

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.3968/Mum/2018
(A.Y. 2010-11)**

Shri Radhey Comsec Pvt. Ltd., 315, Luxuria Business Hub, Near V.R. Mall, Dumad Road, Surat – 395007	Vs.	CIT(A)-21 Room No. 8, 3 rd Floor, B-Wing, Mittal Court, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAJCS7720B		
Appellant	..	Respondent

Appellant by :	None
Respondent by :	Smt. Mahita Nair

Date of Hearing	04.08.2022
Date of Pronouncement	12.08.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed by the ld. CIT(A)-21, Mumbai, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Act for A.Y.2010-11.

The assessee has raised the following grounds before us:

- “1. *It is humbly submitted that in the facts and circumstances of the case the ld. CIT(A) erred in upholding the validity of notice issued u/s148.*
- 2(i) *In the facts and circumstances of the case, the respected Assessing Officer erred in treating the amount of Rs.12,06,809/- due to client code*

modification as profit shifting without any documentary evidence to substantiate the same.

- (ii) In the facts and circumstances of the case, the client code modification done by the assessee's broker was in line with accepted practices as per SEBI.*
 - (iii) Further the assessee should not be penalized for a mistake committed by its broker.*
3. *The ld. Assessing Officer also erred in not mentioning the relevant section of the Income-tax Act, 1961 in which the addition was made.”*

2. This case was listed for hearing on 12 occasions but no one attended from the side of the assessee during the course of appellate proceedings before us, therefore the case is adjudicated after hearing the ld. D.R. and considering the material available on record.

3. The fact in brief is that return of income declaring loss of Rs.1,46,285/- was filed on 13.09.2010. Subsequently, the case was reopened on 30th march, 2016 after issuing notice /s 148 of the Act on 30.03.2016. The reason for reopening was also communicated to the assessee and in response to the various notices the assessee has made compliance before the A.O. The assessee company was involved in the share investment and trading business. The assessment u/s 143(3) r.w.s 147 of the Act was finalized on 19.12.2016 and total income was assessed at Rs.10,60,524/-. The further relevant fact are discussed while adjudicating the ground of appeal filed by the assessee as under:

(i) Validity of reassessment u/s 147 r.w.s 148 of the Act:

4. After perusal of the material on record it is noticed that the A.O has received information from ADIT(Investigation) Ahmedabad that assessee has evaded taxes from share transaction by modification of clients codes and it has shifted its profit of Rs.12,06,809/- to other investors through

clients code modification to evade taxes. In this regard, the Id. CIT(A) has given his detail findings at para 6 of the office order which is reproduced as under:

"I have considered the facts of the case and submissions made by the appellant. As could be seen from record, the AO has recorded reasons for reopening and has satisfied himself that there is a reason to believe that income has escaped assessment the Appellant has raised objection against reopening of the case which should be treated as beyond the scope of Sec 147 of Income-tax Act. 1961 in the facts and circumstances of the case and CCM carried out by the assessee was in the usual course of business as recognized by various stock exchanges Sec 147 of the Income Tax Act, 1961 says that the AO 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. In this case, Assessing Officer received information from Ahmedabad Investigation Wing about the assessee as one of the beneficiary who has shifted its profit of Rs 12,06,809/- to other investors through client code modification to evade taxes. This information is adequate 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 AO 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 AO 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) Rohilkhand Educational Charitable Trust vs. CCIT and others 365 ITR 233 (All) where in the Hon'ble High Court held that the AO should have relevant and credible material with him to form requisite reason to believe that income of assessee has escaped assessment Material available on record has rational connection and relevant bearing on such for belief for issuing valid