

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1482/PUN/2016

निर्धारण वर्ष / Assessment Year : 2012-13

ITO, Ward-1(1),
Aurangabad.

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Akash Farms LLP,
Nath House, Paithan Road,
Aurangabad.

PAN : AADCA3303J

.....प्रत्यर्थी / Respondent

Revenue by : Smt. Shabana Parveen
Assessee by : Shri N. R. Agarwal

सुनवाई की तारीख / Date of Hearing : 15.05.2019
घोषणा की तारीख / Date of Pronouncement : 12.07.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This appeal is filed by the Revenue against the order of the CIT(A)-
1, Aurangabad dated 29.04.2016 for the assessment year 2012-13.

2. The revised grounds raised by the Revenue are as under :-

"1. The Ld. Commissioner of Income-tax (A)-1 erred in passing the order both on the facts of the case and in law.

2. The Ld. Commissioner of Income-tax (A)-1 erred in failing to give to the A.O. reasonable opportunity required to be given to the A.O. as per Rule 46A(3) as only seven days were given to the A.O. for examining and rebutting the considerable additional evidence produced by the assessee and for submitting the Remand Report and the order was passed by CIT(A) on the very next day after the Remand report was due.

3. The Ld. Commissioner of Income-tax (A)-1 erred in not upholding the addition of Rs.42608528/- in light of the decision by the Hon'ble Supreme Court in the case of PCIT Vs NRA Iron & Steel (P) Ltd. (reported in 103 taxmann.com 48) as in the instant case the investor company was in loss of Rs.65,459/- and had negative figures of Reserve & Surplus of Rs.3.60 Crores.

4. *The Ld. Commissioner of Income-tax (A)-1 erred in deleting the addition of Rs.4,26,08,528/- as the assessee had failed to discharge the primary onus contemplated by section 68 of the Act.*

5. *On the facts and in the circumstances of the case, the order of the CIT(A), Aurangabad be quashed and that the order of the A.O. be restored.*

6. *The appellant craves leave to add, amend or alter any other ground at the time of hearing."*

3. Briefly stated the relevant facts include that the assessee is engaged in sale of agricultural produce and filed the return of income declaring total income at Rs.Nil. The assessment was made u/s 143(3) of the Act and determined the total income at Rs.4,19,93,220/-. The Assessing Officer made addition of Rs.4,26,08,528/- on account of unexplained credits. The contents of para 6 of the assessment order are relevant in this regard.

4. The brief facts of this addition include that the assessee issued 99000 shares at Rs.100 each share. In the process, the assessee collected a premium amounting to Rs.8,91,00,000/-. The assessee allotted these shares with premium to the four shareholders, namely, (i) Jeevanlata Kagliwal, (ii) Akash Kagliwal, (iii) Mulibai Kagliwal and (iv) Subhash Kagliwal. The first two shareholders are existing Directors of the assessee company and the rest of the two shareholders are the new share allottees. The Assessing Officer examined the sources of funds of these allottees. In this regard, the assessee explained that these four persons have adequate credit balances in the books of accounts of the assessee. The assessee is required to allot the shares to the said four individuals to clear the liabilities. Assessee received the liabilities on transfer of credit balances available to the credit of the said allottees *qua* the group concerns i.e. M/s. Nath Securities Ltd. and M/s. Rama Pulp &

Papers Ltd. In other words, M/s. Rama Pulp & Papers Ltd. has a liability to pay to these four individuals and instead of payee for the allottees, M/s. Rama Pulp & Papers Ltd. transferred the same to M/s. Nath Securities Ltd. which, in turn, transferred the liabilities to the present assessee. For squaring of the said liabilities, the assessee allotted the shares with premium of Rs.900/- per share, where the book value of the share is Rs.20,326/- (para 4 of the assessment order). In fact, the total of the said liabilities involving all the four allottees by the current year works out to only Rs.4,26,08,528/-. However, the Assessing Officer, on the basis of inadequate information, came to the conclusion that the financial statements of the assessee do not indicate the transfer of funds from M/s. Nath Securities Ltd. to the assessee either by way of cheque transactions or by way of cash entries in the books of account of the assessee. The Assessing Officer did not notice the fact of transfer of fund through the book entries. The Assessing Officer also came to the conclusion that there is no flow of funds in order to match the said allotment of shares worth Rs.8,91,00,000/-, in general, and Rs.4,26,08,528/-, in particular. The contents of para 6 and 7 of the assessment order are relevant and the same are extracted hereunder :-

“06. In order sheet made entry today they also stated that they have no explanation to offer in respect of the amount so credited and therefore they are ready to offer the same to tax. In the circumstances and in the absence any credible evidence, these credits purported to have been brought in by the above persons in the company is treated as unexplained amount credited in the books of the company and the explanation offered by the assessee, in my opinion, is not at all found satisfactory. The sum of Rs.4,26,08,528/- is therefore charged to tax as the income of the assessee company for the assessment year 2012-13. Penalty proceedings u/s 271(1)(c) of the Income tax is initiated for furnishing inaccurate particulars of income and concealment of income. Also initiate penalty proceedings u/s 271A for failure to keep, maintain books of account, documents.

07. In view of the above discussion and on the basis of material available on record, the total income of the assessee company is computed as under :-

<i>Net loss as per profit and loss account</i>	..	-Rs. 6,15,308
<i>Add: Unexplained credit as discussed above</i>	..	<u>Rs.4,26,08,528</u>
<i>Total income</i>	..	<u>Rs.4,19,93,220”</u>

5. Aggrieved with the same, the assessee filed the appeal before the CIT(A). Before the First Appellate Authority, the assessee demonstrated the facts of the said four shareholders, receiving the funds from M/s. Rama Pulp & Papers Ltd./M/s. Nath Securities Ltd. and these amounts were transferred to the assessee bay way of book entries squaring of the transactions involving the said company. Since it is the case of book entries, the question of flow of funds should not arise. Appreciating the said facts of the transactions involved M/s. Rama Pulp & Papers Ltd./M/s. Nath Securities Ltd. and the assessee and accepting the facts that the said Kagliwals are to receive funds from the said company which stands squared by virtue of allotment of the shares with premium. The CIT(A) granted relief to the assessee. The CIT(A) discussed this issue at length in his order, in general, and the contents of para 5 onwards, in particular. The CIT(A) held that there is no scope for invoking the provisions of section 68 of the Act when the identity, capacity and genuineness of the transactions of the loans stand explained. The allotment of shares to Kagliwal against the outstanding amounts is undoubted and the same is very much in order. Relying on the various decisions, the CIT(A) directed the Assessing Officer to delete the said addition of Rs.4,26,08,528/-.

6. Aggrieved with the said decision of the CIT(A), the Revenue is in appeal with the grounds mentioned above.

7. Before us, ld. Counsel for the assessee brought our attention to the various pages of the documents furnished before us in the form of Paper Books and demonstrated that how the funds were transferred through book entries between the assessee and M/s. Nath Securities Ltd. in the first place. Further, he also demonstrated that how the funds were transferred through M/s. Nath Securities Ltd. to M/s. Rama Pulp & Papers Ltd. again through the book entries. Further, he submitted that M/s. Rama Pulp & Papers Ltd., which received fund belonging to the said allottees, is under obligation to make the payments to the allottees and the said liabilities were squared eventually by virtue of the fact that the shares now stand allotted with premium to Kagliwal. The fact that confirmation letters were filed by all these concerns, are also available on record. The ld. Counsel demonstrated that the attempts were made to correct the mistake/omission in the return filed under corporate laws and the same is not successful for the reason that the present assessee now stands converted into LLP.

8. By the time conversion, the company's name was struck off in the website maintained by the Ministry of Corporate Affairs. In any case, there is no dispute on the same as premium is borne out of the records and the net worth/booked value of the assessee is around Rs.20,326/-. The facts that the CIT(A) called for the remand report and the Assessing Officer failure to promptly respond to the said requirement of the CIT(A) were also demonstrated. It is also a fact that the AR for the assessee cooperated with the Assessing Officer during the remand proceedings. Nevertheless, the Assessing Officer did not send report to the CIT(A) in time. The Revenue argues that only 7 days time is given to the Assessing

Officer to reply to the requirement of the CIT(A) in the remand proceedings cannot be the ground for recalling the order of the CIT(A). In any case, all the requisite details needed for making the order are already available to the CIT(A) and therefore, the relief granted by the CIT(A) should not be withdrawn or altered. Further, ld. AR for the assessee also laboured a lot demonstrating the existing of the credit balances in the books of account of the companies i.e. the assessee, M/s. Nath Securities Ltd. and M/s. Rama Pulp & Papers Ltd. *qua* Kagliwals. Bringing our attention to the Paper Book-1 filed by the assessee, ld. Counsel submitted that the pages 1 to 4 of the Paper Book-1 constitute ledger copies of the shareholders in the books of M/s Nath Securities Ltd.. The relevant financial statements are available at pages 5 to 15 of Paper Book-1. Referring to pages 16 to 23 of Paper Book-1, ld. Counsel submitted that these are the copies of affidavits filed by the representatives of the concerned companies. The fact that the CIT(A) called for remand report was also demonstrated by bringing our attention to page 24 of the Paper Book-1.

9. Referring to Paper Book-2, ld. Counsel submitted that the pages 1 to 18 of the said Paper Book-2 reflects the booked value of each share at Rs.20,326/-. A copy of the notice calling for 'Annual General Body Meeting' of the members in this regard is also available on record at page 1 of Paper Book-2. The documents at pages 19 to 40 of Paper Book-2 reflect the ledger extracts of the concerned companies i.e. the assessee, M/s Nath Securities Ltd. The Form No.2 submitted by the assessee u/s 75(1) of the Companies Act, 1956 are placed at pages 41 to 48 of Paper

Book-2 and confirmations by the shareholders are also placed at pages 49 to 52 of Paper Book-2.

10. Referring to page no.3 of Paper Book-1, ld. Counsel submitted that the same constitutes copies of the bank statements of M/s. Nath Securities Ltd. showing the receipt of money from Kagliwal. The assessee also filed a copy of the conversion of the assessee into LLP (page -19 of the Paper Book). It is the submission of the assessee that the allotment of shares with premium is justified when the liabilities to Kagliwal stands squared up by this method with premium of Rs.900 per share. The booked value of the share is to the tune of Rs.20,326/-. Thus, the ld. Counsel asked for confirming the order of the CIT(A).

11. On the other hand, ld. DR for the Revenue heavily relied on the order of the Assessing Officer and filed the written submissions dated 02.04.2019. In the said note, ld. DR highlighted the facts relating to the absence of '**special resolution**' on record. The fact that NAV values of the shares were not supported by the independent valuers and was also violated the Rules. The absence of mutual consent agreement and applicability of the provisions of section 68 of the Act were also discussed in her note. The ld. DR also relied on the Hon'ble Supreme Court's judgement in the case of PCIT vs. NRA Iron & Steel (P) Ltd., 103 taxmann.com 48.

12. We heard both the sides and perused the orders of the Revenue authorities and the Paper Books/written submissions filed by the assessee and the ld. DR respectively. The case of the Revenue is that the provisions of section 68 of the Act apply to the transactions under

scrutiny. Further, it is the suspicion of the Revenue that the shares are allotted to Kagliwals without receiving the funds by way of cash or cheque and against only the book entries.

13. However, on verification of the assessment order, we find the Assessing Officer did not go to the related transactions that took place in earlier years and did not scrutinise the cash book and bank accounts of the assessee involving the fund transferring companies. The Assessing Officer did not examine the facts, that the liabilities are transferred from one company to other i.e. M/s. Rama Pulp & Papers Ltd./ M/s. Nath Securities Ltd. and finally to assessee, thereby assessee has adequate fund to the credit of the all four Kagliwals. Considering the facts that the investigation of the Assessing Officer is very superficial, in our view, the said finding of the Assessing Officer is not sustainable.

14. Further, we examined the order of the CIT(A) and find that Kagliwals are under obligation to receive their dues from M/s. Rama Pulp & Papers Ltd. or others. Therefore, on receipt of their dues to the assessee on transfer, the assessee rightly squired up the dues by allotting the shares to all the four Kagliwals. It is a settled legal proposition that the book entries are vital and the same is appreciated by the CIT(A) while granting relief to the assessee. Thus, it is not the case of the Revenue that there are no liabilities at all to Kagliwals by M/s. Rama Pulp & Papers Ltd./ M/s. Nath Securities Ltd. and the assessee. It is undisputed fact that the assessee received the liabilities on transfer through the book entries *qua* the Kagliwals from M/s Nath Securities Ltd. which, in turn, received the liabilities of Kagliwal from M/s. Rama Pulp & Papers Ltd.. Further, we find there is no allegation by Assessing

Officer on the issues about the identity, creditworthiness and genuineness of the transactions. These allottees are assessed to tax regularly and the fund transferring companies/firms are duly registered under the ROC following the procedure laid down in the Companies Act, as the case may be. Their names are not struck off by Ministry of Corporate Affairs for any illegalities/procedural irregularities under Company Act.

15. Further, we also perused the order of the CIT(A) and find para 5 is relevant. Further, we find a factual as well as legal proposition, there is no case is made by the Revenue before us that the evidences furnished before the CIT(A) was in violation of the provisions of Rule 46A of the I.T. Rules, 1962. Considering the same, we find the contents of para 5 of the CIT(A)'s order are relevant to extract and the same are extracted hereunder :-

“5.

On consideration of entire material/documents placed on record, I am of the opinion that the appellant company has discharged the primary onus that lay on it. The primary onus of proving the identity, creditworthiness and genuineness of the -transactions in relation to receipt of share capital have been satisfactorily discharged by the appellant company. The allegation of the AO that there was no justification for such a huge share premium in the hands of the appellant company, was not justified. It was for the Board of Directors of the appellant company to decide the share premium & wisdom of the subscribers to pay it and same could not have been challenged by the AO. The Hon'ble Mumbai Tribunal has held in the case of Green Infra Ltd. Vs. ITO (38 taxmann.com 253) that it was the prerogative of the Board of Directors of a company to decide premium amount and it was the wisdom of the shareholders whether they wanted to subscribe to shares at premium or not. It was held that the Income Tax department could not question the charging of such a huge premium without any bar from any legislated law of the land. It is a settled law that it is not the duty of the assessee to go into the reasons for investment made by the outsider parties. In the case of ACIT Vs. People's General Hospital Pvt. Ltd. in ITA No. 57/Ind/2007, the Hon'ble Indore Tribunal vide order dated 28.9.2007 for the assessment year 2003-04 had an occasion to consider the same situation. Before the Tribunal, it was argued that the capital contribution by the foreign company at a hefty premium without proper justification was not justified and no prudent businessman would buy the shares of minor shareholding and that too when money was

coming from Gibraltar. It was held by Hon'ble ITAT that it was an admitted fact that the assessee had filed the confirmation letter from M/s. Alliance Industries Ltd. confirming that it had transferred foreign currency from their bank to the account of the assessee and in the said confirmation, all the details of several payments were mentioned. It was also an admitted fact that the shareholder company was registered company and this fact was also proved by the certificate of incorporation of M/s. Alliance Industries Ltd. The identity of the foreign investor M/s. Alliance Industries Ltd. was therefore established beyond doubt. The AO also did not dispute the identity and existence of the shareholder M/s. Alliance Industries Ltd. The AO also did not dispute transfer of money by M/s. Alliance Industries Ltd. to the assessee for the purchase of shares of the assessee company and the amount invested in the assessee company on account of share capital/share premium. The money in question flowed from M/s. Alliance Industries Ltd. therefore the AO was not justified in drawing adverse inference against the assessee. The AO had not brought any evidence on record that the share application money received by assessee from M/s. Alliance Industries Ltd. belonged to the assessee or that it was the assessee's own money which it had received in the shape of dollars from the NRI Company. It was therefore not in the nature of income of the assessee because the money received was on account of share capital/share premium. It is a settled law that the Income Tax Authority cannot ask the assessee to prove source of the source. The AO had raised serious doubt about the genuineness of transaction because no prudent businessman could make huge investment for getting lesser shareholding in the company. However it was held by the ITAT that what the businessman had taken a decision was entirely dependent upon their business needs which was not open to challenge by the Revenue therefore it was not relevant criteria to disbelieve the version of the assessee. Considering the totality of facts and circumstances of the case in the light of the material and evidence on record, it was held that the assessee had discharged the onus that lay upon it to prove identity and existence of the shareholder, its creditworthiness and genuineness of transaction.

.....

On appeal, the Hon'ble Mumbai ITAT held that in view of the fact that the loans had been accepted in the past by the Revenue; the identity, capacity and genuineness of the transaction of loan already stood accepted. The factum of the loan creditors having made the gift of the amounts outstanding and payable to them by the assessee had not been disputed by the Assessing Officer. The Assessing Officer only wanted the assessee to establish the capacity of the donors to make the gift and their identity. As already stated the loans having already been accepted in the past, the Assessing Officer could not insist on the above to proof in this assessment year. In the case of CIT Vs. Usha Stud Agricultural Farms Ltd. (301 ITR 384) (Delhi HC) and CIT Vs. Parameshwar Vora, (301 ITR 404) (Rajasthan HC), it was held that opening balances of earlier year could not be subject matter of investigation under section 68 of the Act. Respectfully following the above decisions and facts of the present case, I direct the AO to delete the addition of Rs.4,26,08,528/- made by him. These grounds of appeal are allowed.”

16. **Sources of Funds of the Kagliwals:** Further, we examined the sources of funds amounting to Rs.4,26,08,528/- invested by (i)

Jeevanlata Kagliwal, (ii) Akash Kagliwal, (iii) Mulibai Kagliwal and (iv) Subhash Kagliwal. We also examined the explanation regarding the sources of investments and find the following is explanation given by the assessee in writing is proper and the same are extracted hereunder :-

“1. Akash Kagliwal (Addition Rs.91,53,611/-)

Source:

(A). Received by Journal entry from Nath Securities Ltd. Rs.91,53,611/- (Rs.16,78,611+Rs.74,75,000)

(B). Source for Rs.16,78,611/-

(a) Nath Securities received on behalf of Mr. Akash Kagliwal Rs.16,78,611/- from Rama Pulp & Paper Mills Limited by cheque on 04.06.2009.

(b) Rama Pulp has repaid Rs.16,78,611/- by cheque, out of Rs.18,00,000/- received from Mr. Akash Kagliwal on 4th May 2009.

(C). Source for 74,75,000/-

(a) Nath Securities received on behalf of Mr. Akash Kagliwal Rs.74,75,000/- from Ashu Farms Pvt. Limited by cheque No.781028 drawn on Dena Bank on 17.03.2010.

(b) Ashu Farms received Rs.74,75,000/- by cheque, from Anand Rathi against sale of shares.

2. Jeevanlata Kagliwal (Addition Rs.1,25,00,000/-)

Source:

(A). Received by Journal entry from Nath Securities Ltd. Rs.1,25,00,000/- (Rs.1,17,90,000+Rs.7,10,000).

(B). Source of Rs.7,10,000/-.

(a) Nath Securities received on behalf of Ms. Jeevanlata Kagliwal Rs.7,10,000/- from Rama Pulp & Paper Mills Limited by cheque on 25.02.2010.

