

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA NO. 1664/MUM/2018 : **A.Y : 2010-11**

M/s. Kedia Finvest Consultant Vs. ITO, Ward-2(2)(2), Mumbai
Private Limited (Respondent)
418/508, Commerce House, 140,
NM Road, Fort, Mumbai 400 023.
PAN : AACCK1169R (Appellant)

Appellant by : Shri Nitesh Jain

Respondent by : Shri S. Michael

Date of Hearing : 16/09/2019

Date of Pronouncement : 03/12/2019

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER

This appeal by the assessee is directed against the order of learned CIT(A) dated 28.11.2017 and pertains to assessment year 2010-11.

2. The grounds of appeal read as under :-

"1. The learned Assessing Officer has erred in issuing notice u/s 148 of the Income Tax Act, 1961 and the reasons assigned for doing so are wrong and contrary to the facts and the provisions of the law.

WITHOUT PREJUDICE TO THE ABOVE

2. *On the facts and under the circumstances of the case, the learned Assessing Officer has erred in not allowing the speculation loss pertaining to the current year*

i.e. A.Y 2010-11 of Rs.4,831/- to be carried forward to subsequent years and the reasons assigned for doing so are wrong and contrary to the facts of the case and the provisions of the law.

3. *On the facts and under the circumstances of the case, the learned Assessing Officer has erred in making an addition of Rs.2,71,800/- to the appellant company's total income on the alleged ground of shifting of profit/loss on share transactions through client code modification, the reasons assigned for doing so are wrong and contrary to the facts of the case and the provisions of the law.*

4. *On the facts and under the circumstances of the case, the learned Assessing Officer has erred in calculating the interest u/s 234D amounting to Rs.22,623/-."*

3. *Apropos issue of reopening. The Assessing Officer's observation on reasons for reopening are as under :-*

"Assessee e-filed its return of Income on 29.09.2010 declaring total loss at Rs(-) 4,831/-. Subsequently, the case was re-opened u/s 147 of the I.T. Act after taking due approval of the Higher Authorities and accordingly notice under section 148 of the Act dated 30.03.2016 was issued after recording reasons for re-opening as under :-

This office is in receipt of information from ADIT Unit-1(3), Ahmedabad that the assessee has benefitted from Client Code Modification ("CCM") whereby the Profit is either shifted out or the Loss is shifted in resulting in to reduced income by unlawful activity. The result is wilful reduction of the taxable income. The specific information received for the assessee is as under :-

<i>Name of the assessee</i>	<i>PAN</i>	<i>AY</i>	<i>Broker Name</i>	<i>When OC (Ascertained Profit Shifted Out)</i>	<i>When MC (Ascertained Losses shifted in)</i>	<i>Net reduction in income due to CCM</i>	<i>Benefit Amount CCM</i>	<i>No. Of transactions where ascertained profit shifted out</i>	<i>No of transactions where loss shifted in</i>	<i>Transactions resulting in No profit/No loss</i>
<i>Kedia Finvest Consultant</i>	<i>AACCK 1169R</i>	<i>2010-11</i>	<i>Kedia Shares</i>	<i>55265</i>	<i>216535.85</i>	<i>271800.85</i>	<i>271800.85</i>	<i>2</i>	<i>1</i>	<i>0</i>

The above information has been duly examined by the undersigned. Modification of the client codes is a practice under which brokers change the client codes in sale and purchase order of securities after the trades are conducted. While it is legally permitted to rectify inadvertent errors in punching order, such modification have also been misused for manipulative activities in the market.

SEBI conducted a probe into “Modification of client codes” by brokers, pursuant to observations by the Finance Ministry about many such modifications taking place in derivatives transactions at the National Stock Exchange during 2010.

The survey report provided by the ADIT(Inv) unit 1(3), Ahmedabad on the basis of data received from National Stock Exchange (NSE) contains elaborate details of the same. After analysis of data received from NSE and after considering the contention of brokers, it has been concluded that CCM has been used as a tool for Tax Evasion. The Genuine contentions of brokers have been duly addressed in the Survey report and only the settled trades have been considered to arrive at the beneficiaries.

Section 147 of the Act contemplates three primary conditions for the initiation of reassessment proceedings :

- There should be a reason to believe, that*
- Income chargeable to tax, has*
- Escaped assessment*

The undersigned has carefully applied his mind to the above information. The information so received gives a substantial basis for the formation of a reason to believe to initiate reassessment u/s 147 of the Act. Further, there is no doubt on the fact that the above amounts to ‘income chargeable to tax’ and the benefit so arising to the assessee through client code modification should have been offered to tax. Further, since this is fresh information

received by the undersigned, there is an escapement of assessment of such income.

Also, since the above received information and this modus operandi was not in possession of the undersigned earlier, it can be reasonably concluded that there is a failure of the part of the assessee to disclose fully and truly all material facts necessary for its assessment.

In view of the above, I have reasons to believe that income Rs.271800.85 chargeable to tax has escaped assessment by reason of the failure on part of assessee to disclose fully and truly all material facts necessary for its assessment for A.Y. 2010-11 within the meaning of Sec 147 of Income-tax Act, 1961."

Accordingly, notice u/s 148 dated 30.03.2016 was issued and truly served upon the assessee. In response to this notice, the assessee filed a letter dated 06.04.2016 requesting to treat its e-return of income filed u/s 139(1) of Income-tax Act, 1961 on 22.09.2010 as return filed in response to notice u/s 148 of the Act. Subsequently, the assessee was provided vide this office letter dated 08.06.2016 the reasons recorded for reopening of the assessment proceedings u/s 148 of the Act."

4. Upon assessee's appeal, learned CIT(A) upheld the Assessing Officer's action by holding as under :-

"I have considered the facts of the case and also submissions made by the appellant. As could be seen from record, the A.O has recorded reasons for reopening and has satisfied himself that there is a reason to believe that income has escaped assessment. Sec 147 of the Income Tax Act, 1961 says that the A.O has to have reason to believe that any income chargeable to tax has escaped assessment. Reason to believe can be on the basis of information which comes to his possession or knowledge. This information is more than enough for any reasonable person to form a reason to believe that income has escaped assessment. Further, the information is not anonymous information but authenticated one received from a Government department. The very fact that reasons are recorded and notice u/s. 148 is issued goes to

show that the A.O. has applied his mind and satisfied himself about the reopening the case. In this case, the information has come from the Investigation wing of the same department with supporting documents and modus operandi. The Act envisages that the A.O should only have to reason to believe to reopen a case. He need not establish beyond doubt that there is escapement before issuing the notice. This can be done at the time of assessment but not at the time of issue of notice. Reliance is placed on :

i) Sun Pharmaceutical Industries Ltd. Vs DCIT 353 ITR 474 (Guj), where the Hon'ble High Court held the formation by belief is essentially within AO's subjective satisfaction-at the stage of issue of notice, only question is whether there was relevant material on which the AO could have formed requisite belief.

In case of M/s. Coronation Agro Industries Ltd. v/s DCIT 6(2)(1), as brought out by the Hon'ble Bombay High Court, the A.O did not have the requisite information like date of transaction, nature of transaction and detail of counter party. However, in the case of appellant, the A.O. possessed the nature and details of transaction. Other details can be extracted by using available information. Therefore the A.O is within jurisdiction and acted in accordance with the provisions of the I.T. Act. This ground of appeal is therefore dismissed.”

5. Against this order, assessee is in appeal before us. We find that on identical situation, Hon'ble Bombay High Court has held that reason recorded do not justify jurisdiction for reopening in the case of M/s. Coronation Agro Industries Ltd., wherein the Hon'ble High Court has held as under :-

“2. This petition challenges notice dated 31st March, 2016 issued under Section 148 of the Income Tax Act, 1961. The impugned notice seeks to reopen the assessment for Assessment Year 2009-10. The regular assessment proceedings were completed on 28th December, 2011 under Section 143(3) of the Act.

3. The reasons in support of the impugned notice relies upon the information received from the Principal Director of Income Tax that the

petitioner has benefited from a client code modification by which a profit of Rs.22.50 lakhs was shifted out by the petitioner's broker, resulting in reduction of the petitioner's taxable income. The only basis for forming the belief is the report from the Principal Director of Income Tax and the application of mind to the report of the Assessing Officer along with the record available with him. This information and application of mind has led the Assessing Officer to form a reasonable belief that there is not only an escapement of income but there has been failure to truly and fully disclose all material facts and information as the modus operandi of shifting profits was not known to the Revenue as not disclosed by the petitioner when the Assessing Officer passed the order in regular assessment proceedings.

4. *We note that the reasons in support of the impugned notice accept the fact that as a matter of regular business practice, a broker in the stock exchange makes modifications in the client code on sale and /or purchase of any securities, after the trading is over so as to rectify any error which may have occurred while punching the orders. The reasons do not indicate the basis for the Assessing Officer to come to reasonable belief that there has been any escapement of income on the ground that the modifications done in the client code was not on account of a genuine error, originally occurred while punching the trade. The material available is that there is a client code modification done by the Assessee's broker but there is no link from there to conclude that it was done to escape assessment of a part of its income. Prima facie, this appears to be a case of reason to suspect and not reason to believe that income chargeable to tax has escaped assessment.*

5. *In the above view, prima facie, we are of the view that the impugned notice is without jurisdiction as it lacks reason to believe that income chargeable to tax has escaped assessment."*

6. We find that the above case law is fully applicable to the present appeal. The learned CIT(A) has totally misled himself in distinguishing the case law. It is settled law that jurisdictional High Court decisions are binding on subordinate Courts and Tribunals.

7. Accordingly, respectfully following the precedent, we set-aside the order of learned CIT(A) and hold that reopening is not justified.

8. As regards the issue on merits, the learned counsel for the assessee submitted that he shall not be pressing the same.

9. In the result, appeal of assessee is partly allowed.

Order pronounced in the open court on 3rd December, 2019.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai, Date : 3rd December, 2019

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "H" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai