IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai

Before Shri B.R. Baskaran, Accountant Member
and Shri Pawan Singh, Judicial Member

ITA No. 532/Mum/2018
(Assessment Year: 2014-15)

M/s. Vora Financial Services P. Ltd. 801/806, 8th Floor, Elite Square 274, Perin Nariman, St. Bazar Gate Fort, Mumbai 400001	Vs.	A C I T - 2(3((1) Aayakar Bhavan M.K. Road Mumbai 400020

PAN – AAACV1975E

Appellant **Respondent**

Appellant by: Shri K. Gopal
& Ms. Neha Paranjpe
Respondent by: Shri T.A. Khan

Date of Hearing: 16.05.2018
Date of Pronouncement: 29.06.2018

O R D E R

Per B.R. Baskaran, AM

The appeal filed by the assessee is directed against the order dated 13.11.2017 passed by Ld CIT(A)-6, Mumbai and it relates to the assessment year 2014-15.

2. The assessee is aggrieved by the decision rendered by Ld CIT(A) on the following issues:-

(a) Disallowance made u/s 14A of the Act.
(b) Disallowance of expenses claimed u/s 35(1)(iii) of the Act.
(c) Addition made u/s 56(2)(viia) of the Act.

3. The assessee is engaged in the business of trading in shares and derivatives. The first issue relates to the disallowance made u/s 14A of the Act. The assessee received dividend income of Rs.31,35,460/- and claimed the same as exempt. The assessee did not disallow any expenditure in terms of sec. 14A of the Act. Before the AO, the assessee submitted that it

has earned dividend income of Rs.4,735/- out of its investments and the remaining amount of Rs.31.30 lakhs was received from the shares held as stock in trade. It was submitted that out of Rs.31.30 lakhs, dividend of Rs.31.21 lakhs was received from a scrip named M/s Muthoot Finance Ltd, which was kept as stock in trade. It was also contended that the purpose of trading in shares was to earn profits and not to earn dividend income. Accordingly it was submitted that earning dividend income was incidental and indivisible part of trading in shares. Accordingly the assessee contended that the there is no reason to invoke Rule 8D and further no disallowance was warranted u/s 14A of the Act.

4. The AO was not convinced with the contentions of the assessee and proceeded to compute the disallowance as per Rule 8D of the ITAT Rules. The disallowance of direct expenses under Rule 8D(2)(i) was computed at Rs.8,22,353/- in proportion to exempt income to total revenue from operations. The disallowance of interest expenses under Rule 8D(2)(ii) was computed at Rs.12,67,410/- in proportion to average value of investments to the average value of total assets. The disallowance of administrative expenses under rule 8D(2)(iii) was computed at 0.50% of the average value of investments at Rs.22,77,018/-. Accordingly the AO disallowed a sum of Rs.43,66,781/- u/s 14A of the Act.

5. The Ld CIT(A) deleted the interest disallowance made under Rule 8D(2)(ii) of I T Rules by following decision rendered by Hon'ble Bombay High Court in the case of HDFC Bank Ltd (366 ITR 505), since the own funds available with the assessee was more than the value of investments. With regard to disallowance made under Rule 8D(2)(iii), the Ld CIT(A) directed the AO to compute the disallowance by considering only those investments which have yielded income, which does not form part of total income. The Ld CIT(A) confirmed the disallowance of direct expenses under rule 8D(2)(i) as per the workings made by the AO. However, by following the decision rendered by Hon'ble Delhi High Court in the case of Joint Investments P Ltd (ITA No.117/2015), the Ld CIT(A) directed the AO

to restrict the amount of disallowance to the amount of exempt income. The assessee is still aggrieved.

6. We heard the parties on this issue and perused the record. We notice that the assessee is engaged in the business of trading in shares and securities. Out of the dividend income of Rs.31.35 lakhs, a sum of Rs.31.30 lakhs dividend income was received from shares held as stock in trade. Out of the same, a sum of Rs. 31.21 lakhs was received from one scrip named M/s Muthoot Finance Ltd. We have noticed that the Ld CIT(A) has already deleted the disallowance of interest expenditure, since the own funds available with the assessee was more than the value of investments. The ld CIT(A) has sustained the proportionate disallowance made out of security transaction tax under rule 8D(2)(i) and also the disallowance out of administrative expenses under Rule 8D(2)(iii) of the I.T rules.

7. We have noticed that the assessee has received major portion dividend of Rs.31.21 lakhs from one scrip. We noticed that the AO has computed disallowance of direct expenses (security transaction tax) in proportion to exempt income to total revenue from operations. In the facts and circumstances of the case, the methodology adopted by the AO, in our view, is not correct. The security transaction tax relating to the shares, which yielded dividend, should alone have been considered. Further, the said expenditure should be allocated between trading operations and exempt income. In fact, we notice that the Ld CIT(A) has directed the AO to compute the disallowance under Rule 8D(2)(iii) by considering only those scrips which has yielded dividend. Hence considering the fact that major portion dividend income has been received from shares held as stock in trade, that too out of a single scrip, we are of the view that it may not be appropriate to apply the provisions of Rule 8D in the instant case. Accordingly we are of the view that the requirements of provisions of sec. 14A shall be met, if the disallowance is made at 5% of the dividend income earned by the assessee. Accordingly we set aside the order passed by Ld

CIT(A) on this issue and direct the AO to restrict the disallowance u/s 14A to 5% of the exempt income earned by the assessee.

8. The next issue contested in this appeal relates to the disallowance of deduction claimed u/s 35(1)(iii) of the Act. The facts relating thereto are that the assessee paid donation of Rs.50.00 lakhs to M/s Bioved Research Society, which was an institution undertaking scientific research. Since it was approved u/s 35 of the Act, the donation paid to it is eligible for weighted deduction of an amount equal to one and three fourth times of amount donated to it as per the provisions of sec. 35(1)(ii) of the Act. Accordingly the assessee claimed deduction of Rs.87,50,000/- under the above said section on the donation of Rs.50.00 lakhs paid by it.

9. During the course of assessment proceedings, the AO issued commission u/s 131(1)(d) of the Act to the Assistant Commissioner of Income tax (exemptions), Lucknow in order to verify the genuineness of the donation paid by the assessee. The Asst. Commissioner reported that the revenue has carried out survey operations in the hands of various persons and it revealed that those persons have paid donations to these kinds of trusts/societies, which were subsequently returned back in cash after deducting commission. These donors have claimed weighted deduction u/s 35(1)(ii) of the Act. Accordingly it was reported that the donations are, in fact, bogus in nature. The Asst. Commissioner also reported that the donations have been treated as anonymous donations in the hands of the trust and further income has been determined at Rs.1911.22 lakhs as against NIL income. In the assessment order passed in the hands of the Trust, it has been observed that the research activities are not carried on. It was further observed that the AO has made suitable recommendation for withdrawal of approval given u/s 35(1)(ii) of the Act.

10. Based on the above report furnished by the Assistant Commissioner of Income tax, Lucknow, the assessing officer concluded that the assessee is one of the beneficiaries of the bogus donations and accordingly disallowed the claim of Rs.87.50 lakhs made u/s 35(1)(ii) of the Act.

11. Before Ld CIT(A), the assessee contended that M/s Bioved Research Society was having recognition u/s 35(1)(ii) of the Act, when the impugned donation was given. It was also contended that the AO has denied rejection on the basis of recommendation given by the AO of the above said society to the Ld CIT. Accordingly it was contended that the rejection of claim was based on surmises and conjectures. The Ld CIT(A) was not convinced with the explanations of the assessee. He also noticed that the registration granted to the above said society u/s 12AA of the Act has been cancelled on 28-02-2017 with retrospective effect from 1.4.2010. Hence the Ld CIT(A) confirmed the disallowance made by the AO.

12. The Ld A.R submitted that the weighted deduction u/s 35(1)(ii) is allowed to donations given to research association, which is approved in accordance with the guidelines issued in this regard and which is notified by the Central Government. He submitted that the M/s Bioved Research Society has been approved and notified, vide notification no.15/2008 dated 01-02-2008. In this regard, he invited our attention to the copy of notification placed at page 30 of the paper book. He submitted that the above said notification has not been withdrawn till date. Accordingly he submitted that there is no valid reason for rejecting the deduction claimed by the assessee u/s 35(1)(ii) of the Act. He submitted that the Ld CIT(A) has placed his reliance on the order passed for withdrawal of the registration granted u/s 12AA of the Act. He submitted that the provisions of sec. 12AA and sec. 35(1)(ii) operate on different fields and further there is no condition prescribed in sec. 35(1)(ii) that the registration of the research association u/s 12AA is the condition for allowing deduction u/s 35(1)(ii) of the Act.

13. The Ld A.R submitted that an almost identical issue was considered by Hon'ble Bombay High Court in the case of Ramdas Maneklal Gandhi v. Union of India (2000)(241 ITR 437). In the above said case, the assessee before Hon'ble High Court paid donation of Rs.1.00 lakh for Rural development Programme to a Society for integral development, which was approved by the prescribed authority at that point of time. The said

payment was eligible for deduction u/s 35CCA of the Act and the assessee was accordingly allowed deduction. Subsequently the approval was withdrawn by the prescribed authority on 3.3.1987 with retrospective effect from 13.12.1982. The Income tax officer sought to withdraw the deduction granted u/s 35CCA of the Act by reopening the assessment. The assessee challenged the reopening of assessment by filing writ petition before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court held that the assessee is entitled to rely upon certificate granted to the institution u/s 35CCA for claiming deduction under that section, which was valid and subsisting when donation was made to it. Accordingly the reopening notice was quashed. He submitted that the Chennai bench has taken an identical view in the case of Smt. Deviyani Dilip Patel in respect of deduction claimed u/s 35(1)(ii) of the Act. The Chennai bench of ITAT has held that the subsequent withdrawal of exemption with retrospective effect will not affect the deduction claimed by the donor u/s 35(1)(ii) of the Act, when the institution was enjoying approval within the meaning of sec. 35(1)(ii) as on the date of receipt of donation.

14. The Ld A.R submitted that, in the above said cases, the approval has been rejected with retrospective effect and still the Court/Tribunal has held that the deduction claimed by the assessee should not be denied. He submitted that the assessee in the present case stands on a better footing, since the approval granted to M/s Bioved Research Society has not been withdrawn till date. Accordingly he submitted that the deduction u/s 35(1)(ii) of the Act should be allowed to the assessee.

15. The Ld D.R, on the contrary, submitted that the revenue has unearthed the fact that certain research societies are indulging in the activity of receiving bogus donations and returning them to the donors by way of cash. He submitted that M/s Bioved Research society has been identified as one of such societies. Hence the donations received by it has been assessed as its income and further the AO has recommended cancellation of approval granted u/s 35(1)(ii) of the Act. He further submitted that the registration of the above said society given u/s 12AA of

the Act has been cancelled with retrospective effect. Accordingly the ld D.R submitted that the assessee has obtained only bogus donation receipts and hence the Ld CIT(A) was justified in confirming the disallowance of weighted deduction of Rs.87.50 lakhs claimed u/s 35(1)(ii) of the Act.

16. We have heard rival contentions on this issue and perused the record. The undisputed fact remains that the research society, viz., M/s Bioved Research Society was duly approved u/s 35(1)(ii) of the Act and the assessee has given the impugned donation of Rs.50.00 lakhs, when the approval was very much available. It is the contention of Ld A.R that the approval so granted has not been cancelled till date. The assessee has given donation during the financial year 2013-14.The Assistant Commissioner refers in his remand report about the survey conducted in the year 2015 in the hands of certain donors. Based on the survey findings, the assessment in the hands of Bioved Research Society has been completed on 29-03-2016. These facts show that the above said society was very much having approval in the financial year 2013-14.

17. It is also an undisputed fact that the revenue did not carry on any survey operations in the hands of the assessee. It is also not clear as to whether any survey operation was conducted in the hands of Bioved Research Society also. Be that as it may, the various case laws relied upon by the Ld A.R would show that the deduction claimed by the assessee u/s 35(1)(ii) cannot be rejected on the basis of subsequent events. The Hon'ble Bombay High Court was considering the issue of deduction claimed u/s 35CCA of the Act in the case of Ramdas Maneklal Gandhi (supra). The head notes of the said decision reads as under:-

> *"Section 35CCA of the Income tax Act, 1961 – Rural development programme, expenses for – Assessment year 1985-86 – Notice issued to withdraw deduction allowed under section 35CCA in respect of donation to an institution whose approval was withdrawn on 3-3-1987 by prescribed authority with retrospective effect – Whether in view of well-settled law that assessee is entitled to rely upon certificate granted to an institution under section 35CCA for claiming deduction under that section, which was valid and subsisting when donation was made to it, there was no escapement of income of*

assessee on account of allowance of said deduction and, therefore, impugned notice had to be quashed and set aside – Held, yes."

Though the above said decision was rendered by Hon'ble jurisdictional Bombay High Court in the context of validity of re-opening u/s 148 of the Act, yet the decision rendered by Hon'ble Bombay High Court makes it clear that the deduction can be claimed on the basis of approval granted to the research society, which was valid and subsisting when donation was made to it.

18. The Chennai bench of Tribunal has considered an identical issue in the case of Smt. Deviyani Dilip Patel (supra) and held that the rejection of weighted deduction in respect of donation cannot be denied when the institution was enjoying approval within the meaning of sec. 35(1)(ii) as on date of receipt of donation, no matter that the approval was cancelled subsequently with retrospective effect. It is pertinent to note that the Chennai bench of Tribunal has placed its reliance on the decision rendered by Hon'ble Bombay High Court in the case of Seksaria Biswan Sugar Factory Ltd vs. Inspecting Assistant Commissioner (1990)(184 ITR 123). In the case of Sekasaria Biswan Sugar Factory Ltd, the assessment was re-opened to withdraw the deduction allowed u/s 35CCA of the Act on the basis of cancellation of approval with retrospective effect. The Hon'ble Bombay High Court expressed the view that the giving retrospective effect to the cancellation of approval was not valid. Accordingly the Hon'ble Bombay High Court held that the notice of reassessment was not valid.

19. The Hon'ble Calcutta High Court has considered an identical issue in the context of sec. 263 of the Act in the case of CIT Vs. General Magnets Ltd (253 ITR 471). In the above said case, the Ld CIT sought to cancel the deduction claimed u/s 35CCA of the Act on the basis of cancellation of approval made with retrospective effect. The following observations made by the Hon'ble High Court are relevant:-

"15. For our consideration in this case the issue is when the approval exemption to the society has been withdrawn with retrospective effect, can the order of the assessing officer be said to be erroneous or prejudicial to the interests of Revenue; our answer will be in the

negative. When the assessee has paid donation to the society which held valid approval under Section 35CCA of the Act and that has not been withdrawn not only in the accounting year but till the assessment was made. That approval to society withdrawn in March, 1987, though with retrospective effect, the benefit under Section 35CCA cannot be denied.

16. For no fault of the assessee, he should not suffer and once the approval is *given to the society under Section 35CCA and the assessee has paid the amount donation to that society, he cannot be denied the deduction for which he was entitled under the valid certificate issued by the society which is approved by the Department on the date of payment to that society.*

17. Assuming by mistake the approval has been given to the wrong society. But for mistake of the department, why should the assessee suffer? That withdrawal of approval to the society with retrospective effect is itself bad. No assessee should suffer for mistake of the Department. The Department has the power of withdrawal but in such cases withdrawal can be only with prospective effect. If the donation to the approved society is genuine in that case withdrawal with retrospective effect does not affect the right of the assessee for deduction of the amount which has accrued to the assessee on the basis of the payment to an approved society under section 35CCA of the Act."

Identical view was expressed by Hon'ble Calcutta High Court in the case of B.P.Agarwalla & sons Ltd (1994)(208 ITR 863).

20. In the instant case, the assessee has given the donation of Rs.50.00 lakhs to M/s Bioved Research Society. In the assessment order passed by the AO in the hands of the above said society, he has only recommended for cancellation of the approval granted u/s 35(1)(ii) of the Act. According to Ld A.R, the said approval has not been cancelled till date. Though the Survey proceedings conducted in the hands of certain donors, which revealed that the donations were bogus in nature, no such finding has been given in the hands of the assessee herein. Hence, we are of the view that the genuineness of payment of donations cannot be doubted in the instant case, particular in the absence of any material to support the view taken by the AO. Hence we agree with the contentions of Ld A.R that the AO was not justified in rejecting the claim of weighted deduction. We further notice that the Ld CIT(A) has placed reliance on the cancellation of registration granted u/s 12AA of the Act to M/s Bioved Research Society

with retrospective effect. The registration granted u/s 12AA of the Act and the approval granted u/s 35(1)(ii) of the Act operates on different field. Hence we are of the view that the Ld CIT(A) was not justified in placing reliance on the order of cancellation of registration u/s 12AA of the Act.

21. Even if the approval is cancelled subsequently with retrospective effect, various case laws discussed above bring out the ratio that the weighted deduction claimed by the assessee u/s 35(1)(ii) of the Act cannot be denied, if there was valid and subsisting approval when the donation was given. In the instant case, it is the contention of Ld A.R that the approval was not cancelled till date. Before us, the revenue did not furnish any material to refute the contentions of Ld A.R.

22. In view of the foregoing discussions, we are of the view that there is no justification in rejecting the claim of weighted deduction claimed u/s 35(1)(ii) of the Act. Accordingly we set aside the order passed by Ld CIT(A) on this issue and direct the AO to allow the weighted deduction claimed u/s 35(1)(ii) of the Act.

23. The last issue urged by the assessee relates to the addition of Rs.82.89 lakhs made u/s 56(2)(viia) of the Act. The facts in brief are that the assessee, during the year under consideration, made an offer to existing shareholders for buy back of 25% of its existing share capital at a price of Rs.26/- per share. The offer was open between 8th May, 2013 and 22nd May, 2013. One of the directors Shri Kashyap Vora offered 12,19,075 shares under the buyback scheme and accordingly the assessee bought those shares paid a consideration of Rs.316.95 lakhs on 24.05.2013. The AO noticed that the book value of shares as on 31.3.2013 was Rs.32.80 per share, whereas the assessee company has bought back the shares at Rs.26/- per share.

24. The AO proposed to invoke the provisions of sec.56(2)(viia) of the Act to this transaction of buy back. The said provisions read as under:-

> *"56(2)(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);"

The AO noticed that consideration of Rs.316.95 lakhs has been reinvested in the assessee company in the form of loan. Hence the AO took the view that the entire exercise was carried out to reduce the liability of the company by purchasing shares below the fair market value. Accordingly the AO assessed the difference between the book value of shares and purchase price of shares amounting to Rs.82.89 lakhs as income of the assessee u/s 56(2)(viia) of the Act. The Ld CIT(A) also confirmed the same.

25. The Ld A.R submitted that the Income tax Act was amended by inserting a new clause in sec. 2(22) of the Act and also by inserting sec.46A, consequent to the insertion of sec. 77A in the Companies Act, which allows a company to purchase its own shares. Amendment in Section 2(22) provides that the dividend does not include any payment made by a company on purchase of its own shares in accordance with provisions of sec. 77 of the Companies Act. Section 46A provides for taxation of consideration received. Accordingly the Ld A.R submitted that the above said provisions only deal with the case of buy back of shares and hence the AO was not correct in invoking the provisions of sec. 56(2)(viia) of the Act in the instant case. In this regard, the Ld A.R placed reliance on

the Memorandum Explaining the provisions in Finance Bill, 1999 available in (1999) 236 ITR (St.) 155.

26. He submitted that the provisions of sec.56(2)(vii) were introduced as counter evasion mechanism as explained in the Memorandum Explaining the provisions in the Finance Bill, 2010 (2010)(321 ITR (St.) 110)", which is extracted below:-

> *"B. The provisions of section 56(2)(vii) were introduced as a* ***counter evasion mechanism*** *to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift Tax Act.* ***The provisions were intended to extend the tax net to such transactions in kind.*** *The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. It is, therefore, proposed to amend the definition of property so as to provide that* ***section 56(2)(vii) will have application to the "property" which is in the nature of a capital asset of the recipient*** *and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient."*

The Ld A.R submitted that the above said explanations squarely apply to the provisions of sec. 56(2)(viia) of the Act also. He submitted that the primary condition for invoking the provisions of sec. 56(2)(viia) was that the shares should become a "Capital asset" and property in the hands of recipient. He submitted that, in the instant case, the assessee has purchased the shares under the buyback scheme and the said shares have been extinguished by writing down the share capital. Hence those shares did not become capital asset of the assessee company and hence the provisions of sec. 56(2)(viia) should not have been invoked in the hands of the assessee company.

27. The question of taxability of bonus shares received by a shareholder u/s 56(2)(vii)(c) of the Act came to be considered in the case of Sudhir Menon HUF vs. ACIT (2014)(148 ITD 260) by the Mumbai bench of Tribunal. The Tribunal held that the additional shares were allotted pro rata to the existing shareholders and there was no scope for any property being received on said allotment of shares and hence provisions of sec. 56(2)(vii)(c) will not apply. The above said decision was followed by the

Bangalore bench of ITAT in the case of DCIT Vs. Dr. Rajan Pal (2016)(180 TTJ 714). The Ld A.R submitted that the above said decisions were rendered in the context o taxability of bonus shares, which enhances the paid up capital, u/s 56(2)(vii)(c) of the Act. However, in the instant case, the issue involved is the buy back of shares, which reduces the paid up capital. Hence the ratio of the above said decision should apply here also.

28. The Ld A.R submitted that the AO has taken the book value of shares at Rs.32.80 per share. He submitted that the assessee also got its shares valued as per which the book value of shares as on 31.3.2013 works out to Rs.25.42 per share. He further submitted that the provisions of sec. 56(2)(viia) speaks about "fair market value" of shares, which is different from book value.

29. The Ld D.R, on the contrary, submitted that the assessee is relying upon a valuation certificate obtained recently and the same was not available before the AO. Accordingly he submitted that the above said valuation report should be ignored. He submitted that the assessee has purchased shares at Rs.26/- per share, while the book value as per the computation of AO was Rs.32.80 shares. Accordingly he submitted that the AO has rightly assessed the difference u/s 56(2)(viia) of the Act.

30. We have heard rival contentions on this issue and perused the record. The provisions of sec. 56(2)(viia) reads that "where **a firm or a company** not being a company in which the public are substantially interested, **receives**, in any previous year, from any person or persons, on or after the 1st day of June, 2010, **any property, being shares of a company** not being a company in which the public are substantially interested" The words "firm or a company" "any property, being shares of a company" are important here. In this regard, we may refer to the Memorandum explaining the insertion of Provisions of sec. 56(2)(viia) by the Finance Act, 2010, which reads as under:-

> *"Under the existing provisions of section 56(2)(vii), any sum of money or any property in kind which is received without consideration or for*

inadequate consideration (in excess of the prescribed limit of Rs. 50,000) by an individual or an HUF is chargeable to income-tax in the hands of recipient under the head 'income from other sources'. However, receipts from relatives or on the occasion of marriage or under a will are outside the scope of this provision.

The existing definition of property for the purposes of section 56(2)(vii) includes immovable property being land or building or both, shares and securities, jewellery, archeological collection, drawings, paintings, sculpture or any work of art.

***A.** These are anti-abuse provisions which are currently applicable only if an individual or an HUF is the recipient. Therefore, transfer of shares of a company to a firm or a company, instead of an individual or an HUF, without consideration or at a price lower than the fair market value does not attract the anti-abuse provision*

In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, it is proposed to amend section 56 to also include within its ambit transactions undertaken in shares of a company (not being a company in which public are substantially interested) either for inadequate consideration or without consideration where the recipient is a firm or a company (not being a company in which public are substantially interested)."

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

32. Accordingly we are of the view that the provisions of sec. 56(2)(viia) should be applicable only in cases where the receipt of shares become property in the hands of recipient and the shares shall become property of the recipient only if it is "shares of any other company". In the instant case, the assessee herein has purchased its own shares under buyback scheme and the same has been extinguished by reducing the capital and hence the tests of "becoming property" and also "shares of any other company" fail in this case. Accordingly we are of the view that the tax

authorities are not justified in invoking the provisions of sec. 56(2)(viia) for buyback of own shares.

33. In view of the foregoing discussions, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition made u/s 56(2)(viia) of the Act.

34. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 29th June, 2018.

Sd/-	Sd/-
(Pawan Singh)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 29th June, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -6, Mumbai*
4. *The Pr. CIT - 2, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.