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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI, S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 2653/Mum/2023
(A.Y. 2011-12)
ITA No. 2635/Mum/2023
(A.Y. 2012-13)
ITA No. 2651/Mum/2023
(A.Y. 2013-14)
ITA No. 2650/Mum/2023
(A.Y. 2014-15)
ITA No. 2646/Mum/2023
(A.Y. 2017-18)

ACIT-1(1)(1) 579, Aaykar Bhavan, M. K. Road, Mumbai-400020	Vs.	M/s. Aadhaar Wholesale Trading and Distribution Ltd. Knowledge House, Shyam Nagar, JV Link Road, Jogeshwari-East, S.O., Mumbai-400060
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAFCA8793G		
Appellant	**..**	**Respondent**

C.O. No. 119/Mum/2023
(Arising out of ITA No. 2653/Mum/2023)
(A.Y. 2011-12)

M/s. Aadhar Wholesale Trading and Distribution Ltd. Knowledge House, Shyam Nagar, JV Link Road, Jogeshwari-East, S.O., Mumbai-400060	Vs.	ACIT-1(1)(1) 579, Aaykar Bhavan, M. K. Road, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: AAFCA8793G		
Appellant	**..**	**Respondent**

Appellant by :	Shri. Madhur Agrawal
Respondent by :	Shri. Ajay Chandra & Shri. Manoj Kumar Sinha

Date of Hearing	27.03.2024
Date of Pronouncement	05.04.2024

आदेश / O R D E R

PER AMIT SHUKLA :-

The aforesaid appeals filed by the revenue and Cross Objection filed by the assessee are interconnected and based on identical issue and facts and therefore, for the sake of convenience these appeals are adjudicated together by this common order, by taking the ITA No. 2653/Mum/2023 as a lead case and the findings of the same on the major issues will be applied to the other appeals filed by the revenue and the assessee mutatis mutandis wherever it is applicable.

1. The summary of issue involved in these appeals are as under:

A.Y.	ITA No.	Appeal filed by	Issues			
			Addition u/s 68 on account of share premium	Addition u/s 56(2)(viib) on account of share premium	Int paid on loan taken from Holding Co.	Total
2011-12	2653/Mum/23	Department	10,00,00,000/-	-	45,67,728	**10,45,67,728**
	CO 119/Mum/23*	Assessee	-	-	-	**-**
2012-13	2635/Mum/23	Department	30,00,00,000	-	-	**30,00,00,000**
2013-14	2651/Mum/23	Department	-	9,60,00,000	-	**9,60,00,000**
2014-15	2650/Mum/23	Department	-	8,00,00,000	-	**8,00,00,000**
2017-18	2646/Mum/23	Department	-	12,00,00,000	-	**12,00,00,000**
						70,05,67,728

***** Validity of reopening u/s 147 of the Act.

ITA No. 2653/Mum/2023 A.Y. 2011-12

2. The grounds of appeal of the revenue in ITA No. 2653/Mum/2023 are as under:

1. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 10,00,00,000/- being the share premium u/s. 68 of the Income tax Act, without appreciating the fact that during the course of assessment the assessee has failed to submit or explain the basis of arriving at the said premium, without which is was not possible to ascertain the genuineness of claim of transaction."

2. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.10,00,00,000/- being the share premium u/s. 68 of the Income tax Act, without appreciating the fact that during the course of assessment the assessee has not submitted any valuation report to show how the premium amount has been arrived at."

3. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made on account of interest of Rs.45,67,728/- paid on loan taken from holding company viz Future Venture India Ltd., without appreciating the fact that during the course of assessment proceedings no explanation was offered by the assessee to show how the payment of interest made to its holding company is justified on the basis of prevalent market rate."

4. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored.

3. The facts of the case, in brief, are that the assessee filed its return of income for A.Y. 2011-12 on 27.09.2011 declaring total income at ₹ Nil and claiming current year loss of ₹ 25,72,89,360/-.

The return was processed u/s 143(1) of the Act on 13.01.2012 accepting the returned income. The case was picked up for scrutiny and after hearing the assessee, the order u/s 143(3) was passed on 30.01.2013 without any addition. Subsequently, the case was reopened after recording the reasons for reopening, which is given at page 2 of assessment order dated 24.08.2016. The case was reopened for the reason that the assessee has issued 25,00,000 equity shares of ₹10/- each on premium of ₹40/- per share. The company collected huge premium of ₹10,00,00,000/- on face value of ₹2,50,00,000/- despite the fact that the company's accumulated losses were of more than 50% of its net worth. The assessee was asked to justify the premium received from the shareholders. The AO observed that the assessee did not provide any documentary evidences to show how premium of ₹40/- per share was arrived at. The AO also referred to the qualifying remarks of the auditors of the assessee, wherein it was stated that the assessee did not have an internal audit system. The AO also found that the company has accumulated loss of more than ₹175,00,00,000/-. Therefore, the investment of such huge amount by way of share premium makes the transaction appear non-genuine. The other reason for reopening was claim of interest expenses of ₹45,67,728/- in spite of huge losses during the year. Since the holding company and the shareholders have introduced share capital, it would

have been proper, if they had advanced interest free loan instead of charging interest.

4. The AO also found that the assessee has made late payments of employee's contribution during the month of February 2011 amounting to ₹ 1,50,958/-. The assessee also made delayed payment of ESIC for month of April 2010 and October 2010 amounting to ₹46,258/-. For these reasons, the AO had reasons to believe that income chargeable to tax had escaped assessment to the extent of ₹10,47,29,944/-

5. In response to the notice issued u/s 148 dated 16.02.2016, the assessee filed reply on 22.02.2016 stating that original return filed on 27.09.2011 may be treated as return filed u/s 148 of the Act. The assessee requested to provide the reasons for reopening the assessment which was duly supplied to it. Objections of the assessee to the reassessment proceedings were rejected in accordance with the decision of the Hon'ble Supreme Court in the case of GKN Driveshaft India Ltd. 259 ITR (2019) SC. The assessment was, thereafter, completed u/s 143(3) r.w.s. 147 of the Act on 24/08.2016 by making addition of ₹54,00,00,000/- u/s 68 of the Act and interest disallowance of ₹45,67,728/-, paid to the holding company. In the assessment order, the AO has accepted the identity and creditworthiness of the shareholders but genuineness of the

transaction on account of share premium was held to be doubtful because the assessee failed to justify the issuance of shares at such huge premium.

6. Aggrieved by the above order, the assessee filed appeal before the Ld. CIT(A). The first issue before the Ld. CIT (A) was validity of the reopening of the assessment u/s 147. The Ld. CIT(A) has relied on the decision of the Supreme Court in the case of Raymod Woollen Mills Ltd. V/s ITO and other in (1999) 236 ITR 34 (SC) where it was held that in determining whether commencement of reassessment proceedings was valid, it is only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. The Ld. CIT(A) has also relied on the decisions in the cases of Aravali Infrapower Ltd. V/s DCIT in 2017-TIOL-42-SC-IT, CIT V/s Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 161 taxmann 316 (SC), Amsa India Pvt. Ltd. v/s CIT (2017-TIOL-603-HC-DEL-IT-), Mohammedally Noorbhoy Bandukwala Trust V/s ITO (2017-TIOL-341-HC-MUM-IT), R.K. Malhotra ITO v/s Kasturbhai Lalbhai 109 ITR 537 (SC).

7. In view of the above decisions, the Ld. CIT (A) held that the AO had sufficient reasons to believe that income had escaped assessment within the meaning of section 147 of the Act..

8. The next ground was in respect of the addition of ₹54,00,00,000/- on account of share premium. During the appellate proceedings, the appellant company stated that company was originally run by the Godrej Group. It was engaged in the business of rural and semi-rural retail distribution of agriculture and consumer products for personal and household uses, including apparent, seeds, fertilizers and FMCG products. The Future group purchased 70% shares from the Godrej group in year 2008. The management of Future Venture India Ltd. and Godrej Agrovet Ltd. planned to help the appellant company and scale its rural retail business by introducing new store formats and innovative selling initiatives. For this view and expecting future growth, both the groups invested in the appellant company on year to year basis, in order to provide liquidity and expand the footprints of the assessee company.

9. The appellant further stated that valuation report from the Valuer was obtained in 2010-11 wherein as per the projected scenario, the share price was arrived at and according to the said report, the shareholders invested the required amount in the company. Further, it was contended that identity and creditworthiness of the parties have been accepted by the AO. It was submitted that the management passed resolution during the subject year for converting short-term loans ₹8.75 crore and ₹2.37 crore from

Future Venture India Pvt. Ltd. and Godrej Agrovet Ltd. respectively into share capital, wherein it was agreed to issue the share at ₹50/- per share comprising face value of ₹10/- per share and share premium of ₹40/- per share. The assessee submitted various documents such as Form-2, board resolution, minuets of meeting and financial statements of the investors to prove genuineness of the transaction. After perusing details submitted by the assessee and the arguments advanced by it, the Ld. CIT(A) allowed the grounds of appeal of the assessee by holding as under:

> *"6.3 However, as submitted by appellant, which has been reproduced at para 6.1 supra, in this case the appellant has converted the loans received by it from its holding company and other shareholders, viz. Future Ventures India Ltd, Godrej Agrovet Ltd., Mahendra Arumugham & Bahar Agrochem & Feeds Pvt. Ltd. In support of its reply, appellant has furnished the following documents before the Id. AO to prove the genuineness of the transaction:-*
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> - *Letter dated 22.11.2013 wherein the financials of Future Ventures India Ltd. and Godrej Agrovet Ltd for relevant year are submitted before the Ld. AO during the course of assessment proceeding (copy of the letter placed at pg 36 of the paper book.*
> - *Preferential offer given to Mr. A Mahendran for increasing the share capital.*
> - *Preferential offer given to Bahar Agrochem & Feeds Pvt. Ltd for increasing the share capital.*
> - *Letter from Future Ventures India Itd and Godrej Agrovet Ltd to convert the short term loan into share capital.*

- *Valuation report for the issue of shares (page no.107-122 of the paper book.*

6.4 From its submissions, it is seen that the subject capital was introduced to augment the appellant company's long term capital requirements and to repay some of the debts. The shares were issued to the joint venture partners at a face value of Rs. 10/- each and premium of Rs. 40/- per share, as recorded in the assessment order and the submission of appellant. The appellant has submitted that the transaction is a commercial transaction wherein a set of independent investors have agreed to participate in a business venture based on their own understanding of the industry, risk-reward matrix and other relevant factors which are highly subjective for each individual investor. The said investors have applied their own commercial acumen to arrive at the value of the shares and accordingly invested in the shares of the Company.

6.5 The valuation report for issue of shares is prepared prior to notification of Rule 11UA in the I. T. Rules 1962. As regards the company, which is a limited company, its board of directors has decided the allotment of the shares to the said investors as per their discretion and strategic planning of the venture under consideration based on the report submitted by an independent consultants before the board. The minutes of the Board Meeting of appellant have been furnished wherein the decision of the Board Members in support of the business plan for allotment of shares after conversion of short term loans into equity has been resolved. In view of the above discussion, this ground of appeal is allowed."

10. Aggrieved by the order of the Ld. CIT(A), the revenue is in appeal before us. The Ld. (CIT) DR has strongly relied on the assessment order and has argued that despite sufficient opportunity of hearing,

the assessee has not been able to prove the genuineness of the transaction regarding the high premium of ₹40/- per share paid by investors. However, he admitted that the identity and creditworthiness of the investors are not in doubt. He stated that there is no valuation report to justify the exorbitant premium paid by the investors. He drew our attention to the fact that the assessee has been constantly incurring losses over the years and total accumulated loss was about ₹173,00,00,000/- at the end of said financial year. In absence of fresh valuation report for the subject year, it is not reasonable to accept the payment solely on the basis of the earlier valuation report.

11. The Ld. AR of the appellant has strongly relied on the order of the Ld. CIT(A).He stated that the Future Group purchased 70% of share from the Godrej Group in year 2008 and the management of both groups decided to invest in the appellant company on year to year basis to provide liquidity and expand footprints of the assessee company. For these purposes valuation report from a Valuer was obtained wherein as per the projected scenario, the share price was arrived at. The shareholders accordingly invested the amount in the appellant company. The Ld. AR stated that the investors are part of well known business houses namely, Future Venture India Ltd. (Currently known as "Future Consumer Ltd.") and Godrej group.

Therefore, genuineness of the transactions cannot be doubted. It is further submitted that the appellant company has already submitted following documents before the AO to substantiate the genuineness of the transaction:

- *Letter dated 22.11.2013 wherein the financials of Future Ventures India Itd and Godrej Agrovet Ltd for relevant year are submitted before the ld.ao during the course of assessment proceeding (copy of the letter placed at pg 36 of the paper book.*
- *Preferential offer given to Mr.A Mahendran for increasing the share capital.*
- *Preferential offer given to Bahar Agrochem &Feeds Pvt. Ltd for increasing the share capital.*
- *Letter from Future Ventures India ltd and Godrej Agrovet Ltd to convert the short term loan into share capital.*
- *Valuation report for the issue of shares (page no.107-122 of the paper book."*

12. The Ld. AR also submitted that the AO has not pointed out any discrepancy regarding the documents submitted during the assessment proceedings. He has relied upon the various decisions which were also relied upon by the appellant before the Ld. CIT (A). The Ld. AR further submitted that valuation report for A.Y. 2010-11 is also referred in this year also because there was not much variation in the financial projections of the current year. It was submitted that to compute the fair market value of quoted shares, one of the methods prescribed under Rule 11UA, Income Tax Rules, 1962 is Discounted

Cash Flow (DCF) method where the fair market value of the share is determined by the merchant banker or an accountant. He contended that actual result may vary upwards or downwards depending on various marketing/economics/social conditions and therefore, such valuation cannot be reviewed or compared with actual figures at a later date. He stated that the valuation report needs to be accepted as it was supported by an independent Valuer which cannot be tinkered at a later point of time by substituting it with actual results. In the said valuation report the equity value of the company has been estimated ₹123,00,00,000/- and the enterprise value estimated at ₹ 145,00,00,000/- and therefore the fair market value of shares of the assessee company ranges from ₹50 to ₹60/-. In the DCF method, all cash flows expected as a particular point of time are estimated and discounted by using cost of capital to determine its present value. The Ld. AR submitted that the AO has nowhere pointed any specific adverse findings in the projections of the valuation report nor has made any independent valuation of the shares of the appellant company.

13.

