IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

BEFORE SHRI MAHAVEER SINGH, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

S.L No.	ITA No.	A.Y	Appellant	Respondent
1	780/Mum/2016	2010-11	DCIT 1(1)(1) 579, Aayakar Bhavan, M.K. Road, Mumbai	Brand Marketing (India) P. Ltd, 409 Tulsiani chambers, Free Press journal Marg, Nariman Point PAN AACCB8257D
2	519/Mum/2017	2011-12		
3	339/Mum/2017	2012-13		
4	729/Mum/2016	2012-13	DCIT 1(1)(1) 579, Aayakar Bhavan, M.K. Road, Mumbai	M/s. BMI Wholesale Trading Pvt Ltd., 9th Floor, Maker Chamber-III, Nariman Point, Mumbai. PAN AAECM7601C

Revenue by : Shri Sanjay Singh, DR
Assessee by : Shri Ritesh Singh, AR

Date of hearing 13.12.2019
Date of pronouncement 20.12.2019

O R D E R

PER M BALAGANESH, AM:

These appeals in ITA No.780/Mum/2016, 519/Mum/2017, 339/Mum/2017 & 729/Mum/2016 for A.Y.2010-11, 2011-12 & 2012-13 arises out of the order by the ld. Commissioner of Income Tax(Appeals)-2 in appeal No.CIT(A)-2/IT/53A/2013-14, CIT(A)-2/IT/95/2015-16, CIT(A)-2/IT-62/2014-15 & CIT(A)-2/IT/135/2015-16 dated 30/11/2015, 20/09/2016, 15/10/2016 & 20/11/2015 respectively (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961

(hereinafter referred to as Income Tax Act, 1961) dated 22/03/2013, 26/03/2015, 25/03/2015 & 29/03/2014 respectively by the ld. Dy. Commissioner of Income Tax – 1(1), Mumbai (hereinafter referred to as ld. AO).

2. With the consent of both the parties, the appeal filed by the revenue in ITA No.780/Mum/2016 for A.Y 2010-11 is taken as the lead case and the decision rendered thereon would apply with equal force for other appeals also except with variance in figures.

3. The first issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in deleting the disallowance made u/s 14A of the Act in the facts and circumstances of the case.

3.1 We have heard rival submissions. It is not in dispute that the assessee had not derived any exempt income during the year. Hence, in our considered opinion, the provisions of Sec. 14A of the Act cannot be made applicable. This issue is now very well settled by the decision of Hon'ble Supreme Court in the case of Maxopp Investments reported in 402 ITR 640 (SC). Accordingly the ground No.1 raised by the revenue is dismissed.

4. Ground No. 2 raised by the revenue is with regard to the action of Ld. CIT(A) in deleting the addition of share premium and share capital added by the Ld. A.O u/s 56(1) of the Act.

4.1. Brief facts of this issue are that the assessee is engaged in the business of import and wholesale trading in branded readymade garments. The assessee had created following six subsidiaries and each of the subsidiary were owning the following brands as under:

S.L	*Name of Subsidiary*	*Brand Managed*
1	*MB Retailing Pvt Ltd*	*Build a Bear*
2	*MC Retail Pvt Ltd*	*Calvin Klein*
3	*MJ Retail Pvt Ltd*	*Jimmy Choo*
4	*MK Retail Pvt Ltd*	*French Connection*
5	*ML Retail Pvt Ltd*	*La Perla*
6	*Murjani Retail Pvt Ltd*	*Gucci*

4.2. The assessee submitted that the idea of forming several subsidiaries was to carry on business through such subsidiaries which would enable the assessee company to encash the success of any particular brand by selling of the successful subsidiary and deriving rich gains thereon. The Ld. A.O observed from the balance sheet of the assessee as on 31.03.2010 and the details filed on record before him that the assessee had credited the following amounts towards share capital and share premium in this balance sheet:-

Subscribed by	*Number of share*	*Face value*	*Equity share capital*	*Share Premium per share*	*Share Premium account*	*Total amount received*
Retail India Ltd	*6,07,768*	*10*	*60,77,680*	*9*	*54,69,912*	*1,15,47,592*
Matrix Partners India LLP	*9,89,974*	*10*	*98,99,740*	*9*	*89,09,766*	*1,88,09,506*
Total	*15,97,742*		*1,59,77,420*		*1,43,76,678*	*3,03,57,098*
0% Compulsory Convertible Participative preference shares of Rs. 220/- each	*30,99,415*	*10*	*3,09,94,150*	*210*	*65,08,81,142*	
Total					*66,52,60,820*	

4.3. The assessee submitted before the Ld. A.O that during the assessment year, equity shares were allotted to M/s. Retail India Ltd., and M/s. Matrix Partners India Investments Holdings LLP. The assessee submitted that M/s Retail India Ltd is a company registered in Mauritius and holds a global business licence of Category-I issued by Financial Services Commission, Government of Mauritius. The licence authorizes M/s. Retail India Ltd., to carry on business of investment holding company. The assessee also submitted that M/s. Matrix Partners India Investments Holdings LLP, Mauritius, was a company incorporated under the laws and was also a duly registered Foreign

Venture Capital Fund registered as FVCI with SEBI under the SEBI regulations 2000. The monies were received from these two entities through automatic route of investments. The assessee submitted the copies of the Foreign Inward Remittance Certificates (FIRCs) together with Chartered Accountant's (CA) certificate for share receipt transactions. The assessee also submitted the copy of the Board resolution for issue of shares. The assessee submitted that since the shares were allotted directly to the investors, no Registrar was appointed for issue of shares. The assessee also submitted that franking stamp for payment of stamp duty have been affixed on copy of share certificates. It was specifically submitted that the directors of the assessee company or their relatives were not related to the directors of the investor company to whom shares were allotted during the year. The Ld. A.O issued show cause notice vide dated 30.03.2013 as under:

> *"From the Share Valuation as per the CI guidelines, the fair value of the equity shares of Brand Marketing (India) P Ltd has been determined at Rs. 10. However, the shares have been issued at a premium of Rs. 9/-. Vide notice u/s 142(1) dated 25.02.2013 you were specifically asked in point No. 7(f) to justify the premium charged on the issue of shares with reference to the basis of valuation with supporting documentary evidences. However, you have merely submitted the valuation certificate as per which the fair value of the share has been arrived at Rs. 10/- per share. Thus, you are again requested to justify the*

charging of share premium of Rs. 9/- share on the issue of shares failing which your are requested to explain as to why the share premium received should not be treated as income u/s 56(1) of the Act, 1961".

4.4. The assessee vide reply dated 19.03.2013 submitted that the shares are always issued at a premium and it would never be listed at the face value. The assessee also submitted that the shares are issued at a premium if the prospects of the company are better and intending buyer appreciates that there would be appreciation in value. The assessee stated that the money received towards share premium has been duly credited to share premium account in the balance sheet and in the books of the investor, the same is reflected as investment in shares in the assets side of its balance sheet. The assessee submitted that there is no question of treating the said receipt of amount as income u/s 56(1) of the Act. The Ld. AO on verification of submission of the assessee together with relevant documentary evidences placed on record observed as under:

A. The premium charged on allotment of shares taxed U/s 56(1) of the Act

i. *The assessee issued 15,97,742 shares of Rs. 10 each at a premium of Rs.9/- per share to subscribers. Thus a share capital representing face value of Rs.I,59,77,420/- and the premium of Rs. 1,43,79,678/- totalling to Rs.3,03,57,098/- was collected during the year. The*

assessee also converted 30,99,415 0% Compulsory Convertible Participative Preference Shares of Rs. 220/- each to 30,99,415 0% Fully Convertible Preference Shares of Rs. 10/- each and the share premium of Rs. 68,03,79,5311- has been credited to the Share Premium Account. The assessee further converted 23,39,181 0% Fully Convertible Preference Shares to equity shares of Rs. 10/- each and the resulting reduction in share premium of Rs. 1,51,18,711/- was debited to the Share Premium Account. Thus, the total amount credited to the Share Premium Account during the AY under consideration amounted to Rs. 66,52,60,820/-.

ii. *During the AV 0% Compulsory Convertible Participative Preference Shares issued at Rs. 220/- per share have been converted to 0% Compulsory Convertible Participative Preference Shares at Rs. 10/- per share and the remaining amount has been credited to the Share premium Account.* ***Thus, the conversion can be treated as fresh issue of Shares of Face Value Rs 10/- and share premium of Rs. 210/- per share.*** *Clearly, as on the date of conversion, the value of the fair market value of the shares as per the Net Asset Value Method was Rs. NIL. However, considering the scope and limitations of the method of valuation, the CA certificate furnished by the assessee indicates that the fair market value of the shares has to be taken at Rs. 10/- per share. Thus, the shares of Fair Market Value of Rs. 10/- per share have been allotted at a premium of Rs. 2 10/- per share while converting the 0% Compulsory Convertible Participative Preference Shares.*

iii, *Vale notice U/s 142(1) dated 13.03.2013 the assessee was specifically asked to justify the charging of share premium. In its reply dated 19.012013 the assessed has merely stated*

that shares are never issued at book value by any listed company nor are the shares listed on stock exchange on the basis of hooL value prices. The assessee contends that the shares are always issued at a premium where the prospects of the company are better and the intending buyer appreciates that there would be appreciation in value. This contention of the assessee is clearly not acceptable in the light of the facts of the case. During the AY the assessee company has tiled its return of income declaring a loss of Rs. 8,44,7,402/-, Since its inception (The date of issue of PAN of the assessee company is 07.04.2006), the assessee company has been incurring losses year after year and the prospects of appreciation in value of shares are quite bleak. The losses incurred by the assessee company since its inception are as follows:

*Thus, the total unabsorbed carry-forward loss till AY 2010-11 is Rs. 40,49,64,189/·. In the light of the fact that the assessee company has been suffering losses year on year, and the fact that the CAs valuation report submitted by the assessee itself arrives at the fair value of the shares at Rs.N1L, the charging of premium amounting to Rs.**210/- and Rs. 9/- is** not justified. Any prudent investor will not invest in shares of a company suffering continuous losses by paying heavy amounts of share premium.*

iv Section 78 and other related provisions of the Companies Act, 1956, provides that the amount in the share premium account can only be utilized towards:

a) Issue of fully paid bonus shares
b) Writing off of preliminary expenses of the Company
c) Writing off of the expenses, commission or discount on issue of shares or debentures
d) Providing for premium payable on redemption of preference shares or debentures;
e) Buy-back of equity shares. _

The rules relating to maintenance of capital are designed to ensure that:

- *The money that the company received from, or is promised by the shareholders for, their shares is equivalent to the nominal value and premium payable for the shares; and*
- *The money received by the company is maintained as capital fund to which the creditors can look as security for their debts.*

From the balance sheet of the assessee it can be seen that the assessce has utilized the entire amount received on account of share premium towards giving loans and advances to subsidiary companies and for making investments in subsidiary companies. The total Share premium received by the assessee during the year has been either used for giving loans and advances to subsidiary companies or for routine business purpose. Thus, the funds received on account of Share premium have been utilized for purposes other than those specified U/s 78(2) of the Companies Act.

There is no justification for the premium charged on the shares. Looking at the accumulated losses of the assessee company the payment of huge share premium cannot be justified by any means. Considering the fact that the shares have been issued to Promoter companies, the entire transaction can be seen to be a sham transaction by which money has been brought into the books of the assessee company in the guise of 'Share Premium'. Any transaction which is a genuine business transaction has to be justified by the principles of commercial expediency. Foreign investor companies based in Mauritius have invested in the shares of the assessce company year on year desyite the assessee company making huge losses and showing no prospects of any good return on

investment in future. Vide show-cause notice U/s 142(1) dated 25.02.2013 the assessee was specifically asked to furnish the names and addresses of the persons to whom shares have been issued, the complete transaction ledger and explanation of sources of the funds of the investor companies. However, in response the assessee has merely stated that the investor companies M/s Retail India Ltd, Mauritius and Mis Matrix Partners India Investments Holding LLP, Mauritius are registered in Mauritius. No details have been filed regarding the sources of funds of the investor companies. The onus is on the assessec to prove the geinlinness of the funds credited to its books of accounts. The assessee has failed to discharge its onus by failing to furnish the financials of the aforementioned parties establishing the genuineness and creditworthiness of the same. In the case of McDowell reported in (1985) 3 SCC 230 the Honb'le SC concluded that where the transaction is not genuine but a colorable device there could be no question of tax planning. The SC held that a sham and non-genuine transaction cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. Clearly, the assessee has neither proved the creditworthiness of the investors nor has the charging of huge amounts of share premium been justified. In the light of the fact that the huge amount of share premium was charged for issue of shares, valued at Rs. NIL as per assessee's own valuation report furnished during the assessment proceedings, and the creditworthiness of the investors including their source of funds have not been proved by the assessee despite specifically being asked to do so, it can be inferred that the entire transaction is a sham transaction designed to bring funds into the books of the assessee company in the guise of Share Premium.

Thus, the amount brought in to the books of assessee in the form of share premium is not a share premium within the meaning of the provisions of the Companies Act and hence the same needs to he treated as such for the purpose of the Income tax *Act. Therefore the very nature of the amount brought in the books is not a share premium but the receipt..*

As such the assessee cannot contend that the amount has been maintained as capital fund as required under the companies act. Even the assessee's subsequent records disprove this. The amounts received back or which may be received back subsequently from the assessee's business activities are thus clearly different from share premium but it represents only return oti such business activity. The utilization of such funds subsequently for any purpose is clearly distinguishable and separate from the share premium account. The book entry in reduction in share premium is only an accounting formality and cannot represent the transaction in real sense.

Hence the introduction of the fresh capital at a premium of Rs.210/- and Rs. 9/- amounting to R. 66,52,60,820/- partakes the character of income uls.56(1) of the Act.

B. Treating share premium received as income U/s 56(1) of the Act.

Having established above facts and in law that the transaction in question is not genuine and the form in which it is brought in to the books of assessee (i.e the introduction of alleged share premium) the taxability of the same in the hands of assessee under section 56(l) under the head income from other sources is analyzed as under:

(a) In response to a specific question as to why the amount involved should not be taxed as assessee's income as income from other sources uls.56(1) of the Act., the assessee has only stated that the question of treating the said amount as income does not arise as Sec 56(1) pertains to income which would not be chargeable under any other head of income.

(b) Having established the fact that the amount received by assessee in the guise of share premium is in fact is not a share premium but transfer of funds in the nature of revocable transfer of asset within the meaning of section 61 to 63, the same is well within the scope of income defined u/s. 5 and the charging provisions of section 4 of the Income Tax Act. Therefore the income arising by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the assessee and shall be included in its total income.

*(c) Further **the assessee has no** liability to repay this amount to the alleged investors as the return on investment for the investor is a subject matter of high volatility.*

(d) As per section 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. This income is not chargeable under the heads specified u/s.14, items A to E and hence is taxable under the head "Income from other sources".

(e) In view of the above stated facts, the amount of Rs. 66,52,60,820/- which is credited to the Share Premium Ale in the AY under consideration and utilized in violation of section 78(2) of the Companies Act is taxed as assessee's income for the year

under the head income from other sources within the meaning of section 56(1) of the LT. Act., 1961.

4.5. The concluding paragraph of the assessment order reads as under:

"The sum of Rs. 66,52,60,820/- is therefore brought to tax as income from other sources u/s 56(1) of the IT Act, 1961. Penalty proceedings u/s 271(1)(c) of the Act are separately initiated for furnishing inaccurate particulars of income and concealing income".

4.6. The Ld CIT(A) deleted the addition made u/s 56(1) of the Act as under:

10.1. This ground relates to share premium recognized in the books of Rs. 66,52,60,820/-. At the outset it is submitted that this premium is divided into two significant parts.

(i)	*Premium on mere conversion of compulsorily convertible participative preference shares without a single fresh rupee being received*	*:*	*Rs. 65,08,81,142/-*
(ii)	*Premium relating to fresh issue of 15,97,742 equity shares of Rs. 10 each,, issued at a premium of Rs. 9 Per share*	*:*	*Rs. 1,43,79,678/-*
	Total premium		***Rs. 66,52,60,820/-***

Particulars	*Preference shares*		*Preference shares FV Rs. 10*		*Equity shares F.V Rs. 10*		*Share Premium*
	Number	*Amount*	*Number*	*Amount*	*Number*	*Amount*	*Amount*
Opening as at 31st march 2009	*30,99,415*	*68,18,71,300*	*43,07,992*	*4,30,79,920*	*94,73,683*	*9,47,36,830*	*66,40,04,053*
Adjustments							
(i) converted from preference FV Rs. 220 to preference FV	*30,99,715*	*68,18,71,300*	*30,99,415*	*3,09,94,150*			*65,08,81,142*

at 10							
(ii) converted from Preference FV Rs. 10 to equity FV Rs. 10			*23,39,181*	*2,33,91,810*	*23,39,181*	*2,33,91,180*	
Iii Fresh issue of equity FV Rs. 10 and premium 9					*15,97,742*	*1,59,77,420*	*1,43,79,678*
Premium sub-total							*66,52,60,820*
Closing as at 31st March 2010	*NIL*	*NIL*	*50,68,226*	*5,06,82,260*	*1,34,10,606*	*13,41,06,060*	*1,32,92,64,874*

30,99,415 preference shares of IV, Rs. 220 converted into 30,99,415 preference shares of F.V. Rs. 10

Stage 1 and premium of Rs. 210 per share, to bring parity with existing preference shares of Rs. 10; no fresh funds infused

Stage 2 23,39,181 preference shares of F.V. Rs. 10 converted Into 23,39,181 equity shares of F.V. Rs. 10

Stage 3 Fresh issue of 15,97,742 equity shares of F.V. Rs. 10, at a premium of Rs. 9 per share

10.3. It is strongly emphasized that this is a mere book entry and no fresh funds have been introduced into the books of the company. It is submitted that none of the provisions namely sections 2(24), 56(1), 68, 61 to 63 can apply to such a restructuring of the share capital without any fresh money into the company's bank accounts.

It is therefore submitted that the addition under section 56(1) of Rs. 1 65,08,81,142 has been made in a routine standard manner WITHOUT understanding and appreciating the peculiar facts of this transaction namely no fresh monies have come into the company's books.

10.4 The appellant has placed before me copies of annual accounts to show that in the earlier years the company was having compulsorily convertible participative preference share capital of Rs. 68,18,71,300 which has been reduced to zero owing to this conversion. Treating monies received under the

garb of share premium quite disproportionate to the performance of the company is the subject matter of wide litigation all over.

However, in this case, the fact that no fresh monies have come into the books of the company cannot be ignored. The addition of Rs. 65,08,81,142 made under section 56(1) is therefore hereby deleted.

Coming to the second tranche relating to share premium of Rs.1,43,79,678, relating to fresh issue of 15,97,742 equity shares of Rs. 10 each issued at a premium of Rs. 9 per share it is submitted as under: -

Strong emphasis is laid on the decision of the Hon'ble Bombay High Court in writ petition of 871 of 2014 in the case of Vodafone India Services Private Limited in writ petition 871 of 2014, copy of which is enclosed in the case law paper book placed on record. The appellant has drawn attention to the observations of the Hon'ble High Court in paras 38, 40 and 41 which are strongly relied upon.

My attention is also drawn to the fact that Hon'ble Bombay High Court in Vodafone case was dealing with a Transfer Pricing issue but the findings in paras 38, 40 and 41 apply to the facts of this case fully.

Reliance is also placed on the decision of Hon'ble Bombay High Court Rockstar Real Estate Pvt. Ltd. (Writ Petition no. 2885 of 2014), copy whereof placed on pages 160 to 161 of the case law paper book where also share premium has been held to be on capital account.

Appellant has also drawn my special attention to the case of the Hon'ble Mumbai Income Tax Appellate Tribunal in the case of Green Infra Ltd. v. ITO (145 ITD 240), copy placed at case law paper book pages 162 to 184. In this case, it is emphasized, that against a face value of Rs. 10

only, premium of R. 490 i.e. 49 times the face value was received by the company and the shares of this company were subscribed by government companies and in the eyes of law such companies are in no way different from the public at large.

10.5. Besides, in the case before me, monies have been received through normal banking channels from abroad and necessary formalities of Reserve Bank of India also stand fully complied with.

10.6. I have gone through the assessment order as well as the submissions given by the AR of the appellant company. The AO has added a sum of Rs. 66,52,60,820/- of share premium u/s. 56(1). The AR of the appellant has brought to my notice the judicial decision in the case of Vodafone India Services Pvt. Ltd. Vs Union of India 8. Others (2014) 368 ITR 01 (Bom HC) wherein it is held as under

"For all the above reasons, we find that in the present facts issue of shares at a premium by the Petitioner to its non resident holding company does not give rise to any income from an admitted International Transaction. Thus, no occasion to apply Chapter X of the Act can arise in such a case."

He has also brought to my notice Hon'ble ITAT "G" Bench order in the case of Green Infra Ltd. ITA No. 7762/Mum/2012 dated 23.08.2013 wherein it is held as under

"Considering the entire issue in the light of the material evidence brought on record in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s. 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of Sec. 68 of the Act. We, therefore, direct the AO to delete the addition of Rs. 47,97,10,0001-. Ground no. 2 & 3 are accordingly allowed."

Respectfully following the judicial decision of High Court of Bombay and Hon'ble ITAT G Bench, I direct the A.O to delete the addition of Rs. 66,52,60,820/-

4.7. Aggrieved the revenue is in appeal before us.

4.8. We have heard the rival submissions and perused the materials available on record. At the outset, we find that the assessee had issued shares at face value of Rs. 10 each at premium of Rs. 9 each and also converted 0% compulsorily convertible participating preference shares (CCPPS) of face value of Rs. 220/- each into equity shares of face value of Rs. 10 each at premium of Rs. 210 each. The details of the same are as under:

Name of shareholder	Date of investment	Number of equity shares	Face value	Equity share capital	Share premium per share	Share premium account	Total amount received
Retail India Ltd	18/01/2010 and 19/01/2010	607768	10	6,077,680	9	5,469,912	11,547,592
Matrix Partners Ind	22/03/2010	989974	10	9,899,740	9	8,909,7666	18,809,506
Investment Holding LLC							
Total		1,597,742		15,977,420	18	14,379,678	30,357,098

Details of issue and conversion of preference shares

Name of shareholder	Date of investment	Number of preference shares	Face value	Preference share capital	Conv. into no of equity shares	Conv. into equity shares	Amount transferred to share premium account
Matrix Partners India	12.10.2007	526,316	220	115,789,520	526,316	5,263,160	110,526,360
Baugar Mauritius Ltd	12.10.2007	2,105,263	220	463,157,860	2,105,263	21,052,630	442,105,230
Baugar Mauritius Ltd	28.05.2008	233,918	220	51,461,960	2333,918	2,339,180	49,122,780
Matrix Partners India Investment Holding LLC	28.05.2008	233,918	220	51,461,960	233,918	2,339,180	49,122,780

Total		3,099,415		681,871,300	3,099,415	30,994,150	650,877,150

4.9. The premium on issue of the aforesaid equity shares and conversion of preference shares amounting to Rs. 66,52,56,828/- has been credited to share premium account in the books of the assessee. The relevant supporting documents in this regard were submitted to the Ld. AO vide letter dated 01.03.2013. Hence, from the aforesaid table it could be safely concluded that assessee had only received a sum of Rs. 3,03,57,098/- towards share capital and share premium during the year from Retail India Ltd., and Matrix Partners India Investment Holding LLC. With regard to conversion of preference shares into equity, the monies were received from the aforesaid four investors as tabulated supra, were received in A.Ys 2008-09 and 2009-10 and during the year under consideration, only those preference shares were converted into equity shares at a premium. In other words, the preference share capital which was originally received by the assessee company at face value of Rs. 220/- each per preference share, where converted into equity shares during the year under consideration into equity comprising of face value of Rs. 10 and premium of Rs. 210/- per equity shares. It would also be relevant to understand the background of the assessee.

4.10. The assessee company was established on 23rd March, 2006 by Murjani Group. Murjani Group is a *75*

year old group with over 40 years of unparalleled international brand management experience. The assessee company was incorporated as a holding company and to carry on cash and carry wholesale trading activity. The assessee incorporated separate operating subsidiaries for carrying the business of cash and carry wholesale trading of 7 major premium and luxury international brands in India, namely, Build a Bear, Gucci, Jimmy Choo, Calvin Klein, FCUK, La Perla and Tumi. All the brands are market leaders in their respective segments globally. These subsidiaries obtained a long term exclusive rights /license/franchise for sale of products of the above brands in the Indian territory. Each subsidiary is dedicated and owning exclusive, long term rights for sale of a single brand in the Indian territory.

4.11. Each of the aforesaid business required substantial capital investment and working capital for the day to day operations. The assessee, being the holding company for the above subsidiaries approached various private equity investors locally as well as international markets to finance the assessee, is retail venture of introducing the above global brands in India. Accordingly, in the year 2007 and 2008, the assessee company identified two investors namely Matrix and Baugur Mauritius Ltd. (Baugur) and issued 30,99,415 CCPPS to these parties at a price of Rs. 220/- each per share. This price was based on a fair valuation of the entire business considering the future

prospects. The assessee submitted that the value of the business is generally derived from the following :-

- Future prospects of the business and not only from past performance of the business;
- The future business plan of the company;
- The Price to Earning multiple in the retail industry;
  experience in the retail industry;
  - Future cash generating capacity of the business;
- The growth of the business;
- The exclusive right to access to various international brands in India; established distributional channels across India;
- The number of retail outlets proposed to be rolled out;
- Market sentiment for premium and luxury brands and demand drivers for such brands

Considering the above factors, a detailed valuation of the entire business was undertaken and on a conservative basis a pre-money valuation for the entire business was estimated at US $ 60 million. After detailed round of negotiations with the investors it was agreed to issue shares to the aforesaid investors in the year 2007 and 2008 in the form of CCPPS at the price of Rs.220/- per share.

• As per the terms of the issue of the preference shares and in order to maintain their respective shareholding ratio, it was agreed between the assessee and the investors that the

CCPPS would be converted into equal number of the equity shares of face value Rs. 10/- each at a price of Rs.220 per share, since the face value of equity shares was Rs. 10/-, the balance amount of Rs.210/per share was transferred to share premium.

• The assessee submitted that the investment made by the aforesaid parties are from the long term point of view considering the immense potential of the business with backing of the exclusive license of these premium brands.

• The assessee submitted that the investees i.e. Matrix and Baugur were independent investors and it does not have direct or indirect interest in the assessee as well as in its subsidiaries. All the investment was made by the investors in 2007 and 2008 after considering the future prospects of the business in India.

• The Assessing Officer has held that as per the assessee's own valuation report, the value has been determined as Nil. The assessee submitted that the methodology of valuation as per the CA certificate was based on the erstwhile guidelines issued by the Controller of Capital Issues (CCI) which were prescribed by the RBI for issue of shares to non-residents. The said methodology only considers the traditional method of valuing shares i.e. the average of the net book value of the company and the profit earning capacity value based on past earning.

• The erstwhile exchange control regulations prescribed that the valued price is the floor price (i.e. minimum price of issue of shares) and it is open for the company to issue shares at a price higher than the said price.

• The aforesaid certificate considering the CCI method of valuation was issued only to meet the requirement of the RBI for the purposes of issue of shares to non-resident and is not the correct methodology for determining the fair value of the business. In fact the RBI in the year 2010 has now amended the method of the valuation and has adopted the Discounted Cash Flow (DCF) Method for valuation of equity shares while issuing shares to non-residents to arrive at the fair value.

• The assessee submitted that it being a new entity, if the valuation of its business is based on the CCI valuation, it is but obvious that the value would be NIL.

In view of the above factual position and the fair value of the business of the company as stated above, the assessee submitted that the price at which the shares were issued / conversion of the preference shares is in accordance with fair value and hence justified. The Assessing Officer erred in holding that since the valuation based on the CA certificate was NIL, the issue of shares /conversion of shares at a premium was not justifiable.

4.12. With regard to comments made by the Ld. AO in his assessment order that the assessee had violated the provisions of the Sec. 78 of Companies Act, 1956 in respect of utilization of share premium account, the Ld. AR submitted before us as under:-

> *(1) The appellant submits that the Assessing Officer erred in holding that the funds received on account of share premium have been utilized for purposes other than those specified under section 78(2) of the Companies Act, 1956.*
>
> *The appellant submits that section 78(2) of the Companies Act, 1956 provides as under:-*
>
> *(2) The securities premium account may, notwithstanding anything in sub-section (1), be applied by the company—*
> *(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares;*
> *(b) in writing off the preliminary expenses of the company;*
> *(c) in writing off the expenses of or the commission paid or discount allowed on, any issue of shares or debentures of the company; or*
> *(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.*
>
> *On perusal of the aforesaid section it is clear that the aforesaid section states that the share premium account may be applied only for the aforesaid purposes. However, there is no bar on the manner of utilization of the cash received by issue of shares at a premium.*
>
> *The appellant submits that the Assessing Officer has failed to appreciate the distinction between the utilization of the cash generated pursuant to the issue of shares at a premium and the restriction contained in section 78(2) of the Companies Act, 1956*

vis-a-vis the application of the share premium account.

The appellant, therefore, submits that it has not violated the provisions of section 78(2) of the Companies Act, 1956 and accordingly the Assessing officer was not justified in holding that the amount brought in the books of company as share premium is not share premium within the meaning of the Companies Act, 1956 and erred in treating the same as income".

4.13. With regard to issuance of shares at a premium by the assessee company, which in opinion of the Ld. AO is a sham transaction in view of losses incurred by the assessee and accordingly there is no future prospects for the assessee to enable the investors to make investments in assessee company at a premium is concerned, the Ld. AR submitted before us that the shares were issued to the foreign investors in accordance with the exchange control regulations. The copies of the Foreign Inward Remittance Certificate (FIRCs), Form FCGPR filed with RBI, Valuation certificate from Chartered Accountant, Compliance certificate from Company Secretary and copies of share certificates were provided to the ld AO during the course of the assessment proceedings which clearly prove beyond doubt the identity of the foreign investors. The ld AO had held that the company had suffered losses for the last 5 years and hence the premium of Rs.210/- on conversion is not justified. The ld AR submitted that the findings of the ld AO are contrary to the above factual position and the basis on

which the value of the assessee company was derived and the terms and conversion of the preference shares. The assesssee's detailed submission in this regard have already been stated in the preceding paragraphs. The ld AR submitted that the terms of the conversion of the CCPPS were already determined at the time of the issue of the CCPPS to the investors and the fact that the assessee had losses for the past *5* years would have no bearing on the conversion of the CCPPS to equity shares at a premium. The entire investment by the investors has been approved by the Foreign Investment Promotion Board of India (FIPB). The ld AR submitted that Matrix is a SEBI registered Foreign Venture Capital Investor (FVCI), in support of which a registration certificate was also furnished before the lower authorities.

4.13.1. The ld AR submitted that the ld AO had held that the investment transaction is a Sham. In this regard, he argued that "Sham" means non existent, or bogus or imaginary. The ld AR submitted that the findings of the ld AO are completely devoid of merits for the following resaons:-

a) The ld AO had clearly failed to appreciate the documents that were furnished which proves the genuineness of the transaction.

b) The funds were infact received from the investors and shares were issued.

c) The assessee had entered into shareholder agreement with the investors.

d) Prior approval of the FIPB, Government of India was taken for the investment.

e) The ld AO had himself held that par value of the shares to be genuine and has held the share premium amount as sham which is in complete contradiction of his findings. A transaction can be said to be sham in entirety and not in parts.

4.14. As regard the reliance placed by the Ld. AO on the decision of Hon'ble Apex Court in the case of McDowell vs CTO reported in (1985) 3 SCC 230 is concerned, we find that in McDowell's case, the assessee was liquor manufacturer and on sale of the liquor the assessee had not included the excise duty which was paid by the buyers (under certain arrangement) in their turnover. The Court held that obligation to pay the excise duty was on the manufacturers and the same should be included in the turnover of the assessee. The court also dealt with the legitimacy of tax planning, where it held that tax

planning may be legitimate provided it is within the framework of law, colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. This decision cannot be applied to the facts of the case of the assessee. Further the aforesaid case is no longer a good law after the decision in the case of Union of India V Azadi Bachao Andolan [(2003) 263 ITR 706 (SC)] where the Court held that the decision in McDowell & Co. Ltd.'s case (supra) cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavour. In any case, in the context of issuance of shares by the appellant at premium this case law of McDowell is completely irrelevant.

4.15. Accordingly we hold that when there are material evidences to substantiate that the shares were issued to foreign investors, and the conversion of the share was in accordance with the terms of issue of the preference shares appropriately justified with the fair valuation, there is no case treating such an issue / conversion as a means of tax avoidance.

4.16. With regard to yet another observation made by the Ld. AO that the amount received by the assessee is not share premium, but transfer of funds in the nature of revocable transfer of asset within the meaning of the Sections 61 to 63 of the Act and there-by the same is well within the scope of income defined u/s 5 r.w.s 4 of the Act, it would be relevant to address the provisions of Sec. 61 of the Act as under:-

> *"All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income".*

4.17. It would also be relevant to address the provisions of Sec. 63 of the Act which defines revocable transfer as under;

> *"For the purpose of sections 60,61 and 62 and of this section-*
> *(a) A transfer shall be deemed to be revocable if –*
> *(i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or*
> *(ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;*
> *(iii) transfer includes any settlement, trust, convenient, agreement or arrangement".*

4.18. From the bare reading of the aforesaid provisions, we find that the provisions of Sec. 61 to 63 are intended to circumvent attempts made by a transfer

or to reduce tax liability by arranging the transfer of its assets such that the income does not accrue to him but reserves the power or interest in the assets transferred or in the income therefrom. We find that u/s 61 of the Act, income arising to any person by virtue of revocable transfer is deemed to be income of the transferor. In the present case, we find that the assessee has converted / issued shares to the foreign investors at a premium. There is no question of any transfer or any assets or any income therefrom on which the transferor has the right to reassume power over the income or assets. In any case, the provisions of Sec. 61 to 63 of the Act is not applicable in the hands of the transferor and the assessee herein is the recipient of the funds from the foreign investor and accordingly it is only transferee. Hence, the provisions of Sec. 61 to 63 of the Act does not come into operation at all.

4.19. We find that the Ld. AO had finally invoked the provisions of Sec. 56(1) of the Act in order to bring the receipt of share premium to tax in the hands of the assessee company. For the sake of convenience, the provisions of Sec. 56(1) of the Act are reproduced hereunder:-

Income from other sources F- Income from other sources:

> *"Sec. 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 Sec. 14, items A to E".*

4.20. The receipt of share capital and share premium by the assessee admittedly is not chargeable to tax under any of the heads specified in Sec. 14 in items A to E. That does not mean that the said receipt would automatically get taxed under the head income from other sources. The term "income" is defined in Sec. 2(24) of the Act to include by way of several clauses and one such clause which is relevant to the issue under consideration would be clause (xvi) which was brought into the statute by the Finance Act 2012 w.e.f 01.04.2013 which reads as under:

Section – 2(24)(xvi)

> *"Any consideration received for issue of shares as exceeds the fail market value of the shares referred to in Clause (viib) of Sub Sec. (2) of Sec. 56".*

4.21. So it could be seen from aforesaid definition that the legislature wanted to bring within the ambit of income u/s 2(24) and consideration received from issue of shares which is over and above the fair market value of the shares as referred to in Sec. 56(2)(viib) of the Act. We find that the said provision was introduced

only w.e.f A.Y 2013-14 onwards and cannot be made applicable to the year under consideration. Moreover, the aforesaid definition refers to consideration received in excess of fair market value of the shares as referred to in Sec. 56(2)(viib) of the Act. Whereas, the Ld. A.O in the instant case, had resorted to tax the receipt of share premium u/s 56(1) of the Act. Hence, the amended definition of Sec. 2 Sub Sec. 24 cannot be made applicable in the instant case. We also find that the amended definition of Sec. (2) sub Sec. 24 (xvi) even w.e.f A.Y 2013-14 would not be applicable in the instant case because the provisions of Sec. 2(56)(viib) of the Act are not applicable for issue of share to non-residents.

4.22. Hence, we hold that compulsorily convertible participating preference shares (CCPPS) were converted at a share premium of Rs. 210 each which was agreed in accordance with share holders agreement entered into with foreign investors and at the fair market price which was determined at the time of issue of shares. It is not in dispute that the conversion of CCPPS was made to independent third parties which does not have any direct or indirect relation with the promoters of the assessee. Hence, we hold that the issue of share and the conversion of CCPPS cannot be regard as sham or

non genuine having regard to the aforesaid facts and observations and more especially the entire details of the investors were duly provided and the same were also subjected to due approval received from Foreign Investment Promotion Board (FIPB) and necessary statutory returns were also filed in the prescribed form with Reserve Bank of India (RBI). We also find that Ld. CIT(A) had given a categorical observation that no fresh monies have been received into the books of the company during the year these preference share were already lying in the books of the assessee company which stood converted into equity shares, these facts remain uncontroverted by the Ld. DR before us.

4.23. We also find that with regard to the receipt of share premium of Rs. 1,43,79,678/- relating to fresh issue of 1597742 of equity shares of Rs. 10 each issued at a premium of Rs. 9 per share, the ld. CIT(A) had placed reliance on the various decisions of Hon'ble jurisdictional High Court which are already reproduced in his order and also the Coordinate Bench decision of this Tribunal in the case Green Infra Ltd., reported in 145 ITD 240. We find that Hon'ble Jurisdictional High Court in the case of Vodafone India Services Pvt Ltd., Vs. Union of India and others reported in 368 ITR 1, had held as under:

25. *But we have examined the issue afresh. The word income for the purpose of the Act has a well understood meaning as defined in Section 2(24) of the Act. This even when the definition in Section 2(24) of the Act is an inclusive definition. It cannot be disputed that income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24) (vi) of the Act. In such a case, Capital Gains chargeable to tax under Section 45 of the Act are, defined to be income. The amounts received on issue of share capital including the premium is undoubtedly on capital account. Share premium have been made taxable by a legal fiction under Section 56(2)(viib) of the Act and the same is enumerated as Income in Section 2(24)(xvi) of the Act. However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of ALP. Therefore, absent express legislation, no amount received, accrued or arising on capital account transaction can be subjected to tax as Income. This is settled by the decision of this Court in Cadell Weaving Mill Co. v. CIT [2011] 249 ITR 265/116 Taxman 77 was upheld by the Apex Court in CIT v. D.P Sandu Bros. Chember (P.) Ltd. [2005] 273 ITR 1/142 Taxman 713. This Court has in Cadell Weaving Mills Co. (supra) inter alia, observed as under:—*

> *'It is well settled that all receipts are not taxable under the Income tax Act. Section 2(24) defines "income". It is no doubt an inclusive definition. However, a capital receipt is not income under section2(24) unless it is chargeable to tax as capital gains under Section 45. It is for this reason that under section 2(24)(vi) that the Legislature has expressly stated, inter alia, that income shall include any capital gains chargeable under section 45. Under Section 2(24)(vi), the Legislature has not included all capital gains as income. It is only capital gains chargeable under Section 45 which has been treated as income under Section 2(24). If the argument of the Department is accepted then all capital gains whether chargeable under section 45 of not, would come within the definition of the word "income" under section2(24). Further, under section 2(24)(vi) the Legislature has not stated that "any capital gains" will be covered under the word income. On the contrary, the Legislature has advisedly stated that only capital gains which are chargeable under Section 45 of the Act could be treated as income. In other words, capital gains not chargeable to tax under section 45 fall outside the definition of the word "income" in section 2(24) of the Act. It is true that section 2(24) of the Act is an inclusive definition However, in this case, we are required to ascertain the scope of Section 2(24)(vi) and for that purpose we have to read the sub section strictly. We cannot widen the scope of sub section by saying that the definition as a whole is inclusive and not exhaustive. In the present case, the words "chargeable under section 45" are very important. They are not being read by the Department. These words cannot be omitted. In fact, the prior history shows that capital gains were not chargeable before 1946. They were not chargeable between 1948 and 1956. Therefore, whenever an amount which is other wise a capital receipt is to be charged to tax, section 2(24) specifically so provides.'*

In view of the above, we find considerable substance in the Petitioner's case that neither the capital receipts received by the Petitioner on issue of equity shares to its holding company, a non-resident entity, nor the alleged short-fall between the so called fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

4.24. We also find that the Coordinate Bench decision of this Tribunal in the case of Green Infra Ltd., is directly on the point herein in ITA No. 7762/Mum/2012 dated 23.08.2013, wherein it was held as under:

> *"Considering the entire issue in the light of the material evidence brought on record in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of Sec. 68 of the Act. We therefore direct the A.O to delete the addition of Rs. 47,97,10,000/-. Ground No. 2 & 3 are accordingly allowed.*

4.25. In view of the aforesaid elaborate observations in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon herein above, we hold that there is absolutely no case for making any addition u/s 56(1) of the Act. Hence we find no infirmity in the order of CIT(A) deleting the said addition. Accordingly, the Ground No.2 raised by the revenue is dismissed.

ITA No. 519/Mum/2017 –A.Y: 2011-12

5. The grounds No. 1 & 2 raised by the Revenue in this appeal are exactly similar to that raised by them in ITA No. 780/2016 for A.Y 2010-11. The decision rendered by us for A.Y 2010-11 would apply with equal force for A.Y 2011-12 also except with variance in figures. Accordingly, the grounds raised by the revenue are dismissed.

ITA No. 339/Mum/2017, A.Y 2012-13

6. The first ground raised by the revenue for A.Y 2012-13 is exactly identical to ground No. 2 raised by the Revenue for A.Y 2010-11 and the decision rendered by us thereon would apply with equal force for this assessment year also except with variance in figures. Accordingly, the ground No. 1 raised by the revenue is dismissed.

7. Ground No. 2 raised by the revenue is with regard to the action of the Ld. CIT(A) restricting the disallowance of interest u/s 36(1)(iii) of the Act to Rs. 34,24,711/- as against Rs. 1,93,41,121/- made by the Ld. A.O in respect of interest free advances given to certain subsidiary companies.

7.1. We have heard the rival submissions and perused the material available on record. It is not in dispute

that the monies were advanced by the assessee company to its subsidiary companies free of interest. We find that the Ld. A.O had disallowed the interest paid on borrowed funds u/s 36(1)(iii) of the Act on a proportionate basis of advancing of monies to its subsidiaries as under:

S. No.	*Name of Subsidiary*	*Brand managed*
1	*MC Retail Pvt. Ltd*	*Calvin Klein*
2	*MK Retail Pvt.Ltd*	*French Connection*

7.2. The aforesaid submissions made by the assessee were not controverted by the revenue before us. Hence, the interest free advances made to subsidiaries by the assessee were purely out of commercial expediency and once the commercial expediency is proved, then there cannot be any disallowance of interest u/s 36(1)(iii) of the Act. But we find that the Ld. CIT(A) despite the fact of commercial expediency being proved by the assessee, had recorded a categorical finding that the disallowance of interest need to be restricted only to Rs. 34,24,711/- based on the availability of own funds with the assessee company. Accordingly, the Ld. CIT(A) had restricted the disallowance of interest to Rs. 3424711, against which action, we are informed that assessee had not preferred an appeal before us. This is

a case where no disallowance of interest need to be made in view of proving of commercial expediency beyond doubt but since the assessee has not preferred an appeal before us against the restriction of disallowance of interest to Rs. 34,24,711/- by the Ld. CIT(A), we do not deem it fit and appropriate to interfere in the said order of the Ld. CIT(A). Accordingly, the ground No.2 raised by the revenue is dismissed.

8. In the result the appeal of the revenue is dismissed.

ITA 729/Mum/2016- A.Y 2012-13

9. The ground No.1 raised by the revenue is exactly identical to Ground No. 2 raised by the Revenue in the case of Brand Marketing India Pvt Ltd, in ITA No. 519/Mum/2017 A.Y 2011-12 hence the decision rendered thereon would apply with equal force for this assessee and for this assessment year also except with variance in figures.

10. In the result all the appeals of the revenue are dismissed.

This order pronounced in Open Court on 20/12/2019

.

Sd/-	Sd/-
(MAHAVIR SINGH)	(M. BALAGANESH)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

KRK

Copy to:-

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai