Taxability u/s 56(2)(x): Gifts and deemed gifts

1. Background:

1.1 India is a country of close knitted families and having lot of reasons to celebrate owing to its diversified culture, customs and religion. Numerous occasions arise where gifts are exchanged. In fact, gifting each other is a symbol of love and affection and can also be a symbol of social status. However, many a time gifts can also be a part of tax planning / tax evasion. While tax planning done within the framework of law is permissible, tax evasion is prohibited and can be penalized.

1.2 The Government, with an objective to impose taxes on gifts, introduced the Gift Tax Act, 1958 (The GTA) w.e.f. 01-04-1958. Under this Act, tax was leviable on the donor of gift under certain specific circumstances. However, by the Finance (No. 2) Act, 1998, the Act was made inapplicable to gifts made on or after 1.10.1998.

1.3 The period from October 1998 till March 2004 was without any tax on gifts. However, the gift tax was reintroduced in a new form and the provisions were included in the Income tax law vide Finance (No. 2) Act, 2004, w.e.f. 1.4.2005. The remarkable difference being that under the erstwhile law, gifts were taxed in the hands of the donor while under the current law, the same is taxable in the hands of donee / recipient of gift.

1.4 The Explanatory Memorandum to Finance (No. 2) Bill, 2004 did not clearly spell out the intention behind introduction of the provision. However, the same is clear from the budget speech delivered by the Hon. Finance Minister, as under:

"Hon'ble Members are aware that I abolished the gift tax in 1997. That decision remains, but a 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. Gifts received from blood relations, lineal ascendants and lineal descendants, and gifts received on certain occasion like marriage will continue to be totally exempt....."

The intention was thus to prevent money laundering.

1.5 To give effect to the above, the Finance (No. 2) Act, 2004 had carried out the following amendments:

a) The definition of income in section 2(24) of the Income-tax Act, 1961 ("the Act") was enlarged by inserting a new sub-clause (xiii) ("the sub-clause") so as to include sums referred to in section 56(2)(*v*) of the Act;

b) Clause (v) was inserted in Section 56(2) taxing any sum of money exceeding Rs. 25,000, received without consideration, by an individual or a Hindu Undivided Family, with certain exceptions.

1.6 In Chandrakant H. Shah v. ITO[2009] 28 SOT 315 (Mum.), the objects of section 56(2)(v) was explained by ITAT as under:

"*11.4....From the perusal of the Hon'ble Finance Minister's speech,… it is apparent that this provision has been brought on statute to fill up the vacuum created by abolition of the Gift-tax Act, 1958, in 1997…. there was a practice of bogus foreign gifts, which started with the Government offering immunity for such gifts as part of Disclosure Schemes, however, the said practice of bogus gifts continued even after the Amnesty Scheme expired. It is also true*

that in the present materialistic society only relatives are likely to make real gifts out of natural love and affection though in the exceptional cases friends and distinct [sic: distant] relatives can also make gifts. It is also true that money laundering, generally, may take place more by way of gifts than by any other means like loans because the person adopting such means, may legally be forced to actually repay the same, if the lender proceeds to do so no person would like to adopt such risky medium unless both entities are very closely related and controlled by same group. ***The Finance Minister has also emphasized on the fact of a loophole existing due to abolition of the Gift-tax Act, 1958, and, thereafter, words 'money laundering' have been used in his speech, hence, the intention is only to prevent money laundering by way of bogus gifts. The Hon'ble Finance Minister has made this intention clear by referring to the Gift tax Act, 1958,*** *and by adding exception for gift received from relatives on the occasion of marriage etc. It is also noteworthy that like gift-tax, the basic exemption limit has also been prescribed in the section and various exceptions provided in section 56(2)(v) of the Act which were also existing in the like fashion in the erstwhile Gift-tax Act, 1958, and this fact also leads to a conclusion that only bogus gifts are also brought to tax under this provision.... Thus, in view of above discussion, we are of the view that* ***this provision applies to the transactions where undisclosed/unaccounted Income of a person is brought in his hand by way of purported gifts***."

1.7 CBDT's Circular No. 5/2005, dated 15-7-2005 reads as follows:

"In order to curb bogus capital-building and money laundering, a new sub-clause has been inserted in section 56 to provide that any sum received without consideration on or after

the 1st day of September, 2004, by an individual or a Hindu undivided family from any person, shall be treated as income from other sources."

1.8 **Section 56(2)(vi)**

Through the Taxation Laws (Amendment) Act, 2006, a new clause (*vi*) was inserted in sub-section (2) of section 56, whereby whole of the aggregate value of any sum of money exceeding Rs. 50,000 received without consideration by an individual or HUF on or after 1-4-2006 was made chargeable to income-tax under the head 'Income from other sources' subject to the exceptions provided in the said clause. Simultaneously, clause (v) was made inoperative w.r.e.f. 1.4.2006.

Thus, the threshold limit was increased from Rs. 25,000 to Rs. 50,000. Earlier, clause (v) was so worded that only if the sum received was greater than Rs. 25,000, it was taxable. However, provisions of clause (vi) were clear in that respect that the entire amount received was chargeable to tax, if the aggregate of such amounts was greater than Rs. 50,000.

It is to be noted here that in order to prevent money laundering, the law makers took only a small step, to tax purported gifts received in cash (i.e. monetary gifts). Gifts in kind were outside the purview of Section 56(2)(v) as well as clause (vi).

1.9 **Section 56(2)(vii)**

The Finance (No. 2) Act, 2009 extended the scope of taxability to cover certain gifts in kind. Clause (vi) was made inoperative in respect of gifts received w.e.f. 1.10.2009 and new clause (vii) was introduced w.e.f. 1.10.2009. The Explanatory Memorandum stated

that anything which is received in kind having 'money's worth' i.e. property is also outside the purview of the existing provisions.

So, new clause (vii) was inserted which taxed, in addition to monetary gifts, certain properties (as defined) received by way of gift. A striking aspect of this amendment made by Finance (No. 2) Act, 2009 was that as properties received without consideration were brought to tax, properties received (purchased) for inadequate consideration were also brought in the tax net. So to say, the agreement value of properties was benchmarked to market value for movable properties and stamp duty value for immovable properties. Accordingly, the new provision substantially widened the scope of taxation of gifts. However, vide Finance Act, 2010, the provision was again amended w.r.e.f. 1-10-2009 to remove the taxability of immovable properties received for inadequate consideration. This provision of taxing immovable properties received (purchased) for inadequate consideration was reintroduced by Finance Act, 2013 with certain safeguards.

The underlying assumption behind section 56(2)(vii) seems to be that the actual consideration for a property cannot be less than its circle rate/ stamp duty value and in case the apparent consideration paid is less than the stamp duty value, the difference amount appears to have been paid in cash outside the books of accounts by the transferee. Such amount is thus deemed to be income of the Individual or HUF assessee as provided under this section viz. section 56(2)(vii).

However, this clause was of limited applicability as the provision of section 56(2)(vii) were applicable only to individual and HUF.

Again, in the Explanatory Memorandum to Finance Bill, 2010, the objects behind donee-based transactions have been explained as under:

"The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift-Tax Act."

1.10 **Introduction of clause (viia) in section 56(2) by Finance Act, 2010**

In 2010, the Government further widened the tax net to cover Firms and closely held companies receiving shares of other closely held companies without consideration or for inadequate consideration, by inserting clause (viia) in section 56(2). The clause provided for exceptions to transactions which are not regarded as transfer under clause (via), (vic), (vicb), (vid) and (vii) of section 47.

1.11 **Introduction of new clause 56(2)(x) by Finance Act, 2017**

The story does not stop here. The government probably realized that there is no meaning restricting the taxability of gifts and deemed gifts only to individuals and HUFs. Therefore, vide Finance Act, 2017 the scope was widened to extend the provision to all types of persons; whether individuals / HUF or others. Simultaneously, sunset was provided for clauses (vii) and (viia) of section 56(2). Later, Finance Act, 2018 brought the flexibility band in clause (x) of section 56(2) on the lines of section 50C and 43CA, and provided for tolerance limit for variation with stamp duty value to the extent of 5 percent.

Clause (x), now, reads as under:

(*x*) where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017,—

(*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,—

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

(B*) for a consideration, the stamp duty value of such property as exceeds such consideration, if the amount of such excess is more than the higher of the following amounts, namely:—*

*(*i*) the amount of fifty thousand rupees; and*

*(*ii*) the amount equal to five per cent of the consideration:*

Provided that where the date of 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 agreement may be taken for the purposes of this sub-clause:

Provided further that the provisions of the first proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank

account, on or before the date of agreement for transfer of such immovable property:

Provided also that where the stamp duty value of immovable property 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 this sub-clause as they apply for valuation of capital asset under those sections;

(*c*) any property, other than immovable property,—

(*A*) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(*B*) 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 sum of money or any property received—

(*I*) from any relative; or

(*II*) on the occasion of the marriage of the individual; or

(*III*) under a will or by way of inheritance; or

(*IV*) in contemplation of death of the payer or donor, as the case may be; or

(*V*) from any local authority as defined in the *Explanation* to clause (*20*) of section 10; or

(*VI*) 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

(*VII*) from or by any trust or institution registered under section 12A or section 12AA; or

(*VIII*) by any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (*iv*) or sub-clause (*v*) or sub-clause (*vi*) or sub-clause (*via*) of clause (*23C*) of section 10; or

(*IX*) by way of transaction not regarded as transfer under clause (*i*) or [11]**[***clause (*iv*) or clause (*v*) or***]** clause (*vi*) or clause (*via*) or clause (*viaa*) or clause (*vib*) or clause (*vic*) or clause (*vica*) or clause (*vicb*) or clause (*vid*) or clause (*vii*) of section 47; or

(*X*) from an individual by a trust created or established solely for the benefit of relative of the individual.

Explanation.—For the purposes of this clause, the expressions "assessable", "fair market value", "jewellery", "property", "relative" and "stamp duty value" shall have

the same meanings as respectively assigned to them in the *Explanation* to clause (*vii*).]

The meaning of certain expressions referred to in clause (vii) are –

(*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;

(*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;

(*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"

Consequential amendment was brought in section 49 to adopt the amount taken into account for the purposes of clause (x) as the cost of acquisition for the purpose of calculating capital gains at the time of subsequent transfer of such capital asset.

2. Analysis and issues

2.1 Meaning of consideration:

2.1.1 Since the whole crux of s. 56(2)(x) is - receipts without consideration and in some cases for inadequate consideration, the meaning of the term 'consideration' is of paramount importance. However, the term is not defined in the Act.

2.1.2 In **Ku. Sonia Bhatia v. State of UP 1981 SCR (3) 239, 1981 SCC (2) 585**, the Supreme Court held that as the word 'consideration' is an expression of well-known legal significance or

connotation, it must be understood in the popular sense – i.e. as defined by Sec 2(d) of Contract Act.

2.1.3 U/s 2(xii) of the GTA "gift" was defined as below:

"*Gift means the transfer by one person to another of any 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 a gift under that section*."

However, even the GTA did not define the term 'consideration' and hence it was the subject matter of dispute on several occasions. In many decisions it was held that as the word 'consideration' is not defined in the Act, therefore, it must carry the meaning assigned to it in section 2(d) of the Indian Contract Act, 1872. [Rai Bahadur H. P. Banerjee v. CIT [1941] 9 ITR 137 (Patna), CGT v. Smt. C.K. Nirmala [1995] 215 ITR 156 (Kerala)(FB).

2.1.4 Section 2(d) of the Indian Contract Act reads as under:

"*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….*"

Thus, the above definition is very wide and it encompasses any act or abstinence –past, present or future e.g. a promise to marry can be a consideration under the Contract Act.

However, in the GTA, the definition of gift had an added condition that the consideration should be 'in money or money's worth'. However, s. 56(2)(x) only mentions the term 'consideration'.

Does the absence of words 'in money or money's worth' make a difference?

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2.2 **Receipt of Alimony:**

The Hon'ble Bombay High Court in the case of Princes Maheshwari Devi of Pratapgarh v. CIT [1984] 147 ITR 258 had held the monthly payments of alimony as taxable and lump sum amount of alimony as tax free being capital receipt. Does this position go to nullity due to this taxation of gift regime?

After dissolution of marriage, the recipient of alimony does not continue to be a 'relative' of his/her ex-spouse. Hence, receipt of alimony would not fall in this first exception. Provisions of section 56(2)(v)/(vi)/(vii)/(x) do not bring to tax any and every capital receipt. It only brings to tax a receipt of money without consideration. Under various personal laws, generally, a dependent spouse has right to get maintenance from his/her spouse and is eligible to get alimony. In such case, it may be claimed that the lumpsum alimony received is against extinguishment of one's right of living with his/her spouse or as a compensation for the severance of relationship. Hence, such receipt of alimony would not be considered as receipt without consideration.

In ACIT v. Meenakshi Khanna [2013] 143 ITD 744 (Delhi ITAT), the wife was entitled to get monthly alimony pursuant to a divorce agreement. The husband did not comply with the

same. Hence, the wife took legal action and they settled the claims with a lumpsum payment towards alimony. The ITAT held that –

"the receipt by the assessee represents accumulated monthly instalments of alimony, which has been received by the assessee as a consideration for relinquishing all her past and future claims. Therefore, there was sufficient consideration in getting this amount. Therefore, section 56(2)(vi) is not applicable."

2.3 **Aggregation:**

Since a threshold of Rs.50,000/- is provided in each of the sub-clauses of sec 56(2)(x), coupled with the word 'aggregate' in some clauses (& not all) following conclusions can be safely drawn:

Sr. No.	**Type of Transaction**	**Whether to be aggregated**
1.	Sum of money received without consideration	Yes
2.	Immovable property received without consideration	No (only individual property if having SDV > 50000 to be taxed)
3.	Immovable property received for consideration < SDV	No The difference between actual consideration & SDV to be seen individually for each property.
4.	Movable property received without	Yes

	consideration	[All movable properties (as defined) to be aggregated]
5.	Movable property received for consideration < FMV	The difference between aggregate actual consideration and aggregate FMV of all movable properties to be seen.

Thus, it is to be noted that only transaction at Sr.No. 1, 4 & 5 refer to aggregation but not those at Sr.No.2 & 3. Further, even transaction at Sr. No. 1, 4 & 5 are to be aggregated within that category only and not across category. Eg. Cash gifts of Rs. 40,000/- cannot be aggregated with gift of jewellery worth Rs. 40,000/-, so as to say that the threshold of Rs. 50,000/- is crossed.

2.4 **Subject matter of receipt:**

2.4.1 Explanation to clause (x) of sec 56(2) refers to the Explanation to clause (vii) for the meaning of various terms. Clause (d) of the Explanation to clause (vii) of sec 56(2) defines the term 'property' in an exhaustive manner. Therefore, any asset, howsoever valuable it is, will not be covered by the provision of sec 56(2)(x), if it does not fall in one of the nine sub-clauses of clause (d) of the Explanation to clause (vii) of sec 56(2).

2.4.2 Few interesting prepositions arise from the analysis of clause (d):

Clause (d) of Explanation to section 56(2)(vii) defines 'immovable property' as land or building or both. Hence, ambit of this sub-clause to section 56(2)(x) is similar to that of

section 50C. In several decisions it has been held that the expression land or building does not include rights in land or building.

2.4.3 Shares & securities: None of these terms are defined either in sec 56(2) or in sec 2. Hence it may be inferred that the commonly understood meaning should be adopted. Sec 2(84) of Companies Act, 2013 defines share as - ***"share" means a share in the share capital of a company and includes stock***.

In common commercial understanding, shares are of two categories, equity and preference. Both will be covered by sec 56(2)(x). Interestingly, the valuation Rule – 11U(h) defines securities as under:

"securities" shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

Thus, all the items enumerated in the inclusive definition of section 2(h) of the SCRA such as units of mutual funds, derivatives, security receipts, Government Securities, bonds, debentures, etc. shall be 'securities' for the purpose of section 56(2)(vii).

But in the absence of a definition in the Act, can the delegated legislation define a term which shall affect the very chargeability of a transaction?

2.4.4 It was held in Dy. CST v. G.S. Pai & Co. [1980] 1 SCR 938 that 'Bullion' in its popular sense cannot include ornaments or other articles of gold. 'Bullion' according to its plain and ordinary meaning, means gold or silver regarded as raw material and it may be either in the form of raw gold or silver or ingots or bars of gold or silver. Ornaments and other articles of gold cannot be regarded as 'bullion', because even if old and antiquated, they

are not raw or unwrought gold or gold in the mass. [Dy. CST v. Advani Coorlikon (P.) Ltd. AIR 1980 SC 609, 612, 613; Department Commissioner of Sales Tax (Law) Board of Revenue (Taxes Ernakulam) v. G.S. Pai & Co. AIR1980 SC 611, 612]

2.4.5 **Gold coins - Whether bullion or jewellery?**

Gold coins of various weights are generally gifted during Diwali and other festivals or functions. Are these items jewellery or bullion?

Gold coins are not bullion as can be seen from the above definitions. Further, these are not 'jewellery' as these are not for personal adornment. Thus, it appears that gold coins are neither bullion nor jewellery and therefore, gifts of gold coins received are not taxable in the hands of recipient individuals/HUFs.

2.4.6 **Property being Capital Asset**:

It is a common requirement in all the nine sub-clauses of clause (d) that it should be a Capital Asset for the recipient. Hence properties, though falling in any of the nine sub-clauses of clause (d), will not be covered by sec 56(2)(x) unless they are Capital Asset for the recipient.

Eg. If rural agricultural land or Gold Deposit Bonds, etc which are excluded from the definition of Capital Asset u/s 2(14), will get excluded automatically from the definition of 'property' in clause (d).

If the property received is stock-in-trade, can it be argued that it is not covered by sec 56(2)(x)? If yes, will it be chargeable u/s 28 as business income?

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2.5 **Receipt Of Money Without Consideration:**

2.5.1 The term "sum" means a quantity of money. [CIT v. Amonbolu Rajiah (1974) 1 ITJ 185].

Law Lexicon defines the term "money" as "the medium of exchange and measure of value." Hence, any money received in any medium of exchange can fall within the ambit of this section. The receipt need not be in Indian currency.

Can receipt of a deposit receipt convertible into money be considered as receipt of money?

Looking into the entire scheme of s. 56(2)(x) where, in addition to money, certain properties are also brought in tax net, the answers seems to be no. In Asstt. CIT v. Anuj Agarwal [2010]3Taxmann.com 46 (Mum.-ITAT), it was held that gift of Indian Millennium Deposit Certificate issued by SBI along with gift deed is not receipt of sum of money.

2.5.2 "Receive" means "to have conferred" or "to have delivered to or brought to one". Such

receipt is intended to be treated as an income of the recipient, hence, it is essential that the receipt is in individual capacity of the assessee and not in a fiduciary capacity. Mere receipt of money need not be income unless the assessee has domain or right over it.

Also, the receipt should not be in nature of a liability. For instance, when the assets are settled in Trust, the Trustee receives the same only in fiduciary capacity.

There must be a 'gain' (in a real sense) in the hands of the assessee so as to hold that 'income' has resulted to him and thereby, tax is attracted as a statutory consequence. A 'gain is conceivable when some enrichment results to the assessee from a transaction. In short, there must be betterment in the wealth position of the assessee by the transaction.

2.5.3 **Can provisions of section 56(2)(x) apply in case of interest free loans received by an assessee?**

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2.5.4 **Can provisions of section 56(2)(x) apply even if there is no actual receipt by the assessee during the year but only a waiver of loan received in earlier year?**

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2.6 **Receipt Of 'Immovable Property' Without consideration or For Less Than Stamp Duty Value:**

2.6.1 **When can an immovable property be considered to have been 'received'? Whether at the time of issue of allotment letter by builder or at the time of registration of sale deed or at the time of handing over of possession?**

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2.7 **Receipt of 'any property other than immovable property' without consideration or for inadequate consideration:**

2.7.1 **When does a person receives shares? At the time of allotment or at the time of receipt of share certificate or credit in Demat account?**

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In case of other movable assets, there may not be much difficulty in ascertaining the date of receipts, because as per Section 123 of the Transfer of Property Act, for the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument or by delivery

2.7.2 **Is there any chargeability u/s 56 on issue of bonus shares or rights shares? What would be the consideration in case of issue of rights shares and bonus shares?**

The transaction of bonus issue and rights issue per se are ostensibly covered by the clear and unambiguous language of the provision. However, does a literal application lead to any unintended or absurd results?

On allotment of bonus or rights shares, can a person be said to have 'received shares'?

In case of a bonus issue, though, apparently nothing has been paid by the shareholder.

However, one has to see that pursuant to a bonus issue only the number of shares of the shareholder increases but net value of the total shares held after bonus issue, in fact, remains the same as that before the issue of bonus shares.

As discussed earlier, the 'consideration' need not be actual inflow or outflow of money. It may be a constructive receipt. Accordingly, if receipt of one property dilutes the value of other asset, that dilution has to be considered while evaluating as to whether the consideration for the property is less than the fair market value.

In DCIT v. Dr. Rajan Pai [2017] 48 ITR(T) 170 - Bang. ITAT, it has been held that an assessee who received bonus shares could never be considered as receiving something

without consideration or for a consideration less than the fair market value of the property. When bonus shares are received, it is not something which has been received free or for a lesser fair market value. A consideration has flown out from the holder of the shares, may be unknown to him, which is reflected in the depression in the intrinsic value of the original shares held by him.

Mumbai Tribunal in case of Sudhir Menon HUF v. ACIT [2014] 148 ITD 260, in context of bonus issue, held that the provision of 56(2)(vii) does not apply to bonus shares. It observed that –

"there is no receipt of any property by the shareholder, and what stands received by him is the split shares out of his own holding. It would be akin to somebody exchanging a one thousand rupee note for two five hundred or ten hundred rupee notes. There is, accordingly, no question of any gift of or accretion to property; the shareholder getting only the value of his existing shares, which stands reduced to the same extent."

The Tribunal, on the issue of applicability of this provision to the rights issue, observed as under:

- In a pro-rata allotment of shares in proportion to existing shareholding of the shareholders, there is only an apportionment of the value of their existing holding over a larger number of shares.
- A higher than proportionate or a non-uniform allotment would attract the rigour of the provision. This is only understandable in as much as the same would only be to the extent of the disproportionate allotment and, further,

by suitably factoring in the decline in the value of the existing holding.

- In the case of issue of bonus shares (as also on demerger), no property is being conveyed to the shareholder in as much as the property therein is comprised in the existing shareholding of the allottee. There is as such no case of a gift; the shareholder only receiving his own property, albeit in a different form.

- In case of right shares, to the extent it is allotted to a person not against his existing shareholding or, even so, albeit disproportionately, there is scope for value or property being passed on to him, depending on the terms of the allotment, which cannot be said to be in lieu of or as recompense of his existing property.

With due respect, can it be said to be a settled law?

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In the context of GTA, Supreme Court Khoday Distilleries Ltd. vs CIT and Anr. [(2008) 307 ITR 312] held that 'allotment of shares' does not involve transfer.

It is worth to make reference to three circulars issued by CBDT recently in quick succession.

1) Circular No. 10/2018, dated 31st December, 2018:

"It is apparent from the legislative intent that clause (viia) was inserted in section 56(2) of the Act as an anti-abuse provision to prevent the practice of transferring shares of a specified company for no or inadequate consideration. Thus, the intention was never to apply these provisions of said clause (viia) to the fresh issuance of shares as mentioned in para 2 above, by the specified company. Keeping in view the legislative intent to apply anti-abuse provision contained in section 56(2)(viia) to transfer of shares for no or inadequate consideration, it is hereby clarified that section 56(2)(viia) of the Act shall apply in cases where a specified company or firm receives the shares of the specified company through transfer for no or inadequate consideration. Hence, the provisions of section 56(2)(viia) of the Act shall not be applicable in cases of receipt of shares by the specified company or firm as a result of fresh issuance of shares as mentioned in para 2 above, by the specified company."

2) Circular No. 02/2019[F.No. 173/616/2018-ITA-I], dated 4-1-2019:

".....Given the fact that the matter relating to interpretation of the term 'receives' used in section 56(2)(viia) of the Act is pending before judicial forums and stakeholders have sought clarifications on similar provisions in section 56 of the Act, the Board is of the view that the matter is required to be examined afresh so that a comprehensive circular on the matter can be issued……

4. In view of the above, the Circular No. 10/2018 dated 31st December, 2018 issued from file No. 173/616/2018-ITA-I is hereby withdrawn and the aid circular shall be considered to have been never issued."

3) Circular No. 3/2019 [F.No. 173/616/2018-ITA.I], dated 21-1-2019:

"……Keeping in view the plain reading as well as the legislative intent of section 56(2)(viia) and similar provisions contained in section 56(2) of the Act, being anti-abuse in nature, it has been decided that the view, as was taken in Circular No. 10/2018 [subsequently withdrawn by Circular No. 02/2019] that section 56(2)(viia) of the Act would not apply to fresh issuance of shares, would not be a correct approach, as it could be subject to abuse and would be contrary to the express provisions and the legislative intent of section 56(2)(viia) or similar provisions contained in section 56(2) of the Act.

3. Therefore, any view expressed by the Board in Circular No. 10/2018 shall be considered to have never been expressed and accordingly, the said circular shall not be taken into account by any Income-tax authority in any proceedings under the Act….."

2.8 **Valuation of Property:**

2.8.1 **Immovable Property –at the stamp duty value (SDV)**

SDV higher than FMV:

In such case, though Section says AO 'may' refer valuation to DVO, decisions pertaining to Section 50C can be applied here, which state that the word 'may' has to be interpreted as 'shall'.

2.8.2 Movable Properties -Rule 11U and Rule 11UA

The position can be summarized as below:

Type of Property	**Mode of Acquisition**	**Fair Market Value**
Jewellery	Purchase from registered dealer – on the date of receipt	Invoice Value
	Other Mode	As per Registered Valuer's Report
Archaeological collections, drawings, paintings, sculptures or any work of art	Purchase from registered dealer – on the date of receipt	Invoice Value
	Other Mode	As per Registered Valuer's Report
Quoted Shares and securities	Through Recognized Stock Exchange	Transaction value as recorded in such stock exchange
	Other mode	lowest price on any recognized stock exchange on the valuation date, if the shares or securities were traded on the valuation date or on a date immediately preceding the valuation date when the shares or securities were last traded.

Unquoted equity Shares	Any mode	As per the formula given (discussed in section 50CA)
Unquoted shares and securities other than equity shares	Any mode	Price that it would fetch if sold in the open market on the valuation date [Assessee can obtain Merchant Banker or Accountant's Report]

What about valuation of bullion? Rule 11UA is silent on valuation of bullion.

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2.8.3 **Cost of Acquisition**: Section 49(4) of the Act deals with Cost of acquisition of capital assets which has been subjected to tax under Section 56(2) (vii)/(viia)/(x). As per this section when any person is subjected to Income tax under Section 56(2)(vii)/(viia)/(x), transfers his capital asset, then the cost of acquisition of such capital asset for the purpose of calculating the resultant capital gain shall be the value which has been taken into account for the purpose of Section 56(2)(vii)/(viia)/(x).

However, how to determine the period of holding of such assets and from which year to claim indexation?

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2.9 **Exceptions:**

The Proviso to clause (x) contemplates certain genuine transactions and excludes the same from the tax net. They are discussed briefly as under:

(I) Receipt from any 'relative':

The meaning of the term relative is same as defined in *Explanation* to clause (*vii*). The term is wide enough to cover most close relations.

The list of 'relatives' given in case of an individual, under clause (e) to Explanation to section 56(2)(vii) is to be read as list of donors and as such each relation is be seen from the recipient's side. Even in a case, where minor's income is taxed in hands of his parent, the relation has to be seen with reference to the recipient, being minor, and not his parent. [ACIT v. Lucky Pamnani (2011) 129 ITD 489 – Mum ITAT].

However, there is no need to prove any occasion since that is not a pre requisite.

- Smt. Geeta Dubey *v.* ITO [2018] 97 taxmann.com 619 (Indore - Trib.)
- Pendurthi Chandrasekhar v. DCIT [2018] 91 taxmann.com 229 (Andhra Pradesh and Telangana)

We are aware of the possible relations envisaged under this definition. However, for the sake of completeness the same is re-iterated hereunder:

Sub-clause	**Relation defined**	**Interpretation**	**Comments**
(A)	spouse of the individual	Husband, Wife	Co-wives are not included. **What about live in relationships?**
(B) Read with (G)	brother or sister of the individual; spouse of the person referred above	Siblings, half siblings, adoptive brother or sister and respective spouses	Cousins are not covered. Mahabir Jute Mills [1983] 17 TTJ (All. ITAT)
(C) Read with (G)	brother or sister of the spouse of the individual; spouse of the person referred above	Brother or sister In-law and respective spouses	
(D)	brother or sister	Uncle, Aunt and	Reciprocal relatives, viz.

Read with (G)	of either of the parents of the individual; spouse of the person referred above	respective spouses In common parlance, Kaka, Fui, Mama, Masi Kaki, Fua, Mami, Masa	niece, nephews, respective spouses are not covered (to be a donor).
(E) Read with (G)	any lineal ascendant or descendant of the individual spouse of the person referred above	Father, Mother, Paternal and Maternal Grand Parents, and so on.. Children, Grand Children, and so on.. Son-in-law, Daughter-in-law, and so on..	Only direct line is covered. Collateral line is not covered. ACIT v. Masanam Veerakumar [2013] 143 ITD 664 – Chen. ITAT Illegitimate child can be considered covered. [First GTO v. A.K.C. Natarajan [1986] 16 ITD 359 (Mad. ITAT)] However, there are contrary views in Executors of the Will of T.V. Krishna
(F) Read with (G)	any lineal ascendant or descendant of the spouse of the individual spouse of the	Father-in-law, Mother-in-law, Paternal and Maternal Grand Parents in law, and so on..	

	person referred above	Step-children, adopted children, etc.	Iyer v. CIT[1960] 38 ITR 144 (KER.), CIT v. C.S. Rajasundaram Chetty [1950] 18 ITR 145 (MAD.)

(i) ‘Brother' does not include 'cousin'- ITO v. Mahabir Jute Mills Ltd. [1983] 17 TTJ (All.) 49.

(ii) ‘Brother' is a male human being considered in his relation to another person having the same parent or having one parent in common - ITO v. Mahabir Jute Mills Ltd. [1983] 17 TTJ (All.) 49.

In case of adopted son or daughter, the relationship needs to be seen from the adoptive lineage or from the biological lineage?

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The theory of transitivity doesn’t apply to the definition of ‘relative’. It gives rise to some irrationalities like - brother or sister of an individual is relative in relation to an individual assessee however son of a brother or sister is not covered by the definition of ‘relative’.

Thus, maternal uncle, for instance is my relative. Consequently, any sum of money gifted by maternal uncle to his nephew shall not be chargeable to tax in the hands of the nephew. However, reverse shall be taxable since nephew is not a relative of his uncle in terms of the definition contained in Section 56.

What is lineal ascendant / descendant?

As per the dictionary meaning ascendant means "*someone from whom one is descended*" and descendant means "*a person considered as descended from some ancestor or race*". Lineal means "*in a straight unbroken line of descent from parent to child*". Therefore, lineal descendant means in a straight unbroken line of descent from parent to child. A question can arise whether an individual can be considered as descendant of father only? Or can one be considered as descendant of mother as well? Since the word used is parent, the term will include both, the father and mother as well.

Group of Relatives:

Can it be said that it does not make any difference if the money is received from a single relative or from a group of relatives. E.g. can we say that *Gift received by member from HUF taxable?*

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Relative for HUF:

The term ‘relative’ is defined for a recipient, being an HUF, as any member thereof. This definition was introduced in the statute vide Finance Act, 2012, w.r.e.f. 1.10.2009.

Prior to this insertion in definition, there was confusion as to how to interpret the definition of relative from an HUF’s perspective.

In Subodh Gupta (HUF) v. PCIT [2018] 169 ITD 60 (Delhi ITAT), it was held that , receipt by an HUF from Karta’s mother is not covered by the definition of ‘relative’. Reason being that mother of Karta is not a member of Karta’s HUF With due respect, this judgment appears to be not a rational one as it is simply going by the rule of literal interpretation. Certainly, the objective behind these provisions, as explained earlier is to counter money laundering and bogus capital building. Taxing gift by Karta’s mother to Karta’s HUF is an over stretching on the literal interpretation of the term.Relative in relation to persons other than Individual/HUF?

Erstwhile clauses (v), (vi) & (vii) applied only to Individual & HUF. The exception was provided in case of receipts from relatives and the definition of relatives was in relation to Individuals & HUFs. Hence there was synchronization. Though clause (viia) applies to firms & closely held companies, there was no exception of receipts from relatives in that clause. The new clause (x) applies to all persons with exception provided for receipts from relatives. However, the term ‘relative’ is defined only in relation to individual & HUFs.

So does this exception apply only to Individuals & HUFs or can it be extended to all persons? If yes, how to interpret the term ‘relative’ in relation to persons other than Individuals and HUFs?

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(II) ‘on the occasion of the marriage of the individual’:

Besides exceptions provided in respect of gifts received from the relatives, an individual is exempted from tax on receipts of gifts from anyone, whether relative or not, on occasion of his/her marriage.

In this exception, the word 'individual' is preceded by the words 'marriage of' and, therefore, it is unambiguous that the exception only relates to the marriage of the individual concerned, i.e., the assessee and not to the marriage of any other person related to him in whatsoever degree, whether as his daughter or son.

In Rajinder Mohan Lal v. DCIT [2013] 263 CTR 231, it was observed by the Punjab & Haryana High Court that *“If the legislature had intended that gifts received on the occasion of marriage of the assessee's children should be exempted, nothing prevented the Legislature from adding the words 'or his children' after the words 'marriage of the individual'”*

Similar exception was provided under section 5(1) of GTA. The expression *‘on the occasion of the marriage’* does not confine the receipt of the gift on the day of wedding or during ancillary functions in relation to wedding. The gift may be received on or before or after the occasion of marriage.

In CIT v. Dr. (Mrs.) Neelambai Ramaswamy [1986] 164 ITR 369 –Mad. HC, (rendered in context of GTA), gift received 11 months after marriage was considered as gift received on the occasion of marriage as the gift was intended to be made at the time of marriage but could not be made. The High Court observed that –"*The relationship between the gift and the marriage is, thus, the relevant factor and not the time of making the gift."* In A. Rudrakodi v. CIT [2000] 244 ITR 309 (Mad.), gift made after 4 years of marriage and in CGT v. G. Venkataswamy [1999] 236 ITR 539 (Mad.), gift made after 15 years of marriage was also considered, in the facts of the cases, as gift received on the occasion of marriage.

"The expression 'on the occasion of marriage is not synonymous with 'at the time of marriage'" - [CGT v. K.B.B. Subudhi [1993] 201 ITR 741 (Ori.) and Sumatilal H. Kapadia (HUF) v. Gift tax Officer [1992] 43 ITD 580 – Ahd. ITAT.

The legislature has precisely chosen the word 'marriage'. Betrothal or engagement cannot be considered as marriage and as such gifts received on such occasions would not fall within ambit of this exception. [Second Gift Tax Officer v. Smt. Nirmala Rajasekharan [1984] 6 ITD 647 – Mad. ITAT]

(III) 'under a will or by way of inheritance':

This exception intends to cover receipt of any sum or any property under a testamentary and non-testamentary settlement, irrespective of whether the deceased is a 'relative' or not.

A question arises-if an individual receives any shares or money covered by a fixed deposit by virtue of being a nominee will these receipts be exempt? This question arises

as there is only mention of will and inheritance but not of nomination in clause (III) of the proviso to section 56(2)(x).

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(IV) <u>in contemplation of death of the payer or donor, as the case may be-</u>

This is a situation where the donor is seriously ill and feels that he may not live long and wishes to give away a property or sum of money to a person. Such receipt is made exempt, irrespective of the donor being a 'relative' or not. Such situations are rarely heard and it is difficult to imagine what evidence one may have to produce to prove the situation, if need be.

An interesting case in this regard was before the Chennai Tribunal in F. Susai Raju v. ITO [2017] 163 ITD 533. In this case, where amounts were received 8 months prior to death and also actually used by the donee prior to death of the donor, Tribunal held that these cannot be regarded as 'gift in contemplation of death', because such gifts take effect on the death of donor and here the amounts were already utilized by donee prior to donor's death.

Similar exception was provided under the Gift Tax Act, 1958 (herein after referred to as "GTA"), wherein for meaning of the said term it referred to section 191 of the Indian Succession Act, 1925.

The requirements of a gift 'in contemplation of death' as laid down by section 191 of the aforesaid Act are:

(i) the gift must be of movable property;

(ii) it must be made in contemplation of death;

(iii) the donor must be ill and he expects to die shortly of the illness;

(iv) possession of the property should be delivered to the donee; and

(v) the gift does not take effect if the donor recovers from the illness or the donee predeceases the donor.

Section 56(2) doesn't refer to Indian Succession Act for meaning of the term 'in contemplation of death'. Hence, can it be inferred that the legislature intended to allow receipt of immovable property into the exception?

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The Apex Court in CIT v. Abdul Karim Mohd. [1991] 191 ITR 317 (rendered in context of exception provided under the GTA) held that it is implicit that the donee becomes the owner of the gifted property only if the donor dies of the illness and if the donor recovers from the illness, the recovery itself operates as a revocation of the gift. The

deed of gift need not spell out the condition that the done becomes owner only if the donor dies.

The above referred decision is recognized by the Tribunals and Court while deciding taxability under section 56(2).

(V) Receipt from "any local authority as defined in the Explanation to clause (20) of section 10"; or

(VI) Receipt 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

(VII)Receipt from or by any trust or institution registered under section 12A or section 12AA; or

(VIII)"by any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10"

The above four clauses have been inserted in the proviso to cover the situation where a person is beneficiary of aid or help or assistance given by such institution like a charitable trust etc. Section 10(23C) & 11 exempts the income of these institutions, however as far as the recipient of charity is concerned, the amount received is without consideration. Therefore to save the beneficiaries of such institutions from the clutches of sec 56(2)(x), these clauses have been inserted in the proviso. However interestingly clause (VII) in the proviso to sec 56(2)(x) uses the words "by" in addition

to the words “from”. It implies that any receipt by a trust or institution registered u/s 12A or 12AA is also now sought to be excluded from the operation of clause (x) of sec 56(2). Proviso to clause (v), (vi) & (vii) of sec 56(2), only used the word “from” and not “by” a trust or institution registered u/s 12A or 12AA. Income of a trust registered u/s 12A or 12AA is excluded from the total income as per the provision of sec 11, subject to income being applied for its objects or accumulated as provided in the section.

What are then the implications of the words “by a trust or institution registered u/s 12A or u/s 12AA” in clause (vii) to the proviso to sec 56(2)(x)?

Does it mean that even without fulfilling the condition of sec 11, receipts by a trust or institution registered u/s 12A or 12AA gets exempted by virtue of clause (VII) of the proviso?

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Sec. 12A(2)provides that the provision of sec. 11 & 12 shall apply to a trust or institution from the assessment year immediately following the financial year in which the application for registration is made. In other words, the exemption applies to the income of entire previous year in which application for registration is made

and is not restricted to the income arising after the date on which application for registration is made.

So can the recipient also claim exclusion under clause (VII) of the proviso for receipts prior to the date of application for registration or will he be eligible for exclusion only for receipts after the date of registration of trust?

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What if a person receives financial assistance from friends, well wishers etc. (non relatives) for some need like medical or educational needs and he spends the same for that purpose?

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(IX) "by way of transaction not regarded as transfer under clause (i) or [clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (vib) or clause (vic) or clause (vica) or clause (vicb) or clause (vid) or clause (vii) of section 47";

There are certain transactions which are not regarded as transfers for the purpose of calculation of Capital Gains. Consequently, there shall not be any capital gains on the above transactions. Such transactions include transfer of capital asset by holding company to subsidiary company, amalgamating company to amalgamated company etc, where the assets are either transferred at book values or the pricing of the asset is affected by relation between such entities. In order to avoid undesirable consequences by imposing tax on the recipient entity and to shield the recipient from taxation, just like the seller entity, such transactions are also kept outside the scope of Section 56(2).

However, clause (IX) does not refer to all the clauses of sec 47. What will be the implications of sec 56(2)(x) in the hands of transferee where the mode of transfer is covered by sec 47 & hence not liable to Capital Gain tax in the hands of the transferor, but is not included in clause (IX) to sec 56(2)(x)? Eg. Assets received by an LLP from a company where all the conditions of sec 47(xiiib) are fulfilled?

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(X) "from an individual by a trust created or established solely for the benefit of relative of the individual"

This exception envisages a scenario where an individual does not directly make a gift to his relative but makes a gift to the trust which has been created solely for the benefit of such relative. There is no further requirement that the donor must be the settler of such trust. The trust could have been created by anyone, the only requirement is that the beneficiary of the trust is a relative of the donor.

Erstwhile clauses – (v), (vi) & (vii) of S. 56(2) were applicable only in case of Individual & HUF. In a series of cases it is held that a private discretionary trust is to be assessed as an individual and is entitled to all the benefits and reliefs which are available to an individual. Therefore receipts from relatives of beneficiaries were covered by the exceptions and not liable to tax. However in certain cases, where a private discretionary trust was assessed as an AOP, there was no need to look in the proviso, as the clauses – (v), (vi) & (vii) itself were not applicable to them.
Eg.: Decision of Delhi Tribunal in Mridu Hari Dalmia Parivar Trust v. Assessing Officer, [2016] 68 taxmann.com 376 (Delhi - Trib.)

Now since clause (x) is made applicable to all persons, it will apply to private trust – irrespective of whether it is assessed as an individual or AOP. Therefore clause (X) of the proviso provides for an exception where the receipts are from an individual by a trust created for the benefit of the relative of the individual. Thus in this case, the donee (beneficiary) should be the relative of the donor, whereas in clause (I), the donor should be the relative of the donee. Practical difficulty may arise, where one of the beneficiary is relative of the donor but the other is not!

2.10 **Other Issues**

2.10.1 ***Does the assessee need to fulfill ICG (Identity – creditworthiness – genuineness) test in case of amounts claimed to have been received as gifts? Can there be any taxability u/s 68, which in turn will invite sec 115BBE? Or is it*** **possible for a person to launder his illegal income like bribe etc. by showing gifts under section 56(2)(x) and paying tax thereon?**

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2.10.2 **Is there an element of double taxation in application of section 56(2)(x) in the hands of buyer and application of section 50C or 50CA in the hands of the seller? Is section 49(4) an answer? E.g. in case of transfer of unquoted shares for a consideration of Rs. 100 as against the FMV of Rs. 150 as determined under the Rules, the difference of Rs. 50 is chargeable in the hands of the buyer and at the same time, capital gains is computed for the buyer taking the consideration of Rs. 150. Is it a jeopardy?**

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2.10.3 **What if personal obligation of one person is met by another person - Applicability of Section 56(2)(x)?**

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2.10.4 **Is buyback of shares at less than FMV taxable in the hands of the company undertaking the buyback?**

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2.10.5 **Does S. 56(2)(x) apply to sum received by a partner on retirement from a firm, in excess of balance standing to his capital account? What if a partner at the time of retirement takes a movable property or an immovable property? – covered by 45(4)**

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2.10.6 **In case of introduction of a capital asset as capital contribution by Partners in Partnership Firms, can section 56(2)(x) be invoked in the hands of the firm?**

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To conclude, can it be inferred that in each case of receipt of a sum or property in the nature of capital receipt which is not taxable under any of the other charging provisions, if the assessee is unable to prove existence of adequate consideration, it can be taxed u/s 56(2)(x)?