**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH "Friday" NEW DELHI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT**
**AND**
**SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**(Through Video Conferencing)**

ITA No.5512/DEL/2011
Assessment Year 2005-06

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| Mr. J.S. Gujral,<br>K-165, Sourth City 1,<br>Gurgaon Haryana | v. | DCIT,<br>Circle-8(1),<br>New Delhi. |
| TAN/PAN: AAAPG4124F | | |
| (Appellant) | | (Respondent) |

ITA No.5513/DEL/2011
Assessment Year 2005-06

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| Ranjeet Singh,<br>V-32/5, DLF Phase-III,<br>Gurgaon | v. | DCIT,<br>Circle-8(1),<br>New Delhi. |
| TAN/PAN: AAAPL0885C | | |
| (Appellant) | | (Respondent) |

ITA No.5546/DEL/2011
Assessment Year 2005-06

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| Sanjiv Narayan,<br>F-225A,<br>Sainik Farm,<br>New Delhi. | v. | DCIT,<br>Circle-8(1),<br>New Delhi. |
| TAN/PAN: AAAPN0933B | | |
| (Appellant) | | (Respondent) |

ITA No.5574/DEL/2011
Assessment Year 2005-06

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| Mr. Krishna Kumar Pant,<br>373, Vikas Kunj,<br>Vikas Puri,<br>New Delhi. | v. | DCIT,<br>Circle-8(1),<br>New Delhi. |
| TAN/PAN: AAAPP 3981D | | |
| (Appellant) | | (Respondent) |

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|---|---|---|---|
| Appellant by: | Shri Tarandeep Singh, CA | | |
| Respondent by: | Shri Vipul Kashyap, Sr.D.R. | | |
| Date of hearing: | 19 | 11 | 2020 |
| Date of pronouncement: | 21 | 12 | 2020 |

**O R D E R**

**PER AMIT SHUKLA, JUDICIAL MEMBER:**

In the aforesaid appeals of different assessees identical issues are involved and are aggrieved by separate impugned orders of even date, 29th September, 2011, passed by the Ld. CIT (Appeals)-XI, New Delhi for the quantum of assessment passed u/s 147/143(3) for the A.Y. 2005-06. Both the representatives appearing before us have fairly stated that facts in all the four appeals are common and the reasoning given by the Assessing Officer and CIT (A) are also identical, therefore same were heard together and are being disposed off by way of this consolidated order. All four appellants are Directors of M/s SGS Tekniks Pvt. Ltd. (hereinafter referred to as "M/s SGS"). With consent of parties, we shall consider appeal of **Shri J. S. Gujral in ITA No.5512/Del/2011** as the lead matter and our finding given therein will apply mutatis mutandis in other 3 appeals.

2. Appellant has challenged the impugned order on following grounds:-

> "*1. That on facts and in law the initiation / culmination of reassessment proceedings u/s 147 is bad in law and void inter alia as:*

*(a) there was no legitimate material to form a reason to believe that income liable to tax has escaped assessment.*

*(b) the assumption of jurisdiction is bad in law, mechanical and without due consideration.*

*(c) the observations of CIT (A) vide order dated 19th December, 2008 in appeal No.183/07-08 could not constitute information leading to escapement of income.*

*2. That on facts and in law the CIT(A) erred in upholding an addition of Rs.1,44,24,000/- as income under the head "Salaries".*

*2.1 That on facts and in law, the CIT (A) erred in upholding that a benefit has been obtained by the appellant as a director of M/s SGS Tekniks Pvt. Ltd. by acquiring shares of M/s Eltek SGS Pvt. Ltd. at face value of Rs.10/- per share from it, which is taxable as a perquisite / income in terms of section 17(2)(iii) read with section 2(24)(iv) of the Act.*

*3. That without prejudice, on facts and in law the CIT (A) erred in adopting the value of "benefit" at Rs.240/- per share.*

*4. That on facts and in law the AO erred in levying interest u/s 234B of the Act.*

*5. That on facts and in law the orders passed by both the AO and the CIT (A) are void ab-initio and bad in law."*

2. Briefly stated the relevant facts are that appellant had filed a return of income on 29th July, 2005. The said return was processed vide intimation dated 10th January, 2006 issued u/s 143(1) of the Act and no notice u/s 143(2) was issued. Thereafter, notice u/s 148 dated 21st July, 2009 was issued by the Ld. AO proposing to reopen the case by

assuming jurisdiction u/s 147 of the Act. During the year under consideration appellant had purchased 60,100 shares of M/s Eltek SGS Pvt. Ltd. (hereinafter referred to as "M/s Eltek"). M/s Eltek is a subsidiary of M/s SGS. During the course of assessment proceedings of M/s SGS for the AY 2005-06, it was observed by the Ld. AO of M/s SGS that dividend income of Rs.1,44,27,080 was received by it from M/s Eltek. It was further found that the opening balance of investment in the shares of M/s Eltek in books of M/s SGS was Rs. 26,71,540/- which was subsequently reduced to Rs.2,67,540/- at the year end. From further enquiries Ld. AO found that during the year under consideration M/s SGS had transferred 2,40,400 shares of M/s Eltek to the four Directors who are appellants before us. The shares have been transferred equally to all the four directors, i.e., 60,100 shares each. Ld. AO further observed that these shares were transferred at book value of Rs.10 per share. However, since a huge dividend of Rs.1.44 crores was earned on a meager investment of Rs.26.71 lakhs, Ld. AO doubted the sale consideration recorded by M/s SGS for transfer of these shares and vide order of assessment dated 28th December, 2007 passed u/s 143(3) of the Act in case of M/s SGS for A.Y.2005-06, Ld. AO treated the dividend received as part of sale consideration and recomputed the Capital Gain Tax in hands of M/s SGS.

3. Being aggrieved by this, M/s SGS filed an appeal before Ld. CIT (A)-XI in appeal No.183/07-08. Ld. CIT (A) vide order

dated 19th December, 2008 decided the issue in favour of M/s SGS by observing that on facts of the case actual sale consideration could not be ignored and substituted. Ld. CIT (A) therefore, deleted the addition in hands of M/s SGS, however, he gave an intimation to the Ld. AO of the four appellants before us for examining the impact of above transaction in their individual capacity. In this regard Ld CIT (A) of M/s SGS held as under:-

> *"4.7 I have carefully considered submissions made on behalf of appellant. I do not have any doubts about the fact that the actual value of the shares of Eltek SGS Pvt. Ltd., which were transferred by the company to its director, was much higher than the face value. According to some basic calculation the fair market price of shares would worked out to about Rs.250 per shares as discussed in the enhancement order dated 4/11/08 (Annexure A to this order). The AO had discussed application of yield method / profit capitalization method to determine the fair market value, but made wrong calculation. The appellant had in earlier submissions accepted the application of that method subject to the some computation error by AO. The AR had himself worked out the quantum of capital gain which was proposed to be offered to tax (see Annexure A). Since the basic method of computation of fair market value was not correct, the enhancement notice was issued proposing to replace the correct and more logical value to the value adopted by the AR. However, I do agree and find jurisdiction in the argument that there is no provision in the IT Act to replace the actual value of transaction with fair market value in the case of transfer of shares. Section 50C talks of only immovable properties. If the main argument of the appellant is considered in the light of*

*legal provisions, no capital gain on transfer of the shares can be brought to tax by substitution some other value than the value at which the shares are actually transferred. In view of this there is no need to go to the alternate submission of the appellant where capital gain worked out by considering Rs.30 per share as the sale consideration was offered to tax. In view of this the full valuation of consideration for the purpose of capital gain has to be worked out at Rs.10 only and accordingly no capital gain is taxable as contended by the appellant. The AO was not justified in replacing sale price actually received. Therefore addition of Rs.1,05,78,288 is deleted.*

*4.8 However, as noted earlier the company has given substantial benefit to its directors by transferring the shares at Rs.10 per share whereas the fair market value of such shares considering huge profitability and substantial amount of dividend is much higher at around Rs.250 per share. Therefore such benefit obtained by the directors from the company may be treated as income in the hands of directors in view of provisions in sub clause (iv) of clause 24 of section 2 giving definition of income. This is reproduced as under:-*

> *(24) "income" includes :-*
>
> *(iv) the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid;*

*It may be noted that all the four directors have obtained from the company benefit in buying shares at substantially less than fair market value. Therefore the*

*issue of taxability of benefit obtained by directors from the appellant company is to be examined in their individual cases. The amount of benefit or perquisite may be taxed either as per sec 17(2)(a)(i) or residual sec. 56. The intimation for this purpose may be sent to the concerned authorities."*

4. Premised on the information received from the office of Ld. CIT(A)-XI vide order dated 19th December, 2008, the Ld. AO recorded his reasons for reopening u/s 148(2) as under :-

*"During the course of assessment of M/s SGS Tekniks Pvt. Ltd. a company in which the assessee is one of the directors, it was found that the company had transferred 60100 shares of M/s Eltek SGS Pvt. Ltd. on the face value of Rs.10/- each. The said company M/s SGS Tekniks Pvt. Ltd. was holding as investment, some shares of another Pvt. Ltd. company namely M/s Eltek SGS Pvt. Ltd. The shares of the company Eltek SGS Pvt. Ltd. were acquired at face value of Rs.10 in various earlier years and included some bonus shares also. Out of that 240400 shares of Eltek were transferred during the year at face value of Rs.10/- to four directors.*

*The Assessing Officer in the case of SGS Tekniks Pvt. Ltd. held that transfer of shares to directors at book value was a colorable device to avoid tax and hence made addition of Rs.10578288/- as short term capital gain. In the appeal proceedings addition was deleted considering appellants arguments that there was no provision in the Income Tax Act to substitute sale consideration with fair market value of a capital asset other than immovable property referred to in section 50C. However it was observed by the Ld. CIT(A) that the real value of shares of Eltek was much higher than the face value, considering the profit earning capacity, dividend track record and net*

*worth of that company. Even the breakup value (book value) of shares was much higher than face value. The appellant company passed on huge benefit to the directors by transferring the shares of Eltek to its directors at face value. The Ld. CIT(A)-XI, New Delhi vide order dated 19/12/2008 has discussed these issues of length from Para 4.1 to Para 4.8 which are made as annexure to these reasons. The Ld. CIT(A) has estimated the value of share at Rs.250 per share. The company has thus bestowed a benefit on the assessee @ Rs.240/- per share, which works out to Rs.14424000/-. This benefit is taxable as a perquisite in the hands of the assessee as per section 17(2)(a)(i) read with section 2(24)(iv) of the Income Tax Act, 1961."*

5. Appellant vide letter dated 6th September, 2010 objected to the action of initiation of proceedings u/s 147. The objection raised was disposed off by the Ld. AO by passing an order dated 20th September, 2010 and thereafter he continued the proceedings for reassessment. Vide order dated 9th November, 2010 passed u/s 147/143(3) of the Act, Ld AO has held that there is an income amounting to Rs.1,44,24,000/- taxable in hands of the appellant as "perquisites" in terms of section 17(2)(iii) r/w section 2(24)(iv) of the Act. The relevant finding of the AO is as under:-

"5.1 *M/s Eltek SGS Pvt. Ltd. was a profit making and dividend paying company. Therefore, it was highly unlikely and also a questionable decision as to how the shares of a profit making and dividend paying company were transferred at face value of Rs.10/- only by M/s SGS Tekniks Pvt. Ltd. to the assessee, who was a*

*director in the company. The assessee in its submissions has not dealt on this issue and has also not explained the reason or the rationale behind this transfer of shares at face value. It can therefore be inferred that the said transfer of shares was done only for the sole purpose of avoiding tax liability by transferring the shares at face value instead of market value.*

*5.2 Since M/s Eltek SGS Pvt. Ltd. was a profit making and dividend paying company, the value of the shares of the company would be much higher than the face value and any transaction done at a price which is lower than the market value of shares would amount to providing undue benefit to the recipient. In this case, as per the reasons recorded for reopening the assessment the value of the share of M/s Eltek SGS Pvt. Ltd. should have been taken at Rs250/- at the time of transfer of 60100 shares of M/s Eltek SGS Pvt. Ltd. held by M/s SGS Tekniks Pvt. Ltd. to the assessee, who was a director in M/s SGS Tekniks Pvt. Ltd. as per section 2(24)(iv) of the I.T. Act, 1961.*

> *"the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such*

*company in respect of any obligation which but for such payment, would have been payable by the director or other person aforesaid"*

*In this case, the company, M/s Eltek SGS Pvt. Ltd. bestowed a benefit of Rs.240/- per share (i.e., value of share at Rs.250 – Face value of Rs.10/-) to the assessee and this can be treated as perquisite received by the assessee as per the provisions of section 17(2)(iii) of the I.T. Act, 1961. Therefore, the total benefit received by the assessee can be worked as Rs.1,44,24,000/- (i.e., 60100 shares X Rs.240/-) and this income is added to the total income of the assessee in terms of section 17(2)(iii) read with section 2(24)(iv) of the I.T. Act, 1961).*

6. Before Ld. CIT (A) the appellant raised objections against validity of assumption of jurisdiction to reassess u/s 147 of the Act, besides challenging the addition on merits. Ld. CIT (A), however, vide order dated 29th September, 2011 did not found any merit in both the contentions raised by the Appellant and the appeal was dismissed after observing and holding as under :

*"1.5 I have considered the submission of the appellant. The appellant is not correct in stating that the AO had not properly disposed off the preliminary objection raised by the appellant. The assessee has given the decision in the case of CIT vs. SFIL Stock Broking where it was stated that reopening on the directors of superior officers cannot*

*be a reason for proceeding u/s 147/148. The appellant has therefore stated that it is not discernable as to whether the AO has applied his mind to the information and independently arrived at a belief on the basis of information before him. The appellant has therefore stated that since the facts of the case are identical to the Delhi High Court the order passed by the AO invoking 148 be annulled.*

*1.6 It is seen from the record that the AO has not depended on the information of the higher authorities only. The AO has applied his mind and thereafter issued 148. The appellant had raised a preliminary objection to the reopening which was cogently answered by the AO. In the case of SFIL Stock broking referred by the appellant it was stated that before reopening the asstt the assessing officer must have formed the belief that income had escaped asstt and there must be some basis for forming such a belief. From the order of the A.O. it is clear that the AO had a belief and there was material on record to support the belief. Reference is also made to the case of ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC) which states if the Assessing Officer for whatever reason has reason to believe that income has escaped asstt he has jurisdiction to reopen the asstt. In the case of Bawa Abhai Singh v. Dy. CIT 253 ITR 83 the portion relevant to the issue is reproduced below:-*

*"Section 147 with effect from 1-4-1989 provides that where the assessing officer has reasons to believe that any income chargeable to tax has escaped assessment for any assessment year, he may apply the provisions of section 148 to 153 of the Act. Conditions precedent for initiation of action under section 147(a) or 147(b) of the pre-amended section are highlighted above. The only condition for action is that the assessing officer should have reasons to believe that income has escaped assessment, which belief can be reached in any manner and is not qualified by a pre-condition of faith and true disclosure of material fact by an assessee as contemplated in the pre-amended section 147(a) and the assessing officer can under the amended provisions legitimately reopen the assessment in respect of an income which has escaped assessment. Viewed in the angle power to reopen assessment is much wider under the amended provision and can be exercised even after the assessee has disclosed fully and truly all the material facts. Reasons which may weigh with the assessing officer may be the result of his own investigation and may come from any source that he considers reliable."*

*In conclusion it is stated that the notice u/s was issued after due consideration. A copy of the notice was given to*

*the appellant. The appellant filed his objections which were duly considered by the AO. The action to reopen the case is valid. This ground of appeal of the applicant is rejected."*

*..... ..... ....*

*4.3 I have considered the submission of the appellant and the material available on record. The appellant is a Director of SGS Tekniks Pvt. ltd. Shares at the face value of Rs.10/- were transferred to the appellant during the relevant year. The shares were of Eltek SGS Pvt. Ltd. who was a profit making and dividend paying company. As per Sec.2(24)(iv) :-*

> *"income includes the value of any benefit or perquisite, whether convertible into money or not, obtained from our company either by Director or by a person who has a substantial income of the company, or by relative of the director or such person".*

*As per Sec.17(2)(iii):-*

> *"Salary includes (the value of any benefit or amenity granted of provided free of cost or at a concessional rate in any of the following cases. By a company to an employees who a director thereof)".*

*4.4 It is thus obvious from these two sections that a benefit has been obtained by the appellant as a director, which should be taken as a perquisite / income of the*

*appellant in terms of section 17(2)(iii) read with section 2(24)(iv). The appellant as a director of the company has been transferred shares at Rs.10/- per share, which is the face value and not the market value. Since M/s Eltek SGS Pvt. Ltd. was a profit making and dividend paying company, the value of the shares of the company would be much higher than the face value and any transaction done at a price which is lower than the market value of shares would amount to providing undue benefit to the recipient. The issue is what should be the value of shares which should be taken to determine what amount of benefit will accrue to the appellant.*

4.5 *The Ld. CIT(A) in his order in the case of SGS Tekniks Pvt. Ltd. for AY 05-06 dated 19/12/08 has calculated in the very logical way what the value of share should be. I find no reason to disagree with this valuation determined by the Ld. CIT(A). In my opinion, therefore the value of shares should be taken as Rs.250/- per share and the benefit of Rs.240/- per share (250-10) may be treated as perquisite/benefit of value received by the appellant. The action of the Assessing Officer is on the same lines, is therefore is found to be justified and the order of the AO is confirmed."*

5. Before us, at the outset Mr. Tarandeep Singh, Ld. Counsel on behalf of the Appellants submitted by that the Ld. AO has erred in assuming jurisdiction to reassess by invoking provision of section 147 inasmuch as there is no application

of mind by the Ld. AO while recording of reasons, rendering assumption of jurisdiction as bad in law. He submitted that the observations of Ld. CIT(A) while disposing off the appeal of M/s SGS were not binding upon the Assessing Officer of the appellant and therefore he was duty bound to apply an independent mind and conduct necessary investigations before issuing notice u/s 148. In support of his submissions, Ld. Counsel relied upon following decisions:-

- Raj kumar (C) HUF reported in 2016-TIOL-727-ITAT-Bang
- Signature Hotels (P) Ltd. reported in 338 ITR 51 (Del)
- SFIL Stock Broking reported in 325 ITR 285 (Del)
- RMG Polyvinyl reported in 396 ITR 5 (Del)

6. Ld. Counsel further submitted that while recording the 'reasons' it was imperative upon the Ld. AO to independently examine whether there existed any "benefit" which is taxable as income in nature of perquisites. He submitted that existence of "benefit" in the instant case was a "jurisdiction fact" which must exist prior to recording of the reasons for reopening u/s 147. In support, he relied upon the decision of apex court in the case of **Arun Kumar reported in 286 ITR 89 (SC).**

7. Ld. Counsel also challenge the merits of the addition by contending that there is no benefit derived by the appellant from purchase of shares of M/s Eltek from M/s SGS at book value of Rs10 per share. In this regard, it was submitted by

the Ld. Counsel that the income from perquisites taxable u/s 17(2)(iii) is the "value of benefit" granted or provided either "free of cost" or "at concessional rate". He submitted that legislature has made the "value of benefit" directly linked to the cost incurred by the employer in either providing the benefit "free of cost" or at "concessional rate". In support of his contention that the perquisite taxable u/s 17(2)(iii) is actual cost incurred by the employer Ld. Counsel relied upon following decisions :-

- PRS Oberoi reported in 183 ITR 103 (Cal)
- VM Salgaoear & Bros reported in 243 ITR 393 (SC)
- Bhavarlal Hiralal reported in (2017) 82 taxmann.com 233 (Pune)

It was also submitted that the Ld. AO in order to determine whether there accrued any "benefit" to the appellants, has erred in comparing the actual transaction of purchase @ Rs 10 per share with the Fair Market Value (FMV) of shares. It was submitted that FMV of shares is irrelevant. In support he relied upon the judgement of Hyderabad ITAT in the case of **KNB Investments Pvt. Ltd. reported in 79 ITD 238 (Hyd)** which has also been upheld by the Hon'ble Andhra Pradesh High Court in **367 ITR 616 (AP).** Ld. Counsel further submitted that where legislature intended that FMV be taken as a relevant criteria for taxability of a "perquisite" it has specifically provided for that in section 17(2)(iiia) and section 17(2)(vi). He also relied upon the decision of Hon'ble Apex Court in the case of **M/s Infosys**

**Technologies reported in 297 ITR 167 (SC)** in support of his contention that provisions like section 17(2)(iiia) and section 17(2)(vi) are not applicable to the year under consideration, Ld. AO was not justified in charging to tax notional benefit by taking into consideration the FMV.

8. Without prejudice, Ld. Counsel also challenged the action of AO assuming that FMV of shares of M/s Eltek as on date of transfer at Rs.240 per share.

9. Lastly, the Ld. Counsel also challenged the action of Ld. AO in levying interest u/s 234B of the Act. In this regard it was submitted that income in dispute is tax deductible and therefore, as per decision of Hon'ble Delhi High Court in **GE Packaged Power** reported in **373 ITR 65 (Del)** interest u/s 234B cannot be levied.

10. On the other hand, Ld. Sr. DR vehemently opposed the above argument of the Ld. Counsel and submitted that the Ld. AO has correctly assumed jurisdiction to re-assess u/s 147 of the Act. He submitted that the order passed by Ld. CIT (A) in the case of M/s SGS was an information "material" enough justifying formation go belief and recording of reasons. Ld. Sr. DR further supported the taxability of income on merits by relying upon orders passed by the lower authorities.

11. We have carefully considered the rival submissions, perused the relevant finding given in the impugned orders

and the material referred to before us. Evidently, the present proceedings u/s 147 got triggered pursuant to order passed by Ld CIT(Appeals)-XI in case of M/s SGS. Ld. CIT (A) in that case has recorded following material facts which have not been disputed before us:-

i. Face value of shares of M/s Eltek transferred to appellant by M/s SGS is @ Rs.10 per share;
ii. M/s SGS held 2,67,154 total number shares (as originally acquired) of M/s Eltek. Out of this 2,40,400 shares were transferred to 4 directors equally i.e 60,100 number of shares per director;
iii. Transaction of share sale was approved by Board of Directors;
iv. Shares of M/s Eltek (total 2,67,154 nos.) were acquired by M/s SGS @ Rs 10 per share. These shares were acquired in years 1997 and 2000;
v. 2,13,723 nos. of shares were allotted as Bonus to M/s SGS in year 2004. However, sale of 2,40,400 shares to 4 directors equally i.e., 60,100 per director was made from original allotment and bonus allotted in 2004 is still held by M/s SGS;
vi. Reason for transfer of shares to Directors was a re-arrangement of shareholding for effective management. In this regard it is noted by Ld CIT (A) that, *"....that transfer of shares from company to directors was merely a rearrangement of the shareholding is for effective management. It was also submitted that the article 4 of*

*collaboration agreement with Eltek group was not applicable. Devolution by different methods as provided therein was to be carried out only if the shares of JVC company (Eltek SGS Pvt Ltd) what will be transferred to anyone other than group companies. Since transfer of shares were made to the director itself, which are part of SGS group that article was not applicable. It was emphasised that the transfer of shares at face value has been approved by the management of and Eltek company also".*

12. Premised above factual position, we will now examine, whether on the present facts, provisions of section 17(2)(iii) are applicable and whether the Ld AO was justified in initiating action u/s 147 of the Act. Provisions of section 17(2)(iii) are reproduced below for sake of ready reference:

*"17. For the purposes of sections 15 and 16 and of this section,—*

*.... ....*

*(2) "perquisite" includes—*

*(i) the value of rent-free accommodation provided to the assessee by his employer;*

*(ii) the value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer;*

*... ....*

*(iii) the* ***value of any benefit*** *or amenity* ***granted or provided free of cost*** *or* ***at concessional rate*** *in any of the following cases—*

*(a) by a company to an employee who is a director thereof;*

*(b) by a company to an employee being a person who has a substantial interest in the company;*

*(c) by any employer (including a company) to an employee to whom the provisions of paragraphs (a) and (b) of this sub-clause do not apply and whose income under the head "Salaries" (whether due from, or paid or allowed by, one or more employers), exclusive of the value of all benefits or amenities not provided for by way of monetary payment, exceeds fifty thousand rupees:*

*Explanation.—For the removal of doubts, it is hereby declared that the use of any vehicle provided by a company or an employer for journey by the assessee from his residence to his office or other place of work, or from such office or place to his residence, shall not be regarded as a benefit or amenity granted or provided to him free of cost or at concessional rate for the purposes of this sub-clause;"*

13. From a bare perusal of section 17(2)(iii), it can be inferred that the "Value of benefit" is directly linked with "cost" incurred by the employer in either providing that benefit "free of cost" or "at concessional rate". "Cost" u/s 17(2)(iii) is that of the employer in providing the benefit. Income u/s section 2(24)(iv) is taxable only if it falls within the scope of section 17(2)(iii) applies and not *vice versa*. As pointed out by Ld. Counsel, this issue came up for consideration before Hon'ble Calcutta High Court in case of M/s **PRS Oberoi reported in 183 ITR 103 (Cal).** In this case, issue involved was grant of interest free loan by the

company to its director. Hon'ble High Court held that provisions of section 17(2)(iii) are not applicable by observing as under:-

> *"12. The question, however, remains as to whether the non-charging of interest will also fall within the purview of section 2(24)(iv).* ***For the purposes of applying section 2(24)(iv), the same test as to what constitutes a benefit or a perquisite has to be applied****. If the loan granted to an employee or a director or a person who has a substantial interest in the company without charging any interest or at a concessional rate of interest does not constitute any benefit for the purposes of Explanation 2(b)(iii) to section 40A(5) or section 17(2)(iii) by the same yardstick, such loan cannot also be construed as benefit or a perquisite for the purposes of section 2(24)(iv).*
>
> *In that view of the matter, we have no hesitation in holding that section 2(24)(iv) cannot be pressed into service on the facts and in the circumstances of this case. Furthermore, even the findings of fact recorded by the Tribunal go to support the case of the assessee.* ***The Tribunal has clearly recorded that there was nothing on record to show that Oberoi Hotels (I)(P.) Ltd., the company, borrowed any money for making advances to the assessee and/or paid any interest on the overdrawn amount which, but for such payment, would have been paid by the assessee. In***

***the absence of any finding that the company has paid any interest on the overdrawn amount which, but for such payment, would have been paid by the assessee, the amount cannot be treated as a benefit within the meaning of section 2(24)(iv).***

*13. The Tribunal has also recorded a finding of fact that there was a clear arrangement between the assessee and the said company not to charge interest on either side in terms of a resolution of the board of directors and that in the past, the assessee had substantial credit balances with the company on which the company never paid any interest to the assessee. In this background too, it cannot be said that the assessee derived any benefit by not paying any interest on the overdrawn amount in the two years under consideration. Where the company borrows funds on interest for the specific purpose of providing loans to its directors but does not charge interest from them, or where the financial condition of the company is such that utilisation of the funds of the company by its directors in the form of loan without payment of interest to the company will be detrimental to the interest of the company, in such cases, grant of interest-free loan to the directors may be regarded as a benefit provided by the company to its directors."*

14. It will be relevant to note that the above decision of Hon'ble Calcutta High Court has been approved by the Hon'ble Apex Court in case of **VM Salgaoear & Bros reported**

**in 243 ITR 393 (SC).** To the similar effect is the decision of Pune ITAT in case of **Bhavarlal Hiralal** reported in **(2017) 82 taxmann.com 233 (Pune)**. In the present case, admittedly M/s SGS acquired shares of M/s Eltek @ Rs 10 per share in year 1997. During the year under consideration some of these shares were further sold to the appellant as part of internal business reorganization at the same price. Considering this fact, it is difficult to appreciate the case of Ld AO in invoking provision of section 17(2)(iii). Pursuant to our directions, Ld. Counsel has also filed the shareholding structure of M/s SGS. All the four directors are also equal share holders therein. Therefore, they were already holding shares of M/s Eltek indirectly and now pursuant to internal reorganization they held these shares directly. Thus, we therefore fail to appreciate how there is any "benefit" derived. Moreover, in order to demonstrate element of "benefit" the Ld. AO has compared the transaction value of actual purchase with the FMV of shares. This again is contrary to the relevant statutory provisions.

15. In this regard, it will be relevant to refer to the decision of co-ordinate bench in Hyderabad in case of **KNB Investment (P) Ltd** reported in **79 ITD 238 (Hyd).** In this case, ITAT was interpreting applicability of provisions of section 28(iv) to a case relating to purchase of shares at cost when allegedly the FMV was much higher. We find that use of word "benefit" in section 17(2)(iii) is comparable with provisions of section 28(iv) as under:

| Section 17(2)(iii) | Section 28(iv) |
|---|---|
| *"the value of any benefit or amenity granted or provided free of cost or at concessional rate in any of the following cases"* | *"the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession"* |

In a like situation, it has been held that there is no legal basis of valuing the amount of "benefit" derived by looking at the Fair Market Value of shares. Coordinate bench held as under:

> *"32. The appellant-companies have acquired the shares at Rs. 90 per share through the preferential allotment made by Dr. Reddy's Laboratories Ltd. The prevailing market price at that time was Rs. 455 per share. The differential price is Rs. 365 per share. Whether this price differential availed by the appellant-companies amounts to benefit arising from business or not, is the issue to be decided in these appeals.*
>
> *.... ...*
>
> *37. When the shares were acquired by the appellant-companies with the specific objective of retaining the controlling interest in Dr. Reddy's Laboratories Ltd., there cannot be a presumption that those shares were acquired for resale in the stock market and earn profit out of that. If a person acquires a large block of shares with the object of the acquisition of the controlling interest of the company whose shares are to be purchased, the inference is inevitable that the intention was not to*

*acquire them as part of the person's stock-in-trade. Subsequent disposal of some of the shares so acquired does not make the transaction an adventure in the nature of trade. This was the view of the Hon'ble Supreme Court in the case of Ramnarain Sons (P.) Ltd.(supra).*

*Where sale of those shares was not contemplated, there is no justification in comparing the market price of existing Dr. Reddy's Laboratories shares with the preferential issue price of shares. One of the strongest arguments of the Revenue is that the appellant companies have derived the benefit through the preferential issue of shares of Dr. Reddy's Laboratories Ltd., as the issue was not made available to the public at large. The main objective of preferential issue was to maintain the group control, even after the Euro-issue. That is why the shares were allotted to the promoters and their core associates. If shares were also offered to the public at large as argued by the revenue, the very purpose of the preferential issue would be defeated.*

*…. …..*

*41. The uncertain future benefit is the eventual capital gain that the appellant-companies may obtain on the sale of shares. Whether such a prospective income/gain could be construed as benefit taxable under section 28(iv) of the Income-tax Act, 1961? In Sir Kikabhai Premchand v. CIT [1953] 24 ITR 506, the Hon'ble Supreme Court has held that state has no power to tax*

*any potential future advantage. The observation in the above case that regard must be had to the substance of transaction rather than to its mere form was later disapproved by the Hon'ble Apex Court in CIT v. B.M. Kharwar [1969] 72 ITR 603. But, the basic principle declared in Smt. Kikabhai Premchand's case (supra) that there could not be any levy of tax on a future income, still holds good. The Court of appeal in Mason (Inspector of Taxes) v. Innes [1968] 70 ITR 491 has pronounced the same basic, elementary principle of Income-tax Law that a man could not be taxed on profit that he might have, but had not made. If Mason's case (supra) was decided in this country, the decision would be the same as that of Court of Appeals, for the principle of leaving out of assessment any potential advantage, benefit or gain was firstly established by the Hon'ble Supreme Court in Smt. Kikabhai Premchand's case (supra).*

*42. The above principle is in no way overlooked in the provisions contained in section 28 of the Income-tax Act, 1961. For the purpose of our discussion, the relevant portion of section 28 is quoted below:*

*…. …..*

*The statute has listed about six items of income chargeable to tax under section 28. The opening words are "The following income shall be….". The words are not, "The following items shall be……". The word 'income, is very important and purposeful. All the six different*

*items should satisfy the character of 'income' so as to be taxed under section 28. Those six items as such are not sufficient; every one of them should be in the nature of income. The income, obviously need to be real. Clause (iv), if edited for our purpose reads as follows: "The value of any benefit arising from business....". That is, the benefit must be one arising from business during the relevant previous year. While defining the scope of total income in section 5 of the Act, the law has made a two-fold characterisation, viz. income accruing or arising. But while dealing with benefit in the nature of income in the context of section 28, law has conspicuously omitted the concept of "accruing" and has prescribed only "arising". "Benefit arising" implies benefit arising in the previous year. In other words, the law has made the nature of benefit under section 28(iv) very clear and precise. That is, the benefit must be income in character; and it should be arising in the relevant previous year. In the present case, the income is prospective on the condition of the future sale of shares. That income which is prospective in nature cannot be construed as "benefit arising" to the appellant-companies in the relevant previous year."*

*43. The basis of the argument that the appellant-companies have derived benefit in the preferential allotment of shares in the sense that the companies have not paid Rs. 455 per share, but paid only Rs. 90 per share, and thus the appellant-companies had a*

*comparative price advantage, is again not well-founded. The Hon'ble High Court of Gujarat had an occasion to examine an issue on the similar line in Spunpipe & Construction Co. Ltd.'s case (supra). Justice P.N. Bhagwati, as then he was, speaking for the Bench held as follows :—*

> *"Where a going concern including fixed assets and stock in trade is purchased, the difference between the book value of any part of the assets acquired by the assessee and the price paid by the assessee for the same cannot be regarded as revenue profit derived by the assessee. No profit at all is made by the assessee from the purchase of any of the assets. At the highest, what can be said is that assets worth a particular amount are purchased by the assessee for a smaller amount, but that does not represent the profit of the assessee."*

*In view of the ratio laid down in the above judgment, it is very difficult to hold that the savings in the acquisition cost of shares on a comparative price advantage is in the nature of benefit contemplated in section 28(iv) of the Income-tax Act, 1961."*

16. **The above decision of Hyderabad ITAT has been upheld by Andhra Pradesh High Court** in **367 ITR 616 (AP**) and it has been held by the Hon'ble High Court as under:

*"11. The second aspect is as to whether the benefit has, in fact, accrued at all to the respondent. There exists a distinction between the "accrual of income", on the one hand, and "arising of income", on the other. While accrual is almost notional in nature, the other is factual. It is too well known that in its complex nature, the Act covers not only the "income" that, in fact, has arisen, but also the one that has accrued.*

*12. When Parliament has consciously chosen to restrict the taxation of benefit only when it has arisen, it is not permissible to tax the benefits by treating them as "accruals". A close scrutiny of the concept of "arising of income" discloses that, it, in fact, must flow into the assets of the assessee, during previous year, and thereby, it became taxable in the financial year. The Income-tax Officer was not even able to show, much less demonstrate, that the income in the form of "benefit" has arisen to the respondents at all.* ***The sole basis for levying income-tax on the amount was on the assumption that in case the shares are sold, they would have yielded the differential price and that, in turn, can be treated as "income". Even if the exercise contemplated by the Income-tax Officer is taken as permissible in law, at the most, it amounts to "accrual" and not "arising" of income****. Here again, the Tribunal has explained the subtle*

*distinction between the two, in a perfect manner and arrived at the correct conclusion."*

17. Further, where legislature intended that for taxation of "perquisite", especially in cases of issuance/allotment/transfer of share by an employer to his employee the value of "perquisite" is determined by taking into consideration the FMV then it has specifically provided for that. One may refer to provisions of section 17(2)(iiia) which was inserted by Finance Act, 1999, w.e.f 01-04-2000 and thereafter was omitted by Finance Act, 2000 w.e.f 01-04-2001 and provisions of section 17(2)(vi) by Finance Act (No.2) 2009 inserted w.e.f. 01-04-2010. These are reproduced below:

| Section 17(2)(iiia) | Section 17(2)(vi) |
|---|---|
| *Section 17(2)(*iiia*) the value of any specified security allotted or transferred, directly or indirectly, by any person free of cost or at concessional rate, to an individual who is or has been in employment of that person :*<br>**Provided** *that in a case where allotment or transfer of specified securities is made in pursuance of an option exercised by an individual, the value of the specified securities shall be taxable in the previous year in which such option is exercised by such individual.*<br>Explanation.—*For the* | *Section 17(2)(vi) the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee.*<br>Explanation. —*For the purposes of this sub-clause,—*<br>*(*a *) "specified security" means the securities as defined in clause (*h *) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme* |

| | |
|---|---|
| *purposes of this clause,—*<br>*(a ) "cost" means the amount actually paid for acquiring specified securities and where no money has been paid, the cost shall be taken as* nil;<br>*(b ) "specified security" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and includes employees' stock option and sweat equity shares;*<br>*(c ) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called; and*<br>*(d ) **"value" means the difference between the fair market value and the cost for acquiring specified securities**;* | *therefor, includes the securities offered under such plan or scheme;*<br>*(b ) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;*<br>*(c ) **the value of any specified security or sweat equity shares shall be the fair market value of the specified security or sweat equity shares, as the case may be, on the date on which the option is exercised by the assessee as reduced by the amount actually paid by, or recovered from the assessee in respect of such security or shares**;*<br>*(d ) "fair market value" means the value determined in accordance with the method as may be prescribed;*<br>*(e ) "option" means a right but not an obligation granted to an employee to apply for the specified security or sweat equity shares at a predetermined price;* |

18. In the present case, we are concerned with law applicable for AY 2005-06 when provisions of section 17(2)(iiia) or 17(2)(vi) are not applicable. In this regard reference can be made to the judgment of Hon'ble Apex Court in case of **M/s Infosys Technologies reported in 297 ITR 167 (SC).** In this case issue involved was taxation of ESOP's as Perquisites. Since provisions of section 17(2)(iiia) were inserted later revenue invoked provisions of section 17(2)(iii). Hon'ble Apex Court rejected the argument raised by revenue seeking valuation of perquisite comparing benefit derived with FMV. Apex Court also held that provision of section 17(2)(iiia) are not retrospective and concluded as under:

> *"16. Be that as it may, proceeding on the basis that there was 'benefit', the question is whether every benefit received by the person is taxable as income? In our view, it is not so. Unless the benefit is made taxable, it cannot be regarded as income. During the relevant assessment years, there was no provision in law which made such benefit taxable as income. Further, as stated, the benefit was prospective. Unless a benefit is in the nature of income or specifically included by the Legislature as part of income, the same is not taxable……."*

19. We therefore fail to appreciate the action of Ld AO in presuming that there is a notional benefit derived by taking into consideration the FMV. As held above, in section 17(2)(iii) legislature has made "Value of benefit" provided directly linked to the "cost" incurred by the employer in either

providing the benefit "free of cost" or "at concessional rate". Undisputedly cost of shares of M/s Eltek for M/s SGS is Rs 10/- per share and the shares have been transferred by M/s SGS to the appellant at the same price i.e., Rs 10/- per share, there is therefore no taxable perquisite arising in this case.

20. For reasons stated above we are also unable to uphold the validity to assumption of jurisdiction u/s 147. While recording reasons, Ld AO should have applied his own mind to first determine whether provisions of section 17(2)(iii) are at all applicable. A mere perusal of "reasons recorded" demonstrates that there is no independent application of mind by the AO on following crucial issues, that is;

- Is there a "Benefit" which is taxable;
- What should be the Value; and
- Under which provision of Act is the income allegedly escaping is taxable

21. Lack of independent application of mind by the Ld AO is also apparent from the fact that in the 'reasons recorded' u/s 148(2), he holds that benefit is taxable in hands of the 'A' u/s 17(2)(a)(i) r.w.s. 2(24)(iv) of the Act. Clearly there is no section 17(2)(a)(i) in statute. Even if it is presumed that CIT (A) of M/s SGS and the current Ld Assessing Officer intended to mention section 17(2)(i), then too it is applicable to Rent Free Accommodations and hence not relevant and applicable. This error is noted by Ld CIT (A) in the impugned order. In fact, Ld

AO while passing the final order realized this and has therefore upheld taxability u/s 17(2)(iii) and not either u/s 17(2)(a)(i) or 17(2)(i) or section 56. In our considered opinion existence of a "Benefit" is a "Jurisdictional Fact" which at the outset must be demonstrated by the Ld. AO by determinative rules while assuming jurisdiction. Hon'ble Apex Court in case of **Arun Kumar reported in 286 ITR 89 (SC)** has held as under:

> *"68. A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a Tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.*
>
> *.... ....*
>
> *78. From the above decisions, it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue'*

*or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."*

22. Reasons recorded by the Ld AO in the instant case clearly shows that, nowhere Assessing Officer has recorded his satisfaction as to the correctness of the findings of the Ld CIT (A) in case of M/s SGS, nor has he recorded his finding as to how he has reached to a conclusion that income in the hands of the 'A' has escaped assessment. Observations made by Ld CIT (A) in case of M/s SGS are not binding upon the Ld. AO. Thus, we hold that assumption of jurisdiction u/s 147 is bad in law. Appellant succeed on this issue as well.

23. As a result, grounds 1, 2 and 2.1 are adjudicated in favor of the appellant. We need not adjudicate upon grounds 3 and 4 as they have been rendered infructuous. Our findings above will also apply mutatis mutandis to the other three appeals as admittedly the facts are same.

24. All the appeals filed by the appellants are therefore allowed.

**Order pronounced in the open Court on 21st December, 2020**

| | |
|---|---|
| Sd/- | Sd/- |
| **[G.S. PANNU]** | **[AMIT SHUKLA]** |
| **VICE PRESIDENT** | **JUDICIAL MEMBER** |

DATED: 21st December, 2020
Pkk