

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI AMARJIT SINGH, JM AND SHRI AMARJIT SINGH, AM**

आयकर अपील सं/ I.T.A. No. 2798/Mum/2018

(निर्धारण वर्ष / Assessment Year:2012-13)

ITO, Range-6(3)(1) Room No.524, 5 th Floor, Aayakar Bhavan, Mumbai- 400020.	बनाम/ Vs.	25FPS Media Pvt. Ltd. 18 th Floor, Marathon Futurex, N. M. Joshi Marg, Lower Parel, Mumbai-400013.
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आयकर अपील सं/ I.T.A. No. 3085/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2012-13)

25FPS Media Pvt. Ltd. 18 th Floor, Marathon Futurex, N. M. Joshi Marg, Lower Parel, Mumbai-400013.	बनाम/ Vs.	ITO, Range-6(3)(1) Room No.524, 5 th Floor, Aayakar Bhavan, Mumbai- 400020.
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACZ2076J**

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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Assessee by:	Shri Percy Pardiwala & Madhur Aggarwal
Revenue by:	Shri Achal Sharma (DR)

सुनवाई की तारीख / Date of Hearing: 27/01/2022

घोषणा की तारीख /Date of Pronouncement: 02/03/2022

आदेश / O R D E R

PER AMARJIT SINGH (JM):

The assessee as well as revenue have filed the above mentioned appeals against the order dated 28.02.2018 passed by the Commissioner of Income Tax (Appeals) -12, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2012-13.

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2. The revenue has filed the present appeal against the order dated 28.02.2018 passed by the Commissioner of Income Tax (Appeals) -12, Mumbai relevant to the A.Y.2012-13.



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3. The revenue has raised the following grounds: -

1. "On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was justified in deleting the disallowance made u/s 14Ar.w. Rule 8(D) of Rs.1,65,85,334/- ignoring the CBDT Circular no. 5/2014 dated 11/02/2014 that disallowance u/s14Ahastobemade irrespective of the fact whether any exempt income has been earned during the year by the assessee or not?"

2. "On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was justified in deleting the addition of Rs134,96,23,835/- made by the AO regarding the transfer of shares of listed companies of the group that took place during the relevant assessment year among various companies of the group and that the group represented a proper division of the vase business empire of the group among the family members of the larger promoter family; at a NIL, consideration by the assessee.?"

4. The brief facts of the case are that the assessee filed its return of income on 29.09.2012 declaring total income to the tune of Rs.6,20,567/- for the A.Y.2012-13. The assessee is a company incorporated with the object to carry on the business of dealing in Cinematographic Films. The assessment was completed on 31.03.2015 determining the total income to the tune of Rs.149,57,54,080/-. After making the addition/disallowance aggregating to Rs.149,51,33,530/- u/s 143(3) of the Act. In the assessment order, the AO raised the addition of Rs.134,96,23,835/- u/s 56(1) towards the market value of the shares of Zee News Ltd. received from the holding company at nil consideration, the disallowance of Rs.1,65,85,334/- was made u/s 14A, disallowance of expenses of Rs.2,58,769/- was made u/s 37 of the Act and addition of



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interest on Income Tax refund of Rs.7,66,868/- was assessed under the head income from other sources. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee but the revenue was not satisfied, therefore, the revenue has filed the present appeal before us.

ISSUE NO. 1

5. Under this issue the revenue has challenged the deletion of disallowance made u/s 14A r.w. Rule 8D of Rs.1,65,85,334/-. The main contention of the Ld. Representative of the revenue is that the CIT(A) has deleted the said disallowance u/s 14A r.w. Rule 8D by ignoring the CBDT Circular No.5/2014 dated 11.02.2014. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record: -

1. *“We have considered the rival submissions. On perusal of the profit and loss account of the assessee, it is observed that the assessee has not earned any income other than interest from income tax refund of Rs. 7,66,868. It is undisputed that the assessee is not in receipt of any exempt income as even observed by the CIT(A) while deleting the addition on this count. The Coordinate Bench in the case of Jayneer Infrapower (supra) after considering various decisions has held that the provisions of section 14A read with Rule 8D do not apply in the absence of exempt income and therefore no disallowance under the said section is sustainable. The relevant extract of the order is as under:*



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“The department is in appeal vide Ground 3 and 4 of their appeal contending that the disallowance under section 14A read with Rule 8D must stand irrespective of the fact that a) entire interest has been disallowed under section 36(l)(iii) of the Act b) no expenses have been claimed by the assessee in its return of income. In our considered opinion, the entire disallowance u/s 14A of the Act amounting to Rs. 28,48,16,401/- (including the suo-moto disallowance of Rs. 8,29,19,798) should be deleted since the Assessee has earned no dividend income during the year under consideration.

49. For this purpose, reliance may be placed on the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd v. CIT [\[2015\] 61 taxmann.com 118/234 Taxman 761/378 ITR 33](#) overruling the Tribunal's decision relied upon by the AO holding as under:

"In the context of the facts enumerated hereinbefore the Court answers the question framed by holding that the expression 'does not form part of the total income' in Section 14A of the envisages that there should be an actual receipt of income, which was not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A would not apply if no exempt income was received or receivable during the relevant previous year."

The Hon'ble Bombay High Court in the case of Pr. CIT v. Rivian International (P.) Ltd. [IT Appeal No. 693 of 2015, dated 21-11-2017] has also held that if the assessee during the relevant year has not earned any tax-free income, the corresponding expenditure incurred cannot be taken into consideration for disallowance.



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50. In view of the above discussions we direct the Assessing Officer to delete the disallowance of Rs. 28,48,16,401/-. The Department's appeal in Ground 3 and 4 against the findings of the CIT(A) will also stand dismissed on the same footing.”

6. On appraisal of the above mentioned finding, it is apparent on record that the assessee did not earn any exempt income, therefore, no disallowance is required in view of the decision of Special Bench in the case of *Cheminvest Ltd v. CIT [2015] 61 taxmann.com 118/234 Taxman 761/378 ITR 33.* Further, the CIT(A) has also dealt the expenses incurred by the assessee. The assessee did not claim any expenses. No deduction was claimed, therefore, there should be no disallowance expenses, hence, on this aspect also no disallowance u/s 14A r.w. Rule 8D is required. The CIT(A) has also dealt with the finding of the AO. The AO computed the average value of the investment which did not yield the exempt income but CIT(A) has relied upon the decision of the case titled as *Rainy Investments P. Ltd. 30 taxmann. Com 169* in which it is specifically held that the share application money which is not capable to yield exempt income, is not required to be considered for computing the disallowance u/s 14A r.w. Rule 8D also. Accordingly, considering the case of the assessee by above said angle, the CIT(A) has disallowed the addition raised in view of the provisions u/s 14A. Circular nowhere hindered the law relied by the CIT(A). Moreover, the issue of interest has duly been adjudicated in due course of law. Taking into account of all the facts and circumstances, we are of the view that the CIT(A) has decided the issue judiciously and correctly which is not required to be interfered with at this appellate stage. Accordingly, this issue is decided in favour of the assessee against the revenue.



ISSUE NO.2

7. The other issue is in connection with the deletion of the addition of transfer of shares of Zee News amounting to Rs.12,78,98,710/-. It is argued that CIT(A) has deleted the addition without looking at the very nature of transfer of shares in substance i.e. the creation of holding company and subsidiary company was a colourable device adopted to evade taxes. The Ld. Representative of the revenue has argued that the transfer of share to its subsidiary is liable to be taxed which is wrongly been denied by CIT(A), therefore, the finding of the CIT(A) is not justifiable. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. The assessee acquired 12,78,98,710/- share of Zee News Ltd., by Essel Corporate Resources P Ltd (ECRPL) without consideration. The AO held that the transaction is a colourable device towards the evasion of tax, therefore, tax is leviable on the value of share in view of the provisions u/s 56(2)(viiia). The assessee filed an appeal before the CIT(A) who deleted the addition stating therein that the transaction is not liable to be taxed in view of the provisions u/s 56(2)(viiia) of the Act and in view of the provision u/s 28(iv) of the Act. The CIT(A) has given the following finding:-

“207. It is a well settled legal position that a capital receipt is not liable for tax unless the statute makes a specific provision to bring the same to tax. Such provisions to bring capital receipts to tax are available in the statute in section 45 and in clauses (v), (vi), (vii) and (viiia) of section 56(2) and the corresponding clauses in section 2(24) dealing with definition of income. It is therefore required to be examined whether the capital receipt of the appellant by way of receipt of shares falls under the scope of any of the above mentioned



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provisions in the statute which seek to bring the capital receipts under the scope of income chargeable to tax. Since the appellant is the recipient of the shares in the transaction of transfer of shares, the provisions of section 45 dealing with capital gains are not applicable to the appellant. As regards clauses (v), (vi) and (vii) of section 56(2), it is seen that the same seek to bring to tax the receipt of any sum of money or moveable property or immovable property by an individual or a HUF without consideration or for inadequate consideration with reference to the fair market value of the property in the hands of the recipient. The same are applicable only to recipients having the status of an individual or HUF and consequently the same are not applicable to the appellant who is a company.

208. As regards clause (viia) of section 56(2), it is seen that the said clause seeks to bring to tax the receipt of shares of unlisted companies by a firm or a company (in which public are not substantially interested) when the same are received without consideration or for inadequate consideration with reference to the fair market value of the shares. Though this clause is applicable in the case of a recipient having the status of a firm or a company, the provisions of the clause deal only with the receipt of shares of unlisted companies. In the present case, the appellant is in receipt of shares of Zee News Ltd., which is a listed company in the Stock Exchange. Hence, the provisions of clause (viia) of section 56(2) are also not applicable to the appellant.

209. Since none of the specific provisions available in the Act to bring capital receipts to tax in the hands of the recipients are applicable to the appellant as discussed above, it has to be held that the capital



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receipt by way of receipt of shares of Zee News Ltd. by the appellant during the year is not liable to be included in the total income of the appellant. Since the provisions of section 56(1) seek to bring to tax under the head Income from Other Sources income of every kind which is not to be excluded from the total income, the same will not be applicable to the capital receipt of the appellant which is not liable to be included in the total income of the appellant.....

*211. The above mentioned conclusion also finds support from **Circular No. 2/2018** dated 15.02.2018 of the CBDT containing the Explanatory Notes to the provisions of the Finance Act, 2017 dealing with the rationale for insertion of clause (x) of section 56(2) of the Act. Clause (x) of section 56(2) has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018 and the same has provided that the receipt of a sum of money or moveable property or immovable property by any person on or after 01.04.2017 without consideration or for inadequate consideration in excess of Rs.50,000j-shall be chargeable to tax in the hands of the recipient under the head Income from Other Sources. The relevant part of the Explanatory Notes is reproduced as under:*

33. Widening scope of Income from other sources

33.1 The provisions of section 56(2)(vii) of the Income-tax Act provided that any sum of money or any property which is received without consideration or for inadequate consideration (in excess of the specified limit of Rs. 50,000) by an individual or Hindu undivided family is chargeable to income-tax in the hands of the resident under the head "Income from other sources" subject to certain exceptions.



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- 33.2 *Further, receipt of certain shares by a firm or a company in which the public are not substantially interested is also chargeable to income-tax in case such receipt is in excess of Rs. 50,000 and is received without consideration or for inadequate consideration.*
- 33.3 *The definition of property for the purpose of this section includes immovable property, jewellery, shares, paintings, etc. These provisions were applicable only in case of individual or HUF and firm or company in certain cases. Therefore, receipt of sum of money or property without consideration or for inadequate consideration does not attract these provisions in cases of other assesseees.*
- 33.4 *In order to prevent the practice of receiving the sum of money or the property without consideration or for inadequate consideration, a new clause (x) has been inserted in sub-section (2) of section 56 of the Income-tax Act so as to provide that receipt of the sum of money or the property by any person without consideration or for inadequate consideration in excess of Rs. 50,000 shall be chargeable to tax in the hands of the recipient under the head "Income from other sources". The scope of exceptions has also been widened by including the receipt by certain trusts or institutions and receipt by including the receipt by certain trusts or institutions and receipt by way of certain transfers not regarded as transfer under section 47 of the Income-tax Act.*
- 33.5. *Consequential amendments have also been made in section 49 of the Income-tax Act for determination of cost of acquisition and section 2(24) of the Income-tax Act to include sum of money or value of property referred to in section 56(2)(x) of the Income-tax Act in the definition of income.*
- 33.6. *Applicability: These amendments will take effect from 1st April, 2017 and the said receipt of sum of money or property on or after 1st April,*



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2017 shall be chargeable to tax in accordance with the provisions of clause (x) of sub-section (2) of section 56 of the Income-tax Act.

212. As can be seen from the above, it has been stated in the Explanatory Notes that the provisions of section 56(2)(vii) provided that any sum of money or property which is received without consideration or for inadequate consideration by an individual or HUF is chargeable to income-tax under the head Income from Other Sources and receipt of certain shares by a firm or a company in which public are not substantially interested is also chargeable to income tax u/s.56(2)(viiia) in case such receipt is in excess of Rs.50,000/- and is received without consideration or for inadequate consideration. It has been clearly stated therein that the above provisions were applicable only in case of individual or HUF and firm or company in certain cases and therefore, the receipt of sum of money or property without consideration or for inadequate consideration did not attract these provisions in cases of other assesses. It has been stated that in order to prevent the practice of receiving the sum of money or the property without consideration or for inadequate consideration, a new clause (x) has been inserted in sub-section (2) of section 56 of the Income-tax Act so as to provide that receipt of the sum of money or the property by any person without consideration or for inadequate consideration in excess of Rs. 50,000 shall be chargeable to tax in the hands of the recipient under the head "Income from other sources" .

213. It is therefore clear from the Explanatory Notes that prior to the insertion of Clause (x) in section 56(2) by the Finance Act, 2017 w.e.f. AY 2018-19 onwards, the receipt of a sum of money or property without consideration in cases not covered by the existing provisions



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of section 56(2)(vii) and (viia) was not chargeable to tax under the head Income from other Sources. The cases of receipt of a sum of money or any property by any person has been made liable to tax under the head Income from Other Sources from AY 2018-19 onwards by inserting Clause(x) in section 56(2). From the legal position explained in the Explanatory Notes, it is also clear that the receipt of a sum of money or property without consideration in cases not covered by the existing provisions of section 56(2)(vii) and (viia) was not chargeable to tax under the head Income from Other Sources under the provisions of section 56(1) also. This is due to the reason that if such receipts were already chargeable to tax as per the provisions of section 56(1) of the Act though they were not covered by the scope of the specific provisions of section 56(2)(vii) or (viia), there was no necessity to insert the specific provision by way of section 56(2)(x) of the Act by the Finance Act, 2017.

214. Since the receipt of shares of Zee News Ltd. by the appellant at NIL consideration did not come under the scope of the provisions of section 56(2)(vii) or (viia) as already discussed earlier, the same was not chargeable to income tax in the hands of the recipient under the head Income from Other Sources under the provisions of section 56(1) also, in view of the legal position as explained in the Explanatory Notes to the provisions of the Finance Act, 2017 contained in Circular No. 2/2018 of the CBDT. Receipts of this nature are chargeable to income-tax in the hands of the recipient under the head Income from Other Sources from AY 2018-19 onwards as per the provisions of section 56(2)(x) of the Act.



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215. *In view of the above discussion, it is held that the receipt of shares of Zee News Ltd. by the appellant at NIL consideration during the year is not chargeable to tax in the hands of the appellant under the provisions of section 56(1) of the Act.”*

As regards applicability of section 28(iv) of the Act:

“216. *During the course of the appellate proceedings, the issue of whether the receipt of shares of Zee News Ltd. at NIL consideration by the appellant during the year is chargeable to tax as income under the head business as per the provisions of section 28(iv) of the Act has been examined, though the AO has considered the same as income chargeable to tax under the head Income from Other sources u/s. 56(1) of the Act. The appellant was therefore requested during the appellate proceedings to explain why the provisions of section 28(iv) are not applicable to the facts of the appellant's case.*

217. *In response to the same, it was stated by the appellant in the written submission dated 28.12.2017 that the receipt of shares of Zee News Ltd. at NIL consideration by the appellant during the year is not taxable u/s. 28(iv) of the Act. It was stated that section 28(iv) specifies that the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession shall be chargeable to tax under the head Profits & Gains of Business or Profession. It was stated that the benefit or perquisite should arise from the business for the same to be considered as income u/s. 28(iv) which means that the assessee must have performed some business activities or carried out his business and must have received any*



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benefit or perquisite in the course of the same. It was stated that the business of the assessee must necessarily have given him the right to receive such a benefit or perquisite to as to constitute income u/s. 28(iv). It was pointed out that the appellant has not carried out any business activity during the impugned assessment year nor at any time in the past which could have given it a right to receive the gift of shares and therefore, the provisions of section 28(iv) are not applicable to the facts of the appellant's case.

218. In support of the above proposition, the appellant relied on the decision of the Hon'ble ITAT, Mumbai in the case of Nirmala Athavale Vs. ITO 118 ITO 373 wherein it was held that a gift will become income only when received as a consequence of exercise of vocation/business/profession and if it is received in lieu of a payment due for services rendered during the course of the business. It was stated that this decision was rendered following another decision of Hon'ble ITAT, Mumbai in the case of Helios Food Improvers Pvt. Ltd. Vs. DCIT (14 SOT 546).. The appellant contended that since the gift of the shares was not received as a consequence of exercise of the business by the appellant and in lieu of a payment due fact the services rendered by the appellant in the course of its business, the said gift of shares does not constitute income chargeable to tax u/s. 28(iv) of the IT Act.

219. During the appellate proceedings, while furnishing remand report dated 22.02.2018, the AO has invited reference to the following decisions of the Hon'ble Bombay High Court and Delhi High Court wherein corporate gifts for the purpose of business were held to be in the nature of revenue expenditure in the hands of the transferor and



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stated that by implication the receipt of the gift has to be treated as a revenue receipt by way of a benefit arising out of the business in the hands of the recipient company u/s. 28(iv) of the Act. This contention was made by the AO without prejudice to the addition made in the assessment order u/s. 56(I) of the Act.

- a) CIT VsAI/ana Sons Pvt ltd 1995)216 ITR 690,691(Bom)*
- b) CIT VsAluminium Cables Ltd (1990) 183 ITR 611(de/)*

220. The contentions advanced by the appellant regarding the non-applicability of the provisions of section 28(iv) to the facts of the appellant case and the contentions of the AO in the remand report regarding the applicability of the provisions of section 28(iv) have been examined carefully. As per the provisions of section 28(iv), the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession shall be chargeable to income tax under the head "Profits and Gains of Business or Profession". The word "perquisite" normally connotes meeting the obligation of one person by another person either directly or indirectly or provision of some facility or amenity by one person to another person. Since the term "benefit" has been used along with the word "perquisite" in this section, both the words are required to be read together and they would draw colour from each other. Hence, the word "benefit" is also required to be understood as the facility or amenity given by one party to another party.

222. In the above mentioned case, the Hon'ble Tribunal held that the gift received by the assessee, who is a social reformer, from his followers cannot be considered as a benefit or perquisite since the same did not arise from



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the exercise of vocation by the assessee on account of the reason that the gifts did not represent the consideration paid by the followers/disciples for the services obtained by them from the assessee. While rendering this decision, the Hon'ble Tribunal placed reliance the decision of the Hon'ble Mumbai in the case of Hellos Food Improvers (P) ltd" Vs CIT (Supra).

223. Further, in the case of CIT Vs. Stads Ltd 373 ITR 313, the Hon'ble Madras High Court held that the benefit or perquisite should arise out of normal transaction of the business for the same to be taxed as business income u/s.28(iv) of the Act. The relevant part of the decision of the Hon'ble High Court is reproduced as under:

Since the issue revolves around Section 28(iv) of the Income Tax Act, it is necessary to extract the same herein for better clarity.

'28. Profits and gains of business or profession. - The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession ", -

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

A plain reading of the above-said provision makes it clear that the amount reflected in the balance sheet of the assessee under the head 'reserves and surplus' cannot be treated as a benefit or perquisite arising from business or exercise of profession. The difference amount post amalgamation was the amalgamation reserve and it could not be said that it is out of normal transaction of the business. The present transaction is capital in nature arose on account of amalgamation of



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four companies. Hence, we have no hesitation to hold that the manner in which the Revenue wants to treat this amount is not in consonance with Section 28(iv) of the Income Tax Act.

224. Further, in the case of Agra Chain Mfg. Co. Vs. CIT 114 ITR 840, the Hon'ble Allahabad High Court held that for the purposes of attracting section 28(iv), it is necessary that the benefit should be intimately connected with the business the assessee was doing. The relevant part of the decision of the Hon'ble High Court is extracted as under:

“For the purposes of attracting clause (iv) of section 28 of the Income-tax Act, it is necessary that the benefit should arise from business. It would be seen that the advantage of receiving the entitlement originated from and was intimately connected with the business which the assessee was doing. In case the assessee would not have exported the goods under the Special Exports Promotion Scheme to the extent of the value mentioned therein, it would not have obtained the entitlements. It is thus clear that the entitlements sprang up or came into being because of the business which the assessee was doing. The dictionary meaning of the word "arise" given in the Chamber's Twentieth Century Dictionary as originate, to come into being, leaves no room for doubt that income from import entitlements had actually arisen from the assessee's business.”

225. Considering the principles laid down in the decisions cited above, a benefit or perquisite should arise/originate from the business of the assessee for the same to be considered as income under the head business u/s. 28(iv) of the Act. The fulfilment of this condition



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requires that benefit or perquisite is received by the assessee as a consequence of performance of business activities by the assessee. The right to receive such a benefit or perquisite should spring up from the business activities carried out by the assessee so as to constitute business income u/s. 28(iv). The applicability of the provisions of section 28(iv) to the transaction of the receipt of shares of Zee News Ltd. by the appellant at NIL consideration is therefore required to be examined from this perspective.

226. On perusal of the financial statements of the appellant for the FYs 2011-12 & 201011 relevant to the present assessment year and the immediately preceding year, it is seen that the appellant did not carry out any business activity during these years. On perusal of the P & L account for these years, it is seen that there is no revenue from operations credited to the P & L Account. The only credit to the P & L Account during the FY 2011-12 relevant to the present assessment year is the interest on the income-tax refund. Further, on perusal of the balance sheet of the appellant for these two years, it is seen that the appellant company did not own any fixed assets. It is seen that the appellant held the shares of its subsidiary company Mediavest India Pvt. Ltd., Short Term Loans given to the said subsidiary company by way of share application money and cash and bank balances as its assets in the balance sheet for these two years. Thus, it is seen that the appellant did not carry out any business activity at all during the year or in the earlier year which could have given it a right to receive the shares at NIL consideration from the group companies.

227. As regards the contention of the AO that the gift received by the appellant has to be treated as a revenue receipt by way of a benefit



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arising from the business u/s.28(iv) of the Act by relying on the decisions of CIT Vs Al/ana Sons Pvt ltd 216 ITR 690 (Bom) and CIT Vs Aluminium Cables Ltd 183 ITR 6U(del), it is seen that the said decisions of the Hon'ble Bombay High Court and the Hon'ble Delhi High Court dealt with the issue of the allowability of expenditure on the articles intended for presentation to the customers for the purpose of advertisement u/s.37 of the Act and the applicability of the limits on such expenditure as laid down in Rule 6B. The Hon'ble High Courts held in these cases that where the articles intended for the presentation did not bear the name of the company or its logo, the same will not fall under the scope of advertisement expenditure which is subject to the limits as laid down in Rule 68. The AO has relied on these decisions to contend that if transfer of a capital asset in the form of corporate gift for the purpose of the business is allowed as a revenue expenditure, a gift received by a company can be treated as a revenue receipt in the form of a benefit arising from the business which is taxable u/s. 28(iv) of the Act. However, as mentioned above, these decisions have not laid down any legal proposition regarding the allowability of the transfer of a capital asset in the form of a gift as a revenue expenditure in the hands of the donor. These decisions have dealt with the expenditure incurred on the articles intended for the presentation to the customers for the purpose of promotion of the sales of the business. Moreover, it is a well settled legal position that the revenue/capital nature of the payment in the hands of the payer has no bearing on the revenue/capital nature of the same amount in the hands of the recipient. Further, it is seen in the present case that the transferor company has not claimed deduction for the value of the shares transferred by it at NIL consideration to the appellant while computing its total income under the Act. Hence, it is considered that



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these decisions cited by the AO have no relevance to the issue on hand.

228. Having regard to the above discussion, the benefit received by the appellant in the form of receipt of shares of Zee News Ltd. at NIL consideration from the holding company cannot be considered to have arisen from the business of the appellant and consequently, it is held that the provisions of section 28(iv) are not applicable to the facts of the appellant's case so as to bring the said benefit to tax: as income under the head business.”

7. The factual position is not in dispute, the assessee company is a 100% subsidiary of Essel Group and accordingly is a part of internal reconstructing who received 12,78,98,710 equity shares of Zee News Limited as a gift without consideration. The internal reconstructing was carried out in compliance with the relevant corporate law and other requirements such as the board approval of the concerned companies for the internal restructuring, authorization by constitutional documents of respective companies enabling transfer and receipt of shares as a gift relevant disclosures filed before SEBI under the SEBI Regulation, 2011 by the Assessee for disclosing inter-se transfer of shares from ECRPL without any consideration. The facts were confronted to the AO in remand proceedings and the AO reported the matter by virtue of letter dated 03.02.2017 by concluding that the due process of law has not been followed up by the assessee company as well as holding company i.e. M/s. Essel Corporate Resources Pvt. Ltd., in transferring the equity shares for the purpose of restructuring and consolidation of Media Assets. The documents were obtained from the assessee in the form of financial statement and place on record. It is to be seen whether a corporate like ECRPL / assessee



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can give or receive gifts. However, apparently there is no gift on record but the provision of Section 5, Section 122 and section 123 of Transfer of property Act is liable to be seen in this regard which is reproduced 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 affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.....

Section 122 of TOPA

122."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 the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void

Section 123 of TOPA



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123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

2. *A perusal of the provisions of sections 5, 122, 123 of TOPA indicate that there do not seem to be any restriction on the corporate transfer of shares by way of gift. There is no requirement in TOPA 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 clear from section 123 of TOPA, there is no requirement of a gift deed.”*

8. The section nowhere caused restriction to the corporate transfer of shares by way of gift. The company can do so when interest is mentioned in the memorandum/article of association. This view is taken by the decision of the Hon’ble ITAT in the case of **Nerka Chemicals Pvt. Ltd. Vs. DCIT [ITA 4423/M/2014]** held as under: -

“Further, the Coordinate bench of Tribunal in DCIT Vs KDA Enterprises (supra) held section 2(24) defines 'income'. The definition of 'income' provided in section 2(24) although an inclusive definition, but it specifically provides the income which are intended to be taxed under the provisions of the Act. Even the income in the nature of capital gains as per section 45, and gifts received as per section 56(2)(v), (vi), (vii) etc. are included in the definition of income. Thus under the Act only the receipts which are in the nature of 'income' are



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subjected to tax. Any other receipts which are not in the nature of 'income' are not liable to tax under the provisions of the Act. Section 5 provides for scope of total income chargeable to tax in India on the basis of receipt, accrual and deemed to be received and accrued in India. In view of above, the charging section of the Act specifically provides for taxation of 'income' of an assessee. 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. Under the Act, what is subjected to tax is only the 'income' of the assessee and not each and every receipt of the assessee, where the other receipts not in the nature of income are intended to tax, the legislature has specifically made provisions for taxability of such receipts in the statute itself like section 45, section 56(v), 56(vi), 56(vii) etc. It was also held that as per the provisions of law prevailing during the year under consideration, the gift received by one corporate body from another corporate bodies do not come under the ambit of income as contemplated under section 2(24) or any other provisions of the Act. While referring and following the decision in DP World (P) Ltd (supra) it was further held that companies are competent to make and receive gifts and natural love and affection are not necessary requirement. It was held that the only requirement for company is to make gifts as per respective Memorandum and Article of association, which authorize the company for the same. Applying the proposition of law laid down in the above decision to the facts of the instant case, it is found that the assessee and the donor companies are authorized in this regard for receiving and making gifts respectively by their Memorandum and Articles of association.



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9. In view of the said decision, the gift is not liable to be considered as Sham transaction. This view is also supported by the decision of the case assessee's group concern Jayneer Infrapower in which it is held that: -

“14. The background facts of the transactions under consideration are as follows. During the year under consideration, the assessee has transferred the following shares.—

Sl. No.	Particulars	Purchaser	No. of shares	Cost of acquisition	Sale consideration	Gain/ (Loss)
1.	Wire & Wireless India Ltd.	Essel Corporate Resources P. Ltd.	1,03,31,658	1,96,31,05,502	NA (Gift)	(19,63,01,502)
2.		Essel Corporate Resources P. Ltd.	1,28,26,555	24,37,04,345	NA (Gift)	(24,37,04,545)
3.		Essel Business Process Ltd.	65,00,000	12,35,00,000	12,35,00,000	-
4.		Essel Business process Ltd.,	1,00,00,000	19,00,00,000	19,00,00,000	-
5.		Essel Business process Ltd.,	2,71,73,445 51,62,95,455		51,62,95,455	-
	Total		6,68,31,658			
1.	Dish TV India Ltd.,	Essel Corporate Resources Pvt Ltd.,	10,32,125	1,74,619	2,81,97,655	2,80,23,486
2.		Premier Finance & Trading Co. Ltd.,	2,100	37,800	NA (Gift)	(37,800)
3.		Direct Media Distribution Ventures P. Ltd.,	3,050	83,326	NA (Gift)	(83,426)
	Total		10,37,275			



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15. From the record we found that the resultant loss has been disallowed by the assessee itself in its computation of income. The Assessing Officer has analyzed the above transactions. The Assessing Officer called for certain details from the assessee and asked for the rationale behind the above transactions as well as the reason why the gain arising out of these transactions should not be brought to tax.

16. From the record we found that the assessee vide its letter dated 16.02.2015 (page No. 17 of paper book No, 1) submitted that the said transfers were made as a part of internal restructuring with a view to consolidate the media assets of the group. The assessee further submitted vide letter dated 28.03.2015 (page No. 19 of PB No, 1) that the transfer of capital asset without consideration is a gift and the same is not regarded as 'transfer' u/s. 47(iii) of the Act. Thus, the gift of shares is not liable to tax u/s. 45 of the Act, It was further submitted that in the absence of sale consideration, the computation mechanism fails and the transaction cannot be brought to tax in view of the decision of the Hon'ble Supreme Court in the case of CIT v. B.C. Srinivasa Setty [1981] 5 Taxman 1/128 ITR 294. It was also submitted that the Assessing Officer cannot substitute the sale consideration by fair market value in the absence of any such provision under the Act. Reliance was placed upon the decisions of the Hon'ble Supreme Court in the case of CTT v. George Henderson and Co. Ltd, [1967] 66 ITR 622 and CIT v. Gillanders Arbuthnot & Co. [1973] 87 ITR 407 (SC).

17. However, the Assessing Officer did not agree with the submission of the assessee and held that the fair market value of the shares is to be substituted for sale consideration and thereby made the addition of Rs. 57,90,33,060/-. His detailed reasonings can be summarized as under:



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- (i) The assessee has very minimal paid up capital and has huge accumulated losses as well as borrowing. It has also advanced huge amounts to related parties and subsidiaries and have substantial investments in subsidiaries and group companies.*
- (ii) The shares of assessee-company are held by the shareholders who are all family members.*
- (iii) Certain details regarding the above transactions were called for, however, the same were not submitted by the assessee.*
- (iv) There are several companies and entities in the group and similar transfer of shares have been carried out in many other companies.*
- (v) The modus operandi of transfer of shares is same in all the group companies wherein the transferor becomes holding company of transferee and thereafter the shares worth crores of rupees are transferred at nil consideration,*
- (vi) The inter se status of the companies keep on changing very quickly. The companies are amalgamated after receiving the shares of other group companies. The accounting treatment is given as per the Court approved scheme.*
- (vii) Although the stated purpose of restructuring is consolidation of media assets or business, the real purpose is to divide the business amongst the family members. This has been done after getting the legal stamp of approval.*
- (viii) Some of such instances of share transfer of group companies have been described, wherein the transaction of shares of Zee News Ltd (para 4.1), Dish TV (para 5.1), Wire & Wireless India Ltd. (City Cable) (para 6.1), Zeel*



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(para 7.1), Zee Learn (para 8.1), Essel Prepack (para 9,1) and Jayneer Capital (para 10-1) have been discussed) The decisions of the Supreme Court in the case of CIT v. Durga Prasad More [\[1971\] 82 ITR 540](#) and Mc Dowell & Co. Ltd. v. Commercial Tax Officer [\[1985\] 22 Taxman 11/154 ITR 148 \(SC\)](#) were invoked and it was held that the transaction is a colourable device. The Assessing Officer also held that the resultant gain is to be taxed under the head 'income from other sources'. The Assessing Officer finally adopted the market value of the shares and calculated the income at Rs.57,90,33,060/- as under.—

Shares of	No. of shares	Average price	Market value	Remarks
Dish TV India Ltd.,	10,37,275	75	7,77,95,625 were	10,32,125 shares were transferred at a profit while only 5,150 shares were gifted.
Wire & Wireless India Ltd.,	6,68,31,658	7.5	50,12,37,435	4,36,73,445 shares were transferred at cost while only 2,31,58,213 shares were gifted.
Total			57,90,33,060	

18. Against the above addition by AO, assessee approached to CIT(A).

19. It was pleaded before the CIT (A) that the transfer of shares made without consideration is gift and, therefore, the same cannot be taxed under the provisions of the Act. It was explained that the transaction was part of internal restructuring exercise carried out for consolidation/rationalization of various media assets. In support of this, the copies of Memorandum and Articles of Association as well as DEMAT slip of share transfers were relied



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upon. It was pleaded that the transaction cannot be considered as colourable device and the principle laid down by the Supreme Court in the case of McDowell and Co. Ltd, is not applicable. The order of the Mumbai Bench of the Tribunal in the case of DP World (P.) Ltd. v. Dy. CIT [\[2012\] 26 taxmann.com 163/\[2013\] 140 ITD 694](#) was relied upon to contend that the transaction of gift cannot be brought to tax. It was also submitted that in the absence of selling price, the capital gain cannot be calculated and, hence, computation machinery falls. It was further contended that the market value cannot be substituted for sale consideration as there is no such provision in the Act. As regards the applicability of S. 56 of the Act, it was submitted that the gain arising out of transfer of capital asset cannot be brought to tax under the head income from other sources.

20. By the impugned the CIT(A) held that the transactions of transfer of shares were in the nature of colourable device. He was also of the view that the transaction of transfer of shares without consideration cannot be said to be gift. He found that certain field in the DEMAT siips have not been properly filled up to categorize the transaction as a gift nor any gift deed was submitted by the assessee. The CIT (A) also observed that the assessee has not furnished any evidence to establish that the transaction was a voluntary act of the donor. He distinguished the case laws relied upon by the assessee stating that the facts are different.

21. The ld, CTT (A) further observed that even if the claim of assessee that transaction is covered u/s. 47(v) of the Act is correct, it has violated S. 47A of the Act since Essel Corporate Resources P. Ltd. has ceased to be the holding company of the assessee. He has pointed out that there are certain transactions of receiving the shares from the group companies and giving the shares to the group companies. According to him, these transactions are



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interconnected to each other. According to the CIT (A), these are exchange of shares and, therefore, the market value of shares have been correctly taken by the Assessing Officer. He was further of the view that the gain, however, should be taxed under the head 'capital gain' and not under the head 'income from other sources' as the gift is arising out of transfer of capital asset. He also held that cost of acquisition of shares should be reduced from selling price. Thus, the CIT (A) upheld the addition but directed the Assessing Officer to give deduction on account of cost of acquisition and tax the gain under the head 'capital gain' instead of 'income from other sources'. The Assessing Officer has since given the effect to the above order of the CIT (A) and the taxable capital gain has been reworked at Rs. 2,65,124.

22. It was contented by the ld. AR that the assessee has transferred the shares of Wire & Wireless India Ltd. and Dish TV India Ltd. to its group companies. These transfers have taken place either at cost or without consideration. It is submitted that both the lower authorities have ignored the fact that the transfers have been effected pursuant to internal restructuring exercise carried out by the assessee. Both the authorities have further erred in assigning the market value as a sale consideration for the purpose of determining the income. It is submitted that there is no such enabling provision under the Act to substitute the market value in place of actual consideration. As per ld A.R., the ld. CIT (A) has correctly held that the transfer of shares is a transfer of capital asset and the gain from which is chargeable to tax u/s. 45 of the Act. The computation of gain, for this purpose, is to be done as prescribed in S. 48 of the Act which provides for deduction of cost of acquisition from 'full value of consideration'. The phrase 'full value of consideration' has received the judicial interpretation in series of decisions by various High Courts as well as Supreme Court. In the



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case of the CIT v. Morarjee Textiles Ltd. [IT Appeal No. 738 of 2014, dated 24-1-2017] (Bom.), on the facts similar to the present case, wherein the question posed was whether fair market value of shares transferred can be taken as sale consideration for computation of long term capital gain, the Hon'ble Bombay High Court held as under:

"4. Regarding question no. (ii):-

(a) The issue which arises herein for consideration is whether it is open to the Assessing Officer to substitute the 'full value of consideration' received on sale of shares by its 'fair market value' in the subject Assessment Year. The impugned order of the Tribunal allowed the respondent-assessee's appeal by inter alia holding that the reliance by the Revenue on Section 2 (22B) of the Act is not justified. This is for the reason that there is no provision under the Act which would permit the Assessing Officer to substitute the 'full value of consideration' received on sale of shares by 'fair market value'. The only provision in the Act at the relevant time allowing substitution of consideration received by the market value was Section 50C of the Act. Section 50C of the Act deals only with substitution of full consideration received by 'fair market value' in respect . of land and/or buildings. The impugned order makes a reference to Section 50D of the Act which provides for substitution of full value of consideration received/accruing on a transfer of a capital asset being substituted by a fair market value. However this came into force only with effect from 1st April 2013. Therefore it cannot be relied upon for the subject Assessment year. The impugned order of the Tribunal further placed reliance upon the decision of its Co-ordinate bench in the case of MGB Shareholders Benefit Trust (Income Tax Appeal No. 316/ Mum/2009) rendered on 26th November, 2009 in case of a group company of the respondent assessee on a similar issue of revaluation of shares by substitution of full value of consideration by fair market value and



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held the same to be impermissible,

- (b) The grievance of the Revenue before us is that these transactions are all between companies belonging to the same group. Therefore it is urged that the transaction are colourable transaction and different considerations mould apply.*
- (c) At the hearing of the admission, the Revenue did not point out any facts which would evidence that the transaction was not genuine. In such a case where the genuineness is not disputed with any evidence, it is not open to discard the document and/or transaction on the basis of some supposed object/intent. In the present facts the Revenue accepts the documents but only substitutes the consideration. Therefore, the issue is whether such substitution of full consideration received by fair market value of the asset is permissible. As held by the Tribunal at the relevant time there was no power vested in the authorities under the Act to substitute a full value of consideration received for sale of shares by fair market value in respect of stocks and shares. The power to substitute full consideration with fair market value in respect of shares came into the statute only on introduction of Section 50D with effect from 1st April 2013. Moreover, such a power under Section 50D of the Act is only to be exercised if the Assessing Officer comes to a finding that the consideration received is not ascertainable or cannot be determined. Moreover the decision of the Co-ordinate bench of the Tribunal in the case of MGM Shareholders Benefit Trust (Supra) on identical facts situation has been accepted by the Revenue, as no appeal from the same has been filed by the Revenue.*
- (d) In the above view, the question as formulated does not give rise to any substantial question of law. Thus not entertained."*



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23. It was also argued by the Ld. AR that notional value of sale consideration can only be taken when it is specifically provided in the Act for e.g. section 50C of the Act which provides for a deemed full value of consideration. As per the ld. A.R. there is no such provision applicable in the present case and accordingly the fair market value cannot be taken as the sale consideration.

24. It was further argued that the transfer in the nature of gift are outside the purview of capital gain provisions. Transfer of shares, by way of gift, are exempt from the provisions of capital gain by virtue of provisions of Sec.47(iii) of the Act which read as under;

Transactions not regarded as transfer.

47. Nothing contained in Section 45 shall apply to the following transfer :

*(i) & (ii)***

*** ***

(iii) any transfer of a capital asset under a fit or will or an irrevocable trust;

25. Reliance was placed on the decision of the Hon'ble Gujarat High Court in the case of the Prakriya Pharmaceem v. ITO [2016] 66 taxmann.com 149/238 Taxman 185 wherein it was held that in case where an assessee gifted its shares to its sister concern, such transaction would fall within the ambit of Sec 47(iii) and therefore such a transaction is exempt from capital gain. Accordingly, the transfer made as gift without consideration are not taxable under the provisions of capital gains.

26. Now we deal with specific objections raised by the A.O.—

(i) As regards the size of capital and huge losses and borrowing, we observe that this fact has no bearing on taxation of gain arising out of transfer of shares.



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- (ii) *Similarly the composition of shareholders also has no bearing on the issue under consideration.*
- (iii) *As regards the alleged non-submission of details, we found that letter dated 25.03.2015 was filed before the Assessing Officer. However, then the details has no much bearing on the issue under consideration.*
- (iv) *As regards the transfer of shares by other group companies, we found that this also could not have any bearing on the issue under consideration. Whether the market value can be substituted for actual consideration, is a question to be decided on the basis of the provisions of the Act.*
- (v) *The modus operandi of transfer of shares in other group companies do not have any bearing on the issue under consideration. In any case, if transfer or becomes the holding company of transferee company, the provisions of S. 47(iv) of the Act would be applicable and the capital would not be charged as per the provisions of the Income-tax Act. If there is no charge of tax as per the provisions of the Act, the Assessing Officer cannot complaint about the same. In any case, the violation of the pre-condition of S. 47(iv) of the Act invites the tax liability as prescribed u/s. 47A of the Act and, therefore, the transaction of transfer by holding company to subsidiary cannot be branded as colourable device. In any case, this is applicable to the case of group companies and not to the assessee as the transfer or under consideration is not by holding company to its subsidiary and consequently no benefit of S, 47(iv) of the Act has been claimed.*
- (vi) *The change in the inter se status of the companies is again irrelevant for the purpose of deciding the issue under consideration the court approved amalgamation cannot be found fault with. For this purpose, reliance is placed upon the order of the Kolkata Bench of the Tribunal in the case*



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of *Electrocast Sales India Ltd. v. Dy. CIT [2018] 92 taxmann.com 85/170 ITD 507.*

- (vii) *It is not correct to say that the real purpose is to divide the business amongst family members. In any case, if the transactions are not in violation of any law or unreal the same cannot be disregarded. Further, when the ultimate recipient of gifted shares sells the shares, it would be subject to capital gain tax taking the cost of acquisition with reference to that of the previous owner as provided under section 49(l)(ii) of the Act, Accordingly, it is not even a case where the assessee has been able to increase its cost of acquisition with a view to pay lower capital gains in future. We also observe that if the transaction is a colourable device, no cognizance of the same can be taken and consequently there is no question of charging any capital gain arising out of these transactions.*
- (viii) *The Assessing Officer has described in detail the transactions of share transfer of group companies. As per our considered view this is not relevant for the purpose of deciding the issue. However, to put at rest any possible doubt the same is discussed herein below,*

(a) Zee News Limited

The allegation of the Assessing Officer is regarding transfer of shares from Churu Trading Co. P. Ltd., Ganjam Trading Co. Pvt. Ltd., etc. to 25FPS Media P. Ltd. In this regard, we observe that transfers have taken place in a legitimate way and there is no illegality involved. The Assessing Officer has merely complained that the ownership of M/s. Zee News Ltd has been shifted from one group of shareholder to another but how this is impermissible or resulted in evasion of lawful tax liability has not been pointed out.



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All transfers of shares are duly accounted and reported. For a transaction to be a colourable device, it has to be sham or impermissible transaction resulting into evasion of tax. None of these ingredients have been proved.

(b) Dish TV

Here the complaint of Assessing Officer is regarding transfer of controlling interest from Veena Investment, P. Ltd., Churu Trading Co. P. Ltd., Jayneer Capital P, Ltd. etc, to Direct Media Dist Ventures P. Ltd. etc. Here again, no illegality of tax evasion has been pointed out. All transfer of shares are duly accounted and reported.

(c) Wire & Wireless India Ltd., (City Cable)

Similar objections have been raised by the A.O regarding transfer of shares from premier finance and Trading Co. Ltd., Jayneer Capital Pvt. Ltd etc. to Direct Media Solution P. Ltd etc. we refer and rely upon the submissions made hereinabove.

(d) Zeel, Zee Learn, Essel Propack, Jayneer Capital Pvt. Ltd. etc. As in the case of companies referred to in the preceding paras, the allegation of the A.O is same in case of these companies. We refer and rely upon our observation made hereinabove.



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27. In light of the above discussion, the transactions cannot be said to be colourable device and, therefore, the decisions relied upon by the A.O has no relevance.

9. In view of the said discussion and law relied by the assessee, we are of the view that the gift is not a colourable device to avoid the tax liability if any. It is also to be seen whether the same is liable to be taxed u/s 56(1) and 28(iv) of the Act or not: -

“56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

From the above, it may be observed that income from other sources is the last and residual head of income. A source of income which does not specifically fall under any one of the other four heads of income (viz, Salaries, Income from House Property, Profit and Gains of business or profession, or capital gain) is to be computed and brought to charge under section 56 under the head "Income from Other sources". In other words, it can be said that the residuary head of income can be resorted to only if none of the specific head is applicable to the income in question and that it comes into the operation only if the preceding heads are excluded. Thus, it can be said that the residuary head of income can be invoked only if all the following conditions are satisfied.

- i. Income - There is an "income" [Section 2(24) read with section 4 and 5 of the Act]*



ii. *Not covered by the other heads of income*

*However, the benefit accrued to the Appellant in present case is in the **capital field** and can be brought to tax only under the head **capital gain**. Accordingly, the provisions of section 56(1) cannot be resorted to.”*

10. So far as the applicability of Section 56(2)(viiia) of the Act is concerned, the same is reproduced as under: -

“(viiia) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010⁸ [but before the 1st day of April, 2017], any property, being shares of a company not being a company in which the public are substantially interested,—

- (i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;*
- (ii) 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 such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vich) or clause (vid) or clause (vii) of section 47.

Explanation.—For the purposes of this clause, “fair market value” of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);



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*From the above, you may observe that the aforesaid provisions apply in a case where a company **receives** shares of **private limited companies** for without or inadequate consideration. In the present case, the assessee is the recipient of shares of a listed company. Accordingly, the provisions of section 56(2)(viia) cannot apply.*

In view of the above, the CIT(A)'s observations that the provisions of section 56(1) do not apply in case of transfer of shares should be upheld.”

12. It speaks about the receipt of share from the Private Limited Company for without or inadequate consideration whereas in the present case, the assessee is the recipient of shares of a listed company so the provisions u/s 56(2)(viia) of the Act is not liable to be applicable.

13. So far as the applicability of Section 28(iv) of the Act is concerned. The section 28(iv) is as under: -

“Section 28(iv) specifies that the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession shall be chargeable to tax under the head Profits & Gains of Business or Profession. The benefit or perquisite should arise from the business for the same to be considered as income under section. 28(iv) which means that the assessee must have performed some business activities or carried out his business and must have received any benefit or perquisite in the course of the same. In the present case, the receipt of shares of Zee News Ltd. as gift does not arise out of any business dealing and accordingly is not



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taxable under section. In any case, the receipt of gift is a capital receipt and on this count too, the provision of section 28(iv) of the Act cannot be applied.”

14. In the case of DP World Pvt. Ltd. Vs.CIT (26taxmann.com163), the Co-ordinate Bench has given the following finding: -

“19. The AO has applied the provisions of Sec. 56 and treated the value of the flats as income under the head 'Income from other sources' and the Ld. CIT(A) has made the addition u/s. 28(iv) of the Act by treating the Stamp Duty value as income from profit and gains from business and profession.

20. We have carefully considered both the provisions. Let us first examine the provisions of sec.28[iv] of the Act relied upon by the CIT [A].

"28. Profits and gains of business or profession.—The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession.”

15. In view of the said decision, it is quite clear that the provision Section 28(iv) and 56 in case of receipt of shares of a listed a company as gift is not applicable. Accordingly, we uphold the finding of the CIT(A) on this issue.

In the result, the appeal filed by the revenue is hereby dismissed.

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16. The assessee has filed the present appeal against the order dated 28.02.2018 passed by the Commissioner of Income Tax (Appeals) -12, Mumbai relevant to the A.Y.2012-13.

17. The assessee has raised the following grounds as under: -

1. *“The Assessing Officer [hereinafter referred to as “the AO”] / Commissioner of Income-tax (Appeals) [hereinafter referred to as “the*



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CIT(A)"] erred in holding that the receipt of shares of the listed company was a part and parcel of division of vast business empire of the group among family members undertaken in a colorable manner so as to avoid tax.

2. *The AO / CIT(A) erred in holding that the receipt of shares of listed company was not in the nature a gift but as a result of a division of vast business empire of the group among family members involving an element of quid pro quo between the ultimate beneficiaries;*
3. *The CIT(A) grossly erred and exceeded his jurisdiction in giving a direction to the AO that the impugned transactions were taxable in the hands of the transferor though taxability of transferor was not a subject matter of appeal;*
4. *The CIT(A) has misdirected himself in as much as all his findings/ observations/directions in the order regarding the Transferor are extraneous to the subject matter of appeal and are beyond the jurisdiction of the CIT(A) thereby rendering that portion of the order illegal and all the said portions deserve to be expunged from the order.*
5. *Without prejudice, CIT(A) erred in holding that transaction under which the assessee received the shares of the listed company was a colorable device undertaken in a manner to avoid tax and taxable in the hands of the transferor without appreciating that:
a) the transfer of shares even in the hands of transferor were exempt from capital gain tax in terms of section 47(iii) and 47(iv) of the Income-tax Act, 1961 [hereinafter referred to as "the Act"]*



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b) in the absence of consideration, the computation mechanism fails rendering the transaction non-taxable even in the transferor's hands and that there is no provision in the Act for substituting the fair market value of the shares as sale consideration for computing capital gains and
c) the transferor appellant had not claimed any capital loss, in view of which there could be no question of tax evasion. The finding arrived is based on incorrect appreciation of facts and circumstances of the case and in law

6. *Without prejudice, the AO & the CIT(A) grossly erred in holding in the Assessment order and Appeal order, respectively that the transferee and the Transferor, respectively, are liable to tax after having lifted the corporate veil so as to make out a case that receipt of shares by the assessee was pursuant to a family arrangement between the ultimate shareholders;*
7. *The appellant states that all the grounds of appeal are independent and without prejudice to one another. The appellant craves leave to add, amend or alter all or any of the grounds of appeal.”*

18. The facts of the present case are quite similar to the facts of the case as narrated above, therefore, there is no need to require the same.

ISSUE Nos. 1 to 4

19. Under these issues the assessee has raised the objection to the fact that the CIT(A) has wrongly been issued the direction to tax the share transaction amount in the hands of the transferor. The provisions of Section 251 of the Act provide the power of the CIT(A) in which the CIT(A) confirmed the order of the AO, reduce, enhance or annul the assessment. Further, he has powers to pass such orders in the appeal as he thinks fit. These powers nowhere allow the CIT(A) to transfer beyond the scope of



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appeal. More these instructions or/ direction can affect the third party. The Hon'ble Supreme Court in the case of ITO Vs. Muralidhar Bhagwan Das [52 ITR 335] has discussed the powers of the CIT(A) to analyze what constitutes a "finding" in appeal. The extract of the finding is hereby as under: -

““If that be the correct meaning, any finding on an irrelevant or extraneous matter would be a finding. That certainly cannot be the intention of the legislature. The Madras High Court also in A.S. Khader Ismail v. Income-tax Officer, Salem [1963] 47 ITR 16 gave a very wide interpretation to that word, though it did not go so far as the Full Bench of the Allahabad High Court. Ramachandra Iyer J., ashe then was, speaking for the court, observed that the word "finding" in the proviso must be given awide significance so as to include not only findings necessary for the disposal of the appeal but also findings which were incidental to it. With respect, this interpretation also is inconsistent with the well-known meaning of that expression in the legal terminology. Indeed, learned counsel for the respondent himself will not go so far, for he concedes that the expression "finding" cannot be any incidental finding, but says that it must be a conclusion on a material question necessary for the disposal of the appeal, though it need not necessarily conclude the appeal. This concession does not materially differ from the definition we have given, but the difference lies in the application of that definition to the finding given in the present case. A "finding", therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and



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thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression "direction" cannot be construed in Vacuum, but must be collated to the directions which the Appellate Assistant Commissioner can give under section 31. Under that section he can give directions, inter alia, under section 31(3)(b), (c) or (e) or section 31(4). The expression "direction" in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words "in consequence of or to give effect to" do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions."

20. Accordingly, the CIT(A) can direct the authorities which are necessary for the disposal of the appeal. The observation of the CIT(A) to assess the transferor, was not necessary for disposal of appeal. It is beyond his power and in this regard we relied upon the decision in the case of Vijay Kumar SardaVs.DCIT(40taxmann.com113) (T. Mum.) and the relevant finding is hereby reproduced as under: -



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“8. We have carefully considered the rival submissions and perused the record. Under section 251 of the Income Tax Act the first Appellate Authority has the powers to confirm, reduce, enhance or annual the assessment. He can also initiate penalty proceedings and in any other case he may pass such orders in the appeal as he thinks fit. The expression 'may pass such orders in the appeal' was subject matter of consideration by various Courts. While deciding the appeal the Appellate Authority may give appropriate directions to the AO either in regard to the assessee in appeal before him or otherwise. However, these directions cannot travel outside the assessment year to which the appeal relates. In the same way the directions cannot relate to a third person, whose appeal is not pending before him. The policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage, as observed by the Hon'ble Apex Court in the case of Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1. In the instant case no addition was made in the hands of Smt. Kalpana VijaySarda though she has filed the return by specifying that she has purchased the property. At the same time it is not in dispute that the AO has taken a consistent stand that a sum of Rs. 16,51,000/- was paid for purchase of the said property but consciously took a view that she has no wherewithal to make such payment and hence no addition can be made under section 69A of the Act. This finding has become final and this was not in dispute before the Appellate Authority. In the appeal filed by the assessee's husband the only issue was as to whether he paid a sum of Rs. 16,51,000/- to the tenant on behalf of his wife and it is not the case of either the AO or the assessee that the payment was made by assessee's wife. Such being the case, an issue which is not before the first Appellate Authority cannot be



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subject matter of consideration while disposing of an appeal, in exercise of the powers vested in the first Appellate Authority under section 251 of the Income Tax Act. In the case of A.B. Parikh v. ITO [1993] 203 ITR 186 the Hon'ble Gujarat High Court had considered identical issue with regard to extension of time limit by virtue of provisions of section 150(1) of the Income Tax Act and in that regard the Court observed that in order to issue such directions, which would amount to enhancing the assessment of a third party, such person must have been put on notice, as otherwise, it is not permissible to give such direction. The first ingredient is that there must be a finding that the income excluded from the total income of one person is the income of another person. The second ingredient is that the order must be one which has come to be passed after the other person was given an opportunity of being heard. The person concerned must be put on notice that the consequence of the income being held as her income is likely to adversely affect her tax liability.

9. In the instant case the learned CIT(A) has not called for any record either from the AO or from the affected parties before coming to the conclusion as to why the alleged payment was made from the undisclosed sources of income, more particularly when the AO was firmly of the opinion that she would not have been in a position to pay such huge amount since she had no other income to make such payment. The expression 'may be deemed to be the income' under section 69A of the Act implies that even after coming to the conclusion that a sum of Rs. 16,51,000/- would have been paid for surrender of tenancy rights it is not automatic that such addition should be made under section 69A of the Act unless it is shown that she was capable of having so much of income in the year under consideration. The first



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Appellate Authority has not made any comment in that regard and, in fact, has not given any opportunity to Smt. Kalpana VijaySarda, which shows the fallacy in the direction given by him.”

21. In the case of Mrs. Banoo E. Cawasji v. CIT [138 ITR 686], the Hon'ble High Court has observed that the CIT(A) is not required to pass the order in the case of third party. Accordingly, we are of the view that the observation of the CIT(A) is not justifiable, therefore, we set aside the such direction and decide the issue nos. 1 to 4 in favour of the assessee against the revenue.

ISSUE Nos. 5 & 6

22. Since the matter of controversy has been adjudicated while deciding the issue nos. 1 to 4, therefore, these issues could only be academic in nature, hence, no need to require any adjudication.

ISSUE NO.7

23. Issue no. 7 is formal in nature which nowhere required any adjudication.

24. In the result, the appeal filed by the assessee is hereby allowed and the appeal filed by the revenue is hereby dismissed.

Order pronounced in the open court on 02/03/2022

Sd/-
(AMARJIT SINGH)
लेखा सदस्य / ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक Dated : 02/03/2022
Vijay Pal Singh, (Sr. P.S.)

Sd/-
(AMARJIT SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER



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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai