

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

BEFORE SHRI SAKTIJIT DEY (JM)

**ITA No. 7002/MUM/2018
Assessment Year: 2009-10**

**ITA No. 7004/MUM/2018
Assessment Year: 2011-12**

M/s Excellent Shares & Finance Services Pvt. Ltd., (Formerly known as Pashupati Shares & Finance Services Pvt. Ltd.), 601, Krishna Utsav, Khandelwal Layout, Evershine Nagar, Malad (W), Mubmai - 400064 PAN: AADCP0465C	Vs.	The Income Tax Officer – 13(1)(3), Room No. 225, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

&

**ITA No. 7005/MUM/2018
Assessment Year: 2009-10**

M/s Pashupati Derivatives & Commodities Pvt. Ltd. (Formerly Known as Pashupati Stock & Commodities Pvt. Ltd.), 806, 8 th Floor, DLH Park, S.V. Road, Near MTNL Exchange, Goregaon (W), Mumbai – 400062 PAN: AADCP8027G	Vs.	The Income Tax Officer – 13(1)(3), Room no. 225, Aayakar Bhavan, M.K. Road, Mumbai – 400020
(Appellant)		(Respondent)

Assessee by : Shri Rakesh Joshi (AR)

Revenue by : Shri Sanjay Sethi (DR)

Date of Hearing: 14/12/2020
Date of Pronouncement: 18/01/2021

ORDER

PER SAKTIJIT DEY, JM

Captioned appeals by two different assessee arise out of three separate orders, all dated 21.08.2018, of learned Commissioner of Income Tax (Appeals) – 21, Mumbai for the Assessment Years 2009-10 and 2011-12.

2. In ground No. 1, of all these appeals the assessee has challenged the validity of reopening of assessment u/s 147 of the Act.

3. Briefly the facts which are common in all these appeals are, the assessee are resident companies and are dealing in shares and securities in both derivative and forward and option (F & O) segments. For the assessment years under dispute the assessee, in regular course, have filed the return of income as per section 139(1) of the Act. Returns filed by the assessee were initially processed u/s 143(1) of the Act. Subsequently, the Assessing Officer vide letter dated 11.03.2016 received information from DDIT (Inv.), Ahmedabad that certain assessee's were engaged in tax evasion through client code modification and the assessee is one of them. On the basis of such information Assessing Officer reopened the assessments u/s 147 of the Act. Ultimately, the Assessing officer completed the assessments u/s 143 (3) r.w.s. 147 of the Act making addition of various amounts and also computed commission income at 2%. Accordingly, the additions were made at the hands of the assessee. Though, the assessee challenged the assessment orders before learned Commissioner (Appeals) both on the validity of reopening of assessment u/s 147 of the Act as well as merits of the additions. Further, the learned Commissioner (Appeals) did not find merit in the grounds raised. Accordingly, he dismissed the appeals filed by the assessee.

4. The learned Counsel for the assessee drawing my attention to the reasons recorded by the Assessing Officer on 05.07.2016 for reopening the assessment submitted that only on the basis of certain information received

from the Investigation Wing, Ahmedabad, the Assessing Officer has mechanically reopened the assessment u/s 147 of the Act. He submitted, there was no information available with the Assessing Officer regarding any client code modification by the assessee. He submitted, neither in the reasons recorded for reopening of assessment nor in the assessment order, the Assessing Officer has pointed out even a single instance of client code modification by the assessee. He submitted, without making any independent enquiry or application of mind, the Assessing Officer reopened the assessment merely on the basis of letter received from the DGIT (Inv.). He submitted, while considering identical issue in assessee's own case in assessment year 2010-11, a Division Bench of the Tribunal has held the initiation of proceedings u/s 147 of the Act to be invalid. To demonstrate that the reasons on the basis of which the assessment was reopened in AY 2010-11 and in the impugned assessment years are identical, The learned counsel for the assessee took us through the discussions made by the Tribunal in the appeal order passed for Assessment Year 2010-11. Thus, he submitted, the issue is squarely covered by the decision of the Tribunal in assessee's own case.

5. The learned Departmental Representative, though, agreed that the identical issue has been decided by the Tribunal in assessee's own case in Assessment Year 2010-11, however, he submitted that department might have filed appeal against the decision of the Hon'ble jurisdictional High Court relied upon by the Tribunal.

6. I have considered rival submissions and perused the material on record. Undisputedly, reopening of assessment in all these cases are on the basis of information received by the Assessing Officer that the assessee had indulged in client code modification from which it has provided fictitious loss to different clients as well as fictitious profit to other clients. The reasons recorded by the Assessing Officer for reopening the assessments, which are common in all these years, are as under:-

"In this case Information has been received from DDIT (Inv.) Unit-1 (3),

Ahmedabad, through email dated 11.03.2016 that fictitious profits and losses were created by some brokers by misusing the client code modification facility in F&O segment on NSF during the FY. 2008-09. The brokers were alleged to be indulging in transferring the fictitious losses to different clients to reduce their tax liability and also fictitious profit to other clients. As per the information received by the DDIT (Inv), Ahmedabad from NSF, Client code Modification (CCM) data for .A.Y. 2009-10 and the CCM transactions received from NSF were further analyzed and the mapping of data was done to ascertain the exact amount of fictitious profit/losses in each case. On detailed analysts by the DDIT (Inv.), Unit-1(3), Ahmedabad, it was established that the brokers has misused client code modification facility and created non-genuine losses and profits. These losses and profits were given to different clients/beneficiaries according to their requirement. The clients have taken fictitious losses to set off against their profits with a view to reduce their tax liability. Some of the Client have confirmed that they have misused the facility of client code modification in order to create fictitious losses/profits. They have committed that they have received commission at the rote varying from 0.5% to 2% on the amount of loses/profits for transferring such losses/profits to their client. The name of the broker is Pashupati Capital Services Pvt. Ltd. This CCM data is relating to the beneficiaries in whose account more than Rs, 1,00,000/- losses/Profits have been genera red through CCM.

In this-case. 'ssessee has executed the transaction during the FY 2008-09. As per the information received, assessee company is one of the beneficiaries and create fictitious Profit/Lass amounts to Ps. 29,02,696/-

In view of the above, I have reason to believe that income chargeable to tax amounting to Rs. 29,02,696/- has escaped assessment, by the reason of failure on the part of the assessee to disclosed fully and truly till material facts within the meaning of provision of section 147 of the IT. Act, 1961. Therefore, the assessment is reopened and issued notice c/s 148 of the IT. Act.”

7. Perusal of the reasons recorded clearly indicate that the reopening of assessments is on the basis of a letter received from DDIT (Inv.), Ahmedabad, wherein, it is alleged that some brokers are misusing the client code modification facilities to benefit their clients and in the process received

commission varying between 0.5% to 2% of the amount of loss/profit transferred to the respective clients. It is noticed, on the basis of identical reasoning in assessee's own case for the assessment year 2010-11, assessment was reopened u/s 147 of the Act. The Tribunal while deciding the issue in ITA No. 7003/Mum/2018 dated 28.02.2020, following the decision of Hon'ble Bombay High Court in case of M/s Coronation Agro Industries Ltd. vs. DCIT Writ Petition No. 2627 of 2016, held the reopening of assessment as invalid and accordingly, quashed the assessment orders. The relevant observations of the Bench is reproduced hereunder for better appreciation:

6. We have heard the rival submissions of the parties and perused the material on record including the cases relied upon by the Ld. counsel for the assessee and the authorities below in the light of the rival contentions. The reasons recorded for reopening the assessment read as under:

"Information has been received from DIT (Intell. & CR. Inv.), Mumbai, vide letter No. DIT (I & CI)/CCM/2014-15 dated 27.02.2015 that fictitious profits and losses were created by some brokers by misusing the client code modification facility in F&O segment on NSE during March, 2010. The brokers were alleged to be indulging in transferring the fictitious losses to different clients to reduce their tax liability and also fictitious profit to other clients. As per the information received by the DIT (I&CI), Mumbai from NSE, Client Code Modification (CCM) data for F.Y. 2009-10, and the CCM transactions received from NSE were further analysed and the mapping of data was done to ascertain the exact amount of fictitious profits/losses in each case. On detailed analysis by the DIT (I & CI), Mumbai, it was established that the brokers has misused client code modification facility and created non-genuine losses and profits. These losses and profits were given to different clients/beneficiaries according to their requirement. The clients have taken fictitious losses to set off against their profits with a view to reduce their tax liability. Some of the Client have confirmed that they have misused the facility of client code modification in order to create fictitious losses/profits. They have admitted that they have received commission at the rate varying from 0.5% upto 2% on the

amount of losses/profits for transferring such losses/profits to their client. The names of such brokers are i) Transglobal Securities Ltd. ii) Crosseas Capital Services Pvt. Ltd. iii) Indianivesh Securities Pvt. Ltd. and iv) Anugrah Stock & Broking Pvt. Ltd. This CCM data are relating to the beneficiaries in whose account more than Rs. 25 lacs Losses/Profits have been generated through CCM.

In this case, assessee has executed the transaction during the F.Y. 2009-10. As per the information received, assessee company is one of the beneficiaries and create fictitious Profit/Loss amounts to Rs. 1,12,08,455/-. Assessee has modified 2,58,47,552 Quantity of shares and the value of shares modified as per the information was to the tune of Rs. 2,23,01,04,598/- resulting into loss of Rs. 1,12,08,485/- due to client code modification”.

7. As pointed out by the Ld. counsel, in the case of M/s Coronation Agro Industries Ltd. vs. DCIT (supra), the Hon'ble Bombay High Court has decided the identical issue in favour of the assessee and held the notice issued u/s 148 of the Act lacks reason to believe that the income chargeable to tax has escaped assessment holding 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 benefitted 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 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."*

8. *The legal ground raised by the assessee is covered by the ratio laid down by the Hon'ble High Court discussed above. As per the law laid down by the Hon'ble Court, the material available with the AO was not sufficient to form a belief that income chargeable to tax has escaped assessment. Hence, respectfully following the ratio laid down by the Hon'ble Court, we hold that the notice issued by the AO is bad in law. Since we have held the notice issued by the AO as without jurisdiction, the appellate proceedings has also become bad in law. Hence, we allow this ground of appeal of the assessee and set aside the impugned order passed by the Ld. CIT(A)."*

8. Perusal of the reasons recorded for reopening of assessment reproduced in the order passed by the Tribunal makes it very much clear that the reasons recorded are identical to the reasons recorded by the Assessing

Officer in case of the present assessee. Only factual difference is, in Assessment Year 2010-11 the Assessing Officer had referred to information received from DIT (Intell), Mumbai vide letter dated 27.02.2015, whereas, in the present case he has referred to letter dated 11.03.2016 received from DDIT (Inv.), Ahmedabad. Except, the aforesaid factual difference there is no other difference in the reasons recorded. Therefore, respectfully following the decision of the Division Bench of the Tribunal, which is binding, I hold that the reopening of assessments in all these cases under appeal are invalid. Accordingly, the assessment orders are quashed. Consequently, the impugned orders of learned Commissioner (Appeals) are set aside. In view of my decision on the legal issue, the grounds raised on merits have become infructuous, hence, are not required to be adjudicated.

In the result, appeals filed by the assessee are allowed as indicated above.

Order pronounced in the open court on 18th January, 2021.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 18/01/2021

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,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai