

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.1662/Del/2018
Assessment Year : 2009-10**

Prabhu Dayal Aggarwal, G- 47, Preet Vihar, New Delhi.	Vs.	ACIT, Circle- 59(1), New Delhi.
PAN : ACBPA0069J		
(Appellant)		(Respondent)

Assessee by : Shri K. Sampat, Adv.
Shri V. Raja Kumar, Adv.
Department by : Shri Atiq Ahmad, Sr.DR
Date of hearing : 25-06-2018
Date of pronouncement : 29-06-2018

ORDER

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 12.02.2018 of the CIT(A)- XXV, New Delhi relating to assessment year 2009-10.

2. Facts of the case, in brief, are that the assessee is an individual and is engaged in the business of sale & purchase of flat, plots, construction business and trading in shares etc. and filed his return of income on 31.07.2009 declaring total income of Rs.1,16,37,353/-. The Assessing Officer mentioned in the

assessment order that the return was processed u/s 143(1). Subsequently, the

Assessing Officer issued notice u/s 148 by recording the following reasons :-

“The department is in possession of information that some brokers had misused client code modification facilities (in short "CCM") to transfer loss and profits on account of share transactions from one client to the other. The losses/profits were shifted to reduce the tax liability in the hands of either the original client or modified client. The information received in the case of the assessee is as under:

PAN of Beneficiary Client	Name of the Beneficiary Client	Address of Beneficiary	Name of Broker	F.Y.2008-09		
				When Original Client (Ascertained Profit Shifted Out) (In Rs.)	When Modified Client (Ascertained Losses Shifted In) (In Rs.)	Net Reduction in Income due to CCM (In Rs.)
ACBPA0069J	PRABHU DAYAL AGGARWAL	G-47, PREET VIHAR, DELHI-110092	AMRAPALI AADYA TRADING & INVESTMENT PVT. LTD.	1,37,86,298.4	-24,89,527.5	1,62,75,825.9

The information received was examined with reference to the return of income filed by the assessee. On perusal of the ITR filed by the assessee and from the examination of the above information, it is evident that through client code modification a net reduction of income to the tune of Rs.1,62,75,826/- has taken place in the case of the assessee, reducing tax liability in F.Y.2008-09.

In view of the above mentioned facts and evidences gathered, I have reasons to believe that income to the tune of Rs.1,62,75,826/- chargeable to tax has escaped assessment and this income needs to be assessed/reassessed u/s 147 of the Act. It approved, notice u/s 148 of the Act may be issued.

Submitted for kind approval please.

3. In response to the notice u/s 148, the assessee submitted that the original return filed for assessment year 2009-10 may be treated as return filed in response to notice u/s 148 of the I.T. Act. Subsequently, the Assessing Officer issued notice u/s 143(2) of the I.T. Act. The Assessing Officer discussed the background of client code modification and manipulation of this facility, SEBI order, the modus operandi adopted etc.. He observed that a survey u/s 133A

was conducted in the case of Amrapali Adya Trading and Investment Private Limited, which is a member of NSE and it was found to have indulged in large scale client codes modifications so as to facilitate losses and profits to the clients as per the requirement. He observed that the complete data of the client codes modified by the said member for the period from 01.04.2008 to 31.03.2012 was obtained from NSE. On perusal and analysis of the data it was found that the said broker has carried out highest client code modification on the NSE F&O segment for the three years combined. He also referred to the statement of Shri Sanjeeva Kumar Sinha, Director of the company which was recorded during the course of survey. In his statement, Shri Sanjeeva Kumar Sinha was confronted with the client code modification. He had stated that for misuse of CCM for the purposes other than rectification of punching errors penalty of Rs.20,00,000/- was levied on Amrapali Aadya by NSE. After analyzing the statement of Shri Sanjeeva Kumar Sinha, the Assessing Officer confronted the assessee regarding the same. Rejecting the various explanations given by the assessee and observing that the assessee had obtained accommodation entries through broker M/s Amrapali Aadya Trading & Investment Pvt. Ltd. by misusing the client code modification facilities to the tune of Rs.1,62,75,826/-, he made addition of the same to the total income of the assessee.

4. Before the Id. CIT(A), the assessee challenged the validity of the reopening of the assessment as well as the addition on merit. It was submitted that the original assessment was completed u/s 143(3) on 24.12.2011 after thorough scrutiny and there is no allegation of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment. It was submitted that there was no rational connection or live link between the message as received and the reasons of conclusion as to escapement of any income as recorded. It was argued that the information as communicated was not based on any evidence and was in the nature of an obiter. Relying on various decisions, it was argued that the reopening being bad in law and void ab-initio should be quashed.

5. So far as merit of the case is concerned, it was submitted that the conclusion drawn by the Assessing Officer are misconceived, erroneous and untenable. He has not taken a holistic view of the transactions. While keying mistakes are inevitable in this type of business, the Assessing Officer has lost sight of the fact of the end where such mistakes originally occurred. In terms of the organization of business activity, the broker has decentralized the trading operations. Consequently the data feeding errors are not isolated incidents confined to the end of the main broker. They spill over to others also who use the main broker's terminal. Then there is the default mechanism with the

operating system. Irrespective of the data keyed sometimes the system turns intransigent and adamantly displays the previous code of the last transaction. Alterations, therefore, become indispensable. In the subject case all the transactions are in the normal course of business and are genuine. They are always at the market rates of the day through the exchange and are backed by payments or receipts which being beyond controversy is irrefutable. The transaction - track in each and every case is visible and indelible. There is no proof of any underhand adjustment at all for there is truly none. Any authorized broker caught permitting any such misdemeanour is in for severe and irreversible rustication by the SEBI. So none would dare although for winning peace with the tax department, they may parrot the lines provided by the Department. In the subject case the broker's statement having been recorded at variance with the terms of law were ab initio vitiated and deficient and, therefore, could not be utilised for any meaningful or sustainable action. There are a series of orders of the higher judicial authorities disapproving of the stratagem for income generation qua the CCM devise as per the relied upon Ahmedabad Investigation Report. Relying on various decisions, it was submitted that the addition made by the Assessing Officer is uncalled for.

6. However, Id. CIT(A) was not satisfied with the arguments advanced by the assessee. So far as the validity of the reopening of the assessment is

concerned, he upheld the action of the Assessing Officer by observing as under :-

“I have considered the facts of the case, the basis of the disallowance made by the Assessing Officer and the arguments of Ld. AR during appellate proceeding. It has twin issues involving Reopening of the assessment and addition on Client Code Modification.

A. *First issue is pertaining to the reopening of the case assessment. The AO was in receipt of specific information in respect of the conduct of the appellant that was earlier unknown to the AO. The AO is required per law to process the information and examine if any escapement of income has taken place. The basic jurisdictional condition under section 147 is the formation of belief by the Assessing Officer that income chargeable to tax has escaped assessment for any assessment year. The Act requires the AO to carry out this action of reopening of assessment proceedings in such matters. There is no fallacy or error in this conduct nor is any procedural infirmity pointed out by the Ld AR during the detailed submission made during the hearing by Ld AR. Appellant has sought to challenge the reopening on very specious grounds. The issue has now been clearly settled by Hon'ble Supreme Court of India in case of CIT versus PVS Beedis Private limited in 237 ITR 13 (1999), Jt 1998 (9) SC 118, 1998 9 SCC 27. Besides, there are plethora of rulings in this regard and the AO is supposed to process the information and examine the assessee record per proper scrutiny process. It is also pertinent to refer to the ruling of Hon'ble ITAT Delhi where in ITA No.4738/Del./2009 (ASSESSMENT YEAR: 2001-02) ITO, Ward 5 (2), New Delhi. (APPELLANT) Vs. M/s. Kautilya Monetary Services Pvt. Ltd., 10, Local Shopping Complex, Kalkaji, New Delhi. (PAN: AAACK3995P) (RESPONDENT), the Hon'ble Bench have allowed the revenue's appeal. I am also supported by the ruling of Hon'ble Delhi High Court the case of CIT v. Usha International Ltd. reported in 348 ITR 485 (Del). I, therefore, find no infirmity in the action of the AO in initiating 147/148 proceedings. The grounds of the appellant in this regard are not sustainable, hence dismissed.”*

7. So far as addition on merit is concerned, he also rejected the various arguments advanced by the assessee and upheld the action of the Assessing Officer.

8. Aggrieved with such order of the ld. CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds :-

“On the facts and in the circumstances of the case and in law, the CIT (A) erred in:-

- 1. Initiating proceedings u/s 147/148 of the Income-tax Act, 1961 (the Act) without there being any cogent material leading to the belief of escapement of any income;*
- 2. passing the order u/s 147/143(3) of the Act at an income of Rs.2,79,13,178/- against the returned income in a sum of Rs.1,16,37,353/-;*
- 3. making an addition of Rs.1,62,75,825/- by disallowing genuine loss suffered on share trading treating the same as contrived on account of client code modification.*

All the above actions being most arbitrary, erroneous, unlawful and unjust must be quashed with directions for relief.”

9. Ld. counsel for the assessee strongly challenged the order of the Id. CIT(A) in upholding the reassessment proceedings. He submitted that the satisfaction note recorded by the Assessing Officer on the basis of the information as stated by him to be with the Department is wholly vague, unspecific, incomplete and unreliable. He submitted that the CCM is essential concomitant of online share trading. Mistakes are bound to happen. Such mistakes cannot be arbitrarily concluded to be manipulative. To put them in the shelf of contrived transaction critical evidence in the shape of exchange of monetary consideration is crucial. In absence of such evidence, the allegation of manipulation would fall flat on its face. The accusation would become at once erroneous and untenable.

10. Referring to the satisfaction note, he submitted that the Assessing Officer in the first part records that some brokers had misused the client code modification to transfer loss and profit on account of share transactions from

one client to another. Saying so is being totally ambiguous and unspecific especially in absence of the name of the assessee or his broker friend mentioned in any of these dossiers. Further, the amount of Rs.1.62 crores determined by the Assessing Officer is not based on any concrete or credible evidence or tangible material.

11. He submitted that nothing is found from body of the assessment order that the original assessment was completed u/s 143(3) of the I.T. Act. Copy of the order passed u/s 143(3) is placed at page 43 of the Paper Book. Referring to the assessment order passed u/s 143(3)/147, he submitted that the Assessing Officer simply mentions that the return was processed u/s 143(1) of the I.T. Act. Had he applied his mind he could have found that the original assessment was completed u/s 143(3) and the assessee had furnished the requisite details called for during the course of original assessment proceedings. There is no allegation of any failure on the part of the assessee to disclose fully and truly all material facts for necessary for completion of the assessment. He submitted that the Approving Authorities have also mechanically approved the reopening of the assessment without any independent application of mind. Relying on various decisions, he submitted that non-application of mind by the Superior Authorities while giving approval for reopening of the assessment is void.

12. He submitted that while making any addition if the Assessing Officer relied on any statement of any third party, due opportunity of cross-examination should have been granted to the assessee which in the instant case has not been done. Failure to do so is fatal to the cause of the utility of the statement as an evidence. For the above proposition, he relied on the decision of the Hon'ble Supreme Court in the case of M/s Andaman Timber Industries Ltd. vs. CIT reported in 281 CTR 241.

13. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Pradeep Kumar Gupta reported in 303 ITR 95, he submitted that the reassessment proceedings were held to be invalid and unsustainable on account of the statement not being cross-checked through cross-examination. He submitted that the satisfaction as to the escapement of the income has to be of the Assessing Officer's own satisfaction. If the Assessing Officer used such information from an outside source, such statement is required to be verified in its correctness. It cannot be based on any other person's opinion or advice. For the above proposition, he relied on the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Paramjit Kaur reported in 311 ITR 38, the decision of the Hon'ble Delhi High Court in the case of CIT vs. SFIL Stock Broking Ltd. reported in 325 ITR 285, the decision of the Hon'ble Delhi High Court in the case of Sarthak Securities Co. Pvt. Ltd. vs. ITO reported in

329 ITR 110, the decision of the Hon'ble Delhi High Court in the case of Pr.CIT vs. G & Pharma India Ltd. reported in 384 ITR 147 and Pr.CIT vs. Meenakshi Overseas (P) Ltd. reported in 395 ITR 677. He also referred to the decision of the Hon'ble Delhi High Court in the case of Rajiv Agarwal & Ors. vs. ACIT reported in 395 ITR 255 to the proposition that where the reopening is based on suspicion without any tangible supportive material the reassessment was held to be unsustainable in law.

14. On the point of CCM modification not resulting into a valid reassessment, he referred to the decision of the Hon'ble Bombay High Court in Writ Petition No.2627/2016 order dated 23.11.2016 and the decision of the Hon'ble Gujarat High Court in the case M/s GEETATAX vs. DCIT vide SCA No.20977 of 2016 order dated 20.12.2016. He accordingly submitted that both legally and factually addition could not have been made by the Assessing Officer in the reassessment proceedings.