14. The Ld. AR also argued that the valuation of shares is a commercial decision between investors and investees and once both the parties agree on a price of subject shares, then questioning the

same by the AO is would be beyond the scope of section 68 of the Act. For this the Ld. AR relied upon the decision of the ITAT, Mumbai in the case of Green Infra Limited v/s ITO-20 (2013) 38 taxmann.com 238 (Bombay). The said decision has been upheld by the Hon'ble Bombay High Court in Commissioner of Income Tax. V/s Green Infra Limited (2017) 78 taxmann.com 340 (Bombay).

15. He further argued that even if excess premium has been charged, the same it does not become income as it is a capital receipt. Such receipt is not in the revenue field and it cannot added to the total income.

16. We have carefully considered facts of the case and the arguments of both parties. The revenue has contested the deletion by the Ld. CIT (A) of ₹10,00,00,000/-, being the share premium, added by the AO u/s 68 of the Act. According to the AO, the assessee failed to submit or explain the basis for arriving at said premium, without which it is not possible to ascertain genuineness of the transaction. The Assessee also did not submit any fresh valuation report to show how the premium was arrived at.

17. Before deciding the issue, it would be proper to reproduce and discuss the provisions of section 68 which has been applied by the AO

to make the addition of ₹10,00,00,000/- towards share premium. The section reads as under:

68. Cash Credits:-

> *"- Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing Officer] [Substituted by Act 4 of 1988, Section 2, for " Income-tax Officer" (w.e.f. 1.4.1988).], satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.*
>
> *[Provided that] where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*
>
> *(a)the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*
>
> *(b)such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:*
>
> *[Provided further] that nothing contained in the first proviso [or second proviso] shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."*

18. A bare reading of section reveals that section 68 reposes in the AO the jurisdiction to enquire from the assessee the nature and source of the sum amount credited in its books of account. If the

explanation given by the assessee is found not to be satisfactory, further inquires can be made by the AO himself, both in regard to the nature and source of the income credited by the assessee in the books of account. The section accords statutory recognition to the principle that cash credits which are not satisfactorily explained, or not at all explained, might be assessed to be taxed as income of the assessee. The onus of proving source of sum found to have been received by the assessee is on the assessee. It is for the assessee to prove that even if cash credit represents income, it is income from a source which has been already taxed. To prove the genuineness of transaction, the burden lies on the assessee and to discharge the onus, the assessee must prove (i) the identity of the creditors,(ii) creditworthiness or the capacity of the creditors to advance the money and (iii) the genuineness of the transaction. Only when the above three ingredients are prima facie established, the department is required to undertake further exercises. As to how the onus can be discharged would depend on the facts and circumstances of each case.

19. The expression "the assessee offers no explanation" means assessee offers no proper, reasonable and acceptable explanation as regards sums found credited in the books maintained by the assessee. The opinion of the AO is required to be formed objectively with reference to the material on record. Application of mind is a *sine qua*

non for forming the opinion. The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and the attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature.

20. The identities of the creditors are clearly established in case of the appellant because the sum credited in the books of the assessee as share capital and share premium have been subscribed by the Future group and Godrej group, which are the holding company and other major shareholder of the appellant company. The creditworthiness has also not been questioned by the AO. The only reason why the AO made addition u/s 68 of the Act is that there is no basis for valuation of the shares of loss making company at such a high premium of Rs. 40/- per shares (face value is RS. 10/-). The company has been consistently incurring losses and the assessee failed to furnish any valuation report before the AO for the subject assessment year. Moreover, if AO does not doubt the transaction and creditworthiness or the genuineness, then how can addition be made on valuation of premium paid on shares on the ground that valuation is higher according to him. The AO can examine the nature and source of credit and once the nature and source has been proved which is not doubted by him and then how addition can be made

under section 68 for treating the premium amount as unexplained on the reason that premium amount is not justified. To tax such such premium amount on account of valuation more that the fair market value statute has brought section 56(2)(viia)/(viib) from A.Y.2013-14. Thus such an addition cannot be made u/s 68 of the Act.

21. The Ld. AR of the appellant has further contended that the transaction is a commercial transaction wherein exiting shareholders and independent investors have agreed to participate in business venture based on their own understanding of the industry, risk-reward matrix and other relevant factors which are highly subjective for each individual investor. The valuation report for issue of share was prepared prior to notification of Rule 11UA of the Income-tax Rules, 1942. We find that the valuation report was prepared for A.Y. 2010-11. Though, no fresh valuation report has been prepared, there are no substantial changes in the projections made in the said report. The Valuer has adopted DCF method which takes into account the future business prospect of the company. It uses the concept of the time value of money. All cash flows expected at a particular point of time are estimated and discounted by using cost of capital to determine its present value. The appellant has argued that the IT Act itself gives option to the assessee to determine the value of its share

u/s 56(2)(viib) and the same cannot be rejected merely on the ground that actual result or profit does not tally with the projected result.

22. We agree that valuation of shares is a commercial decision between the investors and investees and once both the parties agree on a price of the subject shares, then questioning the same by the AO would be beyond the scope of section 68 of the Act. The decision of the ITAT, Mumbai in the case of Green Infra Ltd. v. ITO (2013) 38 taxmann.com 253 [Mumbai Trib.] is directly on the issue. This decision of the ITAT, Mumbai in favour of the assessee and was subsequently upheld by the Hon'ble Bombay High Court in CIT vs. Green Infra Ltd. (2017) 78 taxmann.com 340 (Bom.). Relevant part of decision of the ITAT, Mumbai is as under:

> *"10.1. No doubt a non-est company or a zero balance company asking for a share premium of Rs. 490/-per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land."*

23. There is no reason why the ratio of the above decision should not be applied to the facts of the case because facts of the present case are similar to the facts of the above case. We may add that no other

adverse material has been produced by the revenue to take a different view on the impugned issue.

24. Be that it as may, even the decision of the Hon'ble Jurisdictional High Court in the case of SLS Energy (P) Ltd. v/s Income ITO (2023) 154 taxmann.com 400 (Bom.) is directly on the issue and is in favour of the assessee. In the said case, security premium of ₹6,79,32,00,000/- was stated to be unjustified on the ground of 'intrinsic valuation of shares'. However, the Hon'ble High Court held that the very basis for reopening was misconceived as receipt of premium on issuance of shares was not "receipt of income", but it was a "capital receipt". The Hon'ble High Court held that the receipt of share capital including share premium was on capital account and gave rise to no income. The facts of the present case are similar to the facts of the decision cited supra and therefore, on this ground also, the appellant is liable to succeed. In the result, the grounds of appeal of the revenue are dismissed.

25. The next ground in deletion of disallowance of interest of ₹ 45,67,728/-. During the year assessee has paid interest of ₹ 45,67,728/- on loan taken from holding company Future Venture India Ltd. AO has made disallowance on the ground that when assessee has made huge losses why interest has been paid.

26. The Ld. CIT (DR) has relied on the assessment order of AO whereas the Ld. AR of the appellant has relied upon the order of the Ld. CIT (A).

27. The Ld. CIT(A) allowed the ground by discussing as under:-

> *"Perusal of the Tax Audit Report reveals that interest paid on ICDS to Future Venture India Ltd. is ₹ 45,67,728/-. In view of the findings on ground of appeal 3 supra, this ground of appeal is allowed."*

Once the assessee has taken ICD's and that ICD's has been taken in the earlier year then payment of interest cannot be disallowed on the ground that assessee has incurred loss during the year. Thus, we do not find any infirmity in the order of the Ld. CIT (A) when the interest has been paid on the ICD's to Future Venture India Ltd. Accordingly, the ground is dismissed.

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

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28. The appellant has filed Cross Objection and the grounds are as under:

> *"1. On the facts and circumstances of the cross-objector's case and in law, the Ld. AO erred in passing an impugned assessment order u/s 147 of the Act which is a mere change of opinion and reopening is bad in law.*

2. on the facts and circumstances of the cross-objector's case and in law, the Ld. AO erred in issuing notice u/s 148 of the Act dated 16.02.2016 which is barred by limitation as per first proviso of section 147 of the Act.

3. The Cross objector crave leaves to add, amend, alter, modify and or withdraw any of the above grounds of cross objection, which are without prejudice to one another.

29. As discussed earlier, the case was reopened, to tax excess premium. The Ld. CIT(A) sustained the reopening by discussing the facts of the case and by relying on the decisions cited in the facts of the case discussed earlier at para 7 including the decision in case of Raymond Woolen Mills Ltd. (supra). While dismissing the ground, the Ld. CIT(A) has stated that in the initial stage the AO is required to prima facie satisfy that there is escapement of income. The quantification and finality is decided subsequently in the reassessment order to be passed after obtaining relevant details and after confronting the assessee.

30. The Ld. AR has argued that in the original assessment, completed on 21.02.2012, the assessee was asked to provide details in respect of share capital received during the year with the name and address of donor, name of bank and cheque number, prove capacity and creditworthiness of the subscriber etc. The appellant had submitted all the requisite details regarding the share capital issued

during the proceedings u/s 143(3) of the Act. In the original assessment order, details submitted by the assessee and the explanation were accepted by the AO and order u/s 143(3) was passed assessing the total income at returned loss at ₹ 25,70,73,672/-. However, the AO has reopened the assessment u/s 147 of the Act for the reasons which were already examined in the assessment proceedings i.e. receipt of share capital including share premium. The objection of the assessee was rejected by the AO on the ground that the assessee was not able to prove the genuineness of the transaction of share premium of ₹ 10,00,00,000/- at the time of assessment proceedings. The Ld. AR submitted that the issue was duly raised by the AO in the original assessment proceedings and no new tangible material has been received by the AO after completion of the original assessment which can warrant any change of the opinion already formed on the subject issue. Mere change of opinion on the same set of facts does not entitle the AO to reopen the completed assessment. It would amount to review of own decision by the AO, which is not permissible. For this, the Ld. AR also relied on the decision of the Hon'ble Apex Court in the case of CIT v/s Kelvintor of India Ltd. reported in 320 ITR 561 (SC). The Ld. AR relied on the decision in the case of CIT v/s Eicher Ltd (2009(26 DTR (Del.) 310 wherein it was observed that if the entire material has been placed by the assessee

before the AO during the original assessment and the AO had applied his mind, then merely because this is not expressly stated in the assessment order, the same would not be a ground to conclude or hold that there was no application of mind. Such cases also fall under 'change of opinion' to quash reopening of completed assessement. The Ld. AR also relied upon the decision of the Hon'ble Bombay High Court in the case of Godrej Projects Development Pvt. Ltd. V. ITO in Writ petition No. 8041 of 2025 dated 01.02.2024 and contended that the facts of the appellant are similar and the case is covered by the above decision.

31. We have carefully considered the facts of the case heard the parties. We have also gone through the decisions relied upon by both the parties. It is a undisputed fact that the case of the assessee was originally assessed u/s 143(3). The Ld. AR contended that the AO had asked for all details regarding receipt of share process during the year in the original assessment proceedings. The same were supplied to the AO and the assessment order was passed after considering the explanation and details furnished before the AO. We find that no addition has been made by the AO in the assessment order u/s 143(3), dated 21.02.2014, except a small disallowance of ₹ 2,15,691/- u/s 36(1) of the Act.. Therefore, it cannot be said that the AO has not applied his mind to impugned issue regarding share capital and share

premium. The Ld. CIT(DR) has not placed any evidence or material before us to counter the argument of the Ld. AR that the details regarding impugned issue were not provided to the AO and the same was not considered by the AO. Therefore, we are of the view that the reopening is based on mere change of opinion on the same set of facts and the same issue already considered by the AO in the original proceedings u/s 143(3) of the Act. The reopening is based on mere change of opinion, which is not permissible, as held by the Hon'ble Courts including Hon'ble Supreme Court in the case of Kelivintor of India Ltd. (supra).

32. We also filed that the decision of the Hon'ble Bombay High Court in case of Godrej Projects Development Pvt. Ltd. (supra) supports the case of the appellant. Under similar facts and circumstances of the case, the Hon'ble Court held that the reopening is basied on mere change of opinion and would amount to reveiew of the assessment order, which is not permissible. It also held that receipt of share premium does not competitive income charged to tax under the Act. The case of the appellant is covered by the above decision. In view of the facts and the precedents discussed above. Therefore, the ground of the appellant is allowed.

33. In the result, the appeal is allowed.

ITA No. 2635/Mum/2023 A.Y. 2012-13

34. The grounds taken up by the revenue are similar to the grounds raised in A.Y. 2011-12. The facts are similar to the facts of the case for A.Y. 2012-13. The issue involved is regarding addition of ₹30,00,00,000/- towards share premium u/s 68 of the Act. The arguments of the Ld. AR and the reasons given by the AO, which was relied upon by the Ld. CIT (DR), are also similar to the reasons and arguments of the earlier year. Hence, following reasons given above for A.Y. 2011-12, the grounds of revenue are dismissed. Accordingly, the appeal of revenue is dismissed.

ITA No. 2651/Mum/2023 A.Y. 2013-14

35. The facts of the case are similar to the facts of the appeal for A.Y. 2011-12 and 2012-13. However, the share premium receipt of ₹ 9,68,00,000/- during the year has been added by the AO u/s 56(2)(viib) of the IT Act in lieu of provisions of section 68 of the Act applied in the A.Ys. 2011-12 and 2012-13. The grounds are reproduced hereunder for ready reference:

> *"1. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowances of Rs.9,60,00,000/- u/x. 56(2) (viib) of the Income tax Act. made by the AO, without appreciating the fact that during the course of assessment the assessee has failed to submit or explain the basis of arriving at the premium, without which it was not possible to ascertain the genuineness of claim of transaction".*

2. "On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowances of Rs.9,60,00,000/- u/s. 56(2)(viib) of the Income tax Act, without appreciating the fact that during the course of assessment proceedings the assessee has not submitted any fresh valuation for FY 2012-13 relevant to AY 2013-14 to show how the premium amount has been arrived at."
3. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O be restored."

36. The facts, of the case, in brief are that the assessee had issued 24,00,00,000 equity shares of ₹10/- per share and had received share premium @ ₹ 40/- per share amounting to ₹ 9,60,00,000/- The AO asked the assessee to justify the valuation of shares as per rule 11UA of the Income-tax Rule, 1962. He also asked assessee to justify the large huge share premium in a situation when the company has accumulated loss of more than ₹ 150,00,00,000/-. The AO was not satisfied with the submission of the assessee. He held that reliance on a share valuation report of A.Y. 2010-11 for considering value of shares for A.Y. 2013-14 would give a distorted picture. Since, the assessee did not carry out fresh valuation of share for the year under consideration, the AO has referred to the valuation report for A.Y. 2010-11 and pointed out various discrepancies and shortcomings in the said report. He stated that the valuation report does not give true and fair picture of the business of assessee because it is based on lofty projections with the sole aim of justifying the high premium. He

also stated the projected targets considered in the valuation report were never achieved and the appellant company continued to incur losses over the years. He further stated that in the case of M/s. Bahar Agrochen and Feeds Pvt. Ltd., which is one of the shareholders of the assessee company in A.Y. 2011-12, the NAV of the appellant company was determined at only ₹5.93. However, the company has received excessive premium of ₹ 40 per share and totaling to ₹9,60,00,000/-. The AO has quoted section 56(2)(viib) in the light of the above factual background and held that the assessee failed to justify issuance of shares at such high premium. Accordingly, the total sum of ₹ 9,60,00,000/- received by the assessee as share premium was disallowed and added u/s 56(2)(viib) of the Act. He also simultaneously initiated penalty proceedings u/s 271(1)(c) of the Act.

37. In the appellate order passed u/s 250 of the Act on 31.05.2023, the Ld. CIT(A) has considered the facts of the case and submission of the appellant that 70% shares of the appellant was held by the Future group and 26.14% was held by Godrej Group. Therefore, the appellant is subsidiary of M/s Future Group Venture Enterprises Ltd. (FVEL) [Now known as Future Consumer Ltd.] . The Ld. CIT(A) examinedfacts of the case against the statutory provisions of section 56(2)(viib) and section 2(18)(b)(B)(b) of the Act and decided the ground in favor of the appellant by holding as under:

"6.2 The appellant has made a detailed submission on the issue that provision of section 56(2)(viib) do not apply to a company in which public are not substantially interested. The appellant has contended that the investors in appellant assessee are Future Ventures India Limited and Godrej Agrovet Limited. These investors have extended Inter Corporate Deposits (ICDs) to appellant. During this AY, assessee has received a premium of Rs. 9,60,00,000/- from these 2 companies as a result of capitalization of working capital loan extended by these 2 companies to appellant. Appellant has allotted 24,00,000 shares at Face Value Rs. 10/- and premium of Rs. 40/- per share to the investor companies during FY 2012-13 relevant to AY 2013-14. 16,80,000 shares at a premium of Rs. 6,72,00,000/- were allotted to Future Ventures India Limited (FVIL) and 7,20,000 shares at a premium of Rs. 2,88,00,000/- were allotted to Godrej Agrovet Limited. Future Ventures India Limited (FVIL) is a group company of Future Group and Godrej Agrovet Limited is a subsidiary of Godrej Industries Ltd. As per the above shareholding, it is clear that the appellant is a subsidiary of M/s. Future Ventures Enterprises Ltd. (FVIL) (now known as Future Consumer Ltd.) which holds more than 51% of the shareholding. FVIL is a listed company on BSE and NSE stock exchanges since 2011 and accordingly, it is a public company as per section 2(71) of the Companies Act, 2013 or Sec 3(1)(c) of the Companies Act, 1956. As per section 2(18)(b)(B) of the 1. T. Act, 1961, FVIL holds 70% of the shares as well as voting rights in the appellant company with no fixed dividend rights.

6.3 The provisions of Sec. 56(2)(viib) of the I. T. Act, 1961 are as under

"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 accede the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares"

"company in which the public are substantially interested a company is said to be a company in which the Public are substantially interested-

6.4 The provisions of section 2(18)(b)(B) of the I. T. Act, 1961 are as under

b) if it a company which is not a private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified ether in tem(Ajor in tem(B) are fulfilled, namely

(A) shares in the company for being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits were, as on the last day off the relevant previous year, listed in a recognized stock exchange in India in accordance with the Securities Contracts (Regulation) Act 1956 (42 of 1956) and any rules made thereunder,

[(B) shares in the company (not being shares entitled to a fixed of dividend whether with or without further right to participate in profits) carrying not less than fifty percent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the relevant previous year beneficially held by

(a) the Government, or

(b) a corporation established by a Central, State of Provincial Act

(c) any company to which this clause applies or any subsidiary company of such company if the whole of the share capital of such subsidiary company has been held by the parent company or by its nominees throughout the

6.5 In the view of the above facts, the provisions of section 56(2)(viib) of the Act are not attracted to the appellant, which is a

subsidiary of a public limited company. The appellant has relied on decisions of Hon'ble ITAT Hyderabad in the cases of Apollo Sugar Clinics Ltd [2019] 105 taxmann.com 254 and M/s Sembcorp Energy India Limited [ITA No. 1774/Hyd/2019] in support of its contention. Respectfully following the above decisions of Hon'ble ITAT Hyderabad and in view of the facts and circumstances of this case, this ground is allowed."

38. Before us, the Ld. DR strongly relied on the assessment order of the AO.

39. The Ld. AR of the appellant has relied on the order of Ld. CIT(A) and submitted that such an addition is beyond the scope of section 56(2) (viib) as the provision is not applicable when assessee company falls in the category company in which public are substantially interested".

40. We have carefully considered the facts of the case and have also gone through the relevant provisions of sections 56(2)(viib) and 2(18)(b)(B) of the Act. It is clear from reading of section 56(2)(viib) of the Act that mischief of the said section is not attracted to a company in which public are substantially interested. The provisions of section 2(8)(b)(B) of the Act defines a "company in which public are substantially interested". The said sections have already been reproduced above. After careful consideration of the facts of the case in the light of the above statutory provisions, it is clear that the case

of the appellant is not covered under the provisions of section 56(2)(viib) of the Act. We also find that the assessee covered by the clause (b) (B)(c) of the subsection (18) of section 2 of the Act because the share holding in the appellant's company is as follows:(1) Future Venture India Ltd. (now known as Future Consumer Ltd.) – 70%, (2) Godrej Agrovet Ltd.19% and (3) Others 11%. Thus, appellant is a subsidiary of Future Venture India Ltd.

41. Further, shares held by the Future group are not entitled to a fixed dividend whether with or without a further right to participate in profits. Clause (b) of section 2(18) applies to the said company since it satisfies the condition in clause (b)(A). The shares of Future Consumers Ltd. are listed on BSE and NSE since 10th May 2011. In view of the facts it is a company in which public are substantially interested and the appellant is deemed to be a company in which the public are substantially interested within the meaning of section 2(18) of the Act. It is thus evidently clear that provisions of section 56(2)(viib) are not applicable to the appellant company.

42. Regarding valuation of shares, we are of the considered view that it was a commercial decision by the promoters of two companies who had agreed to rely on the valuation report which was relied upon while

subscribing to the shares of the assessee company in FY 2009-10. In this regard, the appellant has relied upon the decision of the ITAT, Mumbai in the case of Green Infra Ltd. v/s ITO (2013) 37 CCH 0059 where a newly created company had issued shares of ₹ 10 each at premium of ₹ 490 per share. During the assessment proceedings, the AO had observed that own funds were introduced by the assessee through shareholders under guise of revenue. The AO also questioned the authenticity of the valuation report. In the first appeal, the Ld. CIT(A) confirmed the addition. However, the ITAT decided the issue in favour of the assessee. The following observations of the ITAT are relevant and hence reproduced as under:

> *"10.1. No doubt a non-est company or a zero balance company asking for a share premium of Rs. 490/- per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such of huge premium without any bar from any legislated law of the land. Details of subscribers were before the Revenue authorities. The AO has also confirmed the transaction from the subscribers by issuing notice u/s. 133(6) of the Act. The Board of Directors contains persons who are associated with IDFC group of companies, therefore their integrity and credibility cannot be doubted. The entire grievance of the Revenue revolves around the charging of such of huge premium so much so that the Revenue authorities did not even blink their eyes in invoking provisions of Sec. 56(1) of the Act."*

43. Above decision of ITAT, Mumbai has been upheld by the Hon'ble Bombay High Court in the case of Green Infra Ltd. v/s ITO (2013) 37 CCH 0059 (SC). The facts of the present case are similar to the facts of the case cited above. The investors are reputed listed companies belongings to the Future group and Godrej group. There is no reason why ratio of the above decision shall not be applicable to the facts of the present case. We have already held that provisions of section 56(2)(viib) are not applicable to the case of the appellant company. In view of the above factual and statutory positions and authorities cited supra, the grounds of revenue are dismissed. The appeal of the revenue is, accordingly, dismissed.

ITA No. 2650/Mum/2023 A.Y. 2014-15

44. The grounds taken up by the revenue are similar to the ground taken up for A.Y. 2013-14. The facts are similar to the facts of the case for A.Y. 2014-15. The issue pertains to addition of ₹ 8,00,00,000/-u/s 56(2)(viib) of the Act towards share premium received during the year. Since the facts are similar, following reasons given for A.Y. 2013-14 in this order, we dismiss the grounds of revenue. The appeal of the revenue is dismissed.

ITA No. 2646/Mum/2023 A.Y. 2017-18

45. The grounds raised by the revenue are similar to the grounds taken up in appeal for A.Y. 2013-14. The facts are similar to the facts

of the case for A.Y. 2017-18. The issue pertains to the addition of share premium of ₹ 12,00,00,000/- u/s 56(2)(viib) of the Act. Since, facts are similar, following reasons given above for A.Y. 2013-14, the grounds of revenue are dismissed. According, the appeal of the revenue is dismissed.

46. **In the result, appeals of revenue are dismissed and cross objection of the assessee is allowed**.

Order pronounced in Open Court on 05/04/2024

Sd/-	**Sd/-**
(S RIFAUR RAHMAN)	(AMIT SHUKLA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Place: Mumbai
Date 05.04.2024
ANIKET SINGH RAJPUT/ STENO

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.