

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "SMC-1": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA.No.8031/Del./2018
Assessment Year 2010-11

R.S. Shares & Securities Ltd., 22, Parkash Deep Building, Ansari Road, Darya Ganj, New Delhi. PAN No. AAACR1214J	VS.	ITO Ward 20(4) New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Advocate
For Revenue :	Shri Prakash Dubey, Sr. DR

Date of Hearing :	06.01.2021
Date of Pronouncement :	02.02.2021

ORDER

This appeal by assessee has been directed against the order of Ld. CIT(Appeals)-7, New Delhi dated 09.10.2018, challenging the reopening of the assessment u/s 147 of the Act and addition on account of shifting ascertained losses of Rs. 4,94,027/-.

2. I have heard Ld. Representatives of both the parties and perused the material available on record.

3. Brief facts of the case are that the assessee e-filed its return of income on 29.09.2010 for assessment year under appeal declaring loss of Rs. 13,03,365/-. Subsequently, information was received from the Investigation Wing, Ahmedabad that Client Codes is a practice under which broker changed the client codes in sale and purchase orders of securities after the trades are conducted. The case was reopened u/s 147 and notice u/s 148 was issued on 30.03.2017 to the assessee. The AO passed the reassessment order u/s 143(3)/147 on 12.12.2017, assessing the income at Nil (after reducing the loss of Rs. 7,99,460/-) after disallowing the ascertained loss of Rs. 4,94,027/- due to change of client code and disallowance of Rs.9,881/- on account of commission of 2% for the entry.

4. The assessee challenged the reopening of the assessment as well as addition before Ld. CIT(A). It was contended that AO has recorded incorrect and wrong reasons and approval is granted in most mechanical manner. Since AO recorded non-existing and factually incorrect reasons and did not apply independent mind on the information so received, therefore, reopening of the assessment is invalid and bad in law. The addition is made without any basis. The Ld. CIT(A), however, dismiss the appeal of the assessee.

5. Ld. Counsel for assessee referred to PB 2 to 4 which are reasons recorded for reopening of the assessment. He has

submitted that AO in the form for the reasons in para 7 mentioned that reopening done under the provisions of Section 147(b) of the Act which fact is incorrect because such section does not exist in the statute. He has further submitted that AO has mentioned name of the broker as M/s SMC Global Securities Limited which fact is also incorrect. The Ld. Pr. CIT without giving any reasons gave approval by merely mentioning “yes, I am satisfied”. Ld. Counsel for assessee referred to objections filed before AO challenging the reopening of the assessment, PB 11 to 16 in which the assessee has contended that assessee has never dealt with the broker SMC Global Securities Limited as mentioned in the reasons. The assessee has carried out transaction with M/s Mansukh Securities Finance Limited. He has referred to PB 5 to 10 which is the rejection order of the AO deciding objection of the assessee against reopening of assessment dated 27.11.2017 in which AO has mentioned that assessee has shifted loss through broker Mansukh Securities and Finance Limited. He has, therefore, submitted that AO has recorded incorrect and non existing fact in the reasons and approval is also granted in mechanical manner. He has submitted that on identical facts ITAT Delhi Division Bench in the case of M/s Stratagem Portfolio Pvt. Limited Vs. DCIT in ITA No. 7878/2019 AY 2010-11 quashed the reopening of the assessment vide order dated 15.09.2020. The order is reproduced as under:

“This appeal has been preferred by the assessee against the order dated 30/07/2019, passed by the Learned CIT(Appeals)-XXV, New Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2010-11 raising following grounds:

Ground No.	Grounds of Appeal	Tax Effect
1	<i>That the learned Commissioner of Income Tax (Appeals) has grossly erred both in law and on facts in upholding the initiation of proceedings under section 147 of the Act and, completion of assessment under section 147/144 of the Act without appreciating that the same were without jurisdiction and hence deserved to be quashed as such.</i>	<i>Jurisdictional Ground therefore not considered separately</i>
1.1	<i>That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that there was no specific relevant, reliable and tangible material on record to form a “reason to believe” that income of the appellant had escaped assessment and in view thereof the proceedings initiated are illegal, untenable and therefore unsustainable.</i>	
1.2	<i>That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that even otherwise there was no failure on the part of assessee to disclose fully and truly all material facts necessary for assessment and as such action u/s 147 was in excess of jurisdiction;</i>	
1.3	<i>That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that reasons recorded mechanically without application of mind do not constitute valid reasons to believe for assumption of jurisdiction u/s 147 of the Act</i>	
1.4	<i>That in absence of any valid approval obtained under section 151 of the Act, initiation of proceedings u/s 147 of the Act and assessment framed u/s 147/143(3) of the Act are invalid and deserve to be quashed as such.</i>	
2.	<i>That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in sustaining an aggregate addition of Rs. 6,47,201/- representing loss claimed and incurred by allegedly misusing the client code modification mechanism by</i>	

	<i>the broker of the appellant</i>	
2.1	<i>That further more the learned Commissioner of Income Tax (Appeals) has proceeded to sustain the addition on mere speculation, generalized statements, theoretical assumptions and allegations and assertions, mechanically borrowed and, lifted from report of investigation wing without any inquiry of his own and, then addition made without there being any supporting direct or indirect or circumstantial evidence is not in accordance with law.</i>	
2.2	<i>That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in failing to appreciate the written submissions furnished by the appellant and overlooking the judicial pronouncements relied upon by the appellant.</i>	
2.3	<i>That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that all transaction of appellant were supported by documentary evidence in the shape of contract notes, account payee transactions and therefore addition made on surmises, conjectures and suspicion and without bringing on record any specific evidence establishing that claim made is not genuine or incorrect is highly arbitrary, unjustified and untenable.</i>	
2.4	<i>That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in recording various adverse inferences which are contrary to the facts on record, material placed on record and, are otherwise unsustainable in law and therefore, addition so confirmed is absolutely unwarranted.</i>	
3.	<i>That the learned Commissioner of Income Tax (Appeals) has erred both in law erred both in law and on facts in upholding an addition of Rs. 12,944/- representing alleged income from commission on sale of shares for the instant assessment year.</i>	

Prayer	It is therefore, prayed that, it be held that assessment made by the learned Assessing Officer and sustained by the learned Commissioner of Income Tax (Appeals) deserves to be quashed as such. It be further held that additions made and sustained by the learned Commissioner of Income Tax (Appeals) be deleted and appeal of the appellant company be allowed.	
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2. Briefly stated facts of the case are that for the year under consideration, the assessee company filed its return of income on 27/09/2010 declaring total income of ₹ 5,06,450/-. The return of income filed was processed under section 143(1) of the Income-tax Act, 1961 (in short 'the Act'). Subsequently, on 29/03/2017 the Assessing Officer issued notice under section 148 the Act after recording reasons that income had escaped tax. The assessment in terms of section 147 of the Act was completed on 30/12/2017 after making addition of ₹ 6,47,201/- under section 68 of the Act and ₹ 12,944/- under section 69C of the Act. Aggrieved, the assessee filed appeal before the Learned CIT(A) challenging finding of the Assessing Officer on legal ground as well as on the merit, however, assessee could not succeed before the Learned CIT(A). Aggrieved with the finding of the Learned CIT(A), the assessee is in appeal before the Income-Tax Appellate Tribunal (in short 'the Tribunal') raising grounds as reproduced above.

3. Before us, the parties appeared through videoconferencing facility. The Learned Counsel of the assessee filed a paper-book containing pages 1 to 68 and other documents electronically along with synopsis. The Learned DR has also filed written submission electronically.

4. The ground No. 1 to 1.4 of the appeal relates to validity of the reassessment proceeding. In the ground No. 1.1, the assessee has challenged "reason to believe" on the ground that same are not specific and lacking reliable and tangible material.

5. In support of the ground, the Learned Counsel of the assessee referred to the reasons recorded, which has been reproduced by the Assessing Officer in the impugned assessment order. He submitted that in the reasons recorded, the Assessing Officer has recorded about process of Client Code Modification (CCM) by the brokers under the facility provided by the stock exchanges for rectification of error in punching of the client code while carrying out transaction of purchase and sale of the shares. He further referred to para-12 of the said reasons and submitted that the Assessing Officer has reproduced number of events, where

assessee's code was modified by the broker. The learned Counsel submitted that the Assessing Officer on the basis of modification in the client code of the assessee, has jumped to believe that it had been done for shifting of profit of ₹ 6,42,781/- and shifting of loss of ₹ 4,420/-. According to Learned Counsel, this belief of the Assessing Officer is without any tangible material to support that such client code modification has been done for evasion of the tax. Further, he submitted that the Learned Assessing Officer is not justified in making the belief that profit or loss shifted to other persons by way of client code modification by the broker has resulted into any income to the assessee, which could be assessed under section 68 as cash credit.

5.1 He submitted that learned Assessing Officer acted only on the basis of suspicion and it could not be said that it was based on belief that income chargeable to tax had escaped assessment. He referred to page 5 of reasons recorded where the learned Assessing Officer noted that:

“The assessee's code was modified 44 times in OCC to shift out profits Rs. 6,42,781 and one time in MCC to Shift in loss of Rs.4,420/-. The data clearly shows that the modification was not on grounds of feeding in erroneous data.”

He further submitted that finally while making the addition learned Assessing Officer at page 16 of order of Assessment, however, concluded that :

“In view of above, the profit of Rs. 6,47,201/- claimed by the assessee in the above mentioned transactions is treated as a contrived profit artificially generated through the misuse of the CCM. The profit is, therefore, liable to be taxed and added to the total income of the assessee as unexplained investment u/s 68 r.w.s. 115BBE of the Income-tax Act, 1961.”

5.2 The Ld. Counsel accordingly, submitted that reasons recorded are thus factually incorrect too, or the learned Assessing Officer was not sure about that, the appellant claimed loss or profit by misuse of the CCM.

5.3 He also submitted that there is no live link or direct nexus between alleged material and, inference drawn by the Assessing Officer. The learned Counsel relied on decision of Hon'ble Bombay High Court in the case of **M/s. Coronation Agro Industries Ltd. vs. DCIT reported in 390 ITR 464** and following decisions of the Tribunal to support his contentions:

1. ITA No. 6809/D/2018 dated 22.10.2019 Simmi Sethi vs. ITO (**pages 53-56 of JPB**)
2. ITA No. 4542/D/2018 dated 29.11.2018 Radiance Stock Traders (P) Ltd. vs. ITO (**pages 1-25 of JPB**)
3. ITA No. 6628/D/2018 dated 12.4.2019 Kamal Kishoree Aggarwal vs. ACIT (**pages 92-111 of JPB**)
4. ITA No. 4395/D/2019 dated 27.2.2020 AKG Securities & consulting Ltd. vs. ITO (**pages 112-127 of JPB**)
5. ITA No. 825/D/2019 dated 25.07.2019 Sanjay Kumar Jain vs. ITO (**pages 57-91 of JPB**)

5.4 The Learned DR, on the other hand, submitted that the reasons have been recorded on the information received from the Director of Income Tax (Investigation), Ahmadabad, which is a credible source of the information. He further relied on the order of the lower authorities to support that reasons have been recorded validly.

5.5 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the instant case, the dispute is whether there is any tangible material to infer that by way of the client code modification, the assessee has escaped the income and evaded the Income-tax. The Learned Counsel of the assessee has referred to the various decisions mentioned above, wherein cases were reopened on the basis of the information of client code modification. In the case of **M/s. Coronation Agro Industries Ltd. vs. DCIT (supra)**, the **Hon'ble Bombay High Court** quashed reopening of assessment on identical issue. It has been held in the said judgment as under:

“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.”

5.5.1 Further, the Tribunal in **Radiance Stock Traders (P) Ltd. vs. ITO (supra)**, has held as under:

“6.1 After perusing the aforesaid reasons recorded, I find that „information” was received on 21.3.2016 from **Asstt. Director of Income Tax (Investigation) Unit- 1(3), Ahmedabad** without conducting any enquiry on the same by Assessing Officer and without considering the fact of the case of assessee in light of the issue is not a tangible and relevant material to form opinion that income has escaped assessment. It is noted that the proceedings u/s. 147 of the Act can be initiated only on the basis of the tangible material and not on the basis of assumptions and presumptions. The recondition u/s. 147 of the Act is “reason to believe” and, the expression is stronger than the word “satisfied”. The belief entertained by the AO must not be arbitrary or irrational, however, it must be reasonable. In other words, it must be based on reasons which are relevant and material. The existence of tangible and relevant material is a precondition for assuming jurisdiction, as has been held in the case of CIT vs. Kelvinator of India Ltd. reported in 320 ITR 561 (SC) and ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. reported in 291 ITR 500 (SC). Hence, in this case the proceedings have been initiated on the basis of no material much less any tangible and, relevant material and as such reasons record do not constitute valid reason to believe for initiating proceedings u/s 147 of the Act. It is a case of reason to suspect' and not „reason to believe.”

6.2 I further note that the action of the AO has been taken mechanically on the basis of alleged report of Investigation Wing. The mere recording/ formulation of reasons on the basis of reproduction of information from Investigation Wing and, issuing notice for initiation of re-assessment proceedings does not constitute application of mind much less independent application of mind. Hence, the proceedings are without jurisdiction. It is settled law that AO cannot act mechanically on the basis of report of Investigation Wing and to show that the AO has applied his mind, he must distinct all those materials and he must also show that what was material on record. Hence, initiation of proceedings is also based on non-application of mind much less independent application of mind.....

6.3 I further note that in the reasons recorded assessee has relied upon the information by the Investigation Wing, Ahmedabad, the AO has stated that having perused and considered the information received from Investigation Wing he has reason to believe that income of the assessee has escaped which has not been conformed to the assessee company, in the course of assessment proceedings, though in view of the judgment of Hon"ble Delhi High Court in the case of Sabh Infrastructure Ltd. Vs. ACIT reported in 398 ITR 198 the same was to be confronted alongwith reasons wherein it has been held as under: “(iii) where the reasons make a reference to another document, whether as a letter or report, such document and / or relevant portions

of such report should be enclosed alongwith the reasons.” 6.3.1 Hence in the absence of such material, the allegation and assumptions are nothing but figment of imagination as they are based on assumption and presumption, apart from being without basis.

...

5.8 In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, I am of the considered view that proceedings initiated by invoking the provisions of section 147 of the Act by the AO and upheld by the Ld. CIT(A) are nonest in law and without jurisdiction, hence, the re-assessment is quashed.”

5.5.2 Similarly, in the case of **Kamal Kishoree Aggarwal vs. ACIT (supra)**, the Tribunal has observed as under:

“7. I find that the reasons recorded for issuance of notice u/s 148 was as under:

“REASONS FOR BELIEF THAT THE INCOME HAS ESCAPEDASSESSMENT IN THE CASE OF SHRI GOPAL GUPTA FORTHE ASSESSMENT YEAR 2009-10

As Survey Report in R/o client code modification (CCM) has been received from ADIT (Inv.) U-1(3) Ahmadabad disseminating of beneficiary clients who have taken contrived losses and shifted out profits during the F.Y.2008-09 to 2011-12....

8. We find that in the case of M/s. Prashant Agencies Pvt. Ltd. And PPN Properties Pvt. Ltd. Vs ITO in ITA Nos. 3059 & 3060/Del/2018, order dated 16.01.2019, the Tribunal dealt with the similar issuance of notice u/s 148 of the Act by following the decision of the Hon’ble Bombay High Court in the case of Coronation ‘Agro Industries Ltd. Vs. DCIT 390 ITR 464 (Bom.). In that case, the reasons recorded were asunder:

....

10. **A perusal of the above, shows that Client Code Modification is legally permissible in case of mistake.** In the instant case, the observation of the Assessing Officer is to the effect that due to Client Code Modification in two transactions, the assessee’s income was reduced by Rs.5,96,176/-.

11. **We find that there is no material which has been brought out in the recorded reasons to show that Client Code Modification in the instant case was malafide or the assessee received Rs.5,96,176/- in cash in lieu of the said Client Code Modification. Thus, the above recording at best is a reason to suspect only.**

12. It is an established position of law that the validity of reopening is to be decided on the basis of recording made u/s 148(2) of the Act alone and nothing can be added thereto. The recording should be self-contained to withstand the validity of the reopening made.

13. In the circumstances, respectfully following the decision of the Hon'ble Bombay High Court in the case of Coronation Agro Industries Ltd. Vs DCIT (supra) and the above quoted decision of the Tribunal, in our considered opinion, the reasons recorded in the instant case does not satisfy the requirement of law and the same does not constitute the reason to believe for escapement of any income from tax. Therefore, the reason is not valid. The consequential order of reassessment passed in pursuance thereto cannot be sustained. We, therefore, set aside the impugned order of reassessment passed u/s 147 of the Act and allow this ground of appeal of the assessee."

5.3 In the instant case, though the Assessing Officer has reproduced the reasons recorded, for ready reference same are reproduced here as under:

"1. The assessee is a company filed its return of income on 27.09.2010 declaring Rs.5,06,454/- income. The details of the directors of the assessee company obtained from recants are hereunder:-

(a) Alul Sethi

(b) Gautam Jagga

The return has been verified A digitally signed by Shri Atul Sethi.

2. Thereafter, the return was processed under 143(1) of the IT Act. However, the case was not selected for scrutiny/or scrutinized us 143(3) of the Act. Subsequently, information through email was received on 11/03/2016 from Asstt. Director of Income Tax (Investigation), Unit 1(3), Ahmedabad by which a Survey Report was disseminated in cases of beneficiary clients who have taken contrived losses & shifted old profits using Client Code Modification.

3. It is a detailed report of 593 pages. I have gone through the report and gathered that how Client code modification has been done in case of the assessee to evade tax. Client code is unique code which is assigned by a broker to its clients. A broker can issue just one code to a client. Client Code Modification means modification/change of the client codes after execution of trades. Vide Circular no. SMD/POLICY/Cir-/03, dated February 6, 2003 SEBI mandated that the slack exchanges shall not normally permit changes in the client code except to correct for genuine mistakes. The client code modifications permit brokers to rectify human errors when a client inadvertently provides a wrong code or when or a wrong code is punched in by the broker whilst executing the trade. The broker is

allowed to change it between 3.30 pm and 4 pm to rectify a genuine error that may have occurred while entering the code, the facility ensures smooth functioning of the system and is to be used as an exception rather than routine. Client code modification means modification of client code after the execution of trade.

3.1 Over a period of time, some persons, in connivance with brokers started using Client Code Modification for purposes other than genuine errors. Contrary to its motive, CCM facility was being misused and brokers transferred gains or losses from one person to another by changing the code, in the garb of correcting an error. These gain or loss-book entries were then used to evade taxes.

4. Non genuine CCM were carried out to book contrived losses. In some cases, this facility was used by brokers to transfer gains or losses from one party to another by modifying client codes in the guise of rectifying an error. It became a practice to book artificial profits or losses in March to impact tax liabilities. It is generally done by buying or selling stocks intra-day so as to say consciously incur a loss and use that as a tax offset.

4.1 Client code modification (CCM) especially in the Futures and Options Segment (F&O) was being used a device to evade taxes wherein the client codes were modified for booking artificial profits or losses at the fag end (Jan to March of the Financial year when the book profits/losses of various clients have crystallized. This is done with an intention to impact the tax liabilities of the pair of clients whose codes are modified.

5. Enquiries were conducted by DIT (I&CI) Mumbai: On the spot verification u/s 131 (IA) of the Act was conducted in the cases of few brokers. The brokers admitted misuse of Client code modification & receipt of commission of 0.5 to 2%. In addition, following patterns were observed in the I&CI report:

i. Number and percentage of modified trades traded value is significantly higher in the total number of trades/traded value of particular client indulging into CCM.

ii. Profit/loss arising on account of all modifications by client is significant in comparison to the profit/loss in the trades where no modifications have been carried out.

iii. Trades have been modified to unrelated parties indicating that they are non-genuine

iv. Both buy and sell log of different trades have been modified to most of the client.

v. Number of trade client code modifications substantially increased during the closing months of the financial year.

vi. In some cases, the clients in whose accounts trades were transferred after modification did not have enough margin money to trade in the F & O segment.

vii The client code modification was consistently used to always transfer losses in accounts of some clients and profits in the accounts of others.

viii. Many brokers accepted that they charged commission at the rates varying from 0.5% to 2% on the amounts of accommodation entries provided by them to different beneficiaries.

ix. These brokers revised their computation for A.Y 2010-11 and paid taxes accordingly.

x. Some beneficiaries against whom enquiries were conducted have accepted and withdrawn their claim of non-genuine losses in F&O segment in A.Y-2010-11. They have revised their computation for A.Y.-2010-11 and paid taxes accordingly.

The report of I&CI clearly established that the racket of brokers and beneficiaries foul played and misused CCM for tax-evasion.

6. An action was also undertaken by Ahmedabad Directorate of Investigation Wing. The wing had called for reports from different exchanges and the data was duly analysed. After analysis, 12 Brokers and their related entities/main clients were identified for survey where the pre-survey analysis indicated more quantum of tax-evasion. Based upon data analysis coordinated surveys u/s 133A of the Income Tax Act, 1961 were carried out at-the premises of 12 brokers across India on 23.03.2015.

7. Income-Tax (First Amendment) Rules. 2011 were amended vide Notification No. 14/2011 [F. No. 142/25/2008-So(TPL)], Dated 9-3-2011. The amendment came into force on the 1st day of April, 2011. The amendment required the stock exchanges to ensure that the transactions (in respect of cash and derivative market) once registered in the system are modified only in cases of genuine error and maintain data regarding all transactions (in respect of cash and derivative market) registered in the system which have been modified and submit a monthly statement in Form No. 3BB to the Director General of

Income-tax (Intelligence), New Delhi within fifteen days from the last day of each month to which such statement relates.

8. *SEBI conducted a probe into 'modification of client ended by brokers, pursuant to observations by the Finance Ministry about many such modifications taking place in derivatives transactions at the NSE during March 2011). With regard to the client code modifications, the trading activities under scanner of SEBI mostly took place between 2009 and 2011 after which SEBI tightened its norms to put a full-stop to such manipulations. Before tightening of the norms, the Indian markets were seeing diem code modifications to the tune of Rs.50,000 – Rs. 60,000 crore a month, which came down to just about Rs.100 crore soon after SEBI action. Quantum of such modifications was much higher during March, compared to the other months, which hinted towards the tax evasion angle due to it being the last month of the fiscal. This showed that a large-scale manipulation was taking place where brokers were making changes in the client details after execution of trades citing 'genuine errors' In April 2012, SEBI passed an order against NSE for being "negligent in discharge of its duties" in a case of modification of client codes.*

9. *The report of Ahmedabad Investigation Wing has been compiled after taking into account the findings of SEBI, DG I&CI. Data available with department in form of Form no. 3BB and the information collected by way of surveys.*

The report points out that the essence of tax evasion through CCM is that if the Broker has punched in both Buy and Sell Orders for a given quantity of a given security then at the end id the trading session he has with him an ascertained loss/gain on this Buy Sell pair that he can shift during the CCM window. The analysis of the Investigation Wing focused on narrowing down on systemic transfer of matched quantities of Buy and Sell Orders front a given Original Client Code (OCC) or to a given Modified Client Code (MCC) for a given Broker

10. *The following steps were followed for analysis and computing the quantum of losses profits shifted due to the CCM:*

for computation of the profits and losses shifted on account of client code modifications the matched combinations of the buy and sell orders, in a given scrip with same expiry on a given date, shifted in (in case of MCC) shifted out (in case of OCC) were taken in a pair of clients. For illustration in case from client X(OCC) transactions of 500 buy orders and 500 sell orders of Nifty with expiry 28.03.2020 modified on 06.03.2010 to client Y(MCC), then in such case the difference in buy and sell trades is taken to be profit/loss shifted from

X to Y. All other transactions say where 500 buy and 200 sell trades are shifted front X to Y have been ignored.

- *The transactions where exact buy and sell transaction were transferred from one client to another NO PRICE RISK EVER was borne by the client who received the transactions through CCM. Thus such ASCERTAINED LOSSES shifted through CCM for which no price risk ever was borne by a client are non-genuine losses shifted with the motive of tax evasion by setting of such selectively shifted losses against other income.*
 - *Working on the said logic has been made in both scenarios, i.e., when a given client was original client (OCC) and when the client was modified client(MCC).*
 - *It has been seen with regard to all the clients, so identified to have obtained losses/profits consequent to such working on the NSE data, that when a client has received losses as MCC. It has shifted out profits when it was OCC and its code was modified. Thus, the total losses obtained by the client through CCM would be the sum of the losses received as MCC and profits shifted out to other clients as OCC.*
 - *As per the said working, year-wise and client-wise losses computed for all the diems of different brokers is enclosed al Annexure B, to this report.*
 - *The final figures of the profits and losses shifted due to CCM are at Annexure B to this report,*
11. *The submissions were requested from the brokers by the Investigation Wing and were duly considered. In case the submission had merits, these were duly honoured. The final set of beneficiaries as compiled contained only such beneficiaries for whom no tenable contention remains standing. To counter the contention of the Brokers that the Department has not taken into account the open positions shifted from one client to another as a result of CCM as the shifting of one leg of trade (i.e. buy or sell open position) from one client to another only CCM wherein equal number of buy and sell trades between two clients have been shifted have been taken for computation of the losses profits shifted due to CCM. To be more specific and in simple terms, modifications which appear to be genuine or resemble at being germane were ignored and not considered in this report. Such benefit has already been given by the department.*

12. I have gone through the report as well as the basic data of transaction in respect of my assessee which was supplied with the report. My findings on the issue are as under:

a) The return of the assessee shows that it is involved in sale purchase in stock exchanges and its gross turnover could have included the transactions contrived by way of CCM.

b) The transactions which involved CCM in case of assessee are as under

i) The assessee's code was modified 44 times in OCC to Shift out profits Rs.6,42,781 and one time in MCC to Shift in loss of Rs 4.420/- The data clearly shows that the modification was not on grounds of feeding in erroneous data. The modifications are as under:

To shift out profits. The Assessee's OCC of FSTP have been modified to new codes in MCC as under.

