

**IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM  
&  
SHRI RAM LAL NEGI, JM**

**ITA No.2211/Mum/2019  
(Assessment Year :2014-15)**

M/s. Direct Media Distribution Ventures Pvt. Ltd., 18 <sup>th</sup> Floor, A-Wing Marathon Futurex N.M.Joshi Marg, Lower Parel Mumbai – 400 013	Vs.	Pr. Commissioner of Income Tax, Range-6 Mumbai
<b>PAN/GIR No.AADCD1940Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Percy Pardiwala / Shri Madhur Agarwal / Shri Jay Bhansali
Revenue by	Shri Rahul Raman
<b>Date of Hearing</b>	<b>03/09/2019</b>
<b>Date of Pronouncement</b>	<b>04/10/2019</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.2211/Mum/2019 for A.Y.2014-15 preferred by the order against the revision order of the Id. Principal Commissioner of Income Tax-6, Mumbai u/s.263 of the Act dated 14/03/2019 for the A.Y.2014-15.

2. Though the assessee had raised several grounds of appeal, the effective issue involved in this appeal is as to whether the Id CIT was justified in

invoking revisionary jurisdiction u/s 263 of the Act in the facts and circumstances of the case.

3. The brief facts of this appeal are that the assessee is engaged in the media distribution business of all type, form and manner including distribution of television channels via cable network and / or satellite system etc. The assessment was originally completed u/s 143(3) of the Act on 27.12.2016 determining total loss of Rs 9,85,38,256/- after making disallowance u/s 14A of the Act to the tune of Rs 1,56,966/-. Later this assessment was sought to be revised by the Id CIT u/s 263 of the Act by treating the order framed by the Id AO as erroneous in as much as it is prejudicial to the interests of the revenue. Accordingly, a show cause notice was issued by the Id CIT as under:-

*Office of the  
PRINCIPAL COMMISSIONER OF INCOME TAX - 6,  
Room No. 507, 5<sup>th</sup> floor, Aayakar Bhavan, Maharshi Karve Road,  
Mumbai 400020*

*No. Pr.CIT-6/263/Direct Media/2017-18*

*30<sup>th</sup> October, 2017*

*The Principal Officer,  
M/s. Direct Media Distribution Ventures Pvt Ltd,  
135, Continental Building,  
Dr. Annie Besant Road,  
Mumbai-400018*

*Sir,*

*Sub: Notice u/s 263 of the I.T.Act, 1961 in the case of M/s Direct Media Distribution Ventures Pvt. Ltd for A.Y. 2014-15-Reg.-*

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*In this case assessment was completed u/s 143(3) of the I T.Act, 1961 on 27.12.2016 determining total loss at Rs, (-) 9,85,38,260/- against total less as per return of income of the assessee of Rs. (-) 9,86,95,222A. There has been only one addition of Rs. 1,56,966/- u/s 14A. During the course of assessment proceedings, in the submission dated 16.12.2016, you have submitted the following calculation for the loss on sale of non current investment as follows:*

Particulars	Amount
Sale consideration	
Cost of acquisition 1,93,12,84,243 * 2,45,74,137/48,17,86,397	9,85,07,645
Loss on sale of shares	(9,85,07,645)

As per the annual report, the assessee has transferred 2,45,74.137 Equity Shares of Re,1 each fully paid up of Dish TV India Limited to its related party, Direct Media Solution P. Ltd at Nil consideration to consolidate onshore media assets including shares of the listed companies. The assessee has also claimed it had gifted the shares to M/s. Direct Media Solution P. Ltd and hence no capital gain was offered on these transactions.

The shares of Dish TV India Ltd were acquired by the assessee during AY 2012-13, at Nil consideration from Essel Corporate Resources F. Ltd and Prajatma Trading Co. P. Ltd, The share holding of Dish TV India Ltd has been changing hands as under:-

Sl. No	Shareholders Name	31.03.2008		31.03.2009		31.03.2012		31.03.2013	
		No. of shares	%	No. of Shares	%	No. of shares	%	No. of shares	%
1	Direct Media Distribution Ventures P. Ltd.(Dhaka Warriors Sports P. Ltd)					63,72,12,260	60	48,17,66,397	45
2	Direct Media Solution P. Ltd.							15,54,25,863	15
3.	Agrani Holding (Mauritius) Ltd					3,51,72,125	3	3,51,72,125	3
4.	Veena Investment P. Ltd	7,64,97,825	18	20,86,33,443	22				
5.	Churu Trading Co.P.Ltd.	2,68,58,508	6	19,04,49,138	20				
6.	Jayneer Capital	3,43,99,354	8	16,15,73,370	17				
7.	Premier Finance & Trading Co. Pvt Ltd.	1,64,11,055	4	3,62,68,431	4				
8.	Prajatma Trading Co.P.Ltd.	1,19,98,875	3	7,96,09,638	8				
9.	Afro Asian Satellite Communication Ltd.	3,51,72,125	8	3,51,72,125	4				
10.	Ganjam Trading	1,68,76,987	4	1,68,76,987	2				

	Co.Pvt.Ltd.								
11.	Delgrada Ltd.	1,01,90,293	2	1,01,90,293	1				
	Total	22,84,05,022	53	73,87,73,425	78	57,23,84,385	63	67,23,84,385	63

*In F.Y. 2013-14, the Average Market Price of Dish TV share was Rs. 54.61 per share. The claim of the assessee that it had gifted the shares of M/s Dish TV India Ltd. to M/s Direct Media Solutions P. Ltd. and no capital gains arose in this case was accepted by the AO as such and no enquiry was made in this case during the assessment proceedings.*

*I, therefore, hold that assessment order passed by the A.O, u/s 143(3) of the Act on 27.12.2016 is erroneous and prejudicial to the interest of the revenue and take appropriate corrective measures as contemplated u/s 263 in respect of the assessment order passed on 27.12.2016. If you have any objection to this proposed action, you are requested to send your objections within two weeks of receipt of the letter, failing which undersigned would provisions of the law, if you intend to avail a personal hearing, then you may attend this office on 16/11/2017 at 11.30 AM.”*

4. The assessee replied before the Id CIT that the transfer of shares was done as a measure of administrative convenience as a result of changing business dynamics. The above arrangement was carried out in compliance with the relevant corporate law and other requirements evidenced as under:-

*“To  
The Pr. Commissioner of Income –Tax-6  
612, Aayakar Bhavan  
Mumbai – 400 020*

*Sub: Direct Media Distribution Ventures Pvt. Ltd.  
PAN: AADCD1940Q  
Assessment Year 2014-15.  
Re: Notice u/s 263 dated 30.10.17 and 01.02.2018*

*With reference to your notice u/s 263 dated 30<sup>th</sup> October 2017 and Pt February 2018 (hereinafter referred to as "the Impugned Notices") and in continuation of our submission dated 30<sup>1</sup> November 2017, we submit as under:-*

**Background;**

*During the financial year ended 31<sup>st</sup> March 2014 relevant to the assessment year under consideration, the assessee company had transferred 2,45,74,137 equity shares of Dish TV India Limited to its related party, Direct Media Solutions Pvt. Ltd. ("DMSPL") as gift without consideration.*

*The transfer of shares was done as a measure of administrative convenience as a result of changing business dynamics.*

*The above arrangement was carried out in compliance with the relevant corporate law and other requirements evidenced as under:*

- a. *The board approval of the concerned companies for the transfer of shares.*
- b.

*The above transfer has been duly approved by the Board of Directors of the assessee and DMSPL. The details of the resolution passed at the meeting of their respective Board of Directors authorising the above transfer is summarised as under:*

<i>Name of Company</i>	<i>Date of Board Meeting authorising to Acquire/ Transfer Shares</i>
<i>Direct Media Distribution Ventures Pvt. Ltd.</i>	<i>16<sup>th</sup> May -2013</i>
<i>Direct Media Solutions Private Limited</i>	<i>20<sup>th</sup> May -20 13</i>

*The copies of above resolutions are annexed herewith vide "Annexure [A]".*

- c. *Authorisation by constitution documents of respective companies enabling transfer and receipt of shares as gift :-*
- d.

*The Memorandum of Association of the participating companies duly authorises corporate gifts and the extract of the same are annexed herewith vide "Annexure [B]" to this note for ready reference:*

<i>Name of Companies</i>	<i>Relevant clause of MOA / AOA</i>

Assessee	<i>MOA -Part in - B, Clause 26 - Subject to the provisions of any Law for the time being in force, to make, receive and accept gifts in cash or of property of any kind.</i>
DMSPL	<i>MOA - Part B -, Clause 7- to make, receive and accept gifts in cash or of property of any kind.</i>

***C. Disclosures filed to SEBI under regulation of SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 2011 by DMSPL for disclosing intense transfer of shares from the Appellant without any consideration***

*DMSPL has duly informed SEBI in terms of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 that it had acquired shares of Dish TV by way of an Off market Inter-se transfer of shares without any consideration.*

*The copies of the disclosures filed with SEBI are annexed herewith vide "Annexure [C]"*

*In view of the above, we submit that the transaction of gift was a genuine transaction undertaken as a part of the business exigency discussed aforesaid and in compliance with the relevant legal requirement.*

*In DIT v. Copal Research Limited (2014) 371 ITR 114 (Delhi HC), on the issue of tax avoidance, the Delhi High Court held that the taxpayer's transaction was not structured primarily for the purpose of tax avoidance. This was on the basis that the taxpayer had sufficient commercial reasons for carrying out the transaction in that manner.*

*The Gujarat High Court in the case of Vodafone Essar Gujarat Ltd. Vs. Department of Income-tax (24 [taxmann.com](http://taxmann.com) 323) (Guj.) held that in a scheme of arrangement in the form of demerger where telecom companies falling under same group transferred their respective passive infrastructure business and telecommunication service business to its holding company without consideration with the objective to achieve growth and maximization of value, such scheme could not be disapproved on mere ground that there was no monetary consideration or that there would be huge tax savings.*

*In the instant case, the transaction has been undertaken in the course of business for the purpose of consolidation of media assets and not to evade any tax. Thus, relying on the aforesaid decision, the transfer of shares at without consideration by the group companies to the Company is a 'genuine*

transaction'.

*Further, the acquisition of shares without consideration can at best to be considered as a gift received by the Company, The provision of Transfer of Property Act. 1882 ('TP Act') does not place any restriction on the corporate transfer of shares. The competency of corporate entities to make and receive gift has also been upheld in various judicial precedents discussed below.*

**The Mumbai Tribunal** in the case of *DP World (P.) Ltd. Vs. DCIT [162 TTJ 446]* held that there is no bar in law prohibiting a company from corporate transfer of shares by way of gift.

*It held:*

a. *There do not seem to be any restriction on the corporate transfer of shares by way of gift provided it is made voluntarily and without consideration. In other words, there is no requirement in the TPA that a 'gift' can be made only between natural persons out of natural love and affection which means that as long as a donor company is permitted by its Articles of Association to make a 'gift', it can do so.*

b. *Transfer of shares of an Indian Company by a foreign company without consideration has to be treated as gift within the meaning of Sec.47(iii) of the Act.*

*The relevant extract of the said judgment is as under:*

*"17. It -would not be out of place to mention that a combined reading of Sec, 82 of the Companies Act, Section 5 and Section 122 of the TPA suggest that a company can validly transfer the shares by way of gift, provided where Articles of Association of the donor company permits the same. In case of donor is a foreign company, the relevant corporate/commercial law of the jurisdiction where the donor is based needs to be considered. In the light of the above discussion, we have no hesitation to hold that a company can gift shares and such transaction may appear as 'strange' transaction but cannot be treated as "non-genuine" transaction. "*

**The Mumbai Tribunal** in the case of *DCIT Vs. KDA Enterprises (P.) (171 TTJ 1)* Ltd. has held where an assessee received certain amount from 'R' Ltd. on account of dividend receivable by four concerns against their shareholding in 'R Ltd., since there was no dispute about genuineness of transaction because receipt of amount was duly authorized by respective Memorandum and Articles of Association of assessee and donor companies, it was to be regarded as gift and therefore it is neither taxable as income from other sources under section 56 nor as capital gain. The relevant extract of the said judgment is reproduced as under:

*The said principle has been upheld even by the Authority for Advance Ruling in*

the case of **Deere & Co., In re** (337 ITR 277). Relevant extract is produced as under:

*The learned counsel for the applicant on the other hand has argued that there is no element of love and affection attached to the gift. According to ordinary meaning, "gift" means a thing given willingly to someone without payment. The learned counsel further brought to our notice the definition of "gift" given in section 122 of the Transfer Property Act 1882, "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called donee, and accepted by or on behalf of the donee. The meaning of gift supra reflect no element of love and affection and therefore the contention of the Departmental representative in this regard is without substance. The gift of shares by the applicant to John Deere Asia (Singapore) is made without any consideration and therefore the transfer has to be held to be a gift.*

***It is also well settled that when the shares are transferred without consideration, the computation mechanism for capital gain would fail, rendering the transaction nontaxable***

*The assessee has transferred the shares as gift. It is well settled that the computation of capital gains for charge of tax would fail for the reason that the transaction was undertaken as gift. Even if, such transaction is not regarded as a gift, the transaction having been made as gift is not chargeable to tax as the computation provisions would fail to operate.*

*Reliance is placed on the decision of the Hon'ble Supreme Court rendered in the case of OT v. B. C. Srinivasa Setty 128 ITR 294. It is well established that charging provisions and computation provisions form an integrated code, which has been highlighted by the Hon'ble Supreme Court in the above case as well as in the following cases:*

- . PNB Finance Ltd. v. CIT 307 ITR 75 (SC)*
- CIT v. Infosys Technologies Ltd. 297 ITR 167 (SC)*
- . CIT v. Official Liquidator Palai Central Bank Ltd. 150 ITR 539 (SC)*

*Further attention is invited to the case of **Amintit Interntionl Holding Ltd.. In re** (322 ITR 678) wherein the Applicant had transferred shares of one 'AFIIL', an Indian Company to its wholly owned subsidiary 'ACHL', without consideration, the AAR held that since the full value of consideration was not capable of being computed, the computation mechanism failed and therefore no capital gain arose. Relevant extract of the said judgment is as under:*

*Viewed from any angle, no profit or gain has accrued or arisen to the applicant by virtue of the transfer of shares to its subsidiary company, it is not possible to identify or pinpoint anything which has the characteristics of profit or gain or any consideration which is capable of being valued in present. The income in the*

*sense of profit and gain should be real but not hypothetical income. The income may be in cash or in kind and need not necessarily be pecuniary in nature. Even then, the alleged consideration for which the shares are to be transferred should be capable of being evaluated on commercial and accounting principles. The possibility of applicant-transferor improving its overall business by virtue of reorganization and the mere possibility or chance of the applicant making better returns in the near or distant future as a consequence of reorganization can hardly be regarded as a consideration accruing or arising to the transferor when it has no right to receive a definite or an ascertainable amount or benefit from the transferee. A capital gain cannot arise on the basis of uncertain and indefinite future contingencies or hypothetical and imaginary estimations. There is really no effective answer from the revenues side to the question as to what is the valuable consideration that has accrued or arisen to the transferor and how it can be converted into money's worth for the purpose of computing the alleged capital gain. The full value of consideration for the transfer of shares is sought to be deduced from the overall objectives of reorganization and the resultant changes in investment. It is not explained how they can be evaluated in terms of money or how they are capable of being turned to pecuniary account. Viewed from another angle, the transferor has not acquired any right to receive an identifiable and monetarily convertible benefit, though not money from the transferee. There is nothing concrete or definite which the transferee gives or makes over to the transferor as a quid pro-quo for the receipt of shares. One has to grope in darkness to find valuable consideration for the transfer. By transferring the Indian company's shares to its 100 per cent subsidiary, the applicant will derive no profit and make no gain. Nothing in the form of money or money worth or nothing capable of being turned into money will accrue or arise to the applicant on the date of transfer. Therefore, the contention of the revenue has to be rejected.*

*The above principle has been followed by the AAR in the case of **Goodyear Tire & Rubber Co., In re (199 Taxman 121)** and in the case of **Deere & Co., In re (337 ITR 277)** and by the **Chennai Tribunal** in the case of **Redingtonou (India) Ltd. Vs. JCIT (49 [taxmann.com](http://taxmann.com) 146)***

***Further, when the shares are transferred for NIL consideration, market value of such shares cannot be substituted as sales consideration***

*After having explained that the computation provisions would fail and as such, the charging section 45 would not become active, it is further submitted that the full value of consideration for the purpose of capital gains taxation should be in fact the actual consideration received by the assessee. If there is no actual consideration, it is not permissible in law to substitute with fair value/ or estimated value of the property.*

***The Supreme Court in the case of **CIT Vs. George Henderson and Co. Ltd.*****

*(66 ITR 622) has held that the full value of consideration for the purpose of computing capital gain cannot be substituted with the market value of the asset transferred on the date of transfer. Relevant extract of the said judgment is as under:*

*The expression 'full value of the consideration' cannot be construed as the market value but as the price bargained for by the parties to the sale. The dictionary meaning of the word 'full' is "whole or entire, or complete". The word 'full' has been used in this section in contrast to 'apart of the price'. The words 'full price' means 'the whole price'. Clause (2) of section 12B of 1922 Act itself clearly suggests that if no deductions are made as mentioned in sub clause (ii) thereof, then that amount represents the full value of the consideration or the full price. When deductions are made as specified in sub clauses (i) and (ii), then that amount does not represent the full value. The expression 'full value' means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor has it any necessary reference to the market value of the capital asset which is the subject-matter of the transfer.*

*Even, the Bombay High Court in the case of CIT Vs. Texspin Engg. & Mfg. Works (263 ITR 345) (Bom,) following the aforesaid decision of the Hon'ble Supreme Court and the Mumbai Tribunal in the case of Nariman Point Building Services & Trading (P.) Ltd. Vs. CIT (54 SOT 7) has held that the full consideration cannot be substituted by the market value of the asset transferred. In view of the aforesaid settled principles in law, it is clear that the view taken by the AO is not erroneous and prejudicial to the interest of the revenue; neither does the Impugned Notices purport to explain the same.*

*In view of the aforesaid, we submit that your action to assume jurisdiction u/s 263 is wholly without jurisdiction, and therefore we request you to drop impugned proceedings. In case you decide otherwise, we request you to grant us an opportunity of a personal hearing and to make such further submissions as may be necessary.*

*For Direct Media Distribution Ventures Pvt Ltd.  
Director*

5. The Id CIT completely disregarded all the submissions of the assessee and finally held by passing an order u/s 263 of the Act that the Id AO had not made proper enquiry and accordingly concluded the order passed by the Id AO to be erroneous and prejudicial to the interest of the revenue and set aside the order of the Id AO. Aggrieved, the assessee is in appeal before us.

6. We have heard the rival submissions and perused the materials available on record. We find that the Id CIT categorically agrees in his show cause notice to the fact that the assessee has transferred 24574137 equity shares of Re. 1 each fully paid up of Dish TV India Limited ( a listed entity) to its related party Direct Media Solution P Ltd at NIL consideration. The assessee had explained this in its annual report that the shares were transferred at NIL consideration to consolidate onshore media assets including the shares of the listed companies. Once the shares are gifted by the assessee company to its related party at NIL consideration, there cannot be any incidence of capital gains on the same. It is pertinent to note that the assessee had acquired the shares of Dish TV India Limited in Asst Year 2012-13 also at NIL consideration from Essel Corporate Resources P Ltd and Prajatma Trading Co. P Ltd. When the shares of Dish TV India Limited were purchased in Asst Year 2012-13 at NIL consideration by the assessee which were accepted by the revenue as genuine, then there is no reason to doubt the sale of same shares to its related party in Asst Year 2014-15 at NIL consideration pursuant to the consolidation of onshore media assets carried out by the assessee and its group.

6.1. We find that the assessee had submitted the facts before the Id AO explaining the purpose of acquisition and transfer of shares of Dish TV

India Limited at Nil consideration and had explained that the arrangement was done for commercial reasons due to internal restructuring exercise and not done as a measure of tax avoidance. We find from the perusal of the balance sheet of the assessee as on 31.3.2014 under **Schedule 7 Non-Current Investments** that the assessee had reflected as under:-

*Quoted Investments (valued at cost)*

*457212260 equity shares of Dish TV India Limited  
of Re 1 each fully paid up*

*Rs 183,27,76,598/-*

*(Market Value Rs 2382,07,58,746)*

*(320074575 shares are pledged for loan taken by other related parties)*

*During the year the company had transferred 24574137 equity shares of Re 1 each fully paid up of Dish TV India Limited to its related party, Direct Media Solution Private Limited at Nil Consideration to consolidate onshore media assets including shares of the listed companies.*

The above disclosure was made in the audited financial statements and this balance sheet was very much available before the Id AO at the time of assessment proceedings.

6.2. We find that the correspondences between the Id AO and the assessee during the course of assessment proceedings regarding the impugned transaction that was sought to be revised by the Id CIT are as under:-

a) Notice u/s 142(1) of the Act dated 15.11.2016 wherein the Id AO had asked for the documentary evidence along with a detailed working on the loss on transfer of non-current investments and also asked for detailed of all other non-current investments.

**b) The assessee had replied before the Id AO vide letter dated 24.11.2016 as under:-**

*“With reference to above, we are in receipt of notice u/s 142(1) of the Act dated 15.11.2016, In this regard and under the instructions of our client, we submit as under:*

*Point 1(a): During the year, the assessee has transferred 2,45,74,137 Equity shares of Dish TV India Limited to its group concern Direct Media Solution Pvt. Ltd. ("DMSPL") at NIL consideration.*

*These transfers are affected for the purpose of internal restructuring including shares of the listed entities and duly approved by the Board of Directors. Copy of board resolution of the assessee authorizing the transfer enclosed. Further, Copy of demat statements of the assessee and delivery instruction slip is also enclosed.*

*At the outset, transfer of shares without consideration is in the nature of gift and the gift of shares is not a taxable transfer as per provisions of Section 47(iii) of the Act, Also, there is no bar in law prohibiting a company from corporate transfer of shares by way of gift. Companies are competent to make and receive gifts and natural love and affection are not necessary requirement. Only requirement for company is to make gifts as per respective memorandum and article of association, which authorize the company for the same. In the instant case, the assessee company is duly authorized by its MOA vide Clause 26 to making of such gifts and hence, the above transfer is a valid gift. Copy of MOA and AOA of the assessee enclosed for your ready reference.*

*Further, for a receipt to be taxable under the provisions of the Act it must necessarily be in the nature of an income or its taxability should have been specifically provided by the statute. In absence of any specific provision in the legislature to tax such a receipt, same is not taxable under the Act either u/s 45 or 56 of the Act. Same is in the nature of capital receipt and hence, not liable to tax.*

*Such transfer of shares without consideration is in the nature of gift and the gift of shares is not a taxable transfer as per provisions of Section 47(iii) of the Act.*

*To support our contention, we would like to invite your kind attention to the Hon'ble **Mumbai ITAT's** decision in case of **DP World (P) Ltd. vs. Deputy Commissioner of )' Income-tax - 2(1) [140 ITD 694 (2013)]** wherein Mumbai ITAT has held that transfer of shares without monetary*

*consideration is nothing but a gift and it is a capital receipt - not taxable under the provisions of Section 56(1) and Section 28(iv).*

*Further, recently, the **Chennai bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Redington India Limited** (the taxpayer) has held that transfer of shares in a subsidiary, by way of a 'gift', is not taxable as capital gains under section 45 of the Income-tax Act, 1961 (the Act). Moreover, such a gift is eligible for exemption under section 47(iii) of the Act. It is further held that under section 48 of the Act, the computation mechanism failed where shares were transferred without consideration. Hence, the Addition made on such basis has been deleted by the Hon'ble ITAT.*

*The above view has also been upheld by the Mumbai ITAT in the case of **KDA Enterprises (P.) Ltd. [2015] 57 taxmann.com 284 (Mumbai - Trib.)**.*

*In view of above, we submit that the transfer of shares at NIL consideration is in the nature of gift and hence, following the above judicial precedents, such transaction is not a taxable transaction.*

*We would also like to submit that the full value of consideration should be in fact the actual consideration received by the assessee for the purpose of capital gains taxation. If there is no actual consideration, it is not permissible in law to substitute with fair value/ or estimated value of the property. Hence, one cannot contend to consider the fair market value of the shares for the purpose of calculation of capital gains u/s 48 of the Act when the shares are transferred at NIL consideration.*

*The **Hon'ble Supreme Court** in the case of **George Henderson and Co. Ltd. [1967] 66 ITR 622**, held that the full value of consideration for the purpose of computing capital gain cannot be substituted with the market value for the asset transferred on the date of transfer.*

*Further, when the shares are transferred without consideration, the computation mechanism for capital gain would fail rendering the transaction non-taxable. Reliance is placed on the decision of **Apex Court** in the case of **B C Srinrvasa Shetty** wherein it was held that full value of consideration received or accrued alone can be taken for computing capital gains.*

*Hence, considering the facts of the case and the above judicial precedents, shares transferred are not regarded as taxable transfer.*

c) The assessee further replied vide letter dated 16.12.2016 before the Id AO as under:-

**Point 1 a) Working of loss on sale of non-current investment**

Sale Consideration	NIL
Less: Cost of acquisition	
1931284243 * 24574137 / 481786397	9,85,07,645
<b>Loss on sale of shares</b>	<b>(9,85,07,645)</b>

**Point 1 b) Details of Non-current investment**

Equity shares of Dish TV India Ltd	
Quantity	457212260
Amount	1832776598

6.3. We find that the Id CIT specifically mentions in his show cause notice that the assessee had submitted the calculation for loss on sale of non current investment during the course of assessment proceedings, based on which, the Id CIT tries to draw a different conclusion. The aforesaid correspondences between the Id AO and the assessee clearly go to prove beyond doubt that the Id AO had made due enquiries regarding the issue of loss on sale of non current investments during the course of assessment proceedings and the Id CIT in the instant case is only trying to substitute his own opinion in the place of opinion already framed by the Id AO. This substitution of opinion by the Id CIT cannot be done by exercising revisionary jurisdiction u/s 263 of the Act . Reliance in this regard is placed on the decisions of *Hon'ble Jurisdictional High Court in the case of CIT vs Gabriel India Ltd reported in 203 ITR 108 (Bombay) dated 15.4.1993.*

6.4. We also find that the assessee had filed a detailed reply dated 24.11.2016 before the Id AO which is part of the paper book filed before

us and reproduced hereinabove explaining the purpose of transfer of shares at Nil consideration , factual and legal position thereon together with its act being in consonance with its Memorandum and Articles of Association . We find that the assessee had also placed reliance on several decisions including Mumbai Tribunal, Chennai Tribunal and two Supreme Court decisions in support of its legal arguments. When the assessee had duly explained that the transfer of shares by way of gift at Nil consideration could not be brought to tax as it is either exempt u/s 47(iii) or not taxable u/s 45 or 56 of the Act and more specifically when there is no prohibition of transfer of shares by way of gift by a company to another company by placing reliance on certain decisions which were placed on record by the Id AO, the action of the Id AO in duly considering and appreciating the same would not amount to non-consideration or non enquiry of the said issue both on facts as well as on law. Hence this is a case where it could be safely concluded that the Id AO had duly made proper enquiries in the assessment by raising the relevant questions and assessee replying thereon and thereafter the Id AO on proper appreciation of facts and legal position thereon duly supported by various decisions that were placed on record, had taken a only possible view in the matter. Hence his order by any stretch of imagination cannot be construed as erroneous so as to warrant any revision u/s 263 of the Act by the Id CIT. At the time of hearing, the Id DR could not controvert the detailed factual and legal reply filed by the assessee before the Id AO vide letter dated 24.11.2016 before us.

6.5. We find that the gift of shares by assessee to another related company is not considered as 'transfer' within the meaning of section 47(iii) of the Act. We find that the Id AR also placed on record a copy of co-ordinate bench decision of this tribunal in the case of *Jayneer*

*Infrapower & Multiventures (P) Ltd vs DCIT reported in 103 taxmann.com 118 (Mumbai Trib) dated 28.2.2019* in similar circumstances which was one of the group company of the assessee involved in the transfer of shares of Dish TV India Ltd by way of gift at Nil consideration to another concern , wherein the revenue had treated the entire arrangement as a colorable device and brought to tax a sum of Rs 57,90,33,060/- by adopting market value of shares as sale consideration as against Nil consideration. In the said decision, the assessee therein had also contended in a similar way that (i) the transaction is not colorable device ; (ii) selling price of shares cannot be replaced by the market value and (iii) sale of shares without price is a gift and not transfer u/s 47(iii) of the Act. In the said decision, this tribunal relied on the decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Morarjee Textiles Ltd in ITA No. 738 of 2014 dated 24.1.2017* wherein it was held that fair market value of shares transferred cannot be taken as 'full value of consideration' for computation of long term capital gains. The tribunal finally held that transactions carried out cannot be said to be colourable device and therefore by no stretch of imagination, the gain could be taxed under the head income from other sources. It also held that the gift of shares need not be by way of a gift deed and it should be authorized only by the Memorandum of Association of the company. In the instant case before us, we find that the gift of shares by the assessee company is duly authorized by its Memorandum of Association vide clause 26 as is mentioned by the assessee in the written submission dated 24.11.2016 filed before the Id AO which is not controverted by the revenue before us. The aforesaid tribunal decision also took note of section 5 of Transfer of Property Act which reads as under:-

*5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more*

*other living persons, or to himself and one or more other living persons; and “to transfer property” is to perform such act.*

*In this section “living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall effect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals .....*”

*(underlining and emphasis provided by us)*

6.6. We find that the aforesaid definition of section 5 of Transfer of Property Act , 1882 clearly answers the objection raised by the Id DR before us that the gift of shares could be made only by a living person and that company is not a living person. The aforesaid tribunal decision also by a conjoint reading of sections 5, 122 and 123 of Transfer of Property Act, 1882, held that there is no requirement in Transfer of Property Act that a 'gift' can be made only between natural persons out of natural love and affection which means that as long as a donor company is permitted by its memorandum / articles of association to make a 'gift' , it can do so. Further , it is clear from section 123 of Transfer of Property act, there is no requirement of gift deed. It was observed that for movable property, a gift deed in writing is not necessary, an oral agreement with transfer of possession is sufficient to complete a gift of a movable property.

6.7. We find that the main argument of the Id DR before us was emphasizing the observations of the Id CIT in his order that the assessee by way of an arrangement had avoided the capital gains tax in the instant case by resorting to circular transactions of transfer of shares of Dish TV India Limited. The Id DR before us also argued that once the circular transaction by way of an arrangement in order to avoid tax loses the character of 'gift', then the provisions of section 47(iii) of the Act would not be applicable. We find that this aspect has been duly addressed by

the co-ordinate bench decision of this tribunal in assessee's group company case in *Jayneer Infrapower & Multiventures (P) Ltd vs DCIT reported in 103 taxmann.com 118 (Mumbai Trib) dated 28.2.2019* supra. Moreover, the other reasoning given by the Id CIT in his order that company is not a living person and there cannot be any natural love and affection with it and hence there cannot be any valid gift from the side of the company. All these aspects were also duly addressed by this tribunal in the aforesaid group company's case in *Jayneer Infrapower & Multiventures (P) Ltd vs DCIT reported in 103 taxmann.com 118 (Mumbai Trib) dated 28.2.2019* by making proper reference to relevant provisions of Transfer of Property Act. Moreover, we find lot of force in the argument of the Id AR that once the assessee receives the shares of Dish TV India Ltd by way of gift, it obtains absolute right vested with it on the impugned shares. Hence it is at liberty to transfer those shares either with or without consideration to any other person. Hence the argument of the Id DR in this regard that assessee company had received the shares on gift in earlier years and had transferred the said shares by way of gift during the year which is a colourable device is completely devoid of merits. On the contrary, we find that assessee company receiving shares by way of gift in earlier years and transferring some of its shares during the year to another related person strongly supports the internal restructuring exercise carried out by the assessee and its group. This proves the intention of the assessee and its group to carry out the transactions within the legal framework. Moreover, we find that the assessee had duly informed the entire transfer of shares by way of gift to its related concern due to internal restructuring to SEBI in the prescribed form, evidences for which are enclosed in 96 to 101 of the paper book filed before us.

6.8. We also find that the co-ordinate bench of *Chennai Tribunal in the case of Redington (India) Ltd vs JCIT reported in 49 taxmann.com 146 (Chennai Trib)* had held that *there is nothing against a company making gift of its property to another company. A transfer without consideration when claimed as a gift is always a gift. It is not possible to give any other color. There is nothing anywhere in law, which prescribes that only natural persons can make gift on the ground of 'love and affection'. Therefore, the lower authorities have erred in law in concluding that the assessee being a corporate body cannot make a gift.*

6.9. We find that even the proviso to section 47(iii) of the Act contemplates gifting of shares by a company to its employees under ESOP. This goes to prove that even the provisions of the Act dehors the provisions of section 5 of Transfer of Property Act also contain a provision of gifting of shares by a company to its employees under ESOP scheme. Hence the legislature in its wisdom is conscious of the fact that there might be situations wherein the company would also have to resort to gifting of its shares to its employees under ESOP scheme, among others.

6.10. We hold that when transfer of shares by way of gift are done at Nil consideration, we are not able to comprehend as to the existence of colourable device thereon. In the group company case referred to supra, this tribunal in para 13 of its order had held that no loss was ever claimed by that assessee on transfer of shares. In the instant case, though the assessee had claimed the long term capital loss on transfer of shares of Dish TV India Ltd in the original computation of income, the assessee had filed revised computation of income before the Id AO withdrawing the said loss vide letter dated 24.11.2016 during the course of assessment proceedings. The Id AO however ignored the revised computation filed by

the assessee by not taking any cognizance of the same while completing the assessment. Surprisingly, the Id CIT in his revision order u/s 263 of the Act does not even seek to set right the same by pointing out that the order of the Id AO is erroneous to that extent. However, in order to put a quietus to the entire issue and in order to ensure that the assessee should not be unjustly enriched by having the benefit of set off of this brought forward loss, we direct the Id AO to kindly consider the withdrawal of claim of long term capital loss on transfer of shares by gift by the assessee in the manner known to law.

6.11. We find that the Id CIT at the beginning of his show cause notice stated that no enquiry was made by the Id AO in the instant case on the subject mentioned transactions of gift of shares of Dish TV India Ltd by assessee to its related concern. But in the final para of his order stated that the Id AO had concluded without making proper enquiries. This shows the complete departure by the Id CIT from his show cause notice. We find that by his version in final para of his order, the Id CIT had conceded the fact that the Id AO had indeed made enquiries on the impugned issue of transfer of shares by way of gift to another related concern. Hence once an issue which had been enquired by the Id AO and assessee having given detailed reply explaining the purpose, factual and legal position thereon and Id AO having taken a possible view thereon, it cannot be said that the order passed by the Id AO is erroneous and hence no revision proceedings u/s 263 of the Act would lie on the same. The Hon'ble Supreme Court had categorically held that the twin conditions are to be satisfied cumulatively by the Id CIT before invoking his jurisdiction u/s 263 of the Act viz (i) order of the AO should be erroneous and (ii) it should be prejudicial to the interests of the revenue. In the instant case, the aforesaid detailed observations go clearly to prove that the order of

the Id AO cannot be construed as erroneous. Hence the revision order passed by the Id CIT u/s 263 of the Act deserve to be quashed and is hereby quashed. Accordingly, the grounds raised by the assessee are allowed on preliminary issue.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 04/10/2019

**Sd/-**  
**(RAM LAL NEGI)**  
**JUDICIAL MEMBER**

Mumbai; Dated  
KARUNA, *sr.ps*

04/10/2019

**Sd/-**  
**(M.BALAGANESH)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai