IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 5705/MUM/2017
Assessment Year: 2009-10

Dy. CIT, 4(3)(2), Room No. 649, 6th Floor, Aayakar Bhavan, Mumbai-400020.	Vs.	M/s Setu Securities Pvt. Lt. A/502, Shreyas Apartment, 51/52, TPS Road, Boriwali (West), Mumbai-400092.
		PAN No. AAGCS3919K
Appellant		**Respondent**

C.O. No. 41/MUM/2019
(ITA No. 5705/MUM/2017)
Assessment Year: 2009-10

M/s Setu Securities Pvt. Lt. A/502, Shreyas Apartment, 51/52, TPS Road, Boriwali (West), Mumbai-400092.	Vs.	Dy. CIT, 4(3)(2), Room No. 649, 6th Floor, Aayakar Bhavan, Mumbai-400020.
PAN No. AAGCS3919K		
Appellant		**Respondent**

Revenue by	:	Mr. Satishchandra Rajore, DR
Assessee by	:	Dr. K. Shivaram, Sr. Advocate & Mr. Rahul K. Hakani, Advocate
Date of Hearing	:	11/03/2019
Date of pronouncement	:	25/03/2019

ORDER

PER N.K. PRADHAN, AM

The appeal by the Revenue and the cross-objection by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-9 [in short 'CIT(A)], Mumbai and arise out of the

assessment order passed by the Assessing Officer (AO) u/s 143(3) r.w.s. 147 of the Income Tax Act 1961, (the 'Act'). We begin with the cross-objection filed by the assessee as it relates to the issue of jurisdiction.

2. The cross-objections are filed by the assessee read as under:

1. The Ld. CIT(A) failed to appreciate that reopening of assessment is bad in law as same is done beyond 4 years and originally assessment was u/s 143(3) and there is no failure on part of assessee to truly and fully disclose all material facts and hence reopening is bad in law.
2. The Ld. CIT(A) failed to appreciate that reopening of assessment is bad in law as the Assessing Officer had no reason to believe that income has escaped assessment and reopening is done on the basis of borrowed satisfaction and without independent application of mind and hence reopening is bad in law.
3. The Ld. CIT(A) failed to appreciate that reopening of assessment is bad in law as reopening in the facts of the present case tantamount to change of opinion and hence reopening is bad in law.

3. Briefly stated, the facts are that the assessee-company filed its return of income for the assessment year (AY) 2009-10 on 20.09.2009 declaring loss of Rs.81,44,093/-. The said return was assessed u/s 143(3) on a total income of Rs. Nil and a carry forward of speculation loss of Rs.81,44,093/-. Subsequently, the AO issued notice u/s 148 dated 31.03.2016 and then computed the income at Rs.1,46,05,050/-. The reasons recorded by the AO for issuing notice u/s 148 are as under:

> "The assessee filed return of income on 20.09.2010 declaring total income at Rs. Nil. The return was processed u/s 143(1) on 20.12.2010 and assessment u/s 143(3) was completed on 23.12.2011.

On the basis of information received from the O/o. Pr. DIT (Investigation), Ahmedabad vide letter No. PDIT (Inv)/AHD/CCM/Dissemination/15-16 dtd. 08.03.2016 received through the office of the CCIT-2, Mumbai vide letter dated 17.03.2016 & through office of Pr. CIT-4, Mumbai vide letter No. Pr. CIT/HQ/Dissemination/15-16/2610 dated 18.03.2016, it was seen that brokers change the client codes in sale and purchase orders of securities after the trades are conducted. On detailed analysis it was established that the brokers had misused client code modification facility and created non genuine losses and profits. These losses and profits were given to different client/beneficiaries according to their requirement. The clients had taken fictitious loses to set off against huge loses. The brokers have earned commission income by indulging/misusing the client code facility. As far as commission charged by the broker on transferring the entire of fictitious loss/profits is concerned, it actually varied between 3% to 6% although the brokers in their statements have admitted receipt of commission upto 2% only before DDIT. As per the survey report prepared by the ADIT (Inv) Unit 1(3), Ahmedabad, on the basis of data received from National Stock Exchange (NSE) and after considering the contention of brokers, it is concluded that client code modification has been used a tool for tax evasion.

As the brokers have earned commission income by including/misusing the client code facility, necessary remedial action needs to be taken.

The information in the case of the assessee who have taken losses or shared out profits by client code modification is as under:

Name of the beneficiary client	Name of the Broker	When original code (ascertained profit shifted out) (Rs)	When modified code (ascertained loss shifted in) (Rs.)	Net reduction in income due to CCM (Rs.)
Setu Securities Pvt. Ltd.	Setu Securities Pvt. Ltd.	4973479.05	475785.25	5449264.3

> In view of the above facts, it is clear that the assessee had failed to disclose fully and truly all material facts in respect of AY 2009-10 which remained to be examined. Hence, I have reason to believe that income of the assessee for AY 2009-10 has escaped assessment within the meaning of provisions of sec 147 of the I.T. Act.
>
> In order to bring to tax above mentioned escaped income, as well as any other income which might have escaped assessment, found during the course of proceedings, notice u/s 148 is issued."

4. Aggrieved by the above action of the AO, the assessee filed an appeal before the Ld. CIT(A). Regarding the ground of appeal against reopening u/s 147, the Ld. CIT(A) observed that the AO reopened the assessment on the basis of information received from the office of DIT (Intell CR Inv.), Mumbai regarding fictitious loss/profit using Client Code Modification (in short 'CCM') facility. Thus the contention of the assessee that reopening is done merely on the basis of change of opinion on the same set of facts which were already available on record cannot be found to be acceptable as the said information was not available at the time of completion of assessment u/s 143(3) of the Act. Therefore, the Ld. CIT(A) held that the reopening of assessment made by the AO u/s 147 of the Act was duly in accordance with the provisions of law.

5. Before us, the Ld. counsels of the assessee submit that the assessee is not a registered broker on the stock exchange and only registered brokers can modify Client code of their own clients. Hence, the allegation of assessee having done or resorted to CCM is incorrect. It is further stated by them that in the reasons recorded for reopening, it is alleged that the assessee has availed the benefit of Rs.54,49,264/- due to CMM, but there is no clear indication of how the profit and loss

account as stated in the reasons for reopening of assessment is determined. It is thus argued that there is no working of the said profit and loss amount and there is no reflection of how the assessee has concealed income with the help of CMM.

The Ld. counsels thus submit that the reopening being done after a period of four years which contains discrepancies without any specific information be set aside. Reliance is placed by them on the decision in the case of *Chhugamal Rajpal v. S.P. Chaliha* (1971) 79 ITR 603 (SC) and *Sheo Nath Singh v. Appellate Asst. Commissioner of Income Tax* (1971) 82 ITR 147 (SC).

On the other hand, the Ld. DR submits that the AO has reopened the assessee's case based on information received from the office of DIT (Intell CR Inv.), Mumbai regarding fictitious loss/profit using CMM facility and therefore, the Ld. CIT(A) has rightly held that the contention of the assessee that reopening is done merely on the basis of change of opinion on the same set of facts which were already available on record cannot be found to be acceptable as the said information was not available at the time of completion of assessment u/s 143(3) of the Act.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

A perusal of the reasons recorded by the AO indicates that he has treated the assessee as a broker which is incorrect. There is no working of how the assessee has shifted profit of Rs.49,73,479/- and obtained loss of Rs.4,75,785/- thereby resulting in net reduction in profit of Rs.54,49,264/-. We further find that in the assessment order

dated 30.12.2016 there is no mention of the above figures. The AO has concluded the assessment order with a disallowance of loss of Rs.1,46,22,436/-.

In the case of *Chhugamal Rajpal* (supra), the reopening done by the AO on a vague feeling that there might be bogus transaction has not been approved by the Hon'ble Supreme Court. Also when there was no material or fact stated in the said reasons for starting proceedings for reopening, the said notices had to be quashed as held by the Hon'ble Supreme Court in *Sheo Nath Singh* (supra).

In the instant case, the reasons recorded by the AO is not only vague, but also there was no material or fact stated in the said reasons for starting proceedings u/s 147 on which any belief could be founded for issuing notice u/s 148. The AO could have stated how the assessee had shifted profit of Rs.49,73,479/- and obtained loss of Rs.4,75,785/- thereby resulting in reduction in profit of Rs.54,49,264/-. He has not done so. The entire reason recorded for reopening is clouded in vagueness.

In view of the above facts, we quash the notice u/s 148 issued by the AO.

7. In the result, the cross –objection filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 25/03/2019

Sd/-	Sd/-
(PAWAN SINGH)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 25/03/2019
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai