



Deemed Income u/s 56(2) of the Act

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General background

- Gift Tax Act, 1957 – applicable to gifts made on or after 01.04.1957.
- Finance (No. 2) Act, 1998 abolished the Gift Tax Act, 1957 and proposed to tax value of any movable or immovable property received on or after 01.10.1998 by any person without consideration in money or money's worth as income. This provision did not see the light of the day.
- S. 56(2)(v) introduced by Finance (No. 2) Act, 2004 – applicable to gifts made on or after 01.09.2004.
- S. 56(2)(vi), introduced by Taxation Laws (Amendment) Act, 2006, replaced S. 56(2)(v) – applicable to gifts made on or after 01.04.2006.
- S. 56(2)(vii), introduced by Finance (No. 2) Act, 2009, replaced S. 56(2)(vi) – applicable to gifts made on or after 01.10.2009. Property in kind covered.
- S. 56(2)(viia) introduced by Finance Act, 2010 – applicable to firms or closely held companies receiving shares of closely held companies, on or after 01.06.2010, without consideration or for inadequate consideration.
- Rules 11U and 11UA notified on 07.04.2010 w.e.f. 01.10.2009 for determination of fair market value of the property other than immovable property – Valuation Rules for Ss. 56(2)(vii) and 56(2)(viia).
- S. 56(2)(viib) introduced by Finance Act, 2012, w.e.f. 01.04.2013 – applicable to closely held companies receiving consideration for issue of shares in excess of FMV of the shares.

What is 'income'? Can capital receipts be taxed?

- Income is a term which is easy to understand but difficult to define.
- According to *Oxford Dictionary*, the term "income" means "that which comes in as the periodical produce of one's work, business, land or investments (considered in reference to its amount and commonly expressed in terms of money) or annual or periodical receipts accruing to a person or corporation".
- According to *Webster's Dictionary*, the term "income" means "that gain or recurrent benefit (usually measured in money) which proceeds from labour, business or property, commercial revenue or receipts of any kind, including wages or salaries, the proceeds of agriculture or commerce, the rent of houses or return on investment".
- Eric. L. Kohler in '*A Dictionary for Accountants*' at page 2255 speaks of income as "Money or money's equivalent earned or accrued and includes profits gained through a sale or conversion of capital asset".
- The term income has been aptly described in the case of *CIT v. Shaw Wallace* (6 ITC 178) as "**Income connotes a monetary return 'coming' in with some sort of regularity or expected regularity from definite source**".
- Thus, the above definition reveals three characteristics of income viz. (a) something that comes in, (b) with regularity or expected regularity, and (c) from a definite source.
- S. 2(24) defines the term 'income' in an inclusive manner and contains several artificial categories of income.

What is 'income'? Can capital receipts be taxed?...

■ **Navinchandra Mafatlal v. CIT (26 ITR 758)(SC).**

- The word “income” in Entry 54 in List I of the Seventh Schedule to Govt of India Act, 1935, should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power.

■ **Navnit Lal C. Jhaveri v. K K Sen [1965] (56 ITR 198)(SC)**

- What the entries in the List purport to do is to confer legislative powers on the respective legislatures in respect of areas or fields covered by the said entries; and it is an elementary rule of construction that the widest possible construction must be put upon their words. This doctrine does not, however, mean that Parliament can choose to tax as income an item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen. But in considering the question as to whether a particular item in the hands of a citizen can be regarded as his income or not, it would be inappropriate to apply the tests traditionally prescribed by the Income-tax Act as such.

The Court also observed –

- “If the legislature realises that the private controlled companies generally adopt the device of making advances or giving loans to their shareholders with the object of evading the payment of tax, it can step in to meet this mischief, and in that connection, it has created a fiction by which the amount ostensibly and nominally advanced to a shareholder as a loan is treated in reality for tax purposes as the payment of dividend to him. In making the fiction, the Legislature has not travelled beyond the legislative field assigned to it by entry 82 in List I.”

Are Gifts income ?

- In general terms, gift consists in the relinquishment of one's own right over the property and creation of the right of another in that property.
- As per dictionary meaning 'gift' means the transfer of any property from one person to another gratuitously while donor is alive and not in expectation of death.
- As per erstwhile Gift Tax Act, Gift has been defined under section 2(xii) as transfer by one person to another of an existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer or conversion of any property referred to in section 4, deemed to be gift under that section.
- **CBDT Circular No. 158 [F. No. 173/2/73-IT(A-I)], dated 27-12-1974.**

“2. Receipts which are of a casual and non-recurring nature will be liable to income-tax only if they can properly be characterised as “income” either in its general connotation or within the extended meaning given to the term by the Income-tax Act. Hence, *gifts of a purely personal nature will not be chargeable to income-tax except when they can be regarded as an addition to the salary or when they arise from the exercise of a profession or vocation.*”
- The Hon'ble Kerala HC has in the case of **CGT v.Smt. C.K. Nirmala 215 ITR 156 (FB)** observed as follows :

"One of the essential ingredients constituting a gift under section 2(xii) of the Gift-tax Act, 1958, is that the transfer of property by one person to another must be without consideration in money or money's worth."

Are Gifts income ?...

- In the matter of ***Beynon v. Thorpe* [1928] 14 Tax Cases 1**, it was held:

"The payment was nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves, that it was merely a gift moved by that sort of gratitude or that sort of moral obligation, that whether the gifts are large or small, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks, he ought to supply with funds for one reason or another. Such gifts did not fall under the category of profits and gains which could be the subject-matter of taxation."
- In ***Reed v. Seymour* 11 Tax Cases 625 (HL)**. Viscount Cave L.C. enumerated a principle :

"Is it in the end a personal gift or is it remuneration? If the latter, it is subject to tax; if the former, it is not".
- The Hon'ble SC of India in the case of ***Mahesh Anantrai Pattani v. CIT* 41 ITR 481** held:

"where a receipt is wholly unconcerned with and is not the result of remuneration of services rendered but is strictly in nature of personal gift for the personal qualities of the assessee, received by him as a token of personal esteem and veneration, the amount received cannot be said to be income liable to tax."

Are Gifts income ?...

- The Hon'ble Madras High Court in the case of ***CIT v. S.A. Rajamanickam* [1984] 149 ITR 85** held the amount presented to a member of political party by the donors in recognition of his personal qualities is not liable to tax.
- The Hon'ble Madras High Court in the case of ***C.P. Chitrarasu v. CIT* [1986] 160 ITR 534** held that donations received from friends and well wishers, cannot be recorded as income.
- The Hon'ble Madras HC in the case of ***CIT v. Balamuralikrishna* [1988] 171 ITR 447** where an amount of Rs. 30,000 was received by an artist held that there was no direct nexus between the payment received and his vocation. It is clear that the receipts cannot be treated as income liable to tax.
- The Hon'ble Karnataka HC in the case of ***CIT v. K.R. Honnappa* [1989] 180 ITR 660** held that contributions made by the admirers to a politician in appreciation of his qualities or personal character fell outside the purview of income as defined under section 2(24).
- Similarly in the case of *CIT v. Sarbamangala Devi* [1987] 163 ITR 898 (Patna), *CIT v. Dr. P.R. Chakravarty* [1987] 165 ITR 345 (Patna), *CIT v. Abdul Gani Gurdeji* [1995] 213 ITR 798 (Raj.), *Maharaj Shri Govindlalji Ranchhodlalji v. CIT* [1958] 34 ITR 92 (Bom.), *CIT v. Girdharram Hariram Bhagat* [1985] 154 ITR 10 (Guj.), *CIT v. Ramdeo Samadhi* [1986] 160 ITR 179 (Raj.) **where the gift was made out of love and affection it was held not liable to be treated as income.**

Objective of introducing S. 56(2)(v)

- In the Budget Speech of 2004 while introducing the Finance (No. 2) Act, 2004, Finance Minister stated the objective of amendment as follows :
 - “... I abolished gift-tax in 1997. That decision remains, but the loophole requires to be plugged **to prevent money laundering**. Accordingly, **purported gifts from unrelated persons, above the threshold limit of Rs. 25,000, will now be taxed as income.**”
- **Explanatory Memorandum to Finance (No. 2) Bill, 2004**
 - Modification of the definition of income to include receipts in cash or credit otherwise than for consideration**

It is proposed to insert a new sub-clause in the definition of income so as to provide that any sum received on or after the 1st day of September, 2004, by an individual or a Hindu undivided family from any person, in cash or by way of credit, otherwise than by way of consideration of goods and services shall be included within the definition of income under section 2(24) of the Income-tax Act. It is also proposed to provide a general threshold limit of Rupees twenty five thousand. In addition to this, in the case of an individual's marriage, the aggregate of gifts received upto Rupees one hundred thousand will not be charged to tax. However, in order to avoid hardships in genuine cases, it is also proposed to exclude certain sums from the scope of the new definition of income under section 2(24).....
- “Money laundering” denotes siphoning off money from country by illegal channels – ITO v. Komal Kumar Bader (33 SOT 58)(JP).

Section 56(2)(vi)

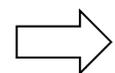
- S. 56(2)(vi) has been introduced by Taxation Laws (Amendment) Act, 2006. It replaces S. 56(2)(v) w.e.f. 01.04.2006.
- S. 56(2)(vi) applies to any sum of money received by an individual or HUF, from any person, if the aggregate value thereof exceeds Rs. 50,000 in a previous year. The section was effective upto 01.10.2009.
- Amounts received from relatives as also amounts received on the occasion of marriage of the individual, under a will or by way of inheritance, in contemplation of death of the payer, etc. were not chargeable under this clause.
- The only difference between the provisions of erstwhile S. 56(2)(v) and S. 56(2)(vi) was that S. 56(2)(v) applied to each individual gift exceeding Rs. 25,000 whereas S. 56(2)(vi) applied to a case where aggregate value of gifts received during the previous year exceeded Rs. 50,000. In a case where the aggregate value of amounts received during the previous year exceeded Rs. 50,000 the entire amount was chargeable under this clause and not merely the excess over Rs. 50,000.

Text of Section 56(2)(vii)

“56(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 :—

(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, -

(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(ii) For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration;

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause;

Provided further that, the said proviso said apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property.

Text of Section 56(2)(vii) ...

- (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 as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

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

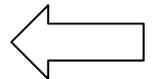
- (a) from any relative; or
- (b) on the occasion of the marriage of the individual; or
- (c) under a will or by way of inheritance; or
- (d) in contemplation of death of the payer or donor, as the case may be; or
- (e) from any local authority as defined in the *Explanation* to clause (20) of section 10; or

Text of Section 56(2)(vii)...

- (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.

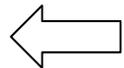
Explanation.—For the purposes of this clause,—

- (a) "assessable" shall have the meaning assigned to it in the *Explanation 2* to sub-section (2) of section 50C;
- (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;
- (c) "jewellery" shall have the meaning assigned to it in the *Explanation* to sub-clause (ii) of clause (14) of section 2;
- (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;
 - (viii) any work of art; or
 - (ix) bullion;



Text of Section 56(2)(vii)...

- (e) *"relative" means,—*
- (i) *in case of an individual—*
 - (A) *spouse of the individual;*
 - (B) *brother or sister of the individual;*
 - (C) *brother or sister of the spouse of the individual;*
 - (D) *brother or sister of either of the parents of the individual;*
 - (E) *any lineal ascendant or descendant of the individual;*
 - (F) *any lineal ascendant or descendant of the spouse of the individual;*
 - (G) *spouse of the person referred to in items (B) to (F); and*
 - (ii) *in case of a Hindu undivided family, any member thereof;*
- (f) *"stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;"*



Section 56(2)(vii) ...

- S. 56(2)(vii) applies when an individual or HUF, in any previous year, receives from any person or persons, on or after 01.10.2009 :

Property received	Amount liable to tax
any sum of money, without consideration, aggregate value of which exceeds Rs. 50,000.	whole of the aggregate value of money received
any immovable property – <ul style="list-style-type: none"> • without consideration, the stamp duty value of which exceeds Rs. 50,000; • for a consideration which is less than its stamp duty value by an amount exceeding Rs. 50,000. 	Stamp duty value of immovable property Difference between the stamp duty value and consideration
any property other than immovable property, -	
* without consideration, the aggregate FMV of which exceeds Rs. 50,000;	whole of the aggregate of FMV (as per prescribed method) of movable property.
* for a consideration which is less than the aggregate FMV of the property by an amount exceeding Rs. 50,000.	aggregate FMV (as per prescribed method) of movable property in excess of the consideration.

- Second Proviso to S. 56(2)(vii) specifies the situations to which this clause does not apply.

Section 56(2)(vii)...

- As per the second proviso, 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 to Section 56(2)(vii) defines the terms 'assessable', 'fair market value', 'jewellery', 'property', 'relative' and 'stamp duty value'.

Section 56(2)(vii)...

- It is not that all properties received without consideration or for inadequate consideration become taxable. The term 'property' has been exhaustively defined in the Explanation as follows :

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

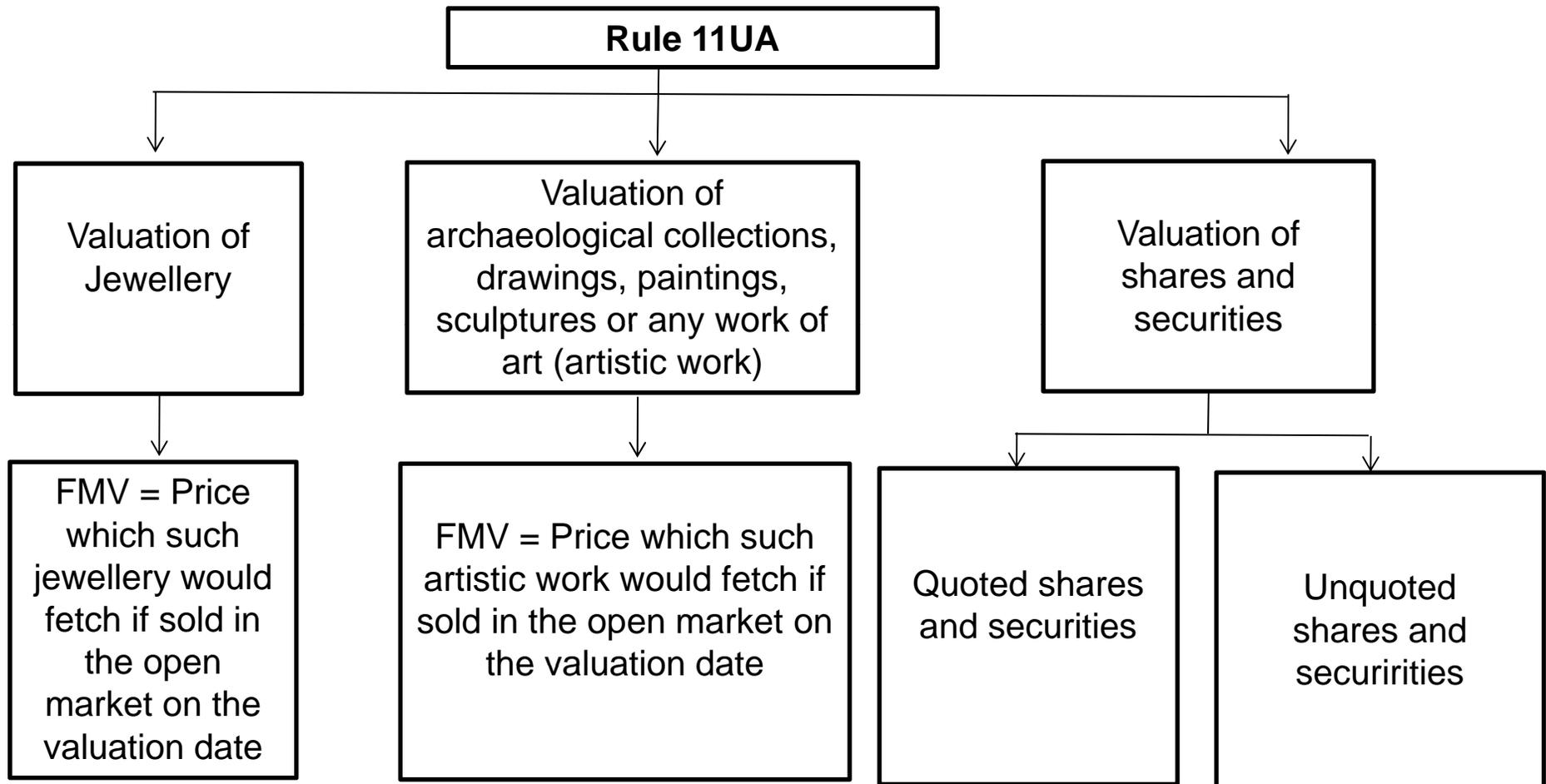
- (i) immovable property being land or building or both;
- (ii) shares and securities;
- (iii) jewellery;
- (iv) archaeological collections;
- (v) drawings;
- (vi) paintings;
- (vii) sculptures;
- (viii) any work of art; or
- (ix) bullion.”

- The Section applies to all individuals irrespective of their age, citizenship or residential status. However, in view of the provisions of Section 5 a non-resident shall be liable to pay tax only on amounts or property received in India.
- While the recipient of the amounts or property can only be individual or HUF, the giver of the amounts or property could be any person including Local Authority, Trust, etc. However, in view of the decision of Andhra Pradesh High Court in CIT v. Dredging Corporation of India (174 ITR 682). Government does not constitute a person. Therefore, amounts received from Government may not be covered by S. 56(2)(vii).

Section 56(2)(vii)...

- The language of the Section is quite wide and covers all types of receipts and not merely receipts in the nature of gifts. For eg. A banker receiving money on behalf of the account holder is also receiving a sum of money. However, this is not intended to be covered. The purpose of the amendment is to prevent a mischief. Accordingly, one should adopt a strict construction while interpreting these provisions. (44 ITR 876, 55 ITR 637, 55 ITR 17).
- Heydon's Rule or the Mischief Rule applies when the amendment is capable of a wider application than the mischief which gave birth to it. A statute must then be understood in a sense in which it best harmonises with the object and advances the remedy. As per the rule in Heydon's case, four factors are to be considered while interpreting a law.
 - (a) *what was the common law before the making of the Act;*
 - (b) *what was the mischief and defect for which the common law did not provide;*
 - (c) *what remedy Parliament resolved and appointed to cure the disease of the Commonwealth; and*
 - (d) *the true reason of the remedy.*
- In case of receipt of immovable property (IP) without consideration, stamp duty value is regarded as taxable whereas, FMV of movable property means the value determined in accordance with the method prescribed in Rules 11U and 11UA.
- Rule 11U defines various expressions used in determination of FMV.
- Rule 11UA deals with determination of FMV.

Rule 11UA



Rule 11UA...

Valuation of Jewellery

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graph TD; A[Valuation of Jewellery] --> B[Received by the way of purchase on the valuation date, from a registered dealer]; A --> C[Received by any other mode and the value of the jewellery exceeds rupees fifty thousand]; B --> D[the invoice value of the jewellery shall be the fair market value;]; C --> E[then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date];
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Received by the way of purchase on the valuation date, from a registered dealer

the invoice value of the jewellery shall be the fair market value;

Received by any other mode and the value of the jewellery exceeds rupees fifty thousand

then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date

Rule 11UA...

Valuation of archaeological collections, drawings, paintings, sculptures or any work of art (artistic work)

Received by the way of purchase on the valuation date, from a registered dealer

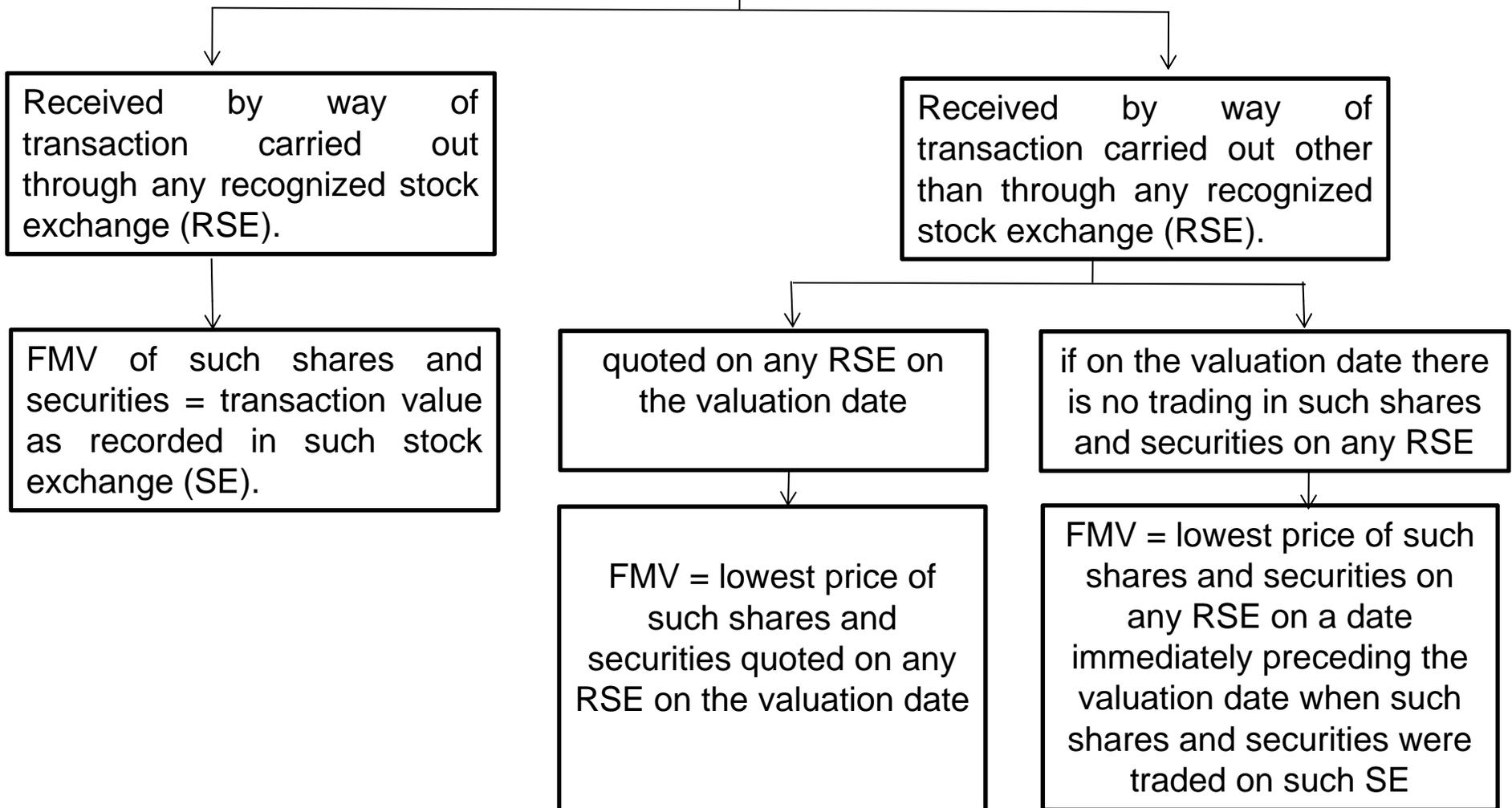
the invoice value of the artistic work shall be the fair market value.

Received by any other mode and the value of the artistic work exceeds rupees fifty thousand

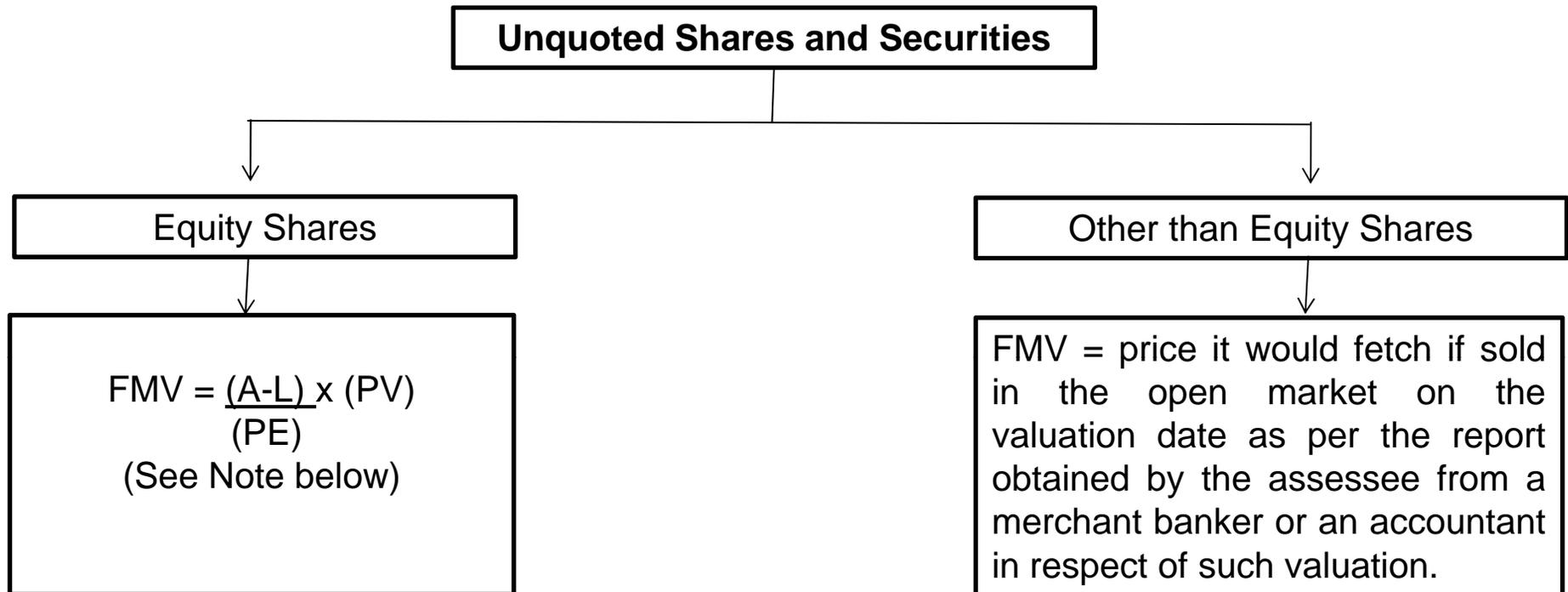
then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date.

Rule 11UA...

Quoted Shares and Securities



Rule 11UA...



Note :

A = Book value of the assets in Balance Sheet as reduced by certain amounts specified in Rule 11UA(c)(b).

L = Book value of liabilities shown in the Balance Sheet but not including amounts stated in (i) to (vii) in Rule 11UA(c)(b).

PE = Total amount of paid up equity share capital as shown in Balance Sheet.

PV = The paid up value of such equity shares.

Background for 56(2)(vii)(b)

- The Finance Act, 2009 inserted section 56(2)(vii) w.e.f. 01.10.2009. Simultaneously with introduction of this section, s. 56(2)(vi) was deleted.
- S. 56(2)(vi) did not cover receipts in kind whereas S. 56(2)(vii) covers receipts in kind as well.
- S. 56(2)(vii) covers receipt of property mentioned therein. Such receipt may be without consideration or for a consideration which is less than its stamp duty value / fair market value
- Receipt of immovable property without consideration is chargeable to tax if such receipt is on or after 01.10.2009 and other conditions are satisfied.
- Receipt of immovable property for a consideration which is less than its stamp duty value is chargeable to tax w.e.f. Asst Year 2014-2015. Earlier, such receipt was chargeable to tax w.e.f. 01.10.2009. However, Finance Act, 2010 deleted this part with retrospective effect from 01.10.2009. The Memorandum explaining the provisions of the Finance Bill, 2010 explained the reason for deletion as under :

“C. In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a taxable differential. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property.”

Background for 56(2)(vii)(b)...

- The difficulty envisaged by the Finance Bill, 2010 is sought to be resolved by the proviso to 56(2)(vii)(b)(ii).
- Except for the proviso to S. 56(2)(vii)(b)(ii) the provisions are the same as they were introduced by the Finance Act, 2009 and amended by the Finance Act, 2010.
- In the event that there is an issue of interpretation of the provisos in view of the language not being clear or being capable of two interpretations the provisos will have to be interpreted in a manner that they resolve the difficulties which were envisaged by the Finance Act, 2010.

Analysis of S. 56(2)(vii)(b)

■ Conditions to be satisfied for the section to apply:

1. The assessee is an individual or a hindu undivided family;
2. The assessee receives from any person or persons any immovable property. For this purpose immovable property is land or buildings or both (for brevity sake hereafter referred to as IP).
3. The immovable property so received is capital asset of the assessee.
4. The assessee receives the immovable property either –
 - a) without consideration and the stamp duty value of such property exceeds Rs. 50,000 ; or
 - b) for a consideration which is less than the stamp duty value of such property and the difference between the stamp duty value and the consideration exceeds Rs. 50,000;
5. The IP is not received from the relative as defined in Explanation (e) to the section.
6. The IP is not received from a person or in any of the situations mentioned in second proviso to section.

Consequences if the above conditions are satisfied:

- **Consequences if the above conditions are satisfied:**

Situation	Amount taxable under IFOS
In case immovable property is received by an assessee -	
without consideration	The stamp duty value of such property
for a consideration which is less than its stamp duty value	Difference between the stamp duty value and consideration.

- For computing capital gains arising on transfer of such property, the cost of acquisition shall be deemed to be the value which has been taken into account for the purposes of S. 56(2)(vii) {Section 49(4)}.

Exceptions

■ Exceptions:

- 1 In case the assessee has –
 - a) entered into an agreement;
 - b) the agreement is for transfer of immovable property; and
 - c) the agreement fixes the amount of consideration;
 - d) the date of such agreement and the date of registration are not the same;
 - e) the amount of consideration referred to in the said agreement or a part of the consideration has been paid by any mode other than cash on or before the date of the said agreement

then,

the stamp duty value on the date of the agreement may be taken for the purposes of S. 56(2)(vii)(b)(ii).

- 2 In case the assessee disputes the stamp duty value and claims before the Assessing Officer (AO) that the value adopted or assessed or assessable by the stamp duty value exceeds the fair market value of the property and the stamp duty value has been accepted (i.e. it has not been disputed in an appeal or revision or no reference has been made before any other authority, court or the High Court) then the AO may refer the valuation of such property to a Valuation Officer and the provisions of Section 50C and S. 155(15) shall apply in relation to the stamp duty value of such property for the purposes of clause 56(2)(vii)(b).

'Individual' and 'HUF'

- The section applies only to an assessee who is an individual or a hindu undivided family.
- Residential status of the assessee is not important i.e. the section applies to a resident and also to a non-resident assessee being an individual or hindu undivided family.
- In case the assessee is a non-resident the receipt covered by this clause will be taxable only if it falls within the scope of his total income as per provisions of S. 5 of the Act.
- In respect of non-resident individual only sum or property received in India will be chargeable under section 56(2)(vii) subject to provisions of DTAA, if any.

- **CIT v. Shri Krishna Bandar Trust (201 ITR 989) (Cal)**

“The Supreme Court in CIT v. Indira Balkrishna [1960] 39 ITR 546 , while considering what constitutes an association of persons, held that the word ‘association’ means ‘to join in any purpose’ or ‘to join in an action’. Therefore, ‘association of persons’ as used in section 2(31)(v) means an association in which two or more persons join in a common purpose or common action. The association must be one the object of which is to produce income, profits or gains. In the instant case, neither the trustees nor the beneficiaries could be considered as having come together with the common purpose of earning income. The beneficiaries had not set up the trust. The trustees derived their authorities under the terms of the deed of trust. Neither the trustees nor the beneficiaries had come together for a common purpose. They were merely in receipt of income. The mere fact that the beneficiaries or the trustees being representative assessee were more than one, could not lead to the conclusion that they constituted ‘an association of persons’.”

'Individual' and 'HUF'...

It is now well-settled that the word 'individual' does not necessarily and invariably always refer to a single natural person. A group of individuals may as well come in for treatment as an individual under the tax laws if the context so requires." (emphasis supplied)

- **CIT v. Deepak Family Trust No. 1 (211 ITR 575)(Guj)**

Trustees of a discretionary trust have to be assessed in status of 'individual' and not in status of 'association of persons'.

- Rajkot Bench of the ITAT has in the case of **Vineetkumar Raghavjibhai Bhalodia [2011] 11 taxmann.com 384 (Rajkot)** held that HUF is nothing but a group of relatives and therefore, gift received from HUF would be exempt from tax under section 56(2)(vi).

- FA, 2012 has w.r.e.f. 01.10.2009 amended the definition of "relative" to also cover in case of a Hindu Undivided Family any member thereof. Therefore, any sum or property received by HUF from a member thereof will not be chargeable under section 56(2)(vii).

'Receives'

- The taxable event is receipt of immovable property, by an individual or HUF, without consideration or for a consideration which is less than its stamp duty value. Immovable property is defined to mean land or building or both.
- Ordinarily, 'receive' means : to take as, something, *i.e.*, offered, given, committed, sending, paid or the like; to accept. It could also mean to take possession of.
- Supreme Court while interpreting the words 'is received' or 'are received' has held that:
 - (a) The words 'are received' are not terms of art and their meaning must receive colour from the context in which they are used [*CIT v. Dharamdas Hargovandas* [1961] 42 ITR 427 (SC)];
 - (b) The word receipt of income refers to the first occasion when the recipient gets the money under his own control. [*Keshav Mills Ltd. v. CIT* [1953] 23 ITR 230 (SC)]
- Two significant aspects may be noted from the above decision: Contextual meaning; and receipt must be such that the thing received is under recipient's own control.
- The meaning of 'receives' must be construed having regard to the following :
 - The receipt is to be treated as income.
 - The receipt must be of immovable property as specified.
 - The receipt must be without consideration or for a consideration which is less than its stamp duty value.
 - The receipt must be from any person(s) (which implies that the person divest his ownership - legal/beneficial - and control in favour of recipient).

'Receives'...

- Receipt can occur only in one place, unlike accrual or arisal, which may occur in more than one place, or in more than one country.
- Receipt by an agent, would be a constructive receipt by the person entitled to receive. This has been laid down in the following decisions:
 - *Pereira And Roche v CIT (1966) 61 ITR 371(Mad)*;
 - *CIT v Bihar Rajya Pul Nirman Nigam Ltd (1991) 191 ITR 173 (Patna)*.
- Thus, one can safely conclude that receipt would mean receipt with a right to deal with the immovable property as an owner. Therefore, mere receipt without any rights to deal with the property as an owner may not attract the charge under this section eg. Gratuitous user or license of the property.
- The same sum of money qua income cannot be received twice over, once outside India and then inside it. [*Keshav Mills Ltd. v. CIT (1953) 23 ITR 230, Secretary, Board of Revenue v. Ripon Press & Sugar Mills Ltd. AIR 1923 Mad 574: 1 ITC 202(Mad)*]

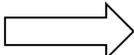
'Receives'...

- Hence, the word 'receives' (the receipt whereof is from any person), in the context of the assets, could mean as follows, in relation to:

Property	Received when
Sum of money	the recipient gets absolute control over the same.
Immovable Property	the recipient gets the possession as well as title thereto along with beneficial rights of enjoyment, like, the absolute rights of disposal thereof or deal with the same as he likes.
Movable Property	the recipient gets possession, legal title where required and absolute control to deal with the same in the manner which he likes implying legal as well as beneficial ownership.

- Prima facie*, therefore, unless all the above requisites are present in a transaction of receipt, it cannot be said that individual/HUF receives the money or property, which could be taxed under the clause.
- In case of an immovable property booked at the time of construction a question would arise as to what is the point of time when one can say that the immovable property is received by the assessee – is it the date of agreement which is relevant or is it the date of registration of the agreement or is it the date when the local authority grants occupancy certificate to the property or is it the date when the assessee receives possession of the immovable property. Answer to this question will determine the year in which the charge is attracted under this section.

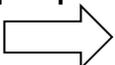
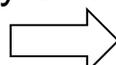
'Receives'...

- The provisions of the clause and also the Memorandum indicate that it is the date of registration which is to be regarded as the date of receipt of the property. The proviso to sub-clause (b)(ii) states that where the date of agreement for transfer is not the same as the date of registration then if conditions stated in the second proviso are satisfied value of the property on the date of such agreement for transfer is what needs to be considered for the purposes of sub-clause (b) of clause (vii) of sub-section (2) of section 56 thereby indicating that in other cases it is the value on the date of registration which is material for the purposes of charge under this clause. The Memorandum explaining the provisions of the FB, 2013 reads as under:
“..... Considering the fact that there may be a time gap between the date of agreement and the date of registration, it is proposed to provide that where the date of the agreement fixing the amount of consideration for the transfer of the immovable property and the date of registration are not the same, ***the stamp duty value may be taken as on the date of the agreement, instead of that on the date of registration***. This exception shall, however, apply only in a case where the amount of consideration, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement fixing the amount of consideration for the transfer of such immovable property.” (emphasis supplied)
- Date of booking or date of registration or date of possession ? Can the charge be postponed if there is no conveyance but possession is received and consideration is paid?
- Is the section retroactive. 

'Immovable Property'

- S. 56(2)(vii)(b) contemplates assessee receiving 'immovable property' without consideration or for a consideration which is less than its stamp duty value.
- Explanation to S. 56(2)(vii) defines 'property' inter alia to mean capital asset being immovable property being land or building or both.
- Question may arise whether rights in land or building, such as tenancy, lease, license in or with respect to land or building or both, are covered by this section. Since the definition of property does not refer to rights or transactions which may enable use or enjoyment of property, it appears that having regard to the description, context and objective, acquisition of such rights cannot be equated with immovable property because the Act specifically refers to such rights or transactions where the same are sought to be covered.
 - Chapter XXC as was applicable, before 01.07.2002, to transfer of immovable property specifically included rights in or with respect to any land or any building apart from land or building [S. 269UA(d)(ii)].
 - Section 27(iii) to (iiib) refer to certain types of transactions w.r.t. land or building.

'Immovable Property'...

- In the context of S. 50C, Tribunal has in the following cases held that the said section does not apply to rights in immovable property.
 - DCIT v Tejinder Singh (2012) (50 SOT 391) (Kol) - Transfer of leasehold rights in a building do not attract provisions of S. 50C.
 - Atul G. Puranik v. ITO (132 ITD 499)(Mum) - Leasehold rights in plot of land is not 'land or building or both'.
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 - Smt. Myrtle D'Souza v. ITO (ITA No. 3168/Mum/2011) (Assessment Year 2006-07) order dated 20.06.2012 – follows Mrs. Arlette Rodrigues and holds that S. 50C applies to Transfer of Development Rights.
- Are the following immovable property –
 - Development agreements
 - Shares with occupancy rights
 - Transfer of 100% shares of the Company whose only asset is an immovable property.
- Is receipt of immovable property situated outside India covered by S. 56(2)(vii)(b)? 
- Is receipt of immovable property held as stock-in-trade covered? 

'Consideration'

- Any immovable property received without consideration or for a consideration which is less than its stamp duty value is the subject matter of charge. However, the term 'consideration' is not defined in the Act. The language used in S. 56(2)(vii)(b) is different from the definition of the term 'gift' was defined under Gifts Tax Act, 1957.
- The Courts, in the context of the provisions under the Direct Tax Laws have explained the word 'consideration' as follows:

In the context of the provisions of the Indian Income-tax Act, 1922, Patna High Court in ***RaiBahadur H.P. Banerjee v.CIT [1941] 9 ITR 137*** explained it as follows :

“In my judgment the word ‘consideration’ appearing in this sub-section is used in its legal sense as it is used in connection with the transfer of assets. A transfer of assets may be gratuitous or wholly without consideration or it may be with consideration, that is for some return moving from the transferee to the transferor. The word ‘consideration’ is not defined in the Transfer of Property Act, and in my judgment it must be given a meaning similar to the meaning which it has in the Indian Contract Act. Section 2(b), Indian Contract Act, defines ‘consideration’ in these words ‘When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise”.

'Consideration'...

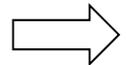
- In the context of the provisions of the Gift-tax Act, 1958 the Full Bench of the Kerala High Court in ***CGT v. Smt. C.K. Nirmala*** [1995] 215 ITR 156, 160, 161 explained it as follows:
“Within the framework of the above finding what is required to be decided by this court is whether the transfer of property involved in this case would come within the meaning of the word ‘gift’ in section 2(xii) of the Act. One of the essential ingredients constituting the gift under this provision is that the transfer of property by one person to another must be ‘without consideration in money or money’s worth’. However, the word ‘consideration’ is not defined in the Act and, therefore, it must carry the meaning assigned to it in section 2(d) of the Indian Contract Act, 1872. In *Keshub Mahindra v. CGT* [1968] 70 ITR 1, the Bombay High Court, in a similar situation, adopted the said course.
- Section 2(d) of the Indian Contract Act is thus :
“**When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.**”

'Consideration'...

- There is nothing to show in the definition of the term 'consideration' that the benefit of any act or abstinence must 'directly' go to the promisor. A contract can arise even though the promisee does or abstains from doing something for the benefit of a third party and the promisor can treat the benefit to a partnership firm where he is also a partner as consideration. Sir William R. Anson said : 'The consideration may be of benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promise.' (Principles of the English Law of Contract).... ..But the cardinal issue in this case has to be solved within the framework of the provisions contained in section 2(xii) of the Gift-tax Act read with section 2(d) of the Indian Contract Act..."
- Thus, consideration may be in cash or in kind. Consideration need not be monetary consideration. Consideration may flow from a third party. Agreements without consideration are void (Section 25 of the Indian Contract Act). S. 25 further provides for following three cases where agreement made without consideration is not void. i.e. following are cases of agreements without consideration which are not void.
 - It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

'Consideration'...

- It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless
 - It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
- Mumbai Bench of ITAT has in the case of Ashok C Pratap v. Addnl. CIT (2012)(23 Taxmann.com 347) (Mum.) held that the amount received by beneficiary from a Trustee on dissolution of a trust cannot be said to be without consideration.
 - In the case of ACIT v. Meenakshi Khanna (143 ITD 744)(Del ITAT), the Tribunal held the amount received by the assessee from her ex-husband representing accumulated monthly installments of alimony to be consideration for relinquishing all her past and future claims. The Tribunal held that since there was sufficient consideration in getting the said amount, S. 56(2)(vi) was not applicable.
 - In the case of Purvez A. Poonawalla v ITO (2011-TIOL- 262-ITAT- MUM), the Tribunal has in the context of S. 56(2)(v) held that the amount received by the assessee for abstaining from contesting the will was for a consideration and therefore was not covered by S. 56(2)(v).
 - Promise to marry has held by Bombay HC to be valid consideration (I. Chatterji v. CGT (53 Taxman 428)(Bom))



Sum of 'money'

- **Oxford Advanced Learner's Dictionary** defines the term 'money' to include wealth and wealth has further been defined as "total value of property" would also include money.
- **Random House Unabridged Dictionary** defines the term 'money' as :
 - (1) any circulating medium of exchange, including coins, paper money, and demand deposits.
 - (2) gold, silver, or other metal in pieces of convenient form stamped by public authority and issued as a medium of exchange and measure of value.
 - (3) any article or substance used as a medium of exchange, measure of wealth, or means of payment, as checks on demand deposit or cowrie.
 - (4) a particular form or denomination of currency.
- **The Major Law Lexicon, 4th Edition, 2010 :**

"MONEY" includes any currency, cheque, promissory note, letter of credit, draft, payorder, travellers cheque, moneyorder, postal remittance and other similar instruments but does not include currency that is held for its numismatic value.
[Finance Act (32 of 1994), S. 67, Explan. (b) as substituted by Finance Act (21 of 2006), S. 68(D)]
- The word 'money' in its ordinary and natural meaning includes money in a foreign currency as well as money in sterling [The Halcyon The Great, (1975) 1 All ER 882, 887 (QBD). [Administration of Justice Act, 1965, S. 4(1); Supreme Court Funds Rules 1927, R.33(1)]].

'Immovable Property'

- S. 56(2)(vii)(b) contemplates assessee receiving 'immovable property' without consideration or for a consideration which is less than its stamp duty value.
- Explanation to S. 56(2)(vii) defines 'property' inter alia to mean capital asset being immovable property being land or building or both.
- Question may arise whether rights in land or building, such as tenancy, lease, license in or with respect to land or building or both, are covered by this section. Since the definition of property does not refer to rights or transactions which may enable use or enjoyment of property, it appears that having regard to the description, context and objective, acquisition of such rights cannot be equated with immovable property because the Act specifically refers to such rights or transactions where the same are sought to be covered.
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'Jewellery'

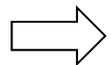
- For the purpose of S. 56(2)(vii) the term 'Jewellery' has the meaning assigned to it in the Explanation to Sub-Clause (ii) of Clause 14 of Section 2 which is as follows :
- "jewellery" includes—
 - (a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;
 - (b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.
- Jewellery would not cover gold or silver commonly known as bullion but bullion is specifically covered w.e.f. 01.06.2010 as a separate item of property. Therefore, upto 01.06.2010, precious metals in raw form would not constitute jewellery.
- **Random House Unabridged Dictionary** defines the term '**ornament**' as :
 - (1) An accessory, article, or detail used to beautify the appearance of something to which it is added or of which it is a part: architectural ornaments
 - (2) to (3)
 - (4) A person or thing that adds to the credit or glory of a society, era, etc
 - (5) The act of adorning

'Jewellery'... and 'Bullion'

- An ornament is something used for decoration. (<http://en.wikipedia.org/wiki/Ornament>)
Ornaments - A thing used to adorn something but usually having no practical purpose.
- Jewellery or jewelry is a form of personal adornment, such as brooches, rings, necklaces, earrings, and bracelets. [<http://en.wikipedia.org/wiki/Jewelry>]
- **Random House Unabridged Dictionary** defines the term '**jewellery**' as :
 - (1) Articles of gold, silver, precious stones, etc; for personal adornment.
 - (2) Any ornaments for personal adornment, as necklaces, cuff links, including those of base metals, glass, plastic, or the like.
- Bullion has not been defined but it as per dictionaries its meaning is as under :
- As per *Collins English Dictionary*
 - Gold or silver in mass.
 - Gold or silver in the form of bars or ingots, suitable for further processing.
- As per *Webster's Dictionary*
 - Uncoined gold or silver in the mass. Properly, the precious metals are called bullion, when smelted and not perfectly refined, or when refined, but in bars, ingots or in any form uncoined, as in plate. The word is often used to denote gold and silver, both coined and uncoined, when reckoned by weight and in mass, including especially foreign, or uncurrent coin.
 - Base or uncurrent coin.[Obs.]

'Capital Asset'

- For the purpose of S. 56(2)(vii) the term 'property' has been defined to mean 'capital asset' of the assessee viz.....
- Therefore, it is the receipt of nine items mentioned in the definition of the term 'property' and which are capital assets of the assessee would be covered by this clause.
- The term 'assessee' refers to the recipient of the property.
- If the term 'capital asset' in the above definition is understood to be as defined in Section 2(14) than it would not cover personal effects, agricultural land outside the notified area, furnitures, motor cars, etc. However, the other view could be that it is used in contradistinction to 'stock-in-trade' and not as it is understood in S. 2(14).
- The clause covers certain specified properties only but still does not cover yatches, aeroplanes, etc. Receipt of these items without consideration will not attract the provisions of S. 56(2)(vii).



'Proviso to sub-clause (b)

- Proviso to sub-clause (b) provides that in case an agreement for transfer has been entered into before registration then the stamp duty value as on the date of the agreement is to be considered instead of the stamp duty value on the date of registration.

The conditions to be satisfied for the proviso to be applicable are as under:

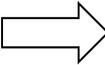
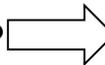
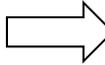
- a) The assessee has entered into an agreement;
- b) The agreement is dated;
- c) The agreement is for transfer of immovable property;
- d) The agreement is entered into before the date of registration;
- e) The agreement fixes consideration;
- f) The consideration or part thereof has been paid on or before the date of the agreement;
- g) Such payment is by a mode other than cash.

The term `agreement' has not been defined in the Act. Therefore, a useful reference can be made to the definition in S. 2(e) of The Indian Contract Act, 1872 which defines the term `agreement' as:

“Every promise and every set of promises, forming the consideration for each other, is an agreement. (Indian Contract Act (9 of 1872), S. 2(e))”

Proviso to sub-clause (b)...

- Dictionaries have explained the meaning of the term `agreement' as under:
 1. the fact of being of one mind; concurrence in the same opinion. {**Casell Concise Dictionary (Revised Edition, P. 29)**}
 2. The act of agreeing or of coming to a mutual arrangement. 2. The state of being in accord. 3. An arrangement that is accepted by all parties to a transaction. 8. Law. A. ***an expression of assent by two or more parties to the same object.*** B. ***the phraseology written or oral, of an exchange of promises.*** { **Websters Unabridged Dictionary (P. 40)**}
 3. AGREEMENT ranges in meaning from mutual understanding to binding obligation.
- The following observations lucidly explain the meaning of the term `agreement'.

“An `agreement' is an instrument between the parties who willfully agree to perform certain acts or refrain from doing something. The parties to the instrument should be agreed about the subject matter at the same time and in the same sense. The two or more parties which are agreed must communicate with each other.”
[Felthouse v. Bindley, (1862) 142 ER 1037]
- Can a letter of allotment be regarded as an agreement for transfer? 
- Can the agreement of transfer contemplated by the first proviso to S 56(2)(vii)(b) be an oral agreement? 
- Significance of the word `may' in proviso to S. 56(2)(vii)(b) ? 

First Proviso to S. 56(2)(vii)

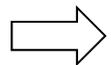
- The proviso grants the assessee a right to dispute SDV of the IP received by him without consideration or for a consideration which is less than the stamp duty value thereof on the ground that the FMV of the property is less than the stamp duty value of the property.
- Upon the assessee disputing the stamp duty value of the property, the AO may refer the valuation of the property to a Valuation Officer.
- The proviso uses the word `may'. In the context of S. 50C(2), the Tribunal has in the following cases held that “may” should be read as as `should'. It is held that if S. 50C is read to mean that if the AO is not satisfied with the explanation of the assessee then he `may' or `may not' send the matter for valuation to the DVO, then in that case this provision would be rendered redundant.
 - M/s Fortuna Structures Pvt. Ltd. v ACIT (2008)(60 itatindia 886)(Lucknow)
 - Meghraj Baid v ITO 23 SOT 25 (Jodh)
 - Kalpataru Industries v ITO (Mum)(41-B BCAJ 32)(ITA No. 5540/Mum/2007, Mum H Bench, Asst Year 2005-06, Order dated 24.8.2009)
 - Abbas T. Reshamwala v ITO (41-B BCAJ 33)(Mum)(ITANo. 3093/Mum/2009)(AY 2006-07)(Decided on 30.11.2009)

First Proviso to S. 56(2)(vii)...

- A question arises as to whether the condition mentioned in sub-section (2) of S. 50C viz. that the stamp duty value has been accepted is applicable in the context of S. 56(2)(vii)(b) because the proviso only makes a reference to the ground on which the stamp duty value is disputed by the assessee and not any other condition. While this may be a possible way of looking at the situation the proviso also mentions that S. 155(15) shall apply. S. 155(15) applies to a case where stamp duty value was accepted and thereafter in an appeal or revision such value undergoes a change. Upon stamp duty value undergoing a change, the order passed will be rectified u/s 154 of the Act. It appears that the better view would be that the stamp duty value should be accepted.
- Once reference is made to the Valuation Officer the provisions of S. 50C and S. 155(15) shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections.

'Capital Asset'

- For the purpose of S. 56(2)(vii) the term 'property' has been defined to mean 'capital asset' of the assessee viz.....
- Therefore, it is the receipt of nine items mentioned in the definition of the term 'property' and which are capital assets of the assessee would be covered by this clause.
- The term 'assessee' refers to the recipient of the property.
- If the term 'capital asset' in the above definition is understood to be as defined in Section 2(14) than it would not cover personal effects, agricultural land outside the notified area, furnitures, motor cars, etc. However, the other view could be that it is used in contradistinction to 'stock-in-trade' and not as it is understood in S. 2(14).
- The clause covers certain specified properties only but still does not cover yatches, aeroplanes, etc. Receipt of these items without consideration will not attract the provisions of S. 56(2)(vii).



'Relative'

- The term 'relative' is defined as follows :

“(e) "relative" means,—

(i) in case of an individual—

(A) spouse of the individual;

(B) brother or sister of the individual;

(C) brother or sister of the spouse of the individual;

(D) brother or sister of either of the parents of the individual;

(E) any lineal ascendant or descendant of the individual;

(F) any lineal ascendant or descendant of the spouse of the individual;

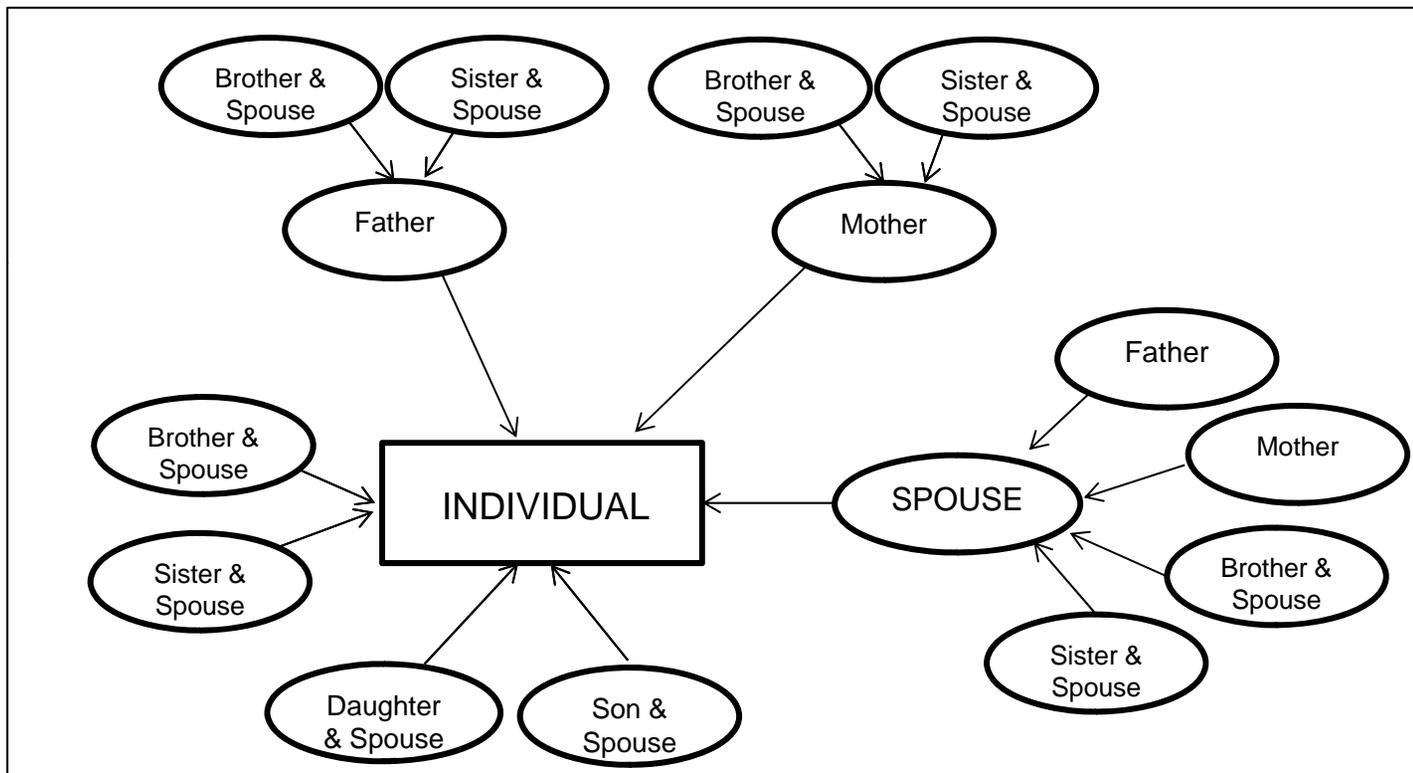
(G) spouse of the person referred to in items (B) to (F); and

(ii) in case of a Hindu undivided family, any member thereof;”

- The definition to be examined from the view point of the recipient.
- A two way relationship cannot always be assumed.
- It is possible that Donor may be relative of the Donee. The gift may therefore, be within the exception. If the said Donee were to make a gift to the Donor it cannot always be presumed that the gift originates from a relative. For eg. A gift given by an individual to his brother's son may be exempt as originating from a relative. However, if the said individual were to receive a gift from his nephew the gift may not fall within the exception.

'Relative'...

- The relatives of an assessee who is an individual are very nicely explained by the following diagram from BCAS Referencer.



Source : BCAS Referencer

'On the occasion of marriage'

- In respect of individuals, gifts received on the occasion of marriage are exempt.
- This exception would apply to the individual receiving the gift on his own marriage – Rajinder Mohan Lal v. CIT (2012)(49 SOT 713)(Chd.) - Word 'individual' used in clause (b) of proviso to section 56(2)(vi) includes only bride or bridegroom.
- Gifts received on engagement ceremony may not qualify as gift 'on the occasion of marriage'.
- Questions could arise as to whether gifts received on the occasion of re-marriage are also exempt.
- Under the Gift Tax Act also there was an exemption in respect of gifts made “on the occasion of marriage”.
- In the context of the said Act the Courts have held that “on the occasion of marriage” does not mean on the date of marriage but the gift should be associated with the event of marriage. It would mean that the marriage should be the immediate cause of making the gift.
- In the case of A Rudrakoti v. CIT 149 CTR 81 (Mad) – a gift given 4 years after marriage was reckoned to be gift on occasion of marriage and therefore was held to be entitled to exemption. Further in the case of CGT v. G Venkataswamy 236 ITR 539 (Mad), gift given after 14 years of marriage was held to have been given “on the occasion of marriage” and therefore exempt. However, the Kerala High Court have in the case of CGT v. Smt. B Indiradevi 238 ITR 846, gift given in close proximity to the time of marriage was held to be not entitle to exemption.

Cost of acquisition for the purpose of computing capital gains arising on transfer of an immovable property received without consideration or for a consideration which is less than its stamp duty value:

- Section 49 dealing with Cost with reference to certain modes of acquisition provides as under–

“(4) Where the capital gain arises from the transfer of a property, the value of which has been subject to income-tax under clause (vii) or clause (viiia) of sub-section (2) of section 56, the cost of acquisition of such property shall be deemed to be **the value which has been taken into account for the purposes of the said clause (vii) or clause (viiia).**”

Cost of acquisition of the property whose value has been subject to income-tax under clause (vii) of sub-section (2) of section 56 shall be deemed to be the value taken into account for the purposes of the said clause (vii).

- To illustrate, to compute capital gains arising on transfer of an immovable property which was received by the assessee for a consideration of Rs. 15,00,000 and whose stamp duty value was Rs. 25,00,000 but the DVO valued it at Rs. 20,00,000, the cost of acquisition will be deemed to be Rs. 20,00,000 (being value taken into account for the purposes of S. 56(2)(vii)).

Conflict between 49(4) and 49(1).

- Section 49(1) provides that where a capital asset is received by the assessee in any of the modes stated therein the cost to the previous owner shall be deemed to be its cost of acquisition. When an assessee who is an individual receives immovable property without consideration from a person who is not a relative of the assessee, the stamp duty value of the immovable property so received will be charged to tax u/s 56(2)(vii)(b). It may so happen that the cost of acquisition of the property to the donor may be more than its stamp duty value on the date of its receipt by the assessee. In such a case, for the purposes of computing capital gains on transfer of this property an issue would arise as to whether the cost of acquisition should be as per provisions of S. 49(1) or S. 49(4). To illustrate, in a case where assessee has on 13th October, 2013 received an immovable property without consideration from a person other than a relative and the stamp duty value of the property so received was Rs. 10,00,000 but the cost of acquisition of this property to the previous owner is Rs. 12,00,000. For computing capital gains arising on transfer of this property in assessment year 2014-15, the cost of acquisition will be deemed to be Rs. 10,00,000 for the following reason –

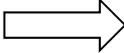
Conflict between 49(4) and 49(1)...

- The assessee has received immovable property as gift i.e. in one of the modes mentioned in S. 49(1). S. 49(1) provides that where the capital asset became property of the assessee in any of the modes stated therein the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be. In other words, as per S. 49(1) the cost of acquisition will be Rs. 12,00,000.
- However S. 49(4) provides that capital gain arising from transfer of a property, the value whereof has been subject to income-tax under S. 56(2)(vii), the cost of acquisition shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii). In other words, the cost of acquisition will be Rs. 10,00,000.
- Since there are two provisions dealing with the same situation one needs to consider whether the assessee has an option to disregard the provisions of S. 49(4) and exercise the option to apply S. 49(1) or will it be contended that 49(4) is a specific provision whereas S. 49(1) is a general provision therefore, the specific will prevail over general. It appears that the specific provision will prevail over the general one. Section 49(1) is a general provision dealing with all assets acquired in modes mentioned therein but S. 49(4) is a specific provision dealing with a particular class of assets whose value has been charged to tax under clause (vii) of sub-section (2) of section 56.

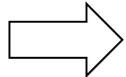
Issues

- In respect of gifts received by a minor, for the purpose of examining whether the donor is covered by the term 'relative', should the relationship of the donor be seen w.r.t. the minor or w.r.t. the parent in whose hands the income of the minor is to be clubbed.
- Each of the clauses of S. 56(2)(vii) provides for a threshold of Rs. 50,000. In the case of a minor whose income is clubbed with the income of the parent should the limit of Rs. 50,000 be examined separately qua the minor and the parent or should the gifts received by the minor and the parent be aggregated and such aggregate amount be compared with the threshold of Rs. 50,000.
- Are Trustees of a trust covered by S. 56(2)(vii).
- Are the following covered by S. 56(2)(vii) :
 - Are amounts received as non-interest bearing loans covered by the provisions of S. 56(2)(vii).
 - Amount received under an insurance policy.
 - Amount received on meeting with an accident so as not to file a case against the driver of the vehicle.
 - Amount received in consideration of the assessee abstaining from contesting the will is not covered by S. 56(2)(v) – *Purvez A Poonawala v. ITO (2011-TIOL-262-ITAT-MUM)*.
 - Hardship Compensation received by a member of the Society from the Developer who has undertaken re-development of the Society Building.
 - Amounts received as educational scholarship.

Issues...

- Compassionate payments received on happening of a natural disaster from Govt / Local Authority / Railway.
- Amounts received by a person who is sick in response to an appeal made by him to the public by an advertisement in the newspapers. If the amounts received are taxable can such a person claim deduction of medical expenses and / or cost of advertisement.
- Are amounts received by the beneficiaries of a discretionary trust from the Trustees of the Trust covered by S. 56(2)(vii).
- Miss A receives a sum of Rs. 1,00,000 and jewellery worth Rs. 10,00,000 from Mr. X against a promise to marry him. 
- Gifts from non-relatives on birthday, thread ceremony, engagement, wedding anniversary.
- Value of motor car received by a Dealer of Mobile Phones from the Mobile Company in the course of business .
- Purchase of specified property at a concessional rate.
- In case of receipt of immovable property without consideration. When can the property be said to be received – (a) on possession, (b) on execution of the agreement, (c) on registration of the agreement.

Issues...

- Are the following 'property' covered by S. 56(2)(vii) :
 - Stamp collection
 - Coins collection
 - Antique furniture
 - Motor car
 - Agricultural land within the limits of municipality
 - Agricultural land outside the notified limits.
 - Flat under construction in Mumbai / Chennai
- Is rural agricultural land covered by the provisions of s. 56(2)(vii)?
- In the case where shares are received without consideration, during the financial year, is it correct to contend that the value of shares received shall be computed with reference to the Audited Balance Sheet as on a date prior to the date of gift.
- Throwing of property into common hotchpot of the HUF.
- Property received under family settlement.
- Is the amount received by an individual from his adopted son covered by S. 56(2)(vii).
- Amounts charged to tax under this section are regarded as cost of acquisition under S. 49(4) from which date is the holding period and indexation to be computed. 

Section 56(2)(viia)

- 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);

Section 56(2)(viia)

- This section has been introduced by the Finance Act, 2010 w.e.f. 01.06.2010. The object of the amendment and the features explained in the Memorandum are as under :

“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 price much below their fair market value, it is proposed to amend section 56 to also include *within its ambit transaction undertaken* in shares of a company (not being a company in which the public are substantially interested) either for inadequate consideration or without consideration where the recipient is a firm or a company (*not being a company in which the public are substantially interested*).”
- A perusal of the above reveals that Memorandum refers to transactions as ‘transfers’ whereas the clause makes a reference to ‘receives’ or ‘receipt’.
- The objective or the reason behind the clause as explained in the Memorandum is not evident from the provision.

Section 56(2)(viiia)...

- It applies to firm or a company not being a company in which the public are substantially interested
 - which receives
 - from any person or persons
 - on or after 01.06.2010
 - any property being shares of a company not being a company in which the public are substantially interested
 - such receipt is without consideration, and the aggregate FMV of which exceeds Rs. 50,000; or
 - for a consideration which is less than the aggregate FMV of the property by an amount exceeding Rs. 50,000.
- If all the conditions stated above are satisfied then in a case where receipt is without consideration the whole of the aggregate FMV of such property, or where the receipt is for inadequate consideration then aggregate FMV of such property as exceeds such consideration shall be chargeable under this clause.
- First proviso to this clause provides that the clause does not cover certain transactions which are not regarded as 'transfer' under clause (via), (vic), (vicb), (vid) or (vii) of S. 47.
- Rules 11U and 11UA apply to this clause also.
- It is highly arguable to contend that allotment of shares is not covered by this provision. However, this proposition may be highly litigious.

Some issues related to Section 56(2)(viiia) ...

- Is allotment of shares covered.
- Bonus shares.
- Right shares (Sudhir Menon HUF v. ACIT 2014-TIOL-150-ITAT-MUM).
- Buy back of shares.
- Conversion of bonds or debentures.
- Transactions referred in S. 47 and not covered by the proviso.
- Capital contribution by partner at the time of his admission.
- Capital contribution by a partner of a firm.

Text of Section 56(2)(viib)

“56(2)(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 1 to clause (23FB) of section 10;”

Section 56(2)(viib) ...

- This clause is inserted by the Finance Act, 2012 w.e.f. 01.04.2013.
- By virtue of this clause share premium in excess of FMV is deemed as income.
- The Memorandum classifies this amendment under the heading “Measures to prevent generation and circulation of unaccounted money’.
- This clause nullifies certain court decisions holding that addition could not sustain under S. 68.
- **Section 56(2)(viib)**
 - Where a company, not being a company in which public are substantially interested (closely held company)
 - 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 then, aggregate consideration received for such shares as it exceeds the FMV of such shares is chargeable under this clause.
 - However, this clause does not apply where consideration for issue of shares is received by:
 - (a) a venture capital undertaking from a venture capital company or venture capital fund; or
 - (b) a company from a class or classes of persons as may be notified by the Central Govt.

Section 56(2)(viib) ...

- For the purpose of this clause FMV has been defined to be higher of the following :
 - (a) Such value as may be determined in accordance with the method to be prescribed; or
 - (b) As may be substantiated by the Company to the satisfaction of the AO based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know how, patents, copy rights, trade marks, licenses, franchises or any other business or commercial rights of similar nature.
- The method of valuation of unquoted equity share has been prescribed by Rule 11UA(2). As per this sub-rule, the value of the unquoted equity share is the value as determined by Net Asset Method (which is the same as has been prescribed for s. 56(2)(vii)(c)) or its fair market value determined by a merchant banker or an accountant as per the Discounted Free Cash Flow Method, at the option of the assessee.
- ‘Substantiate’ would mean, as per Random House Compact (Unabridged Dictionary) “to establish by proof or competent evidence”.
- Supreme Court in Dr. N G Dastane v. Mrs. S. Dastane (2 SCC 326)(1975) explained ‘satisfied’ to mean “satisfied on a pre ponderance of probabilities and not satisfied beyond a reasonable doubt.”

Section 56(2)(viib) ...

- Meaning of the word 'value' has been explained by the Supreme Court in the case Gurbachan Singh v. Shivilak Rubber Industries (2 SCC 626)(1996) as “further the use of the word 'value' means intrinsic worth of a thing. In other words utility of an object satisfying, directly or indirectly, the need or desires of a person.”
- A question could arise as to whether the residential status of the payee is to be checked at the time of receipt of application or during the previous year – e.g. an individual who is out of India pays for subscription of equity shares and the same are allotted to him. Subsequently, he comes to India say in the month of August of that previous year – is the receipt from this individual is covered by the section.



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