

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC +C": NEW DELHI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.N.CHARY, JUDICIAL MEMBER

ITA No. 6253/Del/2018
(Assessment Year: 2009-10)

Kapil Grover, Grover Bhawan, Near Dayal Singh College, Karnal PAN: AEBPG0644R	Vs.	ITO, Ward-2, Karnal
(Appellant)		(Respondent)

Assessee by :	Shri Satish Aggarwal, CA
Revenue by:	Ms. Rakhi Vimal, Sr. DR
Date of Hearing	14/10/2019
Date of pronouncement	13/01/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the learned Commissioner of Income Tax (Appeals), Karnal dated 30/7/2018 for assessment year 2009 – 10 wherein the action of the learned assessing officer in reopening the assessment as well as the addition of INR 5 25025/- on account of the client code modification is confirmed.
2. The assessee has raised the following grounds of appeal:-
 - (1) *That the order passed by the Learned Commissioner of Income Tax (Appeals), Karnal is arbitrary biased and bad in law and facts of the case in so far as it confirms the order of the Assessing Officer.*
 - (2) *That the Learned CIT (Appeals) has grossly erred in confirming the action of the Assessing Officer in reopening the assessment under section 148 of the Act which is illegal and bad in law.*
 - (3) *That the Learned CIT (Appeals) has grossly erred in confirming the action of assessing officer in making mechanical addition on the basis of information of modification of client code without making independent inquiry and by treating allegation in the information received as conclusion.*
 - (4) *That the Learned CIT (Appeals) has grossly erred in confirming the addition of Rs. 5,25,025/- made by the AO on generalizations without conceptualizing the same with the facts of the appellant's case which is bad in law and illegal.*

(5) That the learned CIT(Appeals) has grossly erred in confirming the addition of Rs. 5,700/- for alleged shifting of profit and incurring loss of Rs. 5,19,325/- by modification of client code (CCM)."

3. The assessee is said to be a broker who filed return of income on 31/7/2009 declaring an income of INR 197220/-. The proceedings u/s 147 of the income tax act were initiated by issuing notice u/s 148 on 30/3/2016 for the reason that as per information available on record the assessee has taken a loss of INR 519625/- and shifted profit during the financial year 2008 – 09 in trading of the shares. The assessee submitted that original return filed may be considered as return filed in response to the notice of reopening of the assessment. The copy of the reasons was also supplied to the assessee on 27/6/2016. Assessee objected the reopening of the assessment which was disposed of by the learned assessing officer by a speaking order. Subsequently the assessee was issued a show cause notice on 15/12/2016 giving the details of profit and loss shifted in and out in trading of shares through broker by client code modification. The learned assessing officer explained the complete modus operandi of the client code modification and noted that assessee has ascertained profit shifted out of INR 5700/- and ascertain loss shifted in of INR 519325/- and therefore resulted in deduction in the income on account of client code modification of INR 525025/-. The learned AO noted that, as per survey under section 133A of the income tax act carried out on the share broker of the assessee , Master Capital Services Ltd, it was confirmed that the broker had indulged in large-scale client code modification so as to facilitate losses and profits to the clients as per the requirement. He held that client code is modified by the Member of the stock exchange from 1/4/2008 to 31/3/2012 was also obtained. Thus, the learned assessing officer noted that the said broker has carried out many client modes of modifications on the National stock exchange in F & O segment for the 3 years. Therefore, it is satisfactorily concluded that the real motive behind this client code modification was to facilitate the clients to avail the losses/profits as per the requirement. Thus he found that assessee has reduced his taxable income to the tune of INR 5 25025/-. The assessee submitted reply on 15/12/2016 denying the above loss and submitted that these entries are not genuine losses incurred during the regular course of the business. The assessee

supported his argument with many judicial precedents. The learned assessing officer rejected the explanation of the assessee and has given screenshot of the client code modification which has resulted into a loss of INR 5 25025/- and therefore the same was added to the total income of the assessee and the total taxable income was determined at INR 7 22245/-.

4. The assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A who did not adjudicate reopening of the assessment but confirmed addition made by the learned assessing officer.
5. The learned authorised representative challenged the reopening of the proceedings as per ground number 1 – 3 of the appeal memo and ground number 4 and 5 on the merits of the addition. He submitted that assessee has requested in Right to information act certain information as per page number 6 – 7 of the paper book to provide the clear information received by the AO. He referred to his application dated 24/4/2019 under section 6 of the Right To Information Act 2005 in respect of the assessee .He also referred to page number 13 – 15 of paper book which is the information based on which the case of the assessee is reopened. He submitted that reasons recorded by the learned assessing officer as per para number 11 of the perform of recording of the reasons for initiating proceedings u/s 148 of the income tax act stating that above assessee has taken a loss of INR 519625 and shifted out profit during the financial year 2008 – 09 is vague. He submitted that reopening has been made purely on the basis of the information of the investigation wing. He submitted that reopening based on the information of the investigation wing without application of mind by the learned assessing officer is invalid. Learned authorised representative relied upon the decision of the honourable Bombay High Court in Writ petition number 2627 of 2016 dated 23 November 2016 in case of Coronation Agro industries Ltd versus The Deputy Commissioner Of Income Tax wherein on identical facts and circumstances the reopening notice issued by the learned assessing officer was held to be without jurisdiction. He further referred the decision of the SMC bench New Delhi in ITA number 4558/Del/2019 wherein on identical facts and circumstances relying upon the decision of the honourable Bombay High Court and honourable Gujarat

High Court as well as the Hon. Delhi High Court, notice issued under section 148 of the act was quashed. Therefore, it was submitted that the issue is squarely covered on this point in favour of the assessee.

6. The learned departmental representative relied upon the order of the learned assessing officer and learned CIT – A to hold that there is no infirmity in the action taken by the revenue under section 148 of the income tax act to reopen the case of the assessee as assessee was found to have obtained loss by change of the client code modification through his broker. He referred to various material and modus operandi mentioned in the assessment order. He also referred that reassessment has been made based on the report of investigation wing, Ahmadabad, where the action u/s 133A on the broker was made and it was found that that broker has given the entries of losses through client code modification and assessee is one of the beneficiaries. He therefore submitted that there is a reason to believe with the assessing officer with tangible material and therefore no infirmity can be found in the reassessment proceedings initiated by the learned assessing officer.
7. We have carefully considered the rival contention and boreal the orders of the lower authorities. The assessee's case was reopened on basis of reasons recorded by the learned assessing officer as stated in para-number 11 of the Proforma of recording the reasons for initiating proceedings under section 148 and for obtaining the approval of The Additional/ Joint Commissioner Of Income Tax is stated to be as under:

“In this case there is information available on record that above person has taken losses of ₹ 5 19625/- and shifted out profit during the financial year 2008 – 09. Therefore, I have reason to believe that income to the extent of ₹ 5 19625/- has escaped assessment and notice under section 148 is to be issued to brought to tax escaped income of ₹ 519625/- and any other income and such issues comes to the notice subsequently in the course of assessment proceedings.”
8. The above reasons for reopening were provided to the assessee in the application made by the assessee under the Right to information act. No other reasons were shown by the revenue recorded by the assessing officer other than the above. It was also not the submission of the ld DR that

reasons stated to have been shown by the AR in proforma are only gist of the reasons. It is important to note that while issuing the show cause notice the assessing officer in para number two of his assessment order referred about the methodology of tax evasion by following the client code modification, however in the reasons recorded for reopening he did not mention anything about that. We are surprised to note that in the assessment order, the ld AO has made reference of various material, including screen shots of client code modification in case of assessee and consequent losses transferred to assessee, but they do not find any place in the reasons recorded for reopening of the assessment and consequent approval by the ld Joint Commissioner of Income tax as well as The Principal Commissioner of Income tax. As judicial precedents guide us that validity of reopening of assessment can be tested only on the basis of reason recorded by Assessing officer and nothing else, Therefore, we are duty bound to test action of ld AO on the basis of "reasons Recorded" shown before us. Admittedly, the assessee filed his return of income on 31 July 2009 and it was not picked up for scrutiny. Thus, the return was accepted as it is. For reopening of the assessment, even if the return is not picked up for scrutiny there has to be a tangible material in possession of the assessing officer. Such tangible material should also be recorded or referred in reason for reopening. On looking at the reasons recorded, we do not find that which tangible material is coming in possession of the assessing officer-suggesting escapement of income in the hands of the assessee. As we have already held that reopening of the assessment can only be tested based on the reasons recorded by the assessing officer and not based on all other materials available on file of AO, which may not have been referred to by the assessing officer in the reasons recorded. Before the learned CIT – A assessee contested the reopening of the assessment as per ground number one of appeal before him and made detailed submissions, which are recorded by the learned CIT – (A) in para number 3.1 of his order. However, despite the pleadings of the assessee, the learned CIT – A preferred to remain silent on that issue. Therefore, as the reopening of the assessment is a jurisdictional aspect, decision on merit cannot be given without deciding the jurisdictional issue first. Further in the present case, issue of validity

of section 148/147 of the act is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in case of Coronation Agro industries Ltd (supra) and decision of the SMC bench in ITA number 4558/del/2019 wherein on identical facts, the reopening of the assessment is quashed. We hasten to add that in both these cases the reopening has been quashed as the AO lacked reason to believe that income chargeable to tax has escaped assessment and not on the basis that no reopening can be made on the basis of information received from investigation wing on client code modification. Thus, ground number 2 of the appeal, which specifically challenges reopening of assessment, is allowed.

9. In view of our decisions in ground number two of the appeal, other grounds on merits of addition are not adjudicated.
10. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 13/01/2020

-Sd/-
(K.N.CHARY)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 13/01/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi