

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**“D” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM**

**&**

**SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No.2715/Mum/2018

(निर्धारणवर्ष / Assessment Year: 2012-13)

<b>The Assistant Commissioner of Income Tax 6(2)(2), Mumbai</b> Aayakar Bhavan, M.K.Road, Churchgate, Mumbai-400 020	<b>बनाम/</b> Vs.	<b>Direct Media Distribution Ventures Pvt. Ltd.</b> <b>135, Continental Building, Annie Besant Road, Worli, Mumbai-400 048</b>
स्थायीलेखासं ./जीआइआरसं ./PAN No. <b>AADCD1940Q</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

आयकरअपीलसं./ I.T.A. No.3084/Mum/2018

(निर्धारणवर्ष / Assessment Year: 2012-13)

<b>Direct Media Distribution Ventures Pvt. Ltd.</b> <b>135, Continental Building, Annie Besant Road, Worli, Mumbai-400 048</b>	<b>बनाम/</b> Vs.	<b>The Assistant Commissioner of Income Tax 6(2)(2), Mumbai</b> Aayakar Bhavan, M.K.Road, Churchgate, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. <b>AADCD1940Q</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )
अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Mr. Jay Bhansali
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri. Madhur Agrawal & Manoj

		Kumar Sinha SR AR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	20.01.2023
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	31.01.2023

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid Cross Appeal have been filed by the revenue as well as by the assessee against the order 28/02/2018 passed by the Id. CIT(A) 12 Mumbai for the quantum of assessment u/s. 143(3) for the A.Y. 2012-13. The additions which have been made by AO have been primarily challenged in the appeal of the department wherein following grounds have been raised :

*“ 1. On the facts and circumstances of the case and in law, whether the Ld.CIT(A) was justified in deleting the addition of ₹ 357,89,12,600/- made u/s. 56(1) of the I.T. Act, being the market value of shares of Dish TV India Ltd., which was shown at Nil value by adopting a colourable device to evade taxes?.*

*1. On the facts and circumstances of the case and law, whether the Ld CIT(A) was justified in deleting the addition made u/s. 68 amounting to ₹ 254,4597,000/- without considering the fact that that intrinsic value of the shares is far less than the Discounted*

*Net Assets Value method adopted by the Assessee company to charge such high premium?.*

2. *On the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the CBDT Circular No 5/2014 dated 11/02/2014 that disallowance u/s. 14A has to be made irrespective of the fact whether any exempt income has been earned during the year by the Assessee Company or not?*

4. *On the facts and circumstances of the case and in law, whether the Ld CIT(A) was justified in allowing the Returned Loss of ₹ 1,94,994/- by stating that no discussion has been made by the AO in respect of the same, without considering the fact that the AO in his Assessment Order at Para 27 has stated that the Assessee Company has not carried out any business activity during the year under consideration?”*

2. Whereas in the assessee's appeal, the assessee has mainly challenged certain directions of the ld. CIT (A) given in the above order which are as under:

*“1. The Assessing Officer [hereinafter referred to as “the AO”] / Commissioner of Income –tax (Appeals) [hereinafter referred to as “the CIT(A)”] erred in holding that the shares of the listed company was received as 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 amount family 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 through 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”]*

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 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;”*

3. The brief background of the case is that, the assessee company was incorporated in 5<sup>th</sup> January, 2009 and is one of the promoter group entities of ZEE and ESSEL Group of companies. During the previous year relevant to the current assessment year, the entire shareholding of the assessee company was acquired by Veena Investments Private Ltd., Essel Group Company, from Essel Sports Private Ltd on 23.08.2011. Subsequently, the entire shareholding of the assessee company was acquired by Essel Corporate Resources Pvt. Ltd. (ECRPL) and Essel Group Company from Veena Investments Private Ltd. on 14.11.2011. This way the

assessee company became wholly owned subsidiary of ECRPL from 14.11.2021 onwards. On the same day, a letter of understanding was made between ECRPL and the appellant company wherein it was mutually agreed that as part of the internal restructuring of the group for consolidation of media assets, ECRPL will transfer 44,99,19,548 equity shares in Dish TV India Ltd (Dish TV) to the appellant as a gift without consideration. Further, on 14.11.2011 itself, a letter of understanding was made between Prajatma Trading Co. Pvt. Ltd. (an Essel Group Company) and the appellant company wherein it was mutually agreed that as part of the internal restructuring of the group for consolidation of media assets, ECRPL will transfer 14,64,95,662 equity shares in Dish TV India Ltd to the appellant as a gift without consideration. On the same day, the board of directors of ECRPL and Prajatma Trading Co. Pvt Ltd passed resolutions approving the proposed transfer of equity shares of Dish TV to the appellant company for the purpose of restricting and consolidation of media assets of the group as per the letters of understanding.

4. In accordance with the resolutions passed by the board of directors of the appellant company, ECRPL and Prajatma Trading Co. Pvt Ltd, the equity shares of Dish TV were transferred to the appellant company at 'nil' consideration by ECRPL and Prajatma Trading Co.Pvt. Ltd during the year as per the following details:

Name of the Transferor	Date of Transfer	No. of Shares transferred to the appellant
ECRPL	17.11.2011	38,21,54,548
ECRPL	28.12.2011	6,07,15,000
ECRPL	30.12.2011	70,50,000
Sub Total		<b>44,99,19,548</b>
Prajatma Trading Co.Pvt. Ltd	14.12.2011	9,29,65,050
Prajatma Trading Co. Pvt. Ltd	09.02.2012	5,35,30,612
Sub Total		<b>14,64,985,662</b>
<b>Total</b>		<b>59,64,15,210</b>

5. In addition to the shares of Dish TV received at NIL Consideration from the group companies as mentioned above, the appellant also purchased 4,07,97,050 share on Dish TV through

the stock market for a consideration of ₹ 255,43,22,838/- as per the following details:

<b>Date of purchase</b>	<b>No. of Shares purchased</b>	<b>Amount of consideration (₹)</b>
09.12.2011	2,35,00,000	147,33,41,722
12.12.2011	1,72,97,050	108,09,81,116
<b>Total</b>	<b>4,07,97,050</b>	<b>255,43,22,838</b>

6. As a result, the appellant company held 63,72,12,260 equity shares of Dish TV as on 31.03.2012 which represented 59.86% of the shareholding in Dish TV, out of which 56.03% was acquired at NIL consideration from the group companies and 43.83% was acquired for a consideration from the open market. The market value of 59,64,15,210 Dish TV shares received by the appellant at NIL consideration during the year from the group companies amounted to ₹ 3578,49,12,600/- at the average traded price of ₹ 60/- per share. Dish TV India Ltd is also a company forming part of Essel group of companies and it is engaged in the business of providing DTH services. Dish TV India Ltd is a company in which public are substantially interested and its shares are listed in the Bombay Stock Exchange and National Stock Exchange.

7. The ld. CIT(A) while noting down the facts, has discussed in detail as to how the group companies have been transferring the shareholding to other companies, at nil consideration and showing loss of transfer of this shares at Nil and resultantly, no income under the head capital gain arising from the transfer of the shares have been shown, because it was by way of gift which is exempted from capital gain as per Section 47(iii) of the Act. Further, transfer of a capital asset from the holding company to wholly own subsidiary company is exempt from capital gains as per Section 47(iv) of the Act. After considering the entire gamut of facts and material on record, he has formulated following issues after considering the findings given in the assessment order, remand reports and contentions raised by the assessee in the following manner.

- i. *“1. Whether the transfer of shares made at Nil consideration to the appellant and similar transfers that took place in the case of share of other listed companies of the group during the year were part of division of the business empire of the group among the members of the larger promoter family as held by the AO or whether they were part of the internal group restructuring for consolidation of media assets as contended by the appellant.*

- ii. *Whether transfer of shares made at Nil consideration to the appellant and similar transfers that took place in the case of shares of other listed companies of the group during the year are colorable transactions designed to evade taxes.*
- iii. *Whether transfer of shares made at NIL consideration to the appellant can be considered as a gift that has been validly made.*
- iv. *Whether the receipt of shares of a listed company at NIL consideration by the appellant is liable for the tax u/s. 56(1) of the Act.*
- v. *Whether the receipt of shares at NIL consideration by the appellant constituted Income liable for tax u/s. 28(iv) of the Act.”*

8. In so far as issue No. 1 and 2 are concerned, the learned CIT (A) has dealt in detail and has made various adverse observation as to how by this arrangement there was some kind of colourable device to evade taxes in the hands of transferor company at the time of acquisition of the shares from a holding company to subsidiary company. He has also noted the sequence of transfer of share of Dish TV India Pvt. Ltd from group company which held the shares at the beginning of the year to ECRPL prior to the transfer of the same by ECRPL to the assessee company and then transfer of shares to the ECRPL from various transferor companies were made at ‘nil’ consideration; or the transfer have been made below the

market value of the shares which was approximately Rs. 60 per share at the relevant point of time. Thus, he held that effecting the transfer of shares of Dish TV India Ltd. during the year at nil consideration between ECRPL and the assessee company at the nil/inadequate consideration between the transferor companies of the group and ECRPL have been made, was for sole purpose of evading payment of capital gains tax in respect of such transfer, is clearly a colorable device. After discussing the issue in detail he directed AO to take necessary steps regarding the tax liability of the transferor companies as per the provision of law, whenever the capital gains arising from the relevant transaction of transfer of shares has not suffered tax.

9. With regard to whether transfer of shares, whether at nil consideration to the assessee can be considered as a gift that has been directly made, he held that said transfer of shares cannot be recorded as voluntary transfer and it cannot be considered transfer were made without consideration. Thus, he held that transfer of shares of Dish TV India Ltd made at nil consideration by ECRPL and Prajatma Trading Company Private Limited to the assessee

company cannot be regarded as a gift. As a consequence, the benefit of capital gains u/s 47(3) will not be applicable in respect of these transfers in the hands of transferor companies.

10. Having given adverse findings with regard to the first three issues formulated by him, he proceeded to decide, whether the receipts of shares of a listed companies at a nil consideration by the assessee is liable for tax under Section 56(1) which is the first issue raised by the department, i.e., taxing of amount of Rs. 3578,49,12,600/-.

11. The ld. CIT (A) held that there is no question of taxability in the hands of the assessee company being recipient of shares u/s. 56. The AO's case is that the market values of the shares of Dish TV India Ltd received by the assessee at 'nil' consideration during the year from its group companies would be chargeable to the tax as 'income from other sources' u/s 56(1) of the Act. Accordingly, AO held that transfer of 59,64,15,210 shares of Dish TV India Ltd to assessee at the nil consideration by ECRPL and Prajatma Trading Company Pvt Ltd has resulted in taxable income in the hands of the assessee and accordingly, he treated the market value of the shares

as income of the assessee u/s. 56(1). The ld. CIT(A) has rejected the AO's contention, despite holding that there was a coverable device adopted for evading the payment of tax on the capital gains arising from the transfer of shares in the hands of transferor companies by taking advantage of exemption under Section 47(iii). However, it is not relevant in so far as for the purpose of determining the tax liability in the hands of the assessee company being Transferee Company arising from the transfer of shares for nil consideration. He also held that the share of Dish TV India Ltd received by assessee represented capital receipt in the hands of the assessee as the same was held as investment and therefore constituted capital assets in the hands of the assessee. Thus, capital receipt is not liable for tax otherwise then provided in section 45 and section 56(2).

12. Ld. CIT(A) further observed that section 56(2)(viiia) seeks to bring to tax the receipts of shares of unlisted companies that is company in which publicly are not substantially interested and the same are received without consideration or for inadequate consideration with reference to the fair market value of the shares.

Here in this case the assessee has received shares of Dish TV India Ltd which is listed company in stock exchange, therefore, the said provision are not applicable at all. He further held that the statute had come up with the specific provision by inserting *clause (x)* of Section 56(2) w.e.f 01.04.2018, which is not applicable for the assessment order 2012-13 and he also quoted CBDT Circular No dated 15.12.2018. He thus held that, under the existing provision of under 56(2)(viia) the gift of listed shares was not chargeable to tax under the head 'income from other sources' which has been made specifically brought to tax u/s. 56(2)(x) from A.Y. 2018-19. Accordingly, he held that the receipt of shares of Dish TV India Ltd by the assessee at 'nil' consideration cannot be brought to tax under the head income from other sources.

13. In so far as the issue, whether the receipt of shares at nil consideration construed income liable for tax u/s. 28(iv) of the Act, Ld. CIT(A) after discussing the issue in detail and referring the various judgments observed and held has under :

- i. 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 fulfillment of this condition requires that benefit 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 Dish TV India Ltd. by the appellant at NIL consideration is therefore required to be examined from this perspective.*

- ii. On perusal of the financial statements of the appellant for the FYs 2011-12 & 2010-11 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 and there is no other credit to the P & L Account. 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 asset as on 31.03.2011 and the only item reflected on the assets side of balance sheet is cash & bank balance. As on 31.03.2012 also, appellant company did not own any asset except the shares of receipt of the shares at NIL consideration from the group companies and the only other item reflected on the assets side of balance sheet is cash & bank balance. 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.*

iii. *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 arising from the business u/s. 28(iv) of the Act by relying on the decisions of CIT Vs Allana Sons Pvt Ltd 216 ITR 690 (Bom) and CIT Vs Aluminum Cables Ltd 183 ITR 611 (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 Rule 6B. 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 not 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 companies have not claimed deduction for the value of the shares transferred by them at NIL consideration to the appellant while computing their total income under the Act. Hence, it is considered that these decisions cited by the AO have no relevance to the issue on hand.*

- iv. Having regard to the above discussion, the benefit received by the appellant in the form of receipt of shares of Dish TV India Ltd. at Nil consideration from the group companies cannot be considered to have arisen from the business of the appellant and consequently, **it is held that 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.***

Accordingly, the addition of Rs.3578,49,12,600 made by the AO by treating the market value of share of Dish TV India Ltd recipient apply by nil consideration has been deleted by the Ld. CIT(A).

14. On the issue of addition u/s Section 68 of Rs. 254,45,97,000/- in respect of receipt of share premium, the AO has noted that the assessee company issued 9,90,000 equity shares having a face value of ₹ 10/- per share to its holding company, M/s Essel Corporate Resources Pvt. Ltd. (ECRPL) at a premium of ₹ 2570.30

per share during the year on 31.03.2012. The AO observed that the assessee received an amount of ₹ 255,44,97,00/- on the said issue of the shares which comprised of share capital of ₹ 99,00,000/- and share premium of ₹ 254,45,97,000/-. In this connection, the AO observed that the assessee company was incorporated only on 05.01.2009 and it has not carried out any business activities during the year consideration and the subsequent years. He further observed that the assessee has shown loss as per P & L Account during the assessment year 2011-12 to 2014-15 and therefore, it had negative Earnings Per Share (EPS) during these years. The AO further observed that the appellant allotted 10,000 equity shares at the face value of ₹ 10/- per share to the same investor company on 14.11.2011, which was just four and half months before the issue of shares at a premium. The AO held that it is highly unlikely that any genuine investor who wants to reap the benefits of investment would be inclined to invest in a company which is not doing any business activity and hence not earning any income. The AO therefore stated that the intrinsic value of the shares of the appellant company does not justify charging of a premium.

15. The AO has also made a reference to the valuation report furnished by the assessee during the assessment proceedings wherein the valuation of the shares of the assessee company was made on the basis of adjusted Net Asset Value (NAV) method and observed that the valuation report is factually incorrect in as much as the value of the shares of Dish TV India Ltd held by the appellant company was taken at ₹ 260 Crores in the report though the same is shown at ₹ 255 Crores in the balance sheet for A.Y. 2012-13. The AO further observed that the investment of the assessee in the shares of Dish TV India Ltd of ₹ 255 Crores should not have been taken into consideration for determining the value the shares in the valuation report since the said investment was made out of the share application money received from the investor company itself.

16. The AO therefore came to the conclusion that the assessee has failed to establish the genuineness of the transaction and its true nature and held that it has been established beyond doubt that the assessee could not substantiate its claim of having received the said sum of money in the form of purported premium on shares from the holding company ECRPL, though the primary onus is on

the assessee to prove that the sums found credited in its books of account are truly in the nature of share capital and share premium and it was indeed received from the stated person. Accordingly, AO held that same at Rs.254,45,97,000/- in the form of share premium is unexplained cash credit u/s. 68.

17. The ld. CIT (A) after considering the submissions made by assessee as well as the remand report, his observation and finding are as under:

- i. *“I have carefully considered the facts of the case, the assessment order and the written submissions of the appellant. The appellant company issued 9,90,000 equity shares having a face value of ₹ 10/- per share to its holding company Essel Corporate Resources Pvt. Ltd (ECRPL) at a premium of ₹ 2570.30 per share during the year on 31.03.2012. The appellant received an amount of ₹ 255,44,97,000/- on the said issue of the shares which comprised of share capital of ₹ 99,00,000/- and share premium of ₹ 254,45,97,000/-. In the assessment order, the AO treated the said share premium of ₹ 254,45,97,000/- as unexplained cash credit u/s. 68 of the Act.*
- ii. *Addition u/s. 68 of the Act is required to be made in a case where the assessee fails to explain the nature and source of the amount credited in the books of account or the explanation offered by him is not satisfactory in the opinion of the AO. In the present case, the*

*three ingredients for satisfactorily explaining the nature and source of the share premium amount credited in the books of account are the identity of the investor i.e. ECRPL, the genuineness of the transaction of receipt of the share premium and the creditworthiness of the investor. However, it is noticed that the AO has not made any discussion in the assessment order regarding satisfaction or otherwise of these three essential ingredients in respect of share premium of ₹ 254,45,97,000/- with reference to the facts of the appellant's case though the addition was made u/s. 68 of the Act. The AO has primarily relied on lack of justification for the substantial amount of share premium paid by the investor for making this addition. The issue for examination therefore is whether the identity of the investor, the genuineness of the transaction and the creditworthiness of the investor have been established by the appellant with regard to the receipt of the share premium from ECRPL during the year so as not to warrant addition of the share premium u/s.68 of the Act and whether the lack of justification for the share premium can be a ground for addition of the share premium u/s. 68 of the Act even where the identity of the investor, the genuineness of the transaction and the creditworthiness of the investor have been established by the appellant.*

- iii. As regards the identity of the investor, the appellant has furnished its PAN, address and copy of the ITR acknowledgment for A.Y. 2012-13 to the AO during the assessment proceedings. The investor (ECRPL) is the holding company of the appellant and it is a*

*part of the Essel Group of companies. ECRPL is an existing company which is filling its returns of income as evidenced by the PAN and the copies of the ITR acknowledgment. Further, the appellant furnished a copy of the assessment order passed u/s. 143(3) of the Act in the case of ECRPL for the assessment year under consideration i.e. A.Y. 2012-13 on 30.03.2016 by the DCIT-6(3)(2), Mumbai. Hence, it is considered that the identity of the investor has been established by the appellant.*

- iv. As regards the genuineness of the transaction of the receipt of the share premium from the investor, the appellant furnished a copy of the bank account statement of the appellant reflecting the said receipt from ECRPL to the AO during the assessment proceedings. On perusal of the bank account statement of the statement, it is seen that the entire share premium of ₹ 254,45,97,000/- and share capital of ₹ 99,00,000/- received during the year from ECRPL has been received through the banking channel and the narration given by the bank for the said entries shows that the amounts were received from the said investor only. Further, the appellant furnished a copy of the bank account statement of ECRPL also during the appellate proceedings and it is noticed on perusal of the same that funds were transferred from the bank account of ECRPL to the bank account of the appellant towards the share capital and share premium. The receipt of the share application money through the banking channel from the account of the said investor satisfactorily proves the genuineness of the transaction. Further, on perusal of the balance sheet of ECRPL as on 31.03.2012, it is seen*

that the investment made in the shares of the appellant company inclusive of share premium is duly shown under “Non Current Investment”. Hence, having regard to the above, it is considered that the genuineness of the transaction has been established by the appellant.

- v. As regards the creditworthiness of the investor to pay the share premium to the appellant, the appellant has furnished the financial statements of ECRPL for the assessment year under consideration and stated that it has adequate funds by way of borrowed funds in order to pay the share premium to the appellant. On perusal of the balance sheet of ECRPL, it is seen that the said company raised fresh Long Term Borrowings during the year and as a result, the Long and Short Term borrowings increased from ₹ 1.04 Crores and ₹ 0.14 Crores as on 31.03.2011 to ₹ 797.68 Crores and ₹ 601.89 Crores as on 31.03.2012 respectively :

<b>Particulars</b>	<b>Amount as on 31.03.2012 (₹ )</b>	<b>Amount as on 31.03.2011 (₹)</b>
<b>Borrowings</b>		
-Long Term	797,68,01,206	1,04,57,825
-Short Term	601,89,01,917	14,92,771
<b>Total</b>	<b>1399,57,03,123</b>	<b>1,19,50,596</b>

- vi. On the further perusal of the notes on accounts forming part of the financial statements of ECRPL, it is seen that the increase in Long Term borrowings from ₹ 1.04 Crores as on 31.03.2011 to ₹ 797.68

*Crores as on 31.03.2012 is mainly due to receipt of Inter-Corporate Deposits (ICDs) of ₹ 792.21 Crores by ECRPL from Prime Publishing Pvt. Ltd., the holding company of ECRPL. Further, on perusal of the copy of the bank account statement of ECRPL, it is seen from the narration for the entries contained therein that ECRPL paid the share capital and the share premium to the appellant out of the funds received in the bank account from Prime Publishing Pvt. Ltd, its holding company. It is therefore noticed that the amount of share premium given to the appellant was paid out of the funds available with ECRPL by way of borrowed funds. Further, on perusal of the copy of the balance sheet of Prime Publishing Pvt. Ltd as on 31.03.2012 furnished by the appellant during the appellate proceedings, it is seen that the funds of ₹ 792.21 Crores lent to ECRPL are duly shown therein under 'Short-term Loans and Advances'. Thus, it is seen that the creditworthiness of the investor has been properly established by the appellant.*

*Vii. Having heard to the discussion above, it is seen that the appellant has discharged the primary onus cast upon it for proving the identity of the investor, creditworthiness of the investor and the genuineness of the transaction in respect of the share premium received from ECRPL during the year. As pointed out by the appellant, the onus of the appellant does not extend to proving the source of the source of the sums credited in the books of the account of the appellant. This legal proposition has been laid down by the **Hon'ble Delhi High Court** in the case of **CIT Vs. Diamond Products Ltd.** 177 Taxman 331.”*

18. Ld CIT (A) also referred to decisions of the Rajasthan High Court in the case of Aravi trading company vs. ITO, reported in 187 taxmann 88 and also referred to the *proviso* brought in Section 68 w.e.f. 01.04.2013 and held that same is not retrospective in view of the judgment of Jurisdictional High Court in the case of CIT Vs. Gagandeep Infrastruture Pvt Ltd. reported in 80 taxmann.com 272 (Bom). Thus, he held that assessee has satisfactorily met the requirement of Section 68 in respect of share premium receipt from its holding company.

19. Thereafter, Ld. CIT(A) further went to analyse and held that, in so far as fair value of the shares are concerned, there was no provision in the Act prior to insertion of Section 56(2)(viib) which was brought with effect from 01.04.2013, i.e., A.Y. 2013-14 to treat excess share premium over and above the fair market value of the share as income chargeable to tax. Accordingly, he deleted the addition of Rs.254,45,97,000.

20. Lastly, with regard to disallowance u/s. 14A or Rs.1,28,30,957, the AO note that assessee has held investment in equity shares of Dish TV India Ltd to the tune of Rs. 254,53,22,838/- as at

31.03.2012 and nil as on 31.03.2011. The AO held that assessee has not computed any disallowance of expense in relation to the said investment u/s. 14A read with Rule 8D and accordingly, worked out disallowance of Rs.1,28,30,957/- was consist of direct expenses of Rs.59,343/- on Demat Charges and indirect expenses of Rs. 1,27,71,614 under Rule 8D(2)(iii).

21. The Id.CIT(A) noted that, there is neither any revenue from operations nor any income and only expenses debited to P&L account is Rs.1,91,994/- and most importantly there was no tax exempt dividend income from the investments during the year. Thus, he deleted the addition after observing as under.

*“Further, it is seen that the total expenses debited by the appellant in the P & L Account amounted to ₹ 1,91,994/-. As against the said claim of expenses of ₹ 1,91,994/-, the AO has made disallowance of expenses of ₹ 1,28,30,957/-. The disallowance made by the AO is far higher the total claim of deduction for expenses made by the appellant. The AO has therefore disallowed expenses to the tune of ₹ 1,26,38,963/- which were never incurred nor claimed as deduction by the appellant. In the absence of claim for deduction of any expenses, no disallowance of expenses under the provisions of section 14A can be made. The question of disallowance of expenses does not arise when no deduction has been claimed for*

*the expenses in the first place. Hence, on account of this reason also, the disallowance made by the AO u/s. 14A to the extent of ₹ 1,26,38,963/- cannot be sustained.*

- i. Further, it noticed that the AO has adopted the average value of investment, the income from which does not or shall not form part of the total income, for the purpose of working out the disallowance as per Rule 8D(iii) erroneously at ₹ 255,43,22,838/-. The AO has considered the investment made by the appellant in the shares of Dish TV India Ltd as the investment that is capable of yielding tax exempt income. It is seen that there was no investment in the shares of the said company as on 31.03.2011. The investment in the said shares stood at ₹ 255,43,22,838/- as on 31.03.2012. Hence, the average value of investment works out of ₹ 127,71,61,419/- as against ₹ 255,43,22,838/- adopted by the AO. Due to this mistake, the amount of disallowance as per Rule 8D(2)(iii) has been wrongly computed at ₹ 1,27,71,614/- as against the correct amount of ₹ 63,85,807/-. Thus, it is seen that the disallowance u/s. 14A computed by the AO is excessive by a sum of ₹ 63,85,807/-.*
- ii. However, as already held earlier, disallowance u/s. 14A is not warranted in the case of the assessee for the present assessment year in the absence of receipt of any tax exempt dividend income from the investments made by it. Hence, the A.O. is directed to delete the disallowance of ₹ 1,28,30,957/- made u/s 14A of the Act. This ground of appeal is accordingly allowed.*

22. Lastly, with regard to disallowance of loss claimed in the return of Rs.1,91,994/-, Ld. CIT(A) he has allowed the claim in the following manner :

- i) *In the ground of appeal, the appellant disputed the action of the AO in not considering the returned loss of ₹ 1,91,994/- for computing the total income of the appellant in the assessment order. The appellant stated that though the returned of income was filed declaring a loss of Rs. 1,91,994/- under the head business, the AO has wrongly adopted the business income as per the return of income at ₹ NIL while computing the total income in the assessment order.*
  
- ii) *On examining the issue raised by the appellant, it is seen that AO has not specified any reasons in the assessment order for disregarding the returned business loss of ₹ 1,91,994/-. The adoption of returned business income as ₹ NIL by the AO in the computation of the total income made at page 27 of the order appears to be a clerical mistake since no discussion has been made by the AO in respect of the same in the assessment order. The AO is therefore directed to take into consideration the returned loss of ₹ 1,91,994/- for the computation of total income of the appellant. This ground of appeal is therefore allowed.”*

22. We have heard both the parties, perused the relevant finding given in the impugned orders as well as material referred to before us. The merits of additions have been challenged by the revenue on all the addition made by the AO are as under:

- a. Receipt of share of Dish TV Limited as gift, taxed under section 56 of the Act – ₹ 3578,49,12,600/-**
- b. Share premium received from Essel Corporate Resources Pvt. Ltd., under section 68 of the Act – ₹ 254,45,97,000/-**
- c. Disallowance under section 14A r.w.r 8D of the Act of ₹1,28,30,957/-**
- d. Non-consideration of loss claimed in Return of Income of ₹ 1,91,994/-.”**

23. In so far as, the first issue raised in Ground No. 1 pertaining to addition of Rs. 3578,49,12,600/-, we have already discussed the brief facts and background of the matter and the manner in which additions made by the AO and the finding of the ld.CIT(A). To put it succinctly, assessee company has received 44,99,19,548 shares of Dish TV Ltd from ECRPL and 14,64,95,662 shares of same company (i.e. Dish TV) from Prajatma Trading Company Pvt. Ltd aggregating to 59,64,15,210 shares as a gift at ‘nil’ consideration. Undisputedly, Dish TV Ltd is a public limited company and its

shares are listed on BSE & NSE. The AO held that receipt of shares of Dish TV Ltd. from ECRPL and Prajatma is some kind of colorable device and therefore, he has taxed the market value of said shares being at Rs. 3578,49,12,600 as 'income from other sources' u/s. 56(1) of the Act. Before us, in sum and substance the contention of the assessee had been that:

- a. the receipt of shares from ECRPL and Prajatma as gift was under an internal scheme of consolidation of media assets without violating any provisions of any law.
- b. The aforesaid gift cannot be said to be a colorable device, especially since no provision of any law have been violated and that the receipt of such gift is in accordance with the Memorandum of Association of the assessee and the transferor company ECRPL and Prajatma and approved by the Board of Directors of both the companies. The transaction has been duly disclosed before SEBI in terms of 'SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011'.
- c. There is no bar on corporate from giving and receiving gifts.
- d. The receipt of shares as gift is capital receipt and not taxable under section 56(1) of the Act.

e. Further, considering the receipt of shares of listed company, the provisions of section 56(2)(viiia) cannot be applied.

f. The receipt is not taxable under section 28(iv) since the said receipt is not in ordinary course of business of the assessee.”

24. Before us the learned Counsel for the assessee, Mr. Madhur Agarwal explaining the background of the case submitted that, Essel Group had interests in multiple media business such as broadcastings, news, cable, DTH, Print Media, etc. through various listed and unlisted companies in India. Dish TV India Limited (‘Dish TV’), Zee Media Corporation Limited (formerly known as Zee News Limited) (‘ZMCL’ or ‘Zee News’), Siti Network Limited (formerly known as Wire and Wireless India Ltd, Direct Media Distribution Ventures Pvt. Ltd (formerly known as Dhaka Warriors Sports Pvt. Ltd)(‘Direct Media’ or ‘Dhaka’), 25 FPS Media Private Limited (‘25FPS’) and Bioscope Cinemas Private Limited (“Bioscop”) are all part of the Group. The internal restructuring was carried out with a view to consolidate/rationalize the holding of various Media Assets namely Business operated by Siti Networks Ltd into a single Holding Company, i.e., ECRPL, in accordance with the extant

regulations. As a part of the above restructuring, it was intended that ECRPL, will have 100% subsidiaries to hold each distinct media business vertical, namely, DTH Business operated by Dish TV India Ltd, TV news operated by Zee Media Corporation Ltd and Cable operated by Siti Networks Ltd from the perspective of future raising. In the present case, pursuant to the internal restructuring an interested investor can either invest in all 3 media verticals by investing in ECRPL or in other words, there was a flexibility offered to the potential investors, whereby investments could be made for each vertical of business at holding company level (“assessee”), or at consolidated holding level (“ECRPL”). This type of flexibility would help in fund raising. To achieve the said purpose, during the year, the assessee company, a 100% subsidiary of part of the internal restructuring, it received 59,64,15,210 equity shares of Dish TV from its holding company ECRPL and Prajatma. The internal restructuring was carried out in compliances with the relevant corporate law and other requirements evidenced as under:

- i. The board approval of the concerned companies for the internal restructuring. Authorization by constitution documents of

respective companies enabling transfer and receipt of shares as a gift.

- ii. Relevant disclosures filed to SEBI under regulation of SEBI Regulation, 2011 by the appellant for disclosing inter-se transfer of shares from ECRPL and Prajatma without any consideration. He submitted that a corporate like ECRPL/Prajatma/assessee can give or receive gifts and such receipt is neither taxable under section 56 nor 28(iv) of the Act. At the outset, it was submitted that the issue stands covered by the decision of the **Hon'ble Tribunal in the case of ITO Vs. 25FPS Media Pvt. Ltd, [ITA 2798/MUM/2018]** a group company of the assessee and a part of the same internal restructuring undertaken by the case. In the said case, the assessee, as part of the same internal restructuring, had received shares of Zee News from ECRPL as gift without consideration and similar questions arose as to whether such gift was valid and whether the receipt is taxable under section 56 or 28(iv) of the Act.
- iii. The Hon'ble Tribunal upheld the order of the CIT (A) deleting the addition. The findings of the said judgment would be applicable to the facts of the present case. The Tribunal in the case of 25 FPS

(supra) held that receipt of shares as gift cannot be construed as a sham transaction and observed held as under :

*“ 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 restructuring ho 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 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 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 the 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 to 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*

*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 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 Enterprise (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 subjected to tax. Any other receipts which are not in the nature of 'income' are not liable to tax under the provision 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 the 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 gifts and natural love and affection are no necessary requirement. It was held that the only requirement for company is to make gifts as per receptive 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 [or receiving and making gifts respectively by their Memorandum and Articles of association.*

*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...*

*27. In light a/the above discussion, the transactions cannot be said to be colorable device and, therefore, the decisions relied upon by the AO has no relevance.”*

Thus, gift of shares cannot be held to be sham transaction and the whole purpose of was correct legal rights and obligations and in accordance with the law. The receipt of gift by the assessee is neither chargeable to tax u/s. 56(1) or u/s. 28(iv) of the Act.

25. Referring to the provision of Section 56(1), he further submitted 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 of 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 restored 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 gift received by the assessee in present case is in the **capital field** and can be brought to tax under the head **capital gain**. Accordingly, the provision of section 56(1) cannot be resorted to.

26. After Referring to Section 56(2)(viiia) of the Act, Ld. Counsel submitted that the said provision applies in the case where company received shares of private limited company without or inadequate consideration and in the present case the assessee is recipient of shares of listed company therefore provision of section 56(2)(viiia) cannot apply. Further, referred to the following passage in the case of 25FBA Supra which is at under :

*“9. In view of the said discussion and law relied by the assessee, we are of the view that the gift is not a colorable 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 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 received in any previous year from any person or persons. On or after the 1<sup>st</sup> day of June, 2010 [but before the 1<sup>st</sup> day of April, 2017] any property, being shares of 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 aggregating 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 (vib) or clause (vic) 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);*

*From the above, we 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)(viiia) cannot apply.*

*In view of 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 receipt of shares of a listed company so the provision u/s. 56(2) (viiia) of the Act is not liable to be applicable.”*

27. As regard to the applicability of Section 28(iv), Ld. Counsel submitted that during the course of the appellate proceedings, the AO vide remand report contended that the receipt of shares of Dish TV as gift 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. The provisions of section 28(iv) read as under:

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

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 Dish TV as gift does not arise out of any business dealing and, accordingly, is not 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. The Hon'ble Tribunal in the case of 25FPS (supra) held that receipt of shares of a listed entity is not taxable under the provisions of section 28(iv) of the Act. It observed as under

*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 a/ shares of Zee*

*News Ltd. as gift does not arise out of any business dealing and accordingly is not taxable under section. In any case, the receipt of gift is a capital receipt and on this count too, the provisions of section 28(iv) of the Act cannot be applied.*

*14. In the case of DP World Pvt. Ltd Vs. CIT (26 taxmann.com 163), 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 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.*

Accordingly, the provisions of section 56 and 28(iv) cannot be applied in the present case, where the assessee is recipient of

shares as gift. This view is further fortified by the decision of coordinate benches in the case of DCIT Vs. KDA Enterprises (P) Ltd (57 taxmann.com 284) Nerka Chemical Pvt. Ltd Vs. DCIT (ITA No. 4423/MUM/2014 (supra) and DP World Pvt. Ltd. Vs. CIT (26 taxmann.com 163).

28. The Ld. DR on the other hand after referring to various observation of the AO submitted that, one has to see the fact and background of the case and how the group entities have devised a colorable arrangement wherein the shares have been acquired and gifted without getting into the clutches of taxing provision. He also referred to various observations of the ld. CIT (A) stating that how entire restructuring and transaction of acquiring and gifting of shares was colorable device. Once these transactions are sham and colorable, the AO has rightly taxed the receipt of shares based on the market value.

29. The assessee in its appeal specifically from Ground No. 1 to 6 has objected to the various observations of the ld.CIT(A) on the receipt of shares of Dish TV as a colorable device and hence it has been contended that he has extended his jurisdiction in directing

the AO to the tax of transaction in the hands of transferor companies by taking necessary steps. Learned Counsel before us has submitted that provision of Section 251 cannot allow to travel outside the scope of appeal or travel outside assessment year nor can travel to affect third party as his observations may have any incriminating affect on the third party without even hearing of the issue. He also referred to the decision of the Tribunal in the case of 25 FPS where the Tribunal has observed has under:

*“19. Under these issue 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 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.....*

*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 Sarada Vs. DCIT (40 taxmann.com 113) (T. Mum.) and the relevant finding is hereby reproduced as under.....*

*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.”*

30. As stated above, the only controversy is whether the receipt of shares aggregating 259,64,15,210 of Dish TV Ltd as a gift without consideration can be subjected to tax at the u/s. 56(1) or 56(2)(viiia). A receipt can only be brought to tax under the express provisions of the law and not every receipt can be subject to tax. It cannot be disputed and the shares of Dish TV received by the assessee as gift represented the capital receipt in the hands of the assessee company and the same was held as an investment classified as capital assets in the books of account. The nature of the said receipt of shares remains the same irrespective of whether the shares were transferred at nil consideration. A capital receipt cannot be liable for tax unless there are specific provisions to tax

the same. Certain deeming provision have been brought in the statute u/s. 56(2) (viia),(viib),(vii),(x). Some of these deeming provisions have been brought in the statute with effect from particular years. Admittedly, these deeming provisions u/s. 56 were not applicable in the present assessment year, i.e., A.Y. 2012-13. The deeming provision of Section 56(2)(viia) which was though applicable in the present assessment year, however the same is applicable where a company receives shares of private limited companies without or for inadequate consideration. Thus, this deeming provision is not applicable in the case of the assessee. If at all under this circumstances the receipt of shares is treated as receipt of sum of money or any moveable property by any person as brought in the statue by inserting clause (x) Section 56(2) w.e.f. 01.04.2018, then same too is not applicable in present assessment year as observed and held by the Id.CIT(A) noted supra. The receipt of sum of money or property without consideration brought u/s. 56(2)(x) clearly shows that this were not covered under the existing provision 56(2)(vii) or (viia) so as to be held taxable under the head income of other source. This has been explained in the explanatory note at the time of insertion of clause (x) of the Section 56(2) by the

Finance Act, 2017, w.e.f. 01.4.2018. Thus, it is neither taxable u/s. 56(1) nor 56(2)(viib).

31. In so far as, whether the receipt of shares at nil consideration can construed as business income liable for tax u/s 28(iv), we agree with the findings and the observations of the Id.CIT(A) that the benefit of perquisite as stipulated under clause (iv) of Section 28 that it should arise from business or profession, i.e., assessee must have performed some business activities or carried out business and he must have received any benefit or perquisite in the course of business or profession. The share of Dish TV as a gift does not arise out of business dealing and accordingly, rightly being held by the Id. CIT (A) that is not taxable under the said provision. The AO's finding and reliance placed on certain decision have been dealt by the Id. CIT (A) in Para 192-195 as incorporated above which we are in tandem with the finding and the reasoning of the Id. CIT(A) and same is confirmed. Therefore, the said receipt is not taxable u/s. 28(4). Accordingly, the deletion of the addition made by the Id. CIT (A) is upheld and Ground No. 1 of the revenue's appeal is dismissed.

32. Now coming to ground 1 to 6 raised by the assessee, first of all the ld. CIT(A) has explained the entire background, the manner in which the restructuring of various group companies have been done, the shares have been acquired and given as a gift on a 'nil' consideration does not impact in so far as the receipt of shares in the hands of the company as a gift. Whether the donor company which has even the gift of shares has devised any colorable mechanism in order to escape the capital gains would be a subject matter of scrutiny of examination in those cases. The ld.CIT(A) has given his observation and has directed the AO to take necessary steps under the provisions of the law regarding the tax liability of the transferor company and whether the capital gains rising from relevant transaction transfer of shares can subjected to tax or not. These are merely an observation and direction to AO to examine the issue of chargeability of capital gains in the hands of transferor companies and not that he has directed the same should be taxed. Accordingly, we do not find any reason to interfere in such a direction and observation of ld. CIT(A); and he was well within the scope of section. 251 to make such observations while giving finding of fact placed on record. Whether in the hands of the

transferor company, it would be subject to capital gains tax or not will only be decided on the facts and merits of the issue involved therein. Nowhere the Ld. CIT (A) has said that same should be tax there as he has merely said the AO should consider the tax liability in accordance with the provision of the law. Accordingly, grounds taken by the assessee are dismissed.

33. Coming to the second issue, regarding the addition u/s. 68 of the Act of Rs. 2,54,45,97,000/-. As noted above during the financial year ending 31<sup>st</sup> March, 2012 assessee has issued 9,90,000 equity shares to its holding company at a face value of Rs. 10, i.e., to ECRPL at a premium. The total share premium of Rs. 254,45,97,000/- has been treated unexplained cash credit u/s. 68. It is not in dispute either by the AO or by the CIT(A) that assessee has duly explained the nature and source of the receipt of money of Rs. 99,00,000/- towards share capital and balance Rs. 254,45,97,000/- towards share premium. The addition is only with respect of the premium and not the receipt of share at face value. From the records and the finding of the CIT (A) it is seen that the

identity, creditworthiness of the share subscribers and genuineness of the transaction have been explained in the following manner :

**i. Identity of the Share Subscriber:**

*The share subscriber ECRPL was a regular assessee and, regularly filling return of income. The return of income along with audited balance sheet of the share subscriber was filed before the lower authorities and AO has not doubted the identity.*

**ii. Creditworthiness of the Share Subscriber:**

*ECRPL has subscribed to the shares of the assessee out of its borrowings. The summary of the credit worthiness of the ECRPL are as under:*

<i>Particulars</i>	<i>Amt in Rs</i>
<i>Borrowings</i>	
<i>Short Term</i>	<i>797,68,01,206</i>
<i>Long Term</i>	<i>601,89,01,917</i>
<i>TOTAL AVAILABLE FUNDS</i>	<i>1399,57,03,123</i>
<i>Money received towards share subscription</i>	<i>255,45,00,000</i>

*ECRPL has borrowed funds from its holding company, Prime Publishing Pvt. Ltd. (hereinafter referred to as “Prime Publishing”) and invested the funds into the assessee. The assessee has submitted acknowledgment copy of them of income filed by Prime*

*Publishing, its financials and relevant bank statements in order to prove source of source.*

*In fact, the genuineness of the funds received by ECRPL from Prime Publishing was questioned by the Department in A.Y. 2013-14 and addition under section 68 of the Act was made in the hands of ECRPL for receipt of funds from Prime Publishing. The matter went up to the Tribunal (ITA 1835/MUM/2017). The Tribunal has deleted the addition under section 68 of the Act as the nature and source of such borrowing from Prime Publishing stood proved.*

*Thus, not only is the source of money from ECRPL stands proved but also the source of source i.e. from Prime Publishing stood established.*

**iii. Genuineness of the transaction**

*Since all the funds have been through a proper banking channel duly recorded in the books of account and financials of the Company, there cannot be any doubt on the genuineness of the transaction. A copy of the bank statement of the assessee bank statement of ECRPL Prime Publishing were submitted to establish the same. The assessee even submitted the relevant board resolution and Form 2 filed with the ROC intimating allotment of equity shares in fact, the monies received towards share capital has been accepted by the AO and it is only the money received toward share premium which is in dispute.”*

34. Thus, from the aforesaid explanation and material, nature and source of credit cannot be doubted. In so far as receipt of share premium is concerned, the same is not chargeable to tax unless the provisions of Sections 56(2)(viiia) or (viiib) are invoked that it is in excess of fair market value of shares which provision will apply from A.Y. 2013-14 and not in A.Y. 2012-13. Thus, the finding of the Id. CIT (A) in deleting the said premium is confirmed. The Id.CIT(A) has already dealt with the valuation of the shares which was done on Net Asset Value method based on the report of independent Chartered Accountant and assessee has considered the market value of asset being share of the listed company. There is categorical finding of the fact that the share of the Dish TV were purchase from the open market at Rs. 255 Crores and the fair value of the shares was taken at 260 Crores in the valuation report for the purpose of arriving of the fair value of the shares and therefore, the AO's observation in this regard has been found to be incorrect. In any case, the finding and observation of the Id. CIT (A) as incorporated in forging paragraphs are in consonance with fact and material on record as well as the provisions of law and accordingly, same is confirmed and consequently, the revenue ground is dismissed.

35. Lastly, with regard to disallowance u/s. 14A read with Rule 8D, admittedly there is no exempt income during the year and therefore ld. CIT(A) rightly held that no disallowance can be made under this Section. Apart from that the reasoning given by the ld. CIT(A) has incorporated above is based on correct appreciation of facts and law and therefore the same is confirmed.

36. In so far as, allowance of loss claim in return of income ld. CIT(A) has merely directed to verify the records and allow the loss and we do not find any infirmity in such direction. Accordingly, Ground No. 4 is also dismissed.

37. In the result, appeal of the revenue dismissed and appeal of the assessee is also dismissed.

Orders pronounced in the open court on 31<sup>st</sup> Jan, 2023.

Sd/-

**(S Rifaur Rahman)**

**Accountant Member**

Sd/-

**(Amit Shukla)**

**Judicial Member**

मुंबई Mumbai: दिनांक Dated 31.01.2023

आदेशकी 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- concerned
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR. ITAT, Mumbai
6. गार्ड फाईल Guard File

**आदेशानुसार / BY ORDER.**

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

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**