15. Ld. DR on the other hand heavily relied on the order of the Id. CIT(A). Referring to the decision of the Hon'ble Supreme Court in the case of PCIT vs. Paramount Communication (P.) Ltd. reported in 2017-TIOL-253-SC-IT, he submitted that the Hon'ble Supreme Court in the said decision has held that information regarding bogus purchase by assessee received by DRI from CCE

which was passed on to revenue authorities was 'tangible material outside record' to initiate valid reassessment proceedings.

16. Referring to the decision of the Hon'ble Delhi High court in the case of *Indu Lata Rangwala vs. DCIT* reported in 286 CTR 474, he submitted that the Hon'ble High Court in the said decision has held that where initial return of income is processed u/s 143(1), it is not necessary in such a case for Assessing Officer to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment.

17. Referring to the decision of the Hon'ble Supreme Court in the case of *Thakorbhai Maganbhai Patel vs. ITO* reported in 78 taxmann.com 201, he submitted that the Hon'ble Supreme Court dismissed SLP against High Court's ruling where reopening of assessment u/s 147 was held to be valid despite the Assessing Officer not passing speaking order against objections filed by the assessee.

18. Referring to the decision of the Hon'ble Delhi High Court in the case of *Thakorbhai Maganbhai Patel vs. ITO* reported in 392 ITR 444, he submitted that the Hon'ble High Court in the said decision has held that it is true that in the communications, the petitioner has requested for supply for documents. However, the petitioner also raised the objections to the Assessing Officer exercising the power of reassessment. In true spirit if these communications

were examined, the Assessing Officer would have realized that the assessee was objecting to the process of reopening. In terms of decision of Supreme Court in case of GKN Driveshafts (India) Ltd. vs. ITO reported in 259 ITR 19, the Assessing Officer ought to have disposed of the objections. Ordinarily, we would have insisted on Assessing Officer doing so. However, facts in the present case are somewhat peculiar and no useful purpose would be served in ensuring only cosmetic purpose of completion of formality and then inviting a fresh litigation. Under the circumstances, we have examined the merits of the petitioner's challenge to the reopening also.

19. Referring to the decision of the Hon'ble Supreme Court in the case of Aravali Infrapower Ltd. vs. DCIT reported in 2017-TIOL-42-SC-IT, he submitted that the Hon'ble Supreme Court in the said decision has held that reopening of assessment is justified, when the bank statements as well as the ITR form disclosing returns, raises more questions than satisfying the queries already raised.

20. Referring to the decision of the Hon'ble Delhi High Court in the case of Aravali Infrapower Ltd. vs. DCIT reported in 390 ITR 456, he submitted that the Hon'ble High Court in the said decision has held that where assessee company furnished only cheque numbers, but failed to provide bank details of

share applicant and it was found that share applicants had meager income while investing huge sum of Rs.8 crores, reopening notice was justified.

21. Referring to the decision of Hon'ble Supreme Court in the case of Yogendrakumar Gupta vs. ITO reported in 51 taxmann.com 383, he submitted that the Hon'ble Supreme Court in the said decision has held that where subsequent to completion of original assessment, Assessing Officer on the basis of search carried out in case of another person, came to know that loan transactions of assessee with a finance company were bogus as said company was engaged in providing accommodation entries, it being a fresh information, he was justified in initiating reassessment proceedings in case of assessee.

22. Referring to the decision of the Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd. vs. ITO reported in 236 ITR 34, he submitted that the Hon'ble Supreme Court in the said decision has held that in determining whether commencement of reassessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency of correctness of the material is not a thing to be considered at this stage.

23. Referring to the decision of the Hon'ble Supreme Court in the case of ITO vs. Kasturbhai Lalbhai reported in 109 ITR 537, he submitted that the Hon'ble Supreme Court in the said decision has held that the intimation which the

Income-tax Officer received from the audit department would constitute “information” within the meaning of section 147(b).

24. Referring to the decision of the Hon'ble Supreme Court in the case of CIT vs. P.V.S. Beedies (P.) Ltd. reported in 237 ITR 13, he submitted that the Hon'ble Supreme Court in the said decision has held that audit party had merely pointed out a fact which had been overlooked by Assessing Officer and this was not a case of information on a question of law. Reopening of case u/s 147(b) on basis of factual information given by internal audit party was valid in law.

25. Referring to the decision of the Hon'ble Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P.) Ltd. reported in 291 ITR 500, he submitted that the Hon'ble Supreme Court in the said decision has held that so long as the conditions of section 147 are fulfilled, the Assessing Officer is free to initiate proceedings u/s 147 and failure to take steps u/s section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings, even when intimation u/s 143(1) has been issued.

26. Referring to the decision of the Hon'ble Supreme Court in the case of Yuvraj vs. Union of India reported in 315 ITR 84, he submitted that the Hon'ble Supreme Court in the said decision has held that points not decided while passing assessment order u/s 143(3) was not a case of change of opinion. It was held that assessment was reopened validly.

27. Referring to the decision of the Hon'ble Gujarat High Court in the case of Ankit Financial Services Ltd. vs. DCIT reported in 78 taxmann.com 58, he submitted that the Hon'ble High Court in the said decision has held that where material recovered in search of another person indicated that assessee had received bogus share applications through accommodation entries, since assessee was beneficiary, initiation of reopening was justified.

28. Ld. counsel for the assessee, in his rejoinder, submitted that the various decisions relied by the ld. DR are distinguishable and not applicable to the facts of the present case. In the case of Paramount Communication (P.) Ltd. (supra) it is fact based transaction and therefore the same is not applicable. In the case of Indu Lata Rangwala (supra), the return was processed u/s 143(1) whereas in the present case the original assessment was completed u/s 143(3). In the case of R.K. Malhotra (supra) and in the case of P.V.S. Beedies (P.) Ltd. (supra) reopening was on the basis of audit objection and therefore is not applicable to the facts of the present case.

29. In the case of Ankit Financial Services Ltd. (supra), it was a search case and the material was recovered during the search which is not the case here. He submitted that the various other decisions relied on by the ld. DR are also distinguishable and not applicable to the facts of the present case. In none of those cases, there was assessment u/s 143(3) and reopening has been made

beyond a period of 4 years from the end of the relevant assessment year and there is no allegation of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment. He accordingly submitted that grounds raised by the assessee should be allowed.

30. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the original assessment in the instant case was completed u/s 143(3) on 24.12.2011 copy of which is placed at page 43 of the Paper Book, wherein the Assessing Officer had accepted the returned income of Rs.1,16,37,353/-. However, it is very strange to note that the Assessing Officer for reasons best known to him has not mentioned anything about such order passed u/s 143(3) of the I.T. Act either in the notice issued u/s 148 or in the order passed u/s 143(3)/147. We find during the course of original assessment proceedings, the assessee vide his letter dated 07.12.2011 in Clause No.- 4 had submitted the copy of client ledger with settlement details from the share broker M/s Aditya Trading & Investment (P) Ltd. highlighting the portion of settlement which clearly shows that loss of Rs.1,82,10,431.54 shown in the Profit & Loss Account. A copy of the same is placed at page 39 to 41 of Paper Book. After considering the elaborate submission filed on 07.12.2011, the Assessing Officer

had completed the assessment u/s 143(3) accepting the returned income. A perusal of the reasons recorded on 29.03.2016 show that there is no allegation by the Assessing Officer of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment. Therefore, in view of the proviso to section 147 of the I.T. Act where the original assessment was completed u/s 143(3), no action shall be taken under this section after the expiry of 4 years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment on account of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment. However, in the instant case, the notice u/s 148 has been issued on 31.03.2016 which is beyond a period of 4 years from the end of the relevant assessment year i.e. A.Y. 2009-10. As mentioned earlier, in the instant case the assessment was completed u/s 143(3) on 24.12.2011 and there is no allegation of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment for which income has escaped assessment. Therefore, the proviso to section 147 is clearly applicable to the facts of the present case. Since, the Id. CIT(A) has not addressed the case of the assessee from this angle, therefore, his finding on the issue of validity of reassessment proceedings is incorrect and not in accordance with law. We, therefore, hold that the

reassessment proceedings initiated after a period of 4 years from the end of the relevant assessment year where the original assessment was completed u/s 143(3) is barred by limitation and, therefore, void ab-initio. We, therefore, hold that such reassessment proceedings initiated by the Assessing Officer is bad in law and void ab-initio. Accordingly, the same is quashed. Since, we are quashing the reassessment proceedings on account of being barred by limitation, therefore, other arguments advanced by the ld. counsel for the assessee challenging the addition on merit become academic in nature and therefore are not being adjudicated. The grounds raised by the assessee are accordingly allowed.

31. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 29th June, 2018.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 29-06-2018.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi