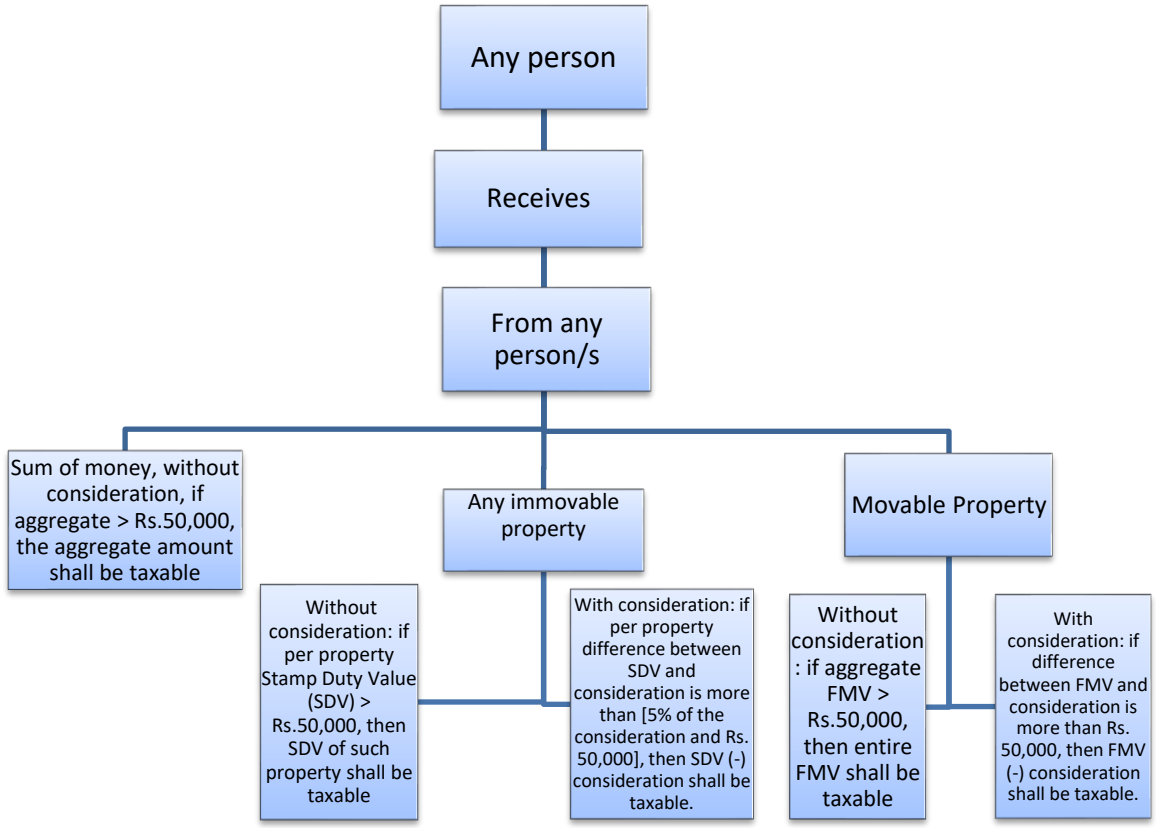
TAXABILITY OF GIFTS—SOME INTERESTING ISSUES

In the present materialistic society, the citizens of our country have lot of reasons to celebrate owing to its diversified culture, customs and religion. On many occasion's 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. These loopholes in the Law have led to the introduction of The Gift Tax Act, 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. The period from October 1998 till March 2004 was without any tax on gifts. However, the gift tax was reintroduced in a new form to fill up the vacuum created by abolition of the Gift tax Act, 1958 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 as income from other source u/s 56 of the Income Tax Act,1961. From time to time, the Government has made many amendments in the provisions of this section. Still there are many interesting practical problems which are faced by the taxpayers. In this write up, we will discuss some issues and try to reply the same as per best of our knowledge. Before we proceed towards our destination, we must see the following graphical presentation of sec 56 of the Act.



1. **Taxability of gift to minor**

In order to resolve this issue, firstly we have to read the sec 56(2) x of the Act. This sec. reads as

"(*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;…."

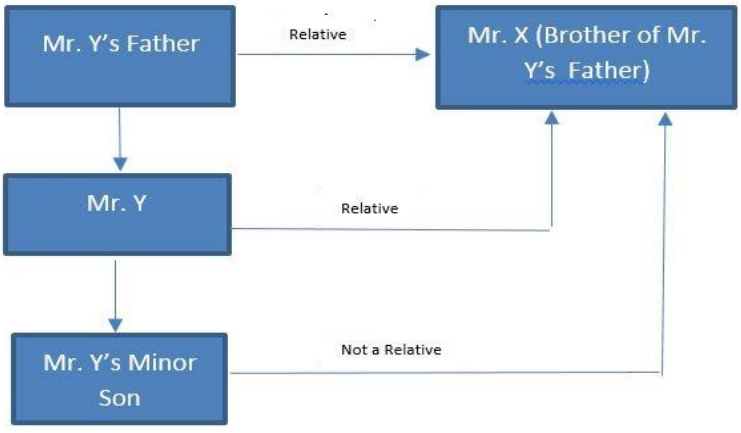
From the above section, it is clear that any person who receives gift of money from person or persons without consideration exceeding Rs.50000/ will be subject to tax as income from other sources. But if this sum is received from relatives or the aggregate of sum of money is Rs.50000/or less, then nothing will be taxed as income. This provision is applicable to any person which includes minor also. But as per the provisions of sec 64(1A) of the Act, the income of the minor is to be clubbed in the hands of the parent whose total income (before clubbing of minor income) is higher. The parent in whose income the income of the minor is clubbed is given an exemption of allowance of Rs.1500/- per child u/s 10(32) of the Act.

Example: Mr. X has gifted a sum of Rs. Rs 50,000 to his nephew Mr. Y and Rs.51000/ to the minor son of Mr. Y. In this case, it is to be noted that a gift Rs.50,000 received by Mr. Y from his uncle who is relative of Mr. Y, is exempt. But in case of gift of Rs.51000/ to minor son of Y two issues arise

(i) Whether this gift is exempted being received from the uncle of Mr. Y and

(ii) whether exemption u/s 10(32) of the Act is to be given to minor child before clubbing of his income in the hands of Mr. Y or this exemption is to be allowed in the hands of Mr. Y after clubbing the income of his minor son.

It is to be noted that the meaning of the term relative is 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]. This can be explained by an underlying diagram.



From the above discussion, it is evident that Mr. X is a relative of Mr. Y and not a relative of minor son of Mr. Y. Hence, gift of Rs. 51,000 to the minor son of Y will be clubbed with the income of Mr. Y

Now the other interesting issue before us is whether the minor child is entitled to exemption of Rs.50,000 u/s 56 of the Act. In the case of a minor whose income is clubbed with the income of the parent will be given exemption of Rs.50,000 separately and his parent will get the separate exemption u/s 56 of the Act. But in the present case, the minor son of Mr. Y has received gift from non-relative exceeding Rs.50,000 will not be entitled to any exemption and whole of the sum of Rs. 51,000 will be clubbed with the income of Mr. Y. Now another question which comes to our mind is that whether gift of Rs. 51,000 to the minor is to be clubbed before allowing exemption of Rs.1,500 u/s 10(32) of the Act which will make the income of minor Rs 49,500. In this context, we must see the provisions of Sec 10(32) of the Act Sec 10(32) reads as

" in the case of an assessee referred to in sub- section (1A) of section 64, any income includable in his total income under that sub- section, to the extent such income does not exceed one thousand five hundred rupees in respect of each minor child whose income is so includable."

From the wordings of above section, it is clear that exemption u/s 10(32) will be allowed to the parent in whose income, the income of the minor has been clubbed. Keeping in mind the above, we can conclude that gift of Rs.51,000 to the minor son of Mr. Y will be clubbed in the income of Mr. Y and Mr. Y will be entitled to an allowance of Rs.1,500 u/s 10(32) of the Act and the balance sum of Rs.49500/-will be taxable in the hands of Mr.Y.

2. Taxability of gift to uncle by nephew.

A very interesting question arises is that whether gift from uncle to nephew and vice versa are allowed. It is also to be seen that as per the definition of sec 56 both are relatives or not. To resolve this issue, first of all we have read the meaning of relative from sec 56 of the Act. It reads as

(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;

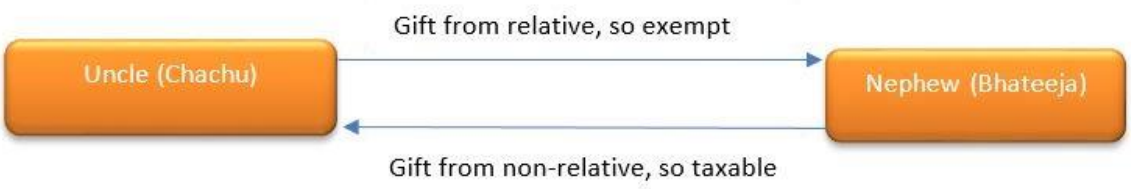
(E) any lineal ascendant or descendant of the individual;

(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;

It is also to be noted that the taxability of gift is donee based and gift is to be charged to tax in the hands of the person who receives the gift which is very much clear from the presentation given in the beginning of the write up. In other words, we can say that the meaning of relative is to be examined from the view point of the recipient. A two-way relationship cannot always be assumed. The theory of transitivity doesn't apply to the definition of 'relative' The theory of transitivity means that a relation between three elements such that if it holds between the first and second and it also holds between the second and third it must necessarily hold between the first and third Thus, as per the definition of relative ,it is possible that Donor may be relative of the Donee. The gift may therefore, be within the exception. If the said Donee was to make a gift to the Donor it cannot always be presumed that the gift originates from a relative. For e g. A gift given by an individual to his brother's son may be exempt as originating from a relative. However, if the said individual was to receive a gift from his nephew the gift may not fall within the exception. . Consequently, any sum of money gifted by 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 of the Act.



3. Whether gifts received from friends and relatives on the occasion of daughter's marriage are exempt?

An individual is exempted from tax on receipts of gifts from anyone, whether relative or not, on occasion of his/her marriage. This exemption has been specifically to individual. Hence, HUF's, companies, firms etc. cannot claim this exemption. The wording of section 56 of the Act "on the occasion of the marriage of the individual" clearly shows that this exemption is available to the assessee i.e. bride or bridegroom. As per the section, gifts received on the occasion of the marriage by the individual are only exempt, meaning thereby, that gifts received by the same person who is getting married. In case gift is received in the name of the father on the occasion of marriage of the daughter same will be taxable. This benefit can't be availed by the parents of the individual. In other words, 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

On the occasion of marriage does not mean on the day of marriage but would also include other functions of marriage and also time near about the marriage. *[CGT v. Budur Thippiah (1976) 103 ITR].* However, the gifts received on marriage anniversary, birthday, silver jubilee etc. are not exempt.

Example: Mr. X received Rs. 2,00,000 in aggregate as 'shaguns' at the time of his daughter's marriage. The gifts worth Rs. 48,000 were received from friends and Rs. 1,52,000 from relatives. Would the implications differ in case the amount received is subsequently transferred to the account of his daughter whose marriage was solemnized?

The gifts are received by Mr. X on the occasion of marriage of his daughter. The gifts are received from friends and relatives. The gifts received on marriage of individual are exempt for that individual only. In the present case individual's (whose marriage is being conducted) father has received gifts. These would not be exempt for Mr. X under clause (II) of the proviso to sec 56(2)(x). However, Rs. 1,52,000 received from relatives would be exempt under clause (I) of the proviso to sec 56(2)(x). Regarding gifts from friends, the exemption limit of Rs. 50,000 would apply. Mr. X has received Rs. 48,000 which is less than Rs 50,000, therefore no amount shall be taxable for Mr. X, assuming that he has not received other monetary gifts during the year. In case Rs. 52,000 would have been received from friends, entire Rs 52,000 would be taxable. If Mr. X has subsequently transferred the amount to his daughter's account, the implications would not be different.

4. Taxability of Gift of Car

For the purpose of S. 56(2)(x) the term 'property' has been defined to mean 'capital asset' of the assessee. . As per sec 56 "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;

Therefore, it is the receipt of nine items mentioned in the definition of the term 'property' and which are capital assets of the assessee would be covered by this clause. This provision applies in case of gift of any of the above-mentioned property other than immovable property [i.e. from (ii) to (ix)]. Gift of any other asset such as motor cars, mobile phones, watches, laptops, etc. is not taxable in the hands of the recipient. Thus, gift of car is not subject to tax in the case of the recipient. But if car is received in lieu of professional services or for achieving sales targets, the same will not be treated as gift and put to tax income from

business and profession u/s 28(iv) of the Act. As per the provisions of sec **28 of the Act** the following income shall be chargeable to income-tax under the head "Profits and gains of business or profession"-

(*iv*) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;

This has been made clear in the case of *Priyanka Chopra v. DCIT [2018] 89 taxmann.com 286 (Mumbai - Trib.)*

The assessee, Priyanka Chopra, had entered into agreement with NDTV for promoting the causes of environmental issues in association with Toyota. She was given a Toyota Prius hybrid luxury sedan car for being the brand ambassador of NDTV-Toyota Greenathon Campaign. The Assessing Officer taxed the market value of such car in the hands of assessee as business income under section 28(iv). However, the assessee contended that the remuneration received against her services as brand ambassador had been offered to tax in the year of receipt. Since she didn't render any services to Toyota Company, the value of the car given to her for promotional purpose couldn't be taxed in her hands.

The Mumbai ITAT held in favour revenue that assessee had done the promotional activity by rendering the services as a brand ambassador of NDTV Toyota Greenathon Campaign, which had also promoted the brand of Toyota. Therefore, value of Toyota car in this connection had rightly been added in her hands under Section 28(iv). Further, the argument that there was no agreement between Toyota and the assessee was totally irrelevant and unsustainable.

5. Whether interest free loans can be charged to tax as sum of money received without consideration?

This is a very important issue which is generally faced by the taxpayers. Generally, in business world, the interest free loans are received from certain parties and after a gap of time, these loans are returned back to the lender. Now a question arises whether such kind of loans can be termed as gift and charged to income tax u/s 56 of the Act. In the beginning of this write up, we have studied the provisions of sec 56 of the Act. In section 56(x)(a) of the Act, it is written that a sum of money received without consideration will be put to tax. The word 'consideration' is neither prefixed by the word 'adequate 'nor it is suffixed by the words; money or money's worth. Therefore, in case of transactions where consideration exists, cannot come under the purview of sec 56(2)(x)(a) of the Act. Therefore, the meaning of the term 'consideration' is of paramount importance. However, the term consideration has not been defined in the Act. Therefore, it must carry the meaning assigned to it in section 2(d) of the Indian Contract Act, 1872. 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. It is also to be noted that consideration may be in cash or in kind. Consideration need not be monetary consideration.

Thus, in a case of interest free loan, the detriment suffered by the lender in parting with use of funds is valid consideration with a promise of repayment back of the loan by the borrower. In other words, the loan of money can be defined as a contract by which on delivers a sum of money to another and the borrower agrees to return the same in future inequivalent to the sum of borrowing. This sum may be with interest or without interest.

Merely because the amount of loan has been raised without involving payment of interest, cannot be seen to have vested the impugned amount with characteristics of an income, within the meaning of section 56(2) of the I.T. Act.

Thus, in the case of loan, the promise to pay back the equivalent sum in future shows the presence of consideration as defined in sec 2(d) of the Contract Act, 1872. The same view has been supported by Hon'ble Delhi High Court in CIT vs. Mridu Hari Dalmia (1982) 8 Taxmann 138/133 ITR 550.

From the above, we can conclude that a loan is having a two-way traffic and gift is a only one way route. This view is also supported by the following judicial pronouncements.

In case loan was taken without interest, same cannot be considered to be income. *[CIT vs Saran Pal Singh (HUF) 237 CTR (P & H) 50].*

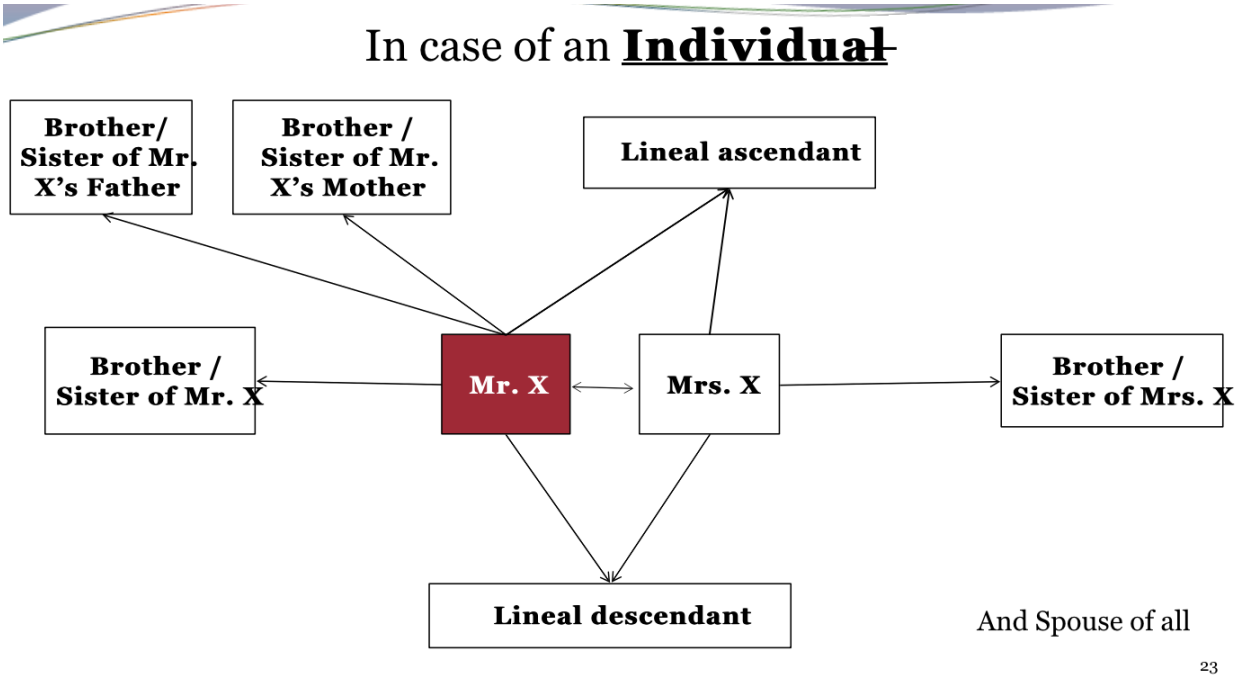
In case amount has been received with the instructions for making the investment and amount has been separately kept and invested in the name of the person who had given the money, the amount cannot be taxed as income in the case of the recipient *(Ms. Sannidhi C. Patel v. ITO, ITA No. 6232/Mum/2011 decided on 17-12-2014).*

6. Gift from Mother's Sister's Son is Taxable

The provisions of sec 56 of the Act has clearly defined the meaning of relative. According to these provisions, if the relation of the recipient of the gift comes within the definition of sec 56 of the Act, then gift amount is not chargeable to tax. Now a question arises whether mother's sister son is a relative. To resolve this issue, firstly we have to see that this is not a direct relationship which can be seen from the provisions of sec 56 of the Act. For this we have firstly understand the meaning of any lineal ascendant or descendant of the individual 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. Lineal ascendant or descendant means ascendant or descendant in the right line without any deviation. This will include line from father to son, and grandson and great grandson and vice versa, from mother to daughter, and granddaughter and great granddaughter and vice versa. 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.

In Asstt. CIT v. Manasam Veerakumar [2013] 34 Taxmann.com 267 (ChennaiITAT) Held that the term used in proviso to section 56(2)(v) is 'relative' which has been further elaborated in the Explanation to clause (v) of section 56(2). When the meaning of the term relative is defined in the Act itself, to derive meaning of the word relative from term 'lineal ascendant or lineal descendant' and bring the relationship with the purview of the section to grant benefit is unjustified and bad in law. When the definition has been provided in the Act itself, it is not appropriate to import dictionary meaning of the term. A perusal of the term 'relative' used in the section clearly shows that mother's sister's son does not fall within the definition of relative. Therefore, the amount received by the assessee from mother's sister's son does not

qualify for the benefit. The meaning of 'lineal ascendant or lineal descendant' is very clear in the following graphical presentation.



7. Gift of Immovable Property which is not a Capital Asset i.e.rural agricultural land

It is a very interesting issue in this write up. In this issue, we have to see whether gift of immovable property which is not a capital asset u/s 2(14) of the Act, is chargeable to tax u/s 56 of the Act. As per the meaning of the term "property" given in Clause (d) of Explanation to section 56(2)(vii), immovable property means any land or building or both. In the aforesaid Explanation while defining the term "property" the word 'capital asset' has also been used. On this basis it is being argued that in case any property is not in the nature of capital asset as defined in section 2(14), same is not covered under the definition of property and therefore, provisions of section 56(2)(x) are not applicable. Example of such cases are agriculture land, stock-in-trade, assets of personal effects etc. The aforesaid contention, however, does not appear to be correct. The words 'capital asset' have been used in the definition of property in a general way and not with a view to restrict the scope with reference to definition in section 2(14) of the Act.

To resolve this issue, we have analyse that if an immovable property which is not a capital asset u/s 2(14) of the Act i.e. rural agricultural land , can be subject to taxation under Section 56(2) of the Act.

Before we proceed further ,we have to see the meaning of property in sec 56 of the Act. As per sec 56 "property" means the following capital asset of the assessee, namely:—(*i*) immovable property being land or building or both;(*ii*) shares and securities (*iii*) jewellery (*iv*) archaeological collections;(*v*) drawings (*vi*) paintings; (*vii*) sculptures;(*viii*) any work of art; or (*ix*) bullion;

The term 'immovable property' is not defined for the purpose of Section 56(2) the Act. The word property includes the immovable properties which are in the nature of 'capital asset'. However, if we see the provisions of sec 56(2) (vii)/(x) of the Act carefully, the word ***'ANY'*** immovable property has been used But now a question arises that the phrase 'any' is to be used as a prefix of 'capital asset' or 'any' in its normal meaning.. The word 'ANY '*refers to any immoveable property and the same is not circumscribed*

or limited to any particular nature of immoveable property. It includes any kind of immoveable property. The word 'ANY' denotes the intention of the legislature to cover all immoveable properties..If that was not the intention of the legislature, the exclusions provided in Section 56(2) should have specifically mentioned that only capital assets are covered and all other are excluded. In our view ,all the immovable properties, whether or not capital assets, are subjected to tax under Section 56(2) of the Act.

Further, Section 49(4) which provides for cost of acquisition of capital asset being a ***property,*** the value of which has been subject to tax inter-alia under Section 56(2)(vii)/(x) shall be the value which has been considered for taxing income under those clauses. Here also the reference is only to property and not immovable property. Hence, to tax income under above clauses as far as immovable property is concerned it need not be a capital asset.

The issue had come up before ITAT Jaipur Bench in the case of *ITO v. Trilok Chand Sain, ITA No. 449/JP/2018 judgment dated 7-1-2019* in the context of agricultural land. It has been held by the Hon'ble Bench that definition of term capital asset in section 2(14) of the Act is not relevant for the purpose of section 56(2)(vii) of the Act.

8. Whether Section 269ST is Applicable on Cash Gifts

It is a very interesting issue that if an individual or HUF receives gift without consideration which exceeds Rs.50,000 in aggregate in a year, the entire sum is subject to tax as income from other sources u/s 56 of the Act. It does not make any difference whether gift is received in cash or through electronic clearing system. Now after the introduction of sec 269ST in the act, there is clash in the provisions of sec 269ST and sec 56 of the Act. To resolve this issue, firstly we read sec 269ST of the Act.

Sec 269ST of The Income Tax Act, 1961 states that

. No person shall receive an amount of two lakh rupees or more—

(*a*) in aggregate from a person in a day; or

(*b*) in respect of a single transaction; or

(*c*) in respect of transactions relating to one event or occasion from a person,

otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account *or through such other electronic mode as may be prescribed*

Provided that the provisions of this section shall not apply to—

(*i*) any receipt by—

(*a*) Government;

(*b*) any banking company, post office savings bank or co-operative bank;

(*ii*) transactions of the nature referred to in section 269SS;

(*iii*) such other persons or class of persons or receipts, which the Central Government may, by notification in the Official Gazette, specify.

Now there is problem in case an assessee receives cash gifts from his relatives and friends exceeding Rs.2,00,000.

Example: If a person receives a sum of Rs. 3,00,000 from his friend as gift in cash and Rs. 2,50,000 from a relative in cash.

Gift of Rs. 3,00,000 will be included as income from other sources u/s 56. Further, a penalty u/s 271DA of Rs.3,00,000 shall be imposed as person has received cash in violation of provision of sec 269ST. In case of the gift of Rs.2,50,000 received from relative in cash, then no income will be put to tax u/s 56 and penalty will be levied u/s 271DA of the Act. Thus, if a person receives a gift in cash in contravention of Sec 269ST, then he has to deposit the same with government plus tax on the same income.

In this connection,a notification is required from the central Government as clause (iii) of the above proviso. of sec 269ST of the Act.

9. Taxability of amount received as Alimony

It is another interesting issue in which wife receives a lumpsum amount or monthly payment from her husband for maintenance of her life or children. As we know that sec 56 of the Act is applicable on receipts which are without consideration. But in case of divorce, a sum of money paid to the wife or children for the relinquishment of all and future claim is not without consideration and therefore, not chargeable to tax. In other words, we can say that under various personal laws, generally, a dependent spouse has right to get maintenance from his/her spouse and is eligible to get alimony. 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."

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. 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.

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