or the edifice on which the provision of section 56(2)(vii) rests, so that it proceeds on the basis or the footing of the burden of the Revenue being satisfied. The receipt of a capital asset is accordingly made the basis or the condition for the charge to tax as income, unless falling under any of the excepted categories, and which it would be noted is a valid basis u/s. 2(45) r/w s.5 of the Act. It is this in fact that had led us to state earlier of the receipt (of an asset) as having been adopted as the basis or the condition of deeming as income u/s. 56(2)(vii) (or clauses (v) and (vi)), and of the provision as being on a firm footing. What the provision essentially does is to widen the scope of the afore-referred provisions of Chapter VI, which is essentially a statutory recognition of the rules of evidence, even further. The explanation referred to therein is dispensed with where the receipt is in respect of a capital asset, as defined, and, further, does not fall under any of the excepted categories in-as-much as the same is regarded as not normative or outside the realm of accepted human behavior, based on preponderance of probabilities (of human conduct). To argue of the receipt as being a synonym for transfer, or of it as not flowing from its owner, is, thus, inconsistent, both in the context of the provision as well as its clear language. Reference in this context was also made by the ld. AR to section 122 of the

Transfer of Property Act, 1882 and section 25 of the Indian Contract Act, 1872. A transaction could be either with or without consideration. Consideration signifies a price, so that it is a case of transfer, which the impugned transaction is not, while if considered as without consideration, the transaction is void in law, being not a gift in-as-much as the company is not the owner of its shares. The argument seeks to support the contention that the transaction in order to qualify as valid in law has to be a case of transfer in-as-much as the consideration implies price, so that the word 'receipt' occurring in section 56(2)(vii) has to be read as a synonym for or equated with 'purchase' or 'transfer'. The shares under question being not acquired through transfer, the transactions falls outside the ambit of section 56(2)(vii). We are completely unimpressed. The argument, attractive on its face, fails miserably the moment the nature of the transaction, i.e., the allotment of the shares (through which the relevant shares stand acquired or received), upon which only the shares come into existence and are received by the allottee thereof, is clarified. The same has been subject to dilation and elucidation by the apex court *inter alia* in *Shree Gopal and Company* (supra) and *Khoday Distilleries Ltd.* (supra) relied upon by the parties themselves before us. As stated explicitly in the former case, a share is a chose in action. A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. A share does not exist prior to its allotment, and in that sense comes into existence only on its allotment. Allotment of a share is only the appropriation of the authorized share capital, being un-appropriated, to a particular person. In nutshell, the difference between the issue of a share to a subscriber and a purchase of a share from an existing shareholder is the difference between the creation and transfer of a chose in action (refer pgs.865, 866). *How could, therefore, purchase be equated with allotment*? In fact, the purchase or transfer implies existence of a property, while the shares, where out of un-appropriated capital, come into existence only on their allotment. It becomes, thus, in the context of the provision, completely irrelevant and of no consequence that the shares in the issuing company are not its property, and that it does not become, therefore, any poorer as a result of the allotment of shares therein.

'Receipt' is a word or term of wide import, and would include acquisition of the subject matter of receipt – defined capital assets in the present context, by modes other than by way of transfer as well. We find no reason to limit or restrict the scope of the word 'receipt' in the provision to cases of 'transfer' only. Doing so would not only amount to reading down the provision, which the tribunal is even otherwise not competent to, being not a court of law, but reading it in a manner totally inconsistent with the unambiguous language and the clear intent (of the Legislature) conveyed thereby, but also its context as well as the drift of section, in complete violence thereto.

In the case of issue of bonus shares (as also on demerger), no property is being conveyed to the shareholder in-as-much as the property therein is comprised in the existing shareholding of the allottee. There is as such no case of a gift; the shareholder only receiving his own property, albeit in a different form. A 'right' share, on the other hand, is placed differently. To the extent it is allotted to a person not against his existing shareholding or, even so, albeit disproportionately, there is, depending on the terms of the allotment, which is the mode of acquisition and, thus, it's receipt, scope for value or property being passed on to him, which cannot be said to be in lieu of or as *recompense* of his existing property. *The section would, as afore-stated, therefore, apply, though the extent of income, if any, chargeable there-under would depend on the actual allotment and its terms*. Thus, considering the assessee's case from this angle also leads us to the same conclusion.

We may at this stage advert to the erstwhile section 52 of the Act or, to put it more precisely, its interpretation as made by the apex court in *K.P. Varghese* (supra), on which heavy reliance was placed by the ld. AR before us. We have perused the judgment; its ratio/s being binding on us. Though the apex court per a detailed judgment discussed various aspects of the matter, referring to the official pronouncements explaining the provision, in the final analysis, what prevailed with it is that the provision, as being read and applied by the Revenue, exceeded its mandate. *The provision is not a charging section*. As explained by it, it does not create any fictional receipt; does not deem as received something which is in fact not received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee, and brings to tax the capital gains on the footing that the FMV of the capital asset represents the actual consideration received by the assessee as against the consideration declared or disclosed by him. Accordingly, once it is established that the consideration actually received by the assessee is more than what is declared or disclosed by him, the Revenue is not required to show the precise extent of the understatement or the exact consideration received by the assessee – an impossible task in most cases. That is to say that unless, therefore, the primary condition of an inaccurate or incorrect disclosure or declaration; rather, an under-statement thereof, was satisfied, the section, which again provided a surrogate measure in the form of the FMV of the relevant asset, as does section 56(2)(vii), could not be invoked. Not doing so would, in its words, would be to read into the statutory provision something which is not there. It is not difficult to see that the Revenue, in applying the provision of section 52(2) in the manner it did, i.e., without establishing the condition of its invocation, was putting the cart before the horse. *The process led to a fundamental flaw in-as-much as it proceeded to estimate – which is a process integral to assessment – something (consideration) that could not be said to exist, i.e., created a fictional receipt, which was beyond its scope*.

One could possibly argue that section 52(2) being no longer on the statute, all this is not relevant, and the abiding legacy of the decision, and the purpose for which it was referred to was *inter alia* its relevance on the principle of *contemporanea expositio* and the statement of the objects per the extant official communications. The argument is, in the context of the present case, misconceived. This is as we have firstly pointed out a fundamental infirmity in the interpretation placed on or accorded to section 52(2) by the Revenue. Section 52(1), which again only enabled the A.O. to substitute the FMV as the consideration as against that declared by the assessee on transfer, subject to his having reason to believe that the transfer was effected with the object of evading or reducing the liability to tax u/s.45, was not adversely commented upon by the apex court. It is easy to see that all the official pronouncements notwithstanding, the apex court would or rather could not have opined in the manner it did but for the fundamental flaw observed by it in-as-much as the provision has to be read within its legal framework, giving a purposeful meaning to its clear words. *No such infirmity inflicts the section under reference or has been shown to exist*. We have already found receipt as a valid basis for deeming income, which is supported by the principles of common law jurisprudence. That 'income' under the Act is a word or term of wide import, and would include anything which comes in or results in gain is also well settled. The provision casts exceptions, again as afore-noted, where in the normal course considerations other than financial/monetary are at play, so that it applies to commercial transactions for which an arm's length basis can be reasonably regarded as the normative basis for conducting or concluding transactions. Further, even the official pronouncements, which are not to be read as one does a statute, do not in any manner detract from or operate to dilute the rigor of the section; the same itself explaining it as an anti-abuse measure. The reason is not far to fathom; it being well neigh impossible, even as observed by the apex court in *K.P. Varghese* (supra), for the Revenue to exhibit the actual consideration that exchanges hands. *Why, this in fact is the basis for the transfer pricing legislation, which is by now an integral part of the tax law of most countries*. That the provision may operate harshly in some cases is no reason for it to be not read in the manner it ought to be, i.e., given its clear mandate. The proposition, apart from being well settled, has been sought to be advanced before us by the Revenue by relying on the decision in the case of *Turner Morrison & Co. Ltd. vs. CIT* [1953] 23 ITR 152 (SC). In fact, even the assessee's case is limited to right shares only, and does not speak of any other capital asset covered by the provision, including shares and securities. We have already explained that to the extent the shares subscribed to are right shares, i.e., allotted pro-rata on the basis of the existing share-holding (as on a cut-off date), the provision, though *per se* applicable, does not operate adversely. A disproportionate allotment, which cannot, therefore, strictly be regarded as right shares, though could be allotted under a rights issue, would however invite the rigor of the provision, i.e., to that extent. It is to be noted that the fresh shares rank *parri passu* with the existing holding and, therefore, we see no reason why the provision shall not apply with full force in such cases.

Conclusion

4.6 We may finally discuss the issue from the stand point of interpretation of statutes, which was urged before us with reference to some case law, viz., *C.W.S. (India) Ltd. vs. CIT* [1994] 208 ITR 649 (SC); *CIT vs. J. H. Gotla* [1985] 156 ITR 323 (SC); *Addl. CIT vs. Surat Art Silk Cloth Manufacturers Association* [1980] 121 ITR 1 (SC), besides in the case of *K. P. Varghese* (supra), also concluding the matter. The gist thereof, or atleast to a substantial extent, stands in fact already brought out in the earlier part of this order while discussing the several arguments urged before us. All that is logical relevant, yielding insight into the purpose and object for and toward which the amendment stands brought, should be admissible. A *casus omissus* cannot be readily inferred, and the courts eschew supplying the same except in the case of clear necessity. The court cannot read anything into a statutory provision which is plain and unambiguous; a statute being an edict of the Legislature. The language employed in a statue is a determinative factor of the legislative intent, the foundational basis of any interpretation, is to be found from the words used by the Legislature itself. The principle is in fact well settled and trite (refer *Padmasundra Rao and others vs. State of Tamil Nadu* [2002] 255 ITR 147 (SC); and *Britannia Industries Ltd. vs. CIT* [2005] 278 ITR 546 (SC). As explained in *Surat Art Silk Cloth Mfrs. Assoc.* (supra) (pg.17), the consequences cannot alter the meaning of a statutory provision where such meaning is plain and unambiguous, though could certainly help to fix its meaning in case of doubt and ambiguity. The amendment/s under reference, as explained in the Finance Minister's speech itself while introducing the provision, follows the abolition of the Gift Tax Act which, as also observed earlier, sought to bring the difference in the consideration to tax in the hands of the donor. That the said Act, together with the Wealth Tax Act and the Act form an integrated code is well settled. 'Income' under the Act, it is again well settled, is a word of widest amplitude, and could include gains derived in any manner. To our mind, therefore, the provisions/s, though no doubt a charging provision, is an extension of the deeming provisions of Chapter VI of the Act, laying down the statutory rules of evidence, incorporating the principles of common law jurisprudence. In sum, as also in fine, the provision, brought as an anti-abuse measure, only seeks to tax the understatement in consideration as the income in the hands of the recipient (of the corresponding asset) as against the donor in the case of Gift Tax Act, since no longer in force, particularly considering the burden that the Revenue would otherwise be called upon to discharge, i.e., to prove otherwise, even as the receipt of the asset by the assessee is established. No ambiguity or absurdity or unintended consequence has been either observed by us or brought to our notice, even as we have endeavoured to examine the provision from all angles; it being well excepted, also excluding cases of business reorganization. The provision is well founded, even as it is settled that hardship in a case would not by itself lead to supplying *casus omissus* or reading down the provision. In fact, we have also observed the same to be in accord with the trend in the legislative field in the recent past where in view of the increasing complexity of business or economic transactions, fair market value, also providing rules for its determination, is being increasingly adopted for uniform application as a basis for commercial transactions for the purpose of taxing statutes. The reliance on the argument made in this regard would thus be of no assistance to the assessee. No property however being passed on to the assessee in the instant case, i.e., on the allotment of the additional shares, no addition in terms of the provision itself shall arise in the facts of the case. We accordingly answer the question raised at the beginning of this order (refer para 2) in the negative.

Decision

5.1 In view of the foregoing, therefore, the provision of s. 56(2)(vii)(c), in the facts and circumstances of the case, shall not apply and, hence, the amount of Rs.27,89,02,160/- cannot be assessed as income in the hands of the assessee on the ground of inadequate consideration. This answers ground nos. 2 to 4. Ground # 1 stands dismissed as not pressed. We decide accordingly.

5.2 The assessee has also moved a stay application. In view of our having decided the appeal itself, the same becomes infructuous.

Result

6. In the result, the assessee's appeal is partly allowed and stay application is dismissed as infructuous.

Order pronounced in the open court on March 12, 2014

Sd/-	Sd/-
(D. Manmohan)	(Sanjay Arora)
उपाध्यक्ष / Vice President	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 12.03.2014

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**