

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI G. MANJUNATHA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 49/MUM/2016
Assessment Year: 2011-2012**

The Income Tax Officer-6(1)(3), R. No. 563-B, Aayakar Bhavan, M.K. Road, New Marine Lines, Mumbai - 20	Vs.	M/s Atco Ltd., 6A, Lalwani Industrial Estate, 14, G D Ambedkar Road, Wadala, Mumbai - 400031 PAN: AADCG7438C
(Appellant)		(Respondent)

**CO No. 218/MUM/2017
(Arising out of ITA No. 49/MUM/2016)
Assessment Year: 2011-2012**

M/s Atco Ltd., 6A, Lalwani Industrial Estate, 14, G D Ambedkar Road, Wadala, Mumbai - 400031 PAN: AADCG7438C	Vs.	The Income Tax Officer-6(1)(3), R. No. 563-B, Aayakar Bhavan, M.K. Road, New Marine Lines, Mumbai - 20
(Appellant)		(Respondent)

Revenue by : Shri Anadi Varma (CIT DR)

Assessee by : Shri Jayesh Dadia (AR)

Date of Hearing: 25/07/2019
Date of Pronouncement: 31/07/2019

ORDER

PER RAM LAL NEGI, JM

These are the appeal and cross objection filed by the revenue and the assessee respectively against the order dated 15.10.2015 passed by the Commissioner of Income Tax (Appeals) (for short 'the CIT (A)')-12, Mumbai, for the assessment year 2011-12, whereby the Ld. CIT (A) has allowed the appeal

filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

ITA No. 49/MUM/2016 (Assessment Year: 2011-2012)

2. Brief facts of the case are that the assessee company a 100% subsidiary of M/s Vaarad Ventures Ltd. formerly known as M/s Atco Corporation Ltd., engaged in the business of manufacturing and processing of aerated water, soft drinks and beverages of all kinds, filed its return of income for the assessment year under consideration declaring loss of Rs. 9,958/-. The return was processed u/s 143(1) of the Act. Since, the case was selected for scrutiny, the AO issued notice u/s 143 (2) and 142 (1) of the Act. In response thereof the authorized representative of the assessee appeared before the AO and submitted the details called for.

3. It was noticed that the assessee company had made purchases of industrial and business supplies division of M/s Vaarad Ventures Ltd. for a total value of Rs. 16 crore as per agreement. The assessee company paid the purchase consideration by issuing allotment of 16,00,000 equity shares of Rs. 1 each at the price of Rs. 100 per share as fully paid up to M/s Vaarad Ventures Ltd. The AO accordingly asked the assessee to explain as to how the value of its shares of Rs. 1 each were taken at Rs. 100 per share, therefore why the purchase consideration should not be taken at Rs. 16,00,00,000/- and balance amount of 15.84 crore should not be treated as income arising from business. It was contended on behalf of the assessee that the total net assets were purchased on slump sale basis for a total consideration of Rs. 16,00,00,000/- and for making payment of the said amount, the company issued 16,00,000 shares of Rs. 1 each at a premium of Rs. 99 per share to its 100% holding company. Therefore, the assessee company being 100% subsidiary of Vaarad Ventures Ltd. is not covered u/s 56 (2)(viib) of the Act. Since, the assessee has explained about the slump sale section 68 of the Act does not apply. Similarly, the AR contended that the Companies Act does not restrict the company to charge any premium. Only utilization of share premium

amount is restricted to specific purpose. The AO holding that the share premium of Rs. 15,84,00,000/- paid for the purchase of the division of the Vaarad Ventures has not explained by the assessee, added the said amount to the total income of the assessee. The AO further made similar addition amounting to Rs. 89,34,750/- to the income of the assessee in connection with the purchase of entire paid up capital of M/s Atcomart Services Ltd. for a total value of Rs. 90.25 lacs by issuing equity share of Rs. 1 each at the price of Rs. 100 as fully paid up to M/s Varad Ventures Ltd. Accordingly, the AO determined the total income of the assessee at Rs. 16,73,24,790/-.

4. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee allowed the appeal of the assessee and deleted the additions made by the AO. The revenue is in appeal against the said findings of the Ld. CIT (A).

5. The revenue has raised the following ground of appeal against the impugned order passed by the Ld. CIT (A):-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in directing the AO to delete the additions of Rs. 15,84,00,000/- & Rs. 89,34,750/- made u/s 68 of the I T Act, 1961 made by the AO on account of unexplained cash credits in the form of Share premium.

2. On the facts and in the circumstances of the case, the Ld. CIT (A) erred in not appreciating the fact that while allotting the shares at premium in lieu of the Division of its holding company as sales consideration as well as allotment of shares at premium to the subsidiary company, the assets of the assessee company was negligible and no business operations as seen in the profit & loss account during the year, to fetch the premium on shares.”

6. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT (A) has wrongly directed the AO to delete the additions made u/s 68 of the Act without appreciating the fact that while allotting the shares at premium in lieu of the division of its holding company as sale consideration as well as

allotment of shares at premium to the subsidiary company, the assets of the assessee company was negligible and there was no business operation during the year to fetch the premium on shares. The Ld. DR pointed out that the company purchased industries and business supplies division of M/s Vaarad Ventures Ltd. for a total consideration of Rs. 16 crores and the consideration was paid by issuing 16,00,000 equity shares of Rs. 1 each at the price of Rs. 100 per share as fully paid up to M/s Vaarad Ventures Ltd. Therefore, the valuation of shares of M/s Atco Ltd. of Rs. 1 each at Rs. 100 per share is not justifiable. The assessee company on the one hand purchased a division of Vaarad Ventures and also received premium of Rs. 99 on its shares. Since, the assessee has failed to explain the share premium of Rs. 15,84,00,000/- paid for purchase of the division of the Vaarad Ventures Ltd., the AO has rightly added the said amount to the income of the assessee. Similarly, the assessee company also purchased entire paid up capital of M/s Atcomaart Service Ltd. for a purchase value of Rs. 90.25 lacs and allotted 90,250/- its equity share of Rs.1/- each at a price of Rs. 100 as fully paid up to M/s Vaarad Ventures Ltd. In this case also, the assessee failed to explain the premium of Rs. 89,34,750/- paid for purchase of paid up capital of M/s Atcomaart Services, the AO has rightly made addition of the said amount to the income of the assessee. Under these circumstances, the Ld. CIT (A) has wrongly deleted the additions made by the AO. The Ld. DR relied on the decision of the Mumbai Tribunal in the case of *M/s Pratik Syntex Pvt. Ltd. vs. ITO ITA No. 6690/Mum/2016, AY 2012-13* in support of his contention.

7. On the other hand, the Ld. counsel for the assessee relying on the order passed by the Ld. CIT (A) submitted that since the findings of the Ld. CIT (A) are based on the law laid down by the Hon'ble Supreme Court and various High Courts, the Ld. CIT (A) has rightly deleted the additions made by the AO. The Ld. counsel further pointed out that the assessee has explained the cash credit as the AO has confirmed the identity of the seller company. Moreover, the transaction of Rs. 15,84,00,000/- is a slump sale which has been confirmed by both the parties. Similarly, the AO has wrongly treated the share

premium of Rs. 89,34,750/- as unexplained cash credit in view of the fact that the AO has confirmed the identity of the seller company. The Ld. counsel further submitted that issuance of shares at a premium was a commercial decision of the Board of Directors and there is no prohibition under the Companies Act on issuing quantum of share premium. The share premium is capital receipt and hence not liable to tax under the Act. The Ld. counsel further submitted that since the purchaser is 100% subsidiary of the seller company. In view of the aforesaid submissions, the Ld. CIT (A) contended that there is no merit in the revenue's appeal. The Ld. counsel relied on the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Green Infra Ltd.* 392 ITR 7 (Bom), *CIT vs. Gagandeep Infrastructure* 394 ITR 680 (Bom), the Hon'ble Madras High Court in the case of *M/s V.R. Global Energy Pvt. Ltd. vs. ITO tax case (Appeal) No. 246 of 2017*, decision of the ITAT, Bangalore in the case of *M/s Cornestone Property Investments Pvt. Ltd. vs. ITO* ITA No. 665/Bang/2017 to substantiate the claim of the assessee.

8. We have heard the rival submissions and also gone through the relevant material on record including the cases relied upon by the parties. The only grievance of the revenue is that the Ld. CIT (A) has wrongly deleted the additions made u/s 68 of the Act. The Ld. CIT (A) has decided the issue in favour of the assessee holding as under:-

"I have carefully perused the assessment order as well as the written submissions of the appellant. The AO made an addition of Rs. 15,84,00,000/- and Rs. 89,34,750/- as unexplained share premium u/s 68. However, it is seen that the AO has erred in disallowing Rs. 15,84,00,000/- share premium paid for the purchase of shares of Vaarad Ventures Limited and Rs. 89,34,750/- share premium paid for the purchase of shares of Alcomart Services Limited. It is seen that the AO has erred in inferring that the payment of shares at a premium is an unnatural and suspicious transaction. There is no prohibition under the Companies Act or any other law providing a limit on the quantum of share premium that can be charged since issuing shares at a premium is a commercial

decision. The share premium is in the nature of capital receipt and hence not liable to tax under the I.T. Act. Reliance is placed in this regard on the Hon. Supreme Court orders in the cases of CIT Vs Standard Vacuum Oil Co. (1996) 59 ITR 685, CIT Vs Allahabad Bank Ltd. (1969) 73 ITR 745 and Punjab State Industrial Development Corporation Ltd. Vs. CIT (1197) 225 ITR 792 (SC). The A.O. has erred in treating the share premium of Rs. 15,84,00,000/- as unexplained cash credit when the identity of the seller company is itself confirmed by the AO as the purchaser company is 100% subsidiary of seller company. Thus, the whole transaction of Rs. 15,84,00,000/- is slump sale which is confirmed by both the parties. Similarly, the AO has erred in treating the share premium of Rs. 89,34,750/- as unexplained cash credit when the identity of the seller company is confirmed by the A.O. himself as the seller company (Atcomart Services Ltd.) is 100% subsidiary of purchaser company (Atco Ltd.) and the transaction is confirmed by both the parties.

6.1 The issuance of shares at premium was a commercial decision of the Board of Directors. There is no prohibition under the Companies Act so far as the amount of premium is concerned. It is the prerogative of the Board of Directors to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. Their integrity and creditability cannot be doubted. It is settled proposition of law that capital receipts, unless specifically taxed under any provisions of the Act are excluded from income. As per section 68 the appellant company has discharged its onus to establish identity, genuineness of the transaction and the capacity of the lender or the depositor. The identity has been established. The genuineness is also established since the entire transaction has been done through the banking channels duly recorded in the books of account of the appellant company and duly reflected in its financial statement. Here, the capacity of the shareholder is also not in doubt. Thus, it is seen that the AO has erred in invoking the provisions of section 68 of the Act. Reliance is placed on the recent judgments of the Hon. Mumbai ITAT in the case of Green Infra Ltd. Vs. ITO (ITA 7762/Mum/2012) dated 23.08.2013 and ACIT Vs Gagandeep Infrastructure P. Ltd. (ITA

5784/Mum/2011) dated 23.04.2014 which are squarely applicable in the case of the appellant and binding on the undersigned as being that of jurisdictional ITAT. Thus, respectfully, following the Hon. Mumbai ITAT, the AO is directed to delete the additions of Rs. 15,84,00,000/- and Rs. 89,34,750/-.

In the light of the discussion here, Ground of Appeal No. 1 and 2 are allowed.”

9. We notice that the Ld. CIT (A) has deleted the additions in question holding that the assessee company has discharged its onus to establish identity of the parties, genuineness of the transaction and the creditworthiness of the parties concerned. Moreover, the transaction is between the holding company and its 100% subsidiary company. The Ld. CIT (A) has pointed out that the transactions done through banking channels have been duly reflected in the books of account of the assessee company. There is no reason to doubt the capacity of the shareholder. The Ld. CIT (A) has further pointed out that it is the prerogative the Board of Director to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. In the case of *CIT vs. Green Infra* (supra), the Hon'ble Bombay High Court has held that where the evidence establishes genuineness of transaction in share capital, the transactions would not be hit by section 68 of the Act. In the case of *CIT vs. Gagandeep Infra* (supra), the Hon'ble Bombay High Court has held that where the contention of the revenue is that the assessee company received share application money from bogus shareholders, it is for the revenue to proceed by reopening the assessment of such shareholders and assessing them to tax and not to add the same to the assessee's income as unexplained cash credit. In our considered view the decision relied upon by the Ld. DR is distinguishable on facts.

10. In the light of the facts of the case and the evidence on record, we are of the considered view that the findings of the Ld. CIT (A) are in accordance with the law, therefore we do not find any infirmity in the order passed by the

Ld.CIT (A) to interfere with the same. Accordingly, we uphold the decision of the Ld. CIT (A) and dismiss the appeal of the revenue.

CO No. 218/MUM/2017 (Assessment Year: 2011-2012)

The assessee has filed the cross objection against the impugned order on the following effective grounds:

Share premium for Vaarad ventures Limited and Atcomaart Services Limited

On the facts and circumstance of the case and as per provision of law the UI. Assessing officer is disallowing of Rs. 15,84,00,000/- and Rs. 89,34,750/- as share premium paid for the purchase of the division of Vaarad ventures limited and Atcomaart Services Limited accordingly as unexplained Cash Credit.

On the facts and circumstance of the case and as per provision of law the Ld. A.O. has disallowed the share premium of Rs. 15,84,00,000/- and Rs. 89,34,750/- as unreasonable and unjustified when there is no prohibition under the Companies Act, 1956 or any other law providing any limit on the quantum of share premium that could be charged and issuing shares at a premium was a commercial decision.

On the facts and circumstance of the case and in law, the Ld. A.O. has failed to appreciate that the share premium received by the tax payer is in the nature of capital receipt as established by various Supreme Court ruling and hence not liable to tax under the Act.

On the facts and circumstance of the case and as per provision of law, the Ld. A.O. has erred in treating the share premium as unexplained cash credit when the identity of the seller company is confirmed by the A.O. as the purchaser company is 100% subsidiary or seller company and the whole transaction is a stamp sale which is confirmed by both of parties.

The A.O. has objected and has raised a new ground for the case by mentioning that the premium is not commensurate with the net assets transferred.

On the facts and in the circumstances of the case, the Ld. CIT (A) erred in not appreciating the fact that while allotting the shares at premium in lieu of the Division of its holding company as sales consideration as well.

Allotment of shares at premium to the subsidiary company, the assets transferred have value and the method chosen for valuation is the net asset method which has been approved by the CBDT.”

2. The Ld. counsel for the assessee submitted that the assessee does not want to press the Cross Objection. In view of the submissions made by the Ld. counsel for the assessee, the Cross Objection filed by the assessee is dismissed as not pressed.

In the result, appeal filed by the revenue as well as the Cross Objection filed by the assessee, are dismissed.

Order pronounced in the open court on 31st July, 2019.

Sd/-

Sd/-

(G. MANJUNATHA)

(RAM LAL NEGI)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 31/07/2019

Alindra PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai