आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

(***Convened through Virtual Court***)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं. / I.T.A. Nos. 2081/Ahd/2018
WITH
CROSS OBJECTION No. 103/Ahd/2019
(**निर्धारण वर्ष /** Assessment Year : 2013-14)

DCIT Circle 3(1)(2), Ahmedabad	**बनाम**/ Vs.	**M/s. Ozone India Ltd.** 301/1, Parshwa, Opp. Rajpath Club, S. G. Highway, Bodakdev, Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACO9588N		
(**Appellant / Respondent**)	..	(**Respondent / Cross Objector**)

राजस्व की ओर से/**Revenue by :**	Shri Virendra Ojha, CIT.D.R.
अपीलार्थी ओर से /**Assessee by :**	Ms. Nupur Shah, A.R.

सुनवाई की तारीख / **Date of Hearing**	03/03/2021
घोषणा की तारीख /**Date of Pronouncement**	13/04/2021

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue. The assessee has filed cross objection in the appeal of the Revenue against the order of the Commissioner of Income Tax (Appeals)-9, Ahmedabad ('CIT(A)' in short) dated 18.07.2018 arising

in the assessment order dated 30.03.2016 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2013-14.

2. The appeal of Revenue and cross objection of assessee emanates from common issue and thus disposed off together.

3. To begin with, we shall take up Revenue appeal for adjudication purposes.

ITA No.2081/Ahd/2018 – Revenue's appeal- AY 2013-14

4. Grounds of appeal raised by the Revenue read as under:

> *"(a) The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs 43,99,66,156/- made by the assessing officer u/s 56(2)(viib) of the Act on account of difference of net asset value of Rs.54,21,16,156/- credited in the books without appreciating the factual backdrop of the case in which the addition was made by the Assessing Officer.*
>
> *(b) The Ld.CIT(A) has erred in law and on facts in not appreciating the fair market value of shares of assessee company @ Rs.6.81/- per share based on which addition was correctly made by the assessing officer.*
>
> *(c) The Ld CIT(A) has erred in law and on facts in deleting the addition of Rs 1,49,137/- made by assessing officer on account of disallowance of Architect fees attributable to the unsold inventory."*

5. Briefly stated, the assessee company filed its return of income for AY 2013-14 in question which was subjected to scrutiny assessment. In the course of assessment proceedings, it was gathered by the AO that one M/s. Kalavir Estate Pvt. Ltd. (KEPL) amalgamated with the assessee company under the scheme of amalgamation. The object of amalgamation was stated to achieve better utilization of resources, higher return on capital, economy of

scale, optimum utilization of available resources and effective control for better profitability. The scheme of amalgamation of KEPL with assessee company was approved by the Hon'ble Gujarat High Court vide order dated 07.09.2012 effective from 01.04.2012 whereby all the assets and liabilities of M/s. KEPL were vested with the assessee company as per scheme placed before the Hon'ble Court. Hence, on coming into effect of the scheme on 01.04.2012, all the assets except land and all the liabilities of KEPL were taken in the books of assessee at book value and land parcels were taken at revalued price. As stated, the transaction of amalgamation has been accounted under the 'pooling of interest' method as prescribed by the Accounting Statndard-AS-14 issued by the Institute of Chartered Accountants of India (ICAI) consequent upon which the difference between net assets of KEPL vested with assessee company and value of shares of assessee company correspondingly issued was accounted for as capital receipts and treated as capital reserve. The excess value of net assets *vis-à-vis* corresponding value of shares issued towards consideration for amalgamation was thus credited in the books of assessee company as 'capital reserve'. The assessee company has accounted for the land so acquired as 'trading asset' of the assessee company.

5.1 In this backdrop, the AO noted that on the date of amalgamation, the issued and paid up capital of assessee company stood at Rs.21,00,000/- divided into 2,10,000 equity shares of Rs.10/- each and that of KEPL stood at Rs.5,00,000/- divided into 50,000 equity-shares of Rs.10/- each. Pursuant to scheme of amalgamation, shareholders of KEPL got 300 equity shares of assessee company for each share of KEPL towards consideration for transfer of its assets and liabilities. The AO observed that the amalgamated company i.e. assessee received assets worth

Rs.60,26,55,864/- and liabilities worth Rs.6,05,39,708/- of the amalgamating company i.e. KEPL. Thus, assessee received net assets worth Rs.54,21,16,156/- against corresponding issue of shares having face value of Rs.15,00,00,000/- to the shareholders of KEPL. The AO thus observed that assessee has received excess net asset worth Rs.39,21,16,156/- on account of amalgamation which was credited by it as capital reserve of the amalgamated company.

5.2 In the opinion of the AO, the excess value of assets so received by assessee company was liable for taxation in the hands of the assessee being excess consideration for issue of its share. A show cause was accordingly issued and reply thereon filed by the assessee was also recorded. However, the AO did not find merit in the defense propagated by the assessee in its reply. The AO observed that the accounting treatment given by the assessee is in departure with AS-14 issued by the ICAI. The AO simultaneously observed that the assessee is liable to tax on excess consideration received *qua* face value of shares issued under the head 'income from other sources' in terms of s.56(2)(viib) of the Act. It was thus essentially observed that the aggregate consideration in the form of net assets (i.e. total assets minus total liabilities acquired) received by the assessee company for issue of its shares which exceeds its fair value is liable to tax in terms of Section 56(2)(viib) of the Act. For determination of fair value of shares of issuing company i.e. assessee, the AO resorted to Rule 11UA of the Income Tax Rules. The fair value was computed at Rs.6.81 per share as against the face value of Rs.10/- per share issued to KEPL on amalgamation as noted above. The total fair market value of shares issued to shareholders of KEPL was consequently worked out at Rs.10,21,50,000/- (1,50,00,000 x 6.81). The AO thus concluded that on amalgamation, the assessee is benefitted by receiving net consideration worth

Rs.54,21,16,156/- in the form of excess value of assets of KEPL against which shares carrying intrinsic value Rs.10,21,50,000/- (face value of Rs.15Crore) were issued to the shareholders of KEPL i.e. amalgamating company. Consequently, the AO was of the opinion that assessee is benefitted by surplus money worth numerically worked out at Rs.43,99,66,156/- on such amalgamation for which the assessee is susceptible to taxation under s.56(2)(viib) of the Act.

5.3 A reference under s.144A of the Act was made to the superior authority i.e. Addl. CIT for issuing suitable directions in this regard. On reference so made, the Addl. Commissioner of Income Tax commenced proceedings under s.144A of the Act and ultimately held that Section 56(2)(viib) of the Act is triggered in the facts of the case on the excess consideration/asset worth received by the assessee company in lieu of corresponding issue of shares. The Addl. CIT consequently directed the AO to cover the excess consideration so received as income in the ambit of taxation on the touchstone of Section 56(2)(viib) of the Act. The taxable income of the assessee was consequently increased to the extent of Rs.43,99,66,156/- towards alleged excess consideration.

6. Aggrieved by the additions made by the AO under the shelter of Section 56(2)(viib) of the Act on account of alleged excess consideration received by the assessee in the form of assets and liabilities of amalgamating company over fair market value of shares issued to KEPL, the assessee preferred appeal before the CIT(A). The CIT(A) in the course of the appellate proceedings before him, took note of the observations made by the AO as well as the explanations and legal contentions made on behalf of the assessee for inapplicability of Section 56(2)(viib) of the Act in the

facts of the case. The CIT(A) found himself in agreement with the detailed submissions made by the assessee on inapplicability of s.56(2)(viib) of the Act in the facts of the case. Consequently, the CIT(A) reversed the action of AO and deleted the impugned additions. The relevant operative para of the order of the CIT(A) is reproduced hereunder:

> *"4.7. I have considered the assessment order and arguments of the appellant. The appellant company has issued 1.5 lac shares to the shareholders of M/s. Kalavir Estate Pvt. Ltd. as per the amalgamation scheme approved by Honourable High Court. The shares have been issued at the face value of Rs. 107- per share in the ratio of 1 to 300 shares held by the shareholders in the amalgamating company. The relevant clause of scheme of amalgamation as approved by Honourable Gujarat High Court vide order dated 07/09/2012 in company petition No. 89 of 2012 is as under:-*
>
> > *"**Clause - 9***
> >
> > *Upon the transfer of undertaking of KEPL to OIL and the vesting of the said assets and liabilities and the amalgamation becoming effective in terms of this Scheme, then, in consideration of the amalgamation and subject to the provisions of this Scheme, OIL, shall, without any further act, application and deed, issue and allot to the, equity shareholders of KEPL 300 equity shares in OIL of Rs. 10/- each, credited as fully paid-up in the capital of OIL, for every equity shares of the face value of Rs. 10/- each held by the shareholders in KEPL"*
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> *4.8. The Clause - 10 of the scheme of amalgamation for accounting of assets and liabilities of M/s. Kalavir Estate Pvt. Ltd. (KEPL) in the appellant company (OIL) has been mentioned as under: -*
>
> > *"10.1. Upon the coming into effect of the scheme, OIL shall record all assets (except land) and liabilities vested in OIL pursuant to the scheme at their book values. The OIL shall record in its books the fair market value of the land with resultant corresponding accounting effects as per GAAP and Accounting Standard (AS)-14.*
> >
> > *10.2. OIL shall credit to its Share Capital Account in its books of account the aggregate face value of the new shares issued by it to the members of KEPL pursuant to this Scheme".*

The appellant company has discharged the consideration of amalgamation by issuing 1.5 lac equity shares of face value of Rs. 10/- each as per the amalgamation scheme. The AO and Addl. CIT have invoked the provisions of section 56(2)(viib) on the issue of share without appreciating the intent and letter of section 56(2)(viib). Section 56(2)(viib) has been introduced by the Finance Act, 2012 w.e.f. 01/04/2013 to deter the generation and use of unaccounted money and taxing the share premium in excess of market value which is evident from Honourable Finance Minister's budget speech at the time of introduction of section 56(2)(viib). The explanatory memorandum to the provisions of Finance Bill 2012 and Finance Act, 2012 has explained the provisions as under :-

> ***"SHARE PREMIUM IN EXCESS OF FAIR MARKET VALUE TO BE TAKEN AS INCOME :***
>
> *Section 56(2) provides specific category of income that shall be chargeable to income tax under the head income from other sources. It is proposed to insert a new clause in Section 56(2). The new clause will apply where a company not being a company in its public are substantially interested receives in any previous year from any person being a resident any consideration for issue of shares, in such a case, if the consideration received for the issue of shares exceeds the face value of such shares, the aggregate consideration received for such share as exceeds the fair market value of the share shall be chargeable to income tax under the head income from other sources...."*

It is therefore, legislative intent to cover the cases of closely held company who receives disproportionate amount while issuing shares over and above the face value of share by way of share premium, in the instant case, shares have been issued at the face value and there is no share premium received, therefore, there is no question of applicability of section 56(2)(viib). In fact, in the scheme of amalgamation, consideration is paid by the amalgamated company in the form of issue of share capita! rather than consideration being received by the appellant company as understood by the AO / Addl. CIT. The persons to whom shares have been allotted have not paid anything for allotment of shares. The shares have been allotted in consideration of their shareholding in. the amalgamating company.

4.9. Section 2(1B) of Income Tax Act, 1961 defines the meaning of amalgamation as merger of one or more company with another company or merger of two or more company to form one company in such a manner that –

1) 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.

(2) All the liabilities of the amalgamating company or companies immediately before the amalgamation becomes the liabilities of the amalgamated company by virtue of the amalgamation.

(3) Shareholders holding at least three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamated company or its nominee) ***becomes the shareholders of the amalgamated company by virtue of the amalgamation.***

4.10. The Accounting Standard - 14 specifically deals with the accounting for amalgamation and treatment of any result in difference arising on account of amalgamation in the books of transferre company. Based on the proprietary of the transaction, the standard classifies the amalgamation as under:-

- *All assets arid liabilities of the transferor company become, after amalgamation, the assets, and liabilities of the transferee company.*
- *Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before amalgamation by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of amalgamation.*
- ***The consideration is discharged by the transferee company wholly by the issue of equity shares only, except that cash may be paid in respect of any fractional shares.***

As per the section 2(1B) of the I. T. Act, 1961 and Accounting Standard - 14, the shareholders of amalgamating company become shareholders of appellant company by virtue of amalgamation and the consideration is to be discharged by the amalgamated appellant company by issue of share but not the other way around as understood by the AO.

4.11. The appellant company has received assets of Rs.6,10,39,708/- as per book value of M/s. Kalavir Estate Pvt. Ltd. along with its liability on amalgamation. The amalgamating

company has transferred all assets as per book value except the land of Rs.5.38 crore which was revalued at Rs.59.5 crore and accounted at market value. The amalgamated company had assets over liability of only Rs.8,59,449/- in the form of share capital and reserve and surplus at the time of amalgamation. The capital account reserve of Rs.39,21,16,156/- was credited on account of revaluation of land as balancing figure as per the scheme of amalgamation and Accounting Standard - 14. Capital reserve account which is notional by no stretch of imagination can be called as a share premium or consideration for issue of share. Therefore, section 56(2) (viib) has no applicability in the case of amalgamation on issue of shares at face value.

4.12. It is evident from Para - 4 of the assessment order that AO had initially proposed to tax the capital reserve of Rs.39,21,16,1567- on account of amalgamation, but subsequently invoked section 56(2) (viib) of the I. T. Act, 1961. I have examined the issue of taxability on revaluation of land and credit of capital reserve account as a balancing figure in the case of amalgamation from this point as well.

Appellant company but for the scheme of amalgamation approved by Honourable High Court transferring all assets except land at book value, was required to transfer all-assets including land at book value as per pooling of interest method prescribed in AS-14. In that case, assets over liability of amalgamating company would have been only Rs.8,59,449/- as against Rs.54,21,16,156/- accounted by appellant company which became the basis for invocation of Section 56(2) (viib) by AO. Therefore, the net asset over liability of Rs.54,21,16,156/- of amalgamating company is only due to revaluation of land and for accounting purposes, as land of book value of Rs.5.38 crore has been revalued at Rs.59.55 crore and taken as stock in trade. The Honourable Supreme Court in the case of Chain Rup Sampatram Vs. CIT [224 ITR 481] and CIT Vs. Hind Construction Ltd. [83 ITR 211] has held that putting the stock at market value does not and cannot bring in any real profit which is necessary for taxing the income. The Honourable Supreme Court in the case of CIT Vs. Birla Gwalior Pvt. Ltd. [89 ITR 266] and CIT, Bombay City 1 Vs. Shoorji Vallabhdas & Co. in 46 ITR 144 has laid down that it is the real income which is taxable under the Income Tax Act and not the notional one like on revaluation of assets. The Honourable Madras High Court in the case of CIT Vs. CIT Vs. M.CT.M Corporation Pvt. Ltd. [221 ITR 524] relying on the decision of Honourable Gujarat High Court in the case of CIT Vs. Leena Sarabhai [221 ITR 520] has held that in the scheme of amalgamation, ***shares are issued in lieu of shareholding in amalgamating company****, and therefore, there is no tax implication:-*

"8. In the case of CIT vs. Leena Sarabhai (1996) 221 ITR 520 (Guj), the assessee was a holder of shares in an amalgamating company. By a scheme of amalgamation, the assets of the amalgamating company as also its liabilities were transferred to the amalgamated company, which in turn, was obliged to issue and allot to the shareholders of the amalgamating company one equity share of the face value of Rs. 100 and two fractional certificates, each representing entitlement of l/10th of one equity share and one 11% redeemable bond of the face value of Rs. 100 in respect of one equity share of the amalgamating company. On these facts on a reference, the Gujarat High Court was requested to render its opinion on the question whether on amalgamation of a company, when the assessee received shares and bonds of the amalgamated company ***in lieu of her shareholding in the amalgamating company****, it was a transfer as contemplated under s.2(47). In view of a letter from the CIT stating that the Department in a similar case belonging to the same group had accepted that where the assessees had received shares and bonds because of amalgamation there was no transfer within the meaning of s.2(47), it was held that in the present case also there is no transfer as contemplated under s. 2(47) of the Act. Thus, according to the facts arising in that case, the Department accepted that whenever there is amalgamation of the two companies, there is no transfer and the question of levying capital gain tax does not arise.'*

The Honourable Mumbai Tribunal in the case of Makers Development Services Pvt. Ltd. Vs. Dy. CIT [40 ITD 185] has held that where the stock in trade was revalued on amalgamation and acquired by the amalgamated company at higher value, in absence of any specific provision of tax, there will not be any tax implication on such notional gain. The Income Tax Act has been subsequently amended to tax the revaluation of assets on amalgamation by inserting a new section 43C by Finance Act, 1988 which provided that where an asset acquired under the scheme of amalgamation is sold by an amalgamated company as its stock in trade, then in computing the business income, the cost of acquisition of such stock in trade shall be the cost of acquisition in the land of amalgamating company. Therefore, the revaluation of land does not attract tax at the time of amalgamation, but would be taxed at the time of its disposal.

4.13. In view of the above, the AO was not justified to invoke section 56(2)(viib) 'on issue of shares at face value to the shareholders of the amalgamating company as per the scheme of amalgamation approved by Honourable High Court. The addition made by the AO, is therefore, ***deleted.***

*The ground of appeal is accordingly **allowed**."*

7. The Revenue, in the captioned appeal, has sought to impugn the action of CIT(A) towards reversal of additions.

8. The learned DR for the Revenue relied upon the order of the AO passed in terms of directions of Addl.CIT issued under s.144A of the Act and submitted that the assessee is clearly benefitted by the scheme of amalgamation and received excess consideration by way of net assets against issue of shares of its company in favour of the shareholders of amalgamating company KEPL. The learned DR for the Revenue quipped that the benefit by way of excess consideration so received and quantified by AO apparently falls within the sweep of Section 56(2)(viib) of the Act and the CIT(A) has clearly mis-directed himself in law and on facts in reversal of the additions.

9. The learned AR for the assessee, on the other hand, strongly defended the conclusion of the CIT(A) and submitted that the AO has grossly misconstrued the letter as well as spirit of Section 56(2)(viib) of the Act. It was submitted that a Court supervised amalgamation where shares of assessee company were issued to shareholders of amalgamating company in terms of scheme of amalgamation do not fall within the sweep of deeming provisions of s. 56(2)(viib) of the Act. References were made to the provisions of s.56(2)(viib) of the Act, the scheme of amalgamation approved by Hon'ble High Court as well as AS-14 issued by ICAI which shall be dealt with as and where considered expedient in the succeeding paragraphs.

9.1 It was contended that so called excess value of assets vested on amalgamation cannot be notionally termed as premium over face value for the purposes of deeming provision. It was contended that another deeming fiction cannot be added to the existing fiction without express consent of the statute.

9.2 In essence, it was contended that the plain language of deeming fiction in s.56(2)(viib) of the Act does not permit the Revenue to cover the impugned transactions arising from amalgamation within its sweep.

9.3 It was contended that as rightly observed by the CIT(A), in terms of section 2(1B) of the I.T. Act,1961 and AS-14 issued by ICAI, the shareholders of amalagamating co. become shareholders of assessee co. by virtue of amalgamation and the consideration is to be discharged by the amalgamated co. (Assessee) by issue of its shares and not other way round where the subscriber of the shares pays money for subscription to the issuer company.

9.4 It was thus asserted that the CIT(A) has rightly deleted the wrongly fastened additions after full analysis of law and facts involved. He accordingly submitted that no interference with the first appellate order is called for.

10. We have dispassionately considered the rival submissions and perused the assessment order as well as first appellate order. The documents referred and relied upon has been taken cognizance in terms of Rule 18(6) of the Income Tax(Appellate Tribunal) Rules, 1963.

10.1 In the case in hand, the short question that arises in essence is whether the shares received by the amalgamating company in

consideration of vesting of its assets, liabilities and undertaking in the amalgamated company pursuant to scheme of amalgamation is hit by the deeming provisions of Section 56(2)(viib) of the Act in the facts of the present case?

10.2 The AO has made impugned additions towards excess consideration solely under S. 56(2)(viib) in terms of approval granted by the Addl. CIT on reference made under S. 144A of the Act. Hence, no other point such as cursory allegation of violation of AS-14 of ICAI etc. needs our indulgence in isolation for adjudication of controversy. To address the issue, it may be pertinent to reproduce the provision of section 56(2)(viib) for an easy reference:

> *"(viib)where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:*
>
> ***Provided** that this clause shall not apply where the consideration for issue of shares is received—*
>
> *(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or*
>
> *(ii)by a company from a class or classes of persons as may be notified by the Central Government in this behalf,*
>
> *Explanation.—For the purposes of this clause,—*
>
> *(a) the fair market value of the shares shall be the value—*
>
> *(i) as may be determined in accordance with such method as may be prescribed; or*
>
> *(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,*

whichever is higher;

(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of [Explanation] to clause (23FB) of section 10;]"

10.3 In the instant case, pursuant to amalgamation, all assets, liabilities, undertaking of the amalgamating company (KEPL) are agreed to be vested in the amalgamated company(the Assessee) as a going concern. The amalgamated company has issued 300 equity shares of its company at face value for each shares of amalgamating company in consideration of such vesting of assets, liabilities etc. as per the scheme of amalgamation duly approved by the Jurisdictional High Court. As a result, shares worth Rs. 15 crore of the amalgamated co. (assessee co.) were issued against the vesting of assets etc. The assessing officer observed that the value of net assets (assets less liabilities) vested in the amalgamated company under the scheme stands at Rs. 54,21,16,156 against which shares worth Rs. 15 crore were issued by it for such acquisition. The difference between the value of assets and corresponding shares issued amounting to Rs.39,21,16,156/- credited by the assessee co.(amalgamated co.) to its capital reserve without any payment of taxes triggered the cause of action for the AO. In the course of assessment, the AO further found on a incisive verification that the intrinsic value of share of amalgamated co. issued at face value of Rs. 10 stands at Rs. 6.81 per shares only. The AO accordingly noted that the share of amalgamated co. so issued carries worth Rs. 10.22 crores only(1,50,00,000 *6.81= 10,21,50,000) as against the net assets acquired Rs. 54.21 crore. The AO after making reference to Addl. CIT under S. 144A has brought the difference of Rs. 43.99 crore within the ambit of taxable income with the aid of deeming

provision of S. 56(2)(viib) of the Act and increased the assessed income to that extent.

10.4 In the backdrop of facts capsuled above, it is the contention of the assessee that impugned transaction of vesting of assets of amalgamated co. in exchange of issue of shares of assessee co. at face value neither matches the essential ingredients of S. 56(viib) of the Act nor is the transaction carried out pursuant to approved scheme, in conformity of the objects and purposes of insertion of section 56(viib) of the Act. It is further contended that applicability of deeming clause is unfounded on giving schematic interpretation to the language employed. The revenue on the other hand seeks to support the action of AO and essentially contends that newly inserted S. 56(2)(viib) was introduced with an object to *inter alia* plug the present situation where consideration received in kind (by way of vesting of assets of amalgamated co.) is far higher than the face value of corresponding shares issued in lieu of such excess value of assets vested.

10.5 The interpretation of S. 56(viib) *qua* the facts of the present case is in controversy. S. 56(2) deems certain income chargeable to income tax under the head 'income from other sources'. Finance Act 2012 has, understandably, inserted clause (viib) with effect from 1-4-2013(assessment year 2013-14) to include consideration received in excess of face value of shares issued i.e. 'share premium' received by an issuing company as it exceeds the fair market value of shares as its income chargeable under the head 'income from other sources'. On a plain reading, two things immediately emerges from the newly inserted provision (i) consideration which is taxable is the one which exceeds face value of shares issued (ii) in the event of shares issued at consideration above face value, the same need to

be compared with fair market value to be determined as per sub-clause(a) appended thereto. The Assessee in the present case, is not found to have issued shares at value more than face value at the first instance as repeatedly exhorted on behalf of the assessee.

10.6 To decipher the true purport of iteration of law in the context and object for insertion of the provision, it may be useful to refer to the explanations given at the time of enactment of the provision.

Explanatory Memorandum to Finance Bill, 2012

Share premium in excess of the fair market value to be treated as income

Section 56(2) provides for the specific category of incomes that shall be chargeable to income-tax under the head "Income from other sources".

It is proposed to insert a new clause in section 56(2).

The new clause will apply where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax under the head "Income from other sources.

However, this provision shall not apply where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund. Further, it is also proposed to provide the company an opportunity to substantiate its claim regarding the fair market value. Accordingly, it is proposed that the fair market value of the shares shall be the higher of the value—

(i) as may be determined in accordance with the method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value of its assets, including intangible assets, being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

10.7 The budget speech of the Hon'ble Finance Minister Mr. Pranab Mukherjee on 16/03/2012 in para 155 concerning Section 56(2)(viib) may also be quoted to understand the object behind the insertion.

> *I propose a series of measures to deter the generation and use of unaccounted money. To this end, I propose*
>
> - -----
> - *Increasing the onus of proof on closely held companies for funds received from shareholders as well as taxing share premium in excess of fair market value*

10.8 The Circular of the Department being a contemporaneous exposition may also serve as useful guide to understand the true intent of S. 56(2)(viib) of the Act. The relevant text of CBDT circular no, 3/2012 dated 12-6-2012 in ths regard is reproduced hereunder:

> ***Share premium in excess of fair market value to be treated as income***
>
> *In the Finance Bill, 2012, it had been proposed [section 56(2), as sub-clause [(viib)] that in case of a company, not being a company in which the public are substantially interested, which receives, in any previous year, from any person being a resident, any consideration for issue of shares and the consideration received for issue of such shares exceeds the face value of such shares, then the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax. An exemption was provided in a case where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.*
>
> *(i) It has now been further provided that such excess share premium is included in the definition of "income" under sub-clause (xvi) of clause (24) of section 2.*
>
> *(ii) Considering that the proposed amendment may cause avoidable difficulty to investors who invest in start-ups where the fair market value may not be determined accurately, it is proposed to provide an exemption to any other class of investors as may be notified by the Central Government.*

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

10.9 When the clause in Section 56(2)(viib) of the Act is read in tandem with elucidations provided in CBDT Circular; Finance Ministers' speech in Parliament disclosing his intentions behind such insertion and also Memorandum explaining Finance Bill, it appears that whole thrust for such insertion is to bring measures to tax hefty or excessive share premium received unjustifiably by private companies on issue of shares without carrying underlying value to support such uncalled for premium and thereby enriching itself without paying taxes legitimately due to them. It also seems that subscription to the shares issued by a company at a substantial premium (not necessarily backed by a valuation justifying the premium) was supposedly resorted to convert unaccounted money. The extant framework of law were not found sufficient by the legislature to curb such practices. Earlier attempts to tax such excessive receipts in the garb of share premium by private cos. did not arguably fructify. The provision was inserted to change the landscape for charging premium to tax of capital nature.

10.10 Section 56(2)(viib) creates a deeming fiction to imagine and fictionally convert a capital receipt into revenue income. It is well entrenched by the body of case laws that while giving effect to such legal fictions, all facts and circumstances thereto and inevitable corollaries thereof have to be assumed. In *CIT vs. Mother India Refrigeration (P) Ltd. (1985) 155 ITR 711*, the Hon'ble Supreme Court has held that the legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond the legitimate field. Thus, a deeming fiction

cannot be stretched beyond its purpose and import another fiction in it.

10.11 In the light of understanding developed on object and purpose of the deeming clause, as discussed above, the provisions of Section 56(viib), would not come to motion where the Assessee company as admittedly not charged any premium at all and the shares were issued at face value.

11. However, We have examined the issue from yet another perspective discussed below

11.1 It may be possibly argued that Section 56(2)(viib) does not oust its applicability in the event of shares issued pursuant to amalgamation. The amalgamation is a compromise or arrangement between the parties, which *inter alia* includes the amalgamated company issuing the shares and the shareholders of the amalgamating company, which is supervised by the Court, in terms of the Companies Act. In other words, there is an agreement or arrangement between the amalgamated company issuing the shares and the shareholders of the amalgamating company. The clause contemplates the issue of shares and the receipt of consideration from a resident person and it is fulfilled on amalgamation. This perspective seeks to cover the issue of shares arising from amalgamation with equal measure.

11.2 In contrast, the applicability of the clause in the case of amalgamation may be equally looked from a little different perspective as well. In amalgamation, the issue of shares is made by inviting subscription from the persons to whom offer is made. The issue of shares is to give effect to the amalgamation, as per mutual

agreement and the Court order. In other words, it may be argued that the issue of shares does not trigger any consideration and in converse, the obligation to give consideration, triggers issue of shares. Secondly, the clause contemplates 'receipt' of the consideration for the shares from a resident person. In other words, it contemplates a transaction between a resident person and the company issuing shares. In the case of an amalgamation, the consideration, which would be undertaking along with all its assets and liabilities is in the form of vesting by the amalgamating company, whereas the shares are issued to its shareholders. Thus, it is, in effect, a tripartite arrangement between (i) amalgamated co. (ii) amalgamating co. (iii) the shareholders of amalgamating co.. Such tripartite arrangements in amalgamation cases are not contemplated in the deeming clause in question.

11.3 There is yet another perspective to dwell upon. As per the proviso to the clause, it does not apply 'to the consideration for issue of shares by a venture capital undertaking(VCU) from a venture capital company(VCC) or a venture capital fund(VCF)'. The proviso implies that there should issue of shares directly by the company to the subscriber, obviously, for a consideration. In other words, it contemplates a bilateral transaction. Further, it also contemplates a transaction in the nature of issue of shares at the instance of the company on its own and it does not contemplate a transaction in the nature of issue of shares for discharging the consideration or issue of shares obligated pursuant amalgamation etc. If a view is adopted that the transaction can also apply to amalgamation etc. then, in that case, if there is amalgamation by and between venture capital undertakings, the provision would possibly apply inconsistent with the intent of the legislature to exclude VCUs etc. If the shareholders are regarded as the persons

providing consideration in the context, they could include VCC or VCF or even notified persons or non-residents along with other resident persons. Such a situation contradicts in the intent of the legislature expressed in the clause. Hence, in terms of proviso, the clause cannot apply in the case of amalgamation etc.

11.4 We may also look at the scheme of the Act in totality for contextual understanding of the issue. The Legislature has contemplated that there arises 'transfer' of shares by the shareholders of amalgamating company in consideration of the allotment of shares by the amalgamated company and consequently with a view to neutralize tax effect, the Act provides for suitable exclusion/ exemption, from the ambit of expression 'transfer', under section 47(vii) which is also of deeming nature. In other words, as per the provisions of the Act, the consideration for issue of shares by the amalgamated company, in so far as the shareholder is concerned, is the shares held in the amalgamated company by way of transfer (except for the saving clause in s.47(vii) of the Act). A bare issue of shares contemplated in S. 56(viib) thus cannot be equated with a situation of transfer gathered from an intent implicit in S. 47(vii). Thus, the consideration and the issue of shares envisaged by section 56(2)(viib) is not found compatible with scheme enacted, when seen from the perspective of revenue.

12. To summarise, in our view, the issue of shares at 'face value' by the amalgamated company (assessee) to the shareholders of amalgamating company in pursuance of scheme of amalgamation legally recognized in the Court of Law neither falls with scope & ambit of clause (viib) to S. 56(2), when tested on the touchstone of objects and purpose of such insertion i.e. to deem unjustified premiums charged on issue of shares as taxable income; nor does it

fall in its sweep when such deeming clause is subjected to interpretative process having regard to the scheme of the Act.

13. In the wake of above delineation, we see no error in the conclusion drawn by the CIT(A) in this regard. The CIT(A) in our view, has rightly found inapplicability of S. 56(viib) in the facts of the present case. We thus decline to interfere with the conclusion so drawn by the CIT(A) whose order is under challenge by the revenue. Similarly, the cross objection filed by the Assessee which merely seeks to support the action of CIT(A) also does not call for separate adjudication and is infructuous.

14. In the result, the appeal of the revenue as well as cross objection of the Assessee is dismissed.

This Order pronounced on 13/04/2021

Sd/-	Sd/-
(RAJPAL YADAV)	(PRADIP KUMAR KEDIA)
VICE PRESIDENT	ACCOUNTANT MEMBER

Ahmedabad: Dated 13/04/2021

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।