(b) Rama Pulp has received Rs.25,00,000/- by cheque of Axis Bank from Jeevanlata Kagliwal.

(C). Source of Rs.1,17,90,000/-.

(a) Nath Securities received on behalf of Ms. Jeevanlata Kagliwal Rs.1,17,90,000/- from Jeevan Farms Pvt. Limited by various cheques.

(b) Jeevan Farms received Rs.1,18,13,324/- by cheque, from Anand Rathi against sale of shares. Out of this amount of 1,17,90,000/- paid by cheques to Nath Securities Ltd. & Balance of 23324/- is lying as credit balance.

3. Mulibai Kagliwal (Addition Rs.1,50,00,000/-)

Source:

(A). Received by Journal entry from Nath Securites Ltd. Rs.1,50,00,000/- (1,19,70,000/-+30,30,000/-).

(B). Source of Rs.1,19,70,000/-

(a) Nath Securities received on behalf of Ms. Mulibai Kagliwal Rs.1,19,89,707/- from Paresh Farms Pvt. Ltd. by cheques out of which 1,19,70,000/- was paid to Nath Securities by cheques on behalf of Ms. Mulibai Kagliwal.

(b) Paresh Farms Pvt. Ltd. had received Rs.1,19,89,707/- by cheque from Anand Rathi for sale of shares.

(C). Source of Rs.30,30,000/-.

(a) Nath Securities received on behalf of Ms. Mulibai Kagliwal Rs.30,30,000/- from Paresh Farms Pvt. Limited by cheque no.046484.

(b) Paresh Farms received Rs.50,00,000/- by RTGS/cheque, from Osian Farms on behalf of Mulibai Kagliwal.

4. Mr. Subhash Kagliwal (Addition Rs.59,54,917/-)

Source:

(A). Received by Journal entry from Nath Securities Ltd. Rs.59,54,917/-.

(B). Source of Rs.59,54,917/-.

(a) Nath Securities received on behalf of Mr. Subhash Kagliwal Rs.8,23,623/- & Rs.51,31,294/- by cheques from Prabha Farms Pvt. Ltd.

(b) Prabha Farms Pvt. Ltd. had received Rs.62,44,725/- by cheque from Anand Rathi for sale of shares.

(c) Out of which Two cheques totalling Rs.59,54,917/- was paid to Nath Securities received on behalf of Mr. Subhash Kagliwal leaving a balance of Rs.2,89,808/-."

17. From the above, it is evident that the assessee company allotted shares certainly against the funds lying to the credit of the Kagliwals. Considering the above deficiency in the scrutiny order made by the Assessing Officer and also the discharge of the onus by the assessee before the CIT(A), we are of the opinion, the decision of the CIT(A) is fair and reasonable and it does not call for any interference. Accordingly, the grounds raised by the assessee are allowed.

18. Before parting, we also would like to place on the records regarding the discrepancies noted in the Form No.2 under the Company Act provisions. So far as the said defects in Form No.2 filed by the assessee under the provisions of Companies Act are concerned, we are of the opinion the same do not have any impact on the income-tax proceedings. It is for the Revenue to take up the issue of deficiency in Form under the provisions of the Company Act.

19. Considering the above, we find that all the four allottees and their identity, creditworthiness and genuineness of the transactions are beyond doubt. Thus, the provisions of section 68 of the Act are not attracted. Therefore, the order of the CIT(A) is fair and reasonable on this issue and it does not call for any interference. Accordingly, the grounds raised by the Revenue are dismissed.

20. In the result, the appeal of the Revenue is dismissed.

Order pronounced on 12th day of July, 2019.

Sd/-
(विकास अवस्थी /**VIKAS AWASTHY**)
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-
(डी. करुणाकरा राव/**D. KARUNAKARA RAO**)
लेखा सदस्य/**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 12th July, 2019.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-1, Aurangabad.
4. The Pr.CIT-1, Aurangabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.