

Judgt. dt. 4.4.19 in T.C.A.224/19
CIT v. Vaani Estates P.Ltd.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4.4.2019

CORAM

**THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN**

Tax Case Appeal No.224 of 2019

Commissioner of Income Tax
Corporate Ward 3(4)
Chennai

Appellant

M/s.Vaani Estates Pvt. Ltd.,
No.60, Old No.100, IV Street,
Abhiramapuram, Chennai 600 018.
PAN: AAECV0933A

Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961
against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench,
Chennai, dated 27.8.2018 made in ITA No.1352/Chny/2018.

For Appellant : Mr.M.Swaminathan
Senior Standing Counsel assisted by
Ms.S. Premalatha

For Respondent : Mr.S.Vijayaraghavan

JUDGMENT

(Delivered by DR.VINEET KOTHARI J.)

The Revenue has filed this Tax Case (Appeal) under Section 260-A of

the Income Tax Act by raising the following purported substantial questions
of law arising from the order passed by the Income Tax Appellate Tribunal
dated 27.8.2018 by which, the learned Tribunal allowed the Assessee's
Appeal for the Assessment Year 2014-2015 and held that Section 56(2)(viib)

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of the Act cannot be invoked in the case of the Assessee for bringing to tax the amount brought into the Assessee Company Mrs.Sasikala Ragupathy, the mother for allotment of Equity Shares in her favour with a very high premium of RS.23.32 Crores on issuance 10,100 Shares at a premium of RS.23.31 crores:-

- "i) Whether, on the facts and circumstances of the case and in law, the Tribunal was justified in deleting the addition made under Section 56(2)(viib)?
- ii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that the provisions of Section 56(2)(viib) cannot be invoked in the assessee's case?"

2. The Company was initially formed with the husband and wife, Mr.B.G.Ragupathy and his wife Sasikala Ragupathy, each holding 5000 shares. Upon the death of Mr.B.G.Ragupathy, his shares devolved upon the only daughter Mrs.Vani Ragupathy. In order to purchase a property in the prime area of Adyar, Chennai, Mrs.Sasikala Ragupathy introduced a sum of RS.23.32 Crores in the Company through Banking Channels and from the said money brought into the Company, she was allotted 10100 shares at a premium of RS.23,086/- per share. The Assessing Authority imposed tax treating the said 'Share Premium' as "Income from Other Sources" under Section 56(2)(viib) of the Act, which was confirmed by the learned

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Commissioner of Income Tax (Appeals). However, the Tribunal has allowed the Appeal of the Assessee the with the following observation:-

*"7.3. It should be also kept in mind that provisions of Section 56(2)(viib) of the Act **creates a deeming fiction** and while giving effect to such legal fictions all facts and circumstances incidental thereto and inevitable corollaries thereof have to be assumed. At this juncture we are reminded of the decision of the Hon'ble Kolkatta High Court in the case M.D.Jindal v. CIT reported in 164 ITR 29, wherein it was held that "legal fictions are created only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond the legitimate field. But the legal fiction has to be carried to its logical conclusion within the framework of the purpose for which it is created.". Further it is apparent from the Finance Minister's speech that the provisions of Section 56(2)(viib) has been enacted to deter the generation and use of unaccounted money. At this juncture we are also reminded of the decision of the Hon'ble Apex Court in the case Allied Motors Pvt. Ltd., vs. CIT reported in 224 ITR 677, wherein it was held that the Finance Minister's Budget speech explaining the provisions are relevant in construing the provisions. Moreover in the*

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decision rendered by the Hon'ble Jurisdictional Madras High High Court in the case CIT v. Kay Arr Enterprises and others reported in 299 ITR 348 and the decision of the Hon'ble Kamataka high Court in the case CIT v. R.Nagaraja Rao it has been categorically held that "where there are transactions involving family arrangement with respect to transfer of shares, the corporate veil of the company has to be lifted and inferred that there is no transfer of shares and accordingly capital gain tax is not exigible." From the above it is apparent that even when there are transfer of shares physically, in the event of family arrangements, the Hon'ble High Courts have held that the entire transactions has to be viewed lifting the corporate veil and treat the transaction as if there is no transfer of shares and hence capital gain tax is not attracted. Similarly we are of the view that in the case of the assessee company also the corporate veil is required to be lifted and thereafter the transaction has to be viewed in the light of the relevant provisions of the Act.

*7.4. Bearing in mind, the facts of the case, the decision of the higher Judiciary Authorities cited supra and the legal principles discussed herein above, we are of the considered view that provisions of **Section 56(2)(viib) of***

the Act, cannot be invoked in the case of the assessee company because by virtue of cash being brought into the assessee company' by Mrs.Sasikala Raghupathy for allotment of equity shares with unrealistic premium the benefit has only passed on to her daughter Mrs.Vani Raghupathy and there is no scope in the Act to tax when cash or asset is transferred by a mother to her daughter. Hence we hereby direct the learned AO to delete the addition made by invoking the provisions of Section 56(2)(viib) of the Act in the case of the assessee company."

3. In the result appeal of the assessee is allowed."

3. The learned Senior Standing Counsel for the Revenue, Mr.M.Swaminathan submitted that since the shares in question were issued at a premium far in excess of the Fair Market Value of the Share in favour of Mrs.Sasikala Ragupathy, the same was clearly an "Income from Other Sources" in the hands of the closely held Company which is covered by Clause (viib) of Section 56(ii) of the Act.

4. Mr.Vijayalaghavan, learned counsel for the Assessee, on the other hand, submitted that the Assessing Authority has not held any enquiry for determination of "Fair Market Value" of the shares in question, which as contended by the Assessee, had gone up subsequently, on account of purchase of a prime property made by the Company in Adyar, Chennai just

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before the allotment of the Shares in favour of Mrs.Sasikala Raghupathy and the Assessing Authority was bound to compute the Fair Market Value taking into account the relevant factors as per Explanation (a)(ii) of Clause (viib) aforesaid. He further submitted that Section 56(2)(x) and proviso thereto states that the said clause does not apply to any sum of money or principal received from any relative and therefore, the indirect benefit of the said share premium paid by the mother on the allotment of share was imminent benefit conferred upon the daughter. The only other shareholder being a relative, the same could be treated only as gift by mother to the daughter and would not fall within the mischief of Section 56(2) Clause (Viib) of the Act. This contention, however, was not raised before the Authorities below.

5. Having heard the learned counsel appearing for the parties and upon perusal of the order passed by the Tribunal, we are of the opinion that before applying the provisions of Section 56(2)(viib) of the Act, the learned Assessing Authority was required to undertake the exercise of determining the Fair Market Value of the Shares, as defined in the provisions of Section 56(2)(viib) of the Act which is quoted below for ready reference:-

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"Income from other sources"

56(1) *Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable*

to income-tax under any of the heads specified in section 14, items A to E.

(2) *In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely:-*

(vib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided *that this clause shall not apply where the consideration for issue of shares is received-*

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons

*as may be notified by the Central Government in
this behalf.*

Explanation.-For the purposes of this clause,-

*(a) the fair market value of the shares shall be the
value-*

*(i) as may be determined in accordance with such
method as may be prescribed; or
(ii) as may be substantiated by the company to the
satisfaction of the Assessing Officer, based on the
value, on the date of issue of shares, of its assets,
including intangible assets being goodwill, know-
how, patents, copyrights, trademarks, licences,
franchises or any other business or commercial
rights of similar nature,
whichever is higher;*

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

6. Mr.Vijayaraghavan, learned counsel for the Assessee has also contended that the Assessee would also apply and seek necessary clarification from the Central Board of Direct Taxes in this regard and therefore, he may be permitted to do so while the matter could be remanded back to the learned Assessing Authority.

7. Having heard the learned counsel for the parties and considering the aforesaid provisions, we are of the opinion that the learned Assessing authority was required to undertake the exercise of fact finding by determining the Fair Market Value of the Shares in question as required in the Explanation to Section 56 as quoted above. That exercise not having been done, the matter deserves to be remanded back to the learned Assessing Authority for undertaking the said fact finding exercise. The Assessee will be free to raise all factual and legal contentions including the point about the said amount being treated as 'gift' from mother to daughter. The Assessee may also seek necessary clarification from the Central Board of Direct Taxes on administrative side.

8. Therefore, without expressing any opinion on the merits of the case and answering the questions sought to be raised in the present Appeal under Section 260A of the Act, we dispose of the Appeal filed by the Revenue by remitting the matter back to the Assessing Authority. No order as to costs.

(V.K.,J.) (C.V.K.,J.)
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Index: Yes/No

Internet: Yes/No

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To

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2.Income Tax Appellate Tribunal,
Madras 'A' Bench, Chennai

3.The Income Tax Officer,
Corporate Ward -3(4)
Chennai



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