Replaced Code	Number of Times
I	13
FAMK	5
FBHA	3
FDDI	8
FJRD	9
FKA1	3
TOTAL	44

(ii) Now let us examine the situation in MCC i.e. when some other's OCC was modified to the assessee's code. The assessee did one transaction in which he got OCC of someone else modified to its Code to gather losses. The original codes of 99 were replaced by assessee's codes of FSTP. This resulted in shifting in of losses of Rs.4,420/-

c) *Levenshtein Distance or edit distance is that it gives a clear indication as to whether the code is wrongly typed or is completely replaced. If the number of digits changed from original code to modified code is I. then it can be reasonably argued that the OCC (Original Client Code) may have been typed wrongly by mistake But if the number of digits changed is more surely it cannot be a genuine typing mistake but a deliberate change. To this extent Levenshtein Distance Analysis or digit edit analysis acts as a clear indicator for genuineness in client code modification. The longer the distance (i.e. number of digits changed), the lesser the chances at genuineness. The analysis of Levenshtein Distance or digit edit analysis, when clubbed with the parameters mentioned in this report establishes the non-genuineness and contrived nature at the code change.*

Levenshtein Distance Analysis or digit edit analysis in case of the assessee shows that in all transactions the value was 2 or more.

(d) Beneficiaries who shift out their profits and at the same time, they have also taken losses from others. These tactics are generally resorted to by the persons who already have taxable income in their books and they want to set it off against contrived losses through CCM.

An important finding of the survey is trend analysis The trend analysis show that the profits are shifted out when the person is original client and losses are shifted in when the client is modified client. This trend show that the CCM has been carried out for non-genuine purposes in the case of assessees. The other important finding of the survey is that most of the brokers admitted that CCMs have been done for a purpose other than genuine punching errors.

13 It should also be kept in mind that Rules of evidence do not govern income tax proceedings and the AO is not fettered or bound by technical rules contained in the Indian Evidence Act and is entitled to act on material which may not be accepted as evidence in a court of law. In clandestine transactions, like that of CCM, it is impossible to have direct evidence or demonstrative proof of every move, the AO has no choice but to take recourse to preponderance of evidence available.

14. A careful scrutiny of information received from the investigation wing and subsequent analysis of report of investigation wing, data of transactions and verification at ITR lead to an irresistible conclusion that Client Code Modification had been carried out in the case of assessee to shift in ascertained losses & shift out profits of Rs.6,47,201/-

Income Chargeable to tax escaping assessment

15. Considering the above referred credible information, and enquiries and analysts subsequent to the information, I have reason to believe that an amount at least of Rs.6,47,201/- & commission @ 2%, amounting to Rs.12,944/- (@ 2%) has escaped assessment in case the of M/s Stratagem Portfolio P Ltd for the A.Y. 2010-11 within the meaning of Section 147/148 of Income-tax Act, 1961.”

5.4 On perusal of the above reasons, it is evident that the material suggests that client code modification has been carried out by the broker in the case of the assessee. According to the information available in the reasons recorded, client code modification is allowed to the brokers by the stock exchange, within a limited window of time after business hours, for rectification of any mistakes in punching of the client code while carrying out transaction of purchase and sale on behalf of the customers. The Learned Assessing Officer, however has alleged in the reasons recorded that client code modification has been done for shifting of the profit or loss by the assessee. But there is no material to infer that such client code modification has been done with malafide purpose of shifting of the profit or evasion of the tax. There is no material before the Assessing Officer to form such a belief that income had escaped due to such client code modification and thus there is no live link between the material before the Assessing Officer and inference made. The Hon’ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. reported in 291 ITR 500 has held that for validity of reason recorded it is essential that there should be a relevant material on which a reasonable person could make requisite belief. In the circumstances, in view of the above decision of the Hon’ble Bombay High Court in the case of M/s. Coronation Agro Industries Ltd. (supra) and decisions of the Tribunal (supra), we are of the opinion that the assessment cannot be reopened validly on the basis of the above reasons recorded in absence of any tangible material to infer that income escaped in the case of the assessee. We, accordingly, quash the reassessment proceedings and set aside the order of the Learned CIT(A) on the issue in dispute. The ground No. 1.1 of the appeal is accordingly allowed.

5.5 Since we have already quashed the reassessment proceeding, we are not adjudicating other ground of the appeal

challenging validity of the reassessment as well as on the merit of the additions.

6. *In the result, the appeal of the assessee is allowed.*

Order pronounced in the open court on 15th September, 2020.

6. On the other hand, Ld. DR relied upon orders of the authorities below and also relied upon the order of SMC Bench in the case of Vijay Kumar Goel & Sons(HUF) Vs. ITO in ITA No. 7222/Del/2017 dated 30.10.2018 in which reopening has been confirmed and appeal of assessee has been dismissed.

7. I have considered the rival submission and perused the material on record. It is well settled law that validity of the reassessment proceedings is to be determined on the basis of the reasons recorded for reopening of the assessment. Copy of the same is filed at pages 2 to 4 of the Paper Book. The AO in the same has mentioned that provisions of section 147(b) are applicable in this case for reopening of the assessment, however, this section does not exist in the statute for assessment year under appeal. Further, the entire reopening is based on information received from ADIT(Inv.) Ahmedabad for shifting out profits using client code modification. It is alleged in the reasons that on the basis of information received from ADIT(Inv.) M/s SMC Global Securities Limited broker has shifted out the profits using client code modification for the assessee to claim losses. The Ld. Pr. CIT while approving the reasons merely mentioned “yes I am satisfied” The assessee

filed objections to the reopening of the assessment and explained before AO that M/s SMC Global Securities Ltd. broker has not done anything for assessee and assessee did not deal with such broker, therefore, there is no question of loss claimed through this broker. The assessee further explained that assessee had carried out transactions through M/s Mansukh Securities Finance Limited. Thus, the AO recorded incorrect and wrong facts in the reasons for reopening of the assessment. Though the AO rejected the objections of the assessee but in the rejection order confirmed that assessee carried out the transactions through Mansukh Securities Finance Limited, therefore, there is no question of assessee arranging any loss through transaction involving CCM through SMC Global Securities Broker. 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 genuine error, originally occurred while punching the trade. The material available is that there is a client code modification done by assessee's broker which fact is also incorrect and there is no link from there to conclude that it was done to escape assessment of a part of its income. ITAT Delhi Division Bench in the case of M/s Stratagem Portfolio Pvt. Ltd. (supra) considering the identical issue in the light of Judgment of Bombay High Court and

other decisions of the Tribunal came to the conclusion that assessment cannot be opened validly on the basis of the above reasons recorded in absence of any tangible material to infer income escaped in the case of the assessee and quashed the reopening of the assessment. The issue is, therefore, covered by the aforesaid decision of the Tribunal in favour of the assessee. Further as noted above AO has also recorded incorrect and wrong facts in reopening of the assessment, therefore, AO did not apply his mind to the report of investigation wing and, as such, there were no justification to reopen the assessment. In such circumstances, the reopening of the assessment is bad in law and approval granted is also in most mechanical manner. Thus, the reopening of the assessment cannot be justified. In support of above findings, I rely upon following decisions:

1. Judgment of Punjab & Haryana High Court in the case of CIT Vs. Atlas Cycle Industries 180 ITR 319;
2. Judgment of Delhi High Court in the case of Pr. CIT Vs. SNG Developers Ltd. 404 ITR 312;
3. Judgment of Delhi High Court in the case of Shamshad Khan vs. ACIT 395 ITR 265;
4. Judgment of Bombay High Court in the case of Siemens Information System Ltd. Vs. ACIT 293 ITR 548.

The crux of the above judgments have been that in case incorrect, wrong and non existing reasons are recorded by the

AO for reopening of the assessment and that AO failed to verify the information received from Investigation wing, the reopening of the assessment would be unjustified and is liable to be quashed.

8. Considering the above discussion, it appears to be a case of reason to suspect and not reason to believe that income chargeable to tax has escaped assessment, therefore, reopening of the assessment is bad in law and the AO would not get valid jurisdiction to proceed for reassessment. The decisions cited by the DR would not be applicable to the facts of the case. In view of the above discussion, I set aside the orders of the authorities below and quash the reopening of the assessment. Resultantly all additions stands deleted.

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

Order pronounced in the open Court on 02.02.2021.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 02.02.2021

*Kavita Arora

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches : Delhi.