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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'D' MUMBAI

BEFORE SHRI D.MANMOHAN,VICE PRESIDENT AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No.3627/Mum/2012
Assessment Year-2008-09

M/s. DP World Pvt. Ltd., Darabshaw House, Level 1, N.M. Marg, Ballard Estate, Mumbai-400 038 PAN-AAACP 6133A	Vs.	The DCIT-2(1), Aayakar Bhavan, Mumbai-400 020
(Appellant)		(Respondent)

ITA No.3841/Mum/2012
Assessment Year-2008-09

The DCIT-2(1), Aayakar Bhavan, Mumbai-400 020	Vs.	M/s. DP World Pvt. Ltd., Darabshaw House, Level 1, N.M. Marg, Ballard Estate, Mumbai-400 038 PAN-AAACP 6133A
(Appellant)		(Respondent)

Assessee by: Shri Rajan Vora &
Shri Nikhil Tiwari
Department by: Mrs. Rupnder Brari

Date of Hearing :03.10.2012
Date of pronouncement:

O R D E R

PER N.K. BILLAIYA, AM:

These cross appeals are filed by the assessee and the Revenue are directed against the very same order of Ld. CIT(A)-4, Mumbai dt. 26.3.2012 pertaining to assessment year 2008-09. As common issues are involved, we

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heard both these appeals together and dispose off the same by this common order for the sake of convenience and brevity.

2. The assessee is aggrieved by the findings of the Ld. CIT(A) who confirmed the addition of Rs. 6,98,54,000/- made by AO under the head "income from other sources " as " profit and gains from business and profession " u/s. 28(iv) of the Act. On the very same issue the Revenue is aggrieved against this finding of the Ld. CIT(A) stating that the AO was correct in making the addition under the head" income from other sources". The assessee is further aggrieved by the addition of notional rent under the head 'Income from House property and on disallowance of expenses amounting to Rs. 6,11,173/. Revenue is aggrieved by the finding of the Ld. CIT(A) who deleted the addition made by the AO on account of undisclosed consultancy fees.

3. Briefly stated the facts of the case are that during course of the assessment proceedings for the year under consideration, the Assessing Officer observed that the assessee has received three residential flats at Hill Park from its sister concern M/s. British India Steam Navigation Co. (BISNCL) which was capitalized in the schedule of fixed assets at Rs. 79,03,460/-. The AO sought explanation from the assessee company to which the assessee replied that it has received shares of Hill Park as gift from M/s. BISNCL as per the gift deed executed in this respect. Both assessee and M/s. BISNCL are 100% subsidy of Peninsular & Oriental Steam Navigation Co., a U.K. based entity which in its turn is 100% subsidy of DP World Ltd., a Dubai based entity. The market value of the gifted property as per registration of the Deed of gift amounted to Rs. 6,98,54,000/-. In the light of the above fact, the AO asked the assessee to explain why the receipt of the flats at Hill park should not be treated as income in its hand u/s. 56(1) of the Act. The assessee filed a detailed reply dt. 2.12.2010 explaining the nature of transaction and claimed that the transaction is a gift of shares and therefore it is a capital receipt in the hands of the assessee. The AO observed that the

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assessee in its submission has chosen not to refer to the provisions of Sec. 56(1) of the Act. In its submission though it was specifically asked to explain why the gift received should not be treated as its income u/s. 56(1) of the Act. The AO was of the opinion that a gift cannot be logically made by one artificial juridical entity to another because the basic condition of love and affection for making gifts does not exist between such artificial entities which are emotion neutral. The AO further observed that the transfer though has been given the colour of a gift is made for business convenience. The AO concluded that the scheme of the Act is such that any income can only be excluded from the total income of the assessee if the Act specifically provides for such exemption. However, in the instant case, no exemption is specifically provided for such income. Thus the income arising in the hands of the assessee on receipt of properties is not to be excluded from its total income. On the question of the amount to be taxed, the AO observed that the assessee itself has valued the properties as on 31.3.2008 in its Wealth tax Return at Rs. 22,74,82,450/-. Accordingly, the AO took this figure as income from other sources and added to the returned income of the assessee.

4. The assessee agitated this matter before the Ld. CIT(A). After considering the facts and submissions of the assessee, though the Ld. CIT(A) was convinced that the income cannot be taxed under the head "income from other sources" but was of the opinion that the same deserves to be taxed u/s. 28(iv) of the Act and accordingly issued notice u/s. 251(2) for merely changing the head of income . However, on the figure of addition, the Ld. CIT(A) directed to tax the value adopted by Stamp Duty Authorities for levy of Stamp duty and made the addition at Rs. 6,98,54,000/- under the head Income from Business and Profession.

5. Both the parties are aggrieved by this finding of Ld. CIT(A) and are before us in cross appeals.

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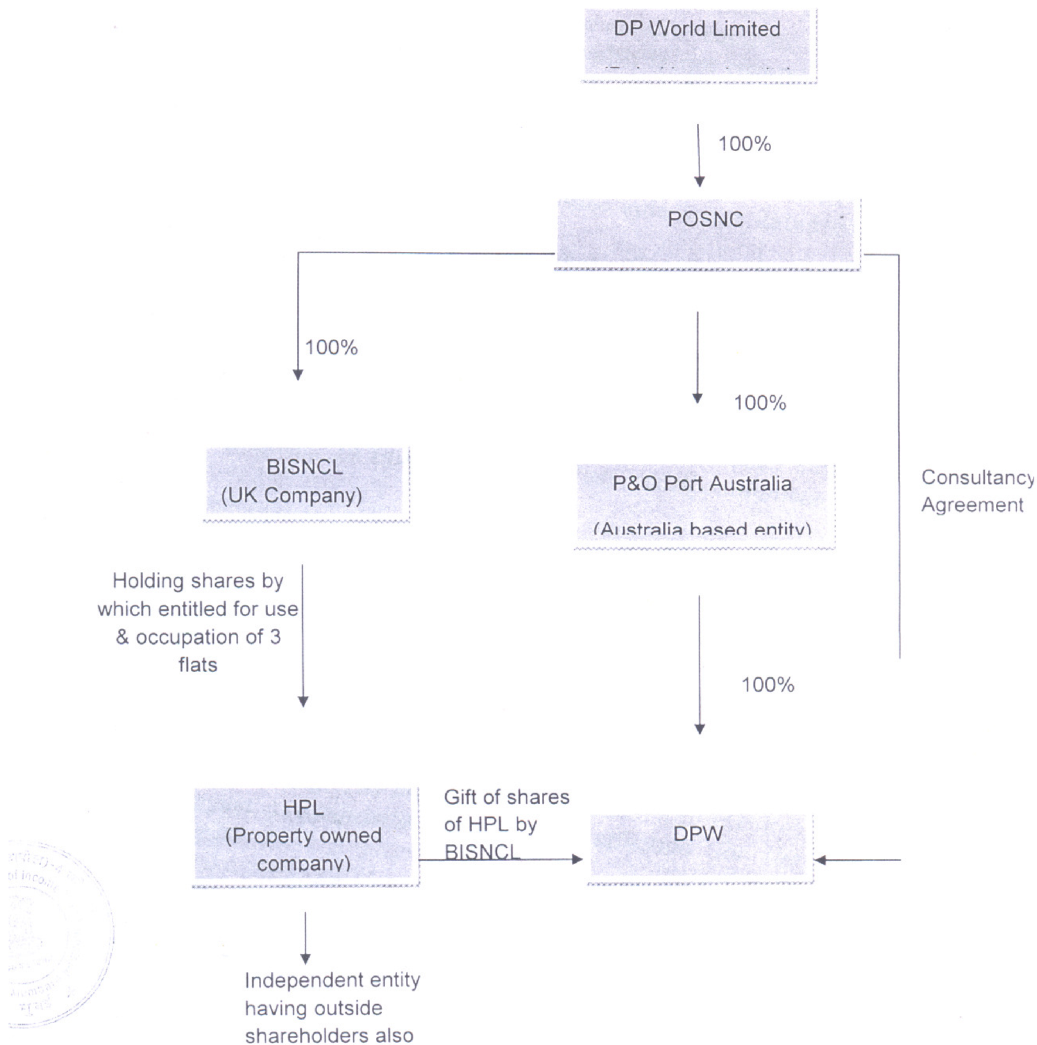
6. Before going further we must first understand the factual matrix of the companies involved in the transaction of gift which is exhibited as under:



7. The fact of the matter is that M/s. BISNCL which is a UK based company was holding shares of M/s. Hill Park Ltd., which entitled it for use and occupation of 3 flats. M/s. BISNCL decided to gift the shares to M/s. DP World Pvt. Ltd. (assessee) by which the assessee became entitled for use and occupation of three flats at M/s. Hill Park. This transaction , in the eyes of the AO was a colorable device who taxed the value adopted for WT purpose

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as income from other sources .However the same , in the eyes of the CIT[A], was nothing but a benefit derived by the donee out of its business relations with the donor company and therefore should be taxed as profit and gains of business & profession . All that we have to decide is whether such transaction can be termed as a ' Gift ' or Income in the hands of the Donee . We have heard the rival submissions at length and perused the orders of the lower authorities and the paper book submitted by the appellant.

8. It is not uncommon that transfer of shares between corporate groups takes place for internal reorganization. Such a transfer may trigger capital gains ramifications in India since the shares of an Indian company are situated in India and when the transferor is a non-resident, the deeming provisions of Sec. 9(i)(i) of the I.T. Act, 1961 come into play. However Sec. 47(iii) contains list of transactions which are not treated as transfers for the purposes of Sec. 45 of the Act. Sec. 47(iii) of the Act relates to transfer of a capital asset under a gift, will or an irrevocable trust. The following issues arise in the application of Sec. 47(iii) of the Act in a corporate reorganization involving transfer of shares of an Indian Company without consideration :

(a) Since the term "Gift" is not defined in the Act, which meaning should be ascribed to it and
(b) Can a company being a corporate entity make a gift?

9. As gift is not defined under the Act, the Sale of Goods Act, Companies Act and the Indian Contract Act, a reference is made to the Gift Tax Act, 1958 ('GTA') and the Transfer of Property Act, 1882 ('TPA').

10. GTA was in force with respect to gifts made till 1st October, 1998. Section 2 (xii) of the GTA defined gift as the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth and includes the transfer or conversion of any property referred to in section 4 deemed to be a gift under

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that section. Transfer of property for inadequate consideration was *Inter alia treated as* deemed as gift. This is similar to section 56(2)(vii)(viia) of the I.T. Act which under certain circumstances, treat the difference between the fair market value of the movable property (including shares of closely held company) and the consideration for the transfer as income from other sources of the recipient of such movable property.

11. Section 5 of the TPA provides that 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. It also provides that 'living persons' 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.

12. Section 122 of the TPA , dealing with gift , defines the same as 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.

13. A perusal of the aforesaid provisions of the TPA indicate that there do not seem to be any restriction on the corporate transfer of shares by way of gift provided it is made voluntarily and without consideration. In other words, there is no requirement in the TPA that a 'gift' can be made only between natural persons out of natural love and affection which means that as long as a donor company is permitted by its Articles of Association to make a 'gift', it can do so. Sec 82 of the Companies Act, 1956 also provide that shares in a company constitute movable property transferable in the manner provided by its Articles of Association.

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14. Now the question arises whether the meaning of 'gift' as per Gift Tax Act could be imported for the purpose of Sec. 47(iii) of the Act. In the case of CIT Vs Shyam Narain Mehrotra (1981) 122 ITR 313 (Cal), the High Court *inter alia* observed that the expressions similar to Sec. 47(iii) of the Act was present in the erstwhile Sec. 12B of the Indian Income Tax Act, 1922 i.e. even before the GTA came into force. This observation of the Hon'ble High Court suggest that meaning of 'gift' as per GTA should not be imported for the purpose of Sec. 47(iii) of the Act.

15. Similar view has taken in the case of ITO Vs Buragadda Satyanarayan (1977) 106 ITR 333 (AO) and ACIT Vs Ranga Pai (1975) 100 ITR 413 (Kar). Although there are other decisions to the contrary however these decisions may not strictly hold good since the GTA has been deleted w.e.f. 1.10.1998 and Sec. 47(iii) of the Act continues in its original form.

16. Considering the above discussion, the definition given u/s 122 of the TPA has to be accepted, meaning thereby that meaning of gift reflect non-element of love and affection. Therefore, gift of shares of an Indian Company by a foreign company without consideration has to be treated as gift within the meaning of Sec. 47(iii) of the Act.

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

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18. In the instant case, the donor is a UK based company therefore we have to see whether law applicable to the donor company permits it to gift shares. We draw support from exhibit 59 of the Paper book which is Certificate and Attestation by the Notary Public of the City of London, England wherein the authority has *inter alia* certified and attested as under:

> *"AND THAT the said Deed of Gift being so signed, is duly executed by and binding on the said Company in accordance with the relevant provisions of English law."*

With the above testimony, it can be safely concluded that the donor company is legally authorized to give gift of shares , more so when the Revenue authorities have not brought any tangible material on records to prove the contrary . This gift of shares is duly supported by a registered Deed of Gift executed between the donor company British India Steam Navigation Co. Ltd., and DP World Pvt. Ltd. on 27.12.2007 wherein the donor has unconditionally gift, transfer and assign to the donee the shares and all its rights, title and interest attaching thereon including all rights, title and interest in the flats along with benefits of all the amounts standing to the credit of the Donor in the books of the company.

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",-- …………………..

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

In our humble opinion, the transaction is of a gift which is a capital receipt in the hands of the assessee and therefore it cannot be said to be a case of any benefit or perquisite arising from business . The contention of the Ld. Departmental Representative that by the said transaction the assessee has derived benefit and such benefit has arisen from the business connection of the donor and the donee, cannot be accepted as no direct nexus has been established by any tangible material brought on record by the Ld.CIT [A]. Simply because both the donor and the donee happened to belong to the same group cannot *ipso facto* establish that they have any business dealings. As we have held that it is a case of a valid gift which is to be treated as capital receipt in the hands of the assessee, in the absence of any specific provision taxing a Gift as a deemed business income , provisions of sec.28[iv] cannot be applied on the facts of the case . The CIT [A] erred in taxing the value of the stamp duty as income under sec.28[iv] of the Act.

21. Now let us examine the provisions of sec 56 of the Act relied upon by the AO.

" 56. Income from other sources.--(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. "

A plain reading of the above provision show that not every receipt is taxable under the head ' Income from other sources ' but only those which can be shown as ' Income ' can be brought to tax under this head , if it does not fall directly under other heads of income specified in sec. 14 of the Act.

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The legislature keeping in mind the Tax Planning done by the Tax Payers by resorting to Gifts , which cannot be termed as Income , made certain amendments by introducing clause [v] to sec. 56[2] which reads as under :

> " v) where any sum of money exceeding twenty-five thousand rupees is received without consideration by an individual or a Hindu undivided family from any person on or after the 1st day of September, 2004, ***but before the 1st day of April, 2006, the whole of such sum :"

However such amendment did not take care of the transactions involved in the instant case. The legislature further brought amendments as under :

> (vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,—
>
> (a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum ;
>
> (b) any immovable property,—
>
> (i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property ;
>
> (ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration ;

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

(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 where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

Even this amendment did not cover the issues involved in the present appeal . The legislature, in its wisdom, further strengthened the provisions of sec. 56[2] by making the following amendments:

viia) 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, 2010**, any property, **being shares of a company** not being a company in which the public are substantially interested,-

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(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 (vicb) 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) ;

The above amendment covers the issues involved in the present appeal but the legislature in its wisdom made it applicable for the **transactions effected after the 1st day of june, 2010.**

Certain lacuna may have still remained to be addressed therefore the legislature did not stop here but went on to make further amendments by inserting clause [viib] as under :

(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares :

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Provided that this clause shall not apply where the consideration for issue of shares is received—

i) by a venture capital undertaking from a venture capital company or a venture capital fund ; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation.— For the purposes of this clause,—

(a) the fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed ; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature , whichever is higher ;

However this amendment has no direct bearing on the facts of the case in hand.

22. Thus, we have considered the application of the provisions of sec. 28[iv] and sec 56 [1] & [2] from all the possible angles on the facts of the case ,in our humble opinion the transaction involved in the present appeal is nothing but a Gift and thus it is a capital receipt not taxable under the alleged provisions of the Act. Therefore ,The Assessee Succeeds and Revenue fails. Issues involved in this ground are decided in favor of the assessee and against the Revenue.

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23. The second grievance of the assessee is that the Revenue authorities have erred in taxing notional income from the flats as 'Income from House property.'

24. The assessee says that the flats are used for the purpose of business and therefore no notional rent under the head "Income from House Property" can be taxed. It is the contention of the Revenue that the assessee has failed to establish that the flats are used for the purpose of the business. On the contrary, the assessee itself has shown the value of the flat as taxable in its Wealth Tax return as residential flats.

25. After considering the facts and perusing the order of the lower authorities and the Paper Book submitted by the assessee, we find that the said flats are shown under the head 'fixed assets' in the balance sheet of the assessee company. The contention of the assessee that the flats have been kept for use for the employees of the company cannot be brushed aside lightly. However, for the year under consideration, the assessee could not establish the usage of the flats by the company for its business purposes, therefore, annual letting value of the flats is liable to be taxed. However, the annual let out value has to be taxed as per the Municipal rateable value as has been held by us in ITA No. 3408/M/2002 in the case of Premchand Roychand & Sons Vs ACIT, therefore this issue is restored back to the files of the AO. The AO is directed to compute annual let out value as per Municipal ratable value in and around the said locality, in the light of the provisions of sec.23 of the Act , after giving reasonable opportunity of being heard to the assessee. Accordingly, ground No. 6 and 7 of assessee's appeal is allowed for statistical purposes.

26. The next grievance of the assessee relates to the disallowance of maintenance charges at Rs. 2,16,000/- and depreciation at Rs. 3,95,173/-.

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27. As we have held that ALV has to be taxed for the year under consideration, the assessee will get the statutory deduction of 30% from the ALV, therefore no separate deduction of maintenance charges is to be allowed. Similarly, as we have already held that the assessee has failed to establish the flats have been used for the purposes of business for the year under consideration, the depreciation claimed cannot be allowed. This ground of the assessee is dismissed.

28 Ground No. 10 is premature and accordingly dismissed.

29. Coming back to the Revenue's appeal, the only grievance remains to be decided relates to the deletion of the addition made by the AO on account of undisclosed consultancy fees.

30. During the course of the assessment proceedings, the AO observed that the assessee has credited an amount of Rs. 5,35,92,500/- under the head "consultancy fees". The assessee was asked to file the details. From the details submitted by the assessee, it is seen that the consultancy fees were received from two parties (i) P&O Steam Navigation Co., UK amounting to Rs. 4,60,92,500/- and (ii) JAFZA amounting to Rs. 75 lakhs. The AO further observed that as per the agreement of P&O Steam Navigation Co., the said company was to pay US Dollors 2,00,000/- per month towards monthly consulting fees for services to Indian terminals. According to the AO, the assessee was to receive a total of USD 24,00,000. However, the assessee has accounted only USD 10,50,000/-. The AO show caused to the assessee as to why the difference of USD 13,50,000/- should not be added as its business income for the year under consideration to which the assessee replied that as per the said agreement, the consultancy fees could be renegotiated as per mutual convenience and hence the amount offered is the only amount receivable during the year from P&O Steam Navigation Co. The said explanation of the assessee was rejected and the AO went on to make an addition of Rs. 5,34,65,000/- which is equivalent of USD 13,50,000.

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31. When the matter was agitated before the Ld. CIT(A), the assessee reiterated its stand that the fees was negotiable and therefore the assessee has accounted for the fees actually receivable during the year under consideration. The Ld. CIT(A) was convinced that from the agreement, it is clear that the consultancy fees can be changed annually and mutually agreed terms and such changed and revised as well as reduced consultancy fees has been received by the assessee during the year under consideration. The Ld. CIT(A) accepted the mutually agreed terms and revised consultancy fees of USD 11,50,000/- for the year under consideration. However, at the same time, the Ld. CIT(A) observed that in the letter dt. 6.12.2010, the consultancy fees receivables has been shown as USD 10,50,000/- whereas in letter dt. 7.6.2011 and 28.2.2012, it has been shown as USD 11,50,000, and accordingly directed the AO to verify the correct amount of consultancy fees.

32. Before us, the Ld. Counsel for the assessee filed a detailed statement showing year wise consultancy fees received and reiterated that the consultancy fees vary year after year and is negotiable.

33. We have considered the chart exhibited at page-53 of the Paper Book and agree with the submission of the Counsel that the fee is revised from time to time. However, at the same time, we find force in the direction of the Ld. CIT(A) to verify the correct figure of the consultancy fee receivable during the year whether it is USD 10,50,000 or USD 11,50,000. Accordingly, while deleting the addition made by the AO, we confirm the findings of the Ld. CIT(A) and direct the AO to verify the actual figure of consultancy fee for the year under consideration. The grievance of the Revenue is restored back to the file of the AO as per above directions. Needless to mention that AO should give reasonable opportunity of being heard to the assessee. Ground No. 4 of Revenue’s appeal is allowed for statistical purposes.

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34. In the result, the appeal filed by the assessee as well as the Revenue are partly allowed for statistical purposes.

Order pronounced on this 12th day of October, 2012

Sd/-	***Sd/-***
(D.MANMOHAN) Vice President	(N.K. BILLAIYA) Accountant Member

Mumbai, Dated 12th October, 2012
Rj

Copy to :
1. *The Appellant*
2. *The Respondent*
3. *The CIT-concerned*
4. *The CIT(A)-concerned*
5. *The DR 'D' Bench*

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By Order

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Vice President **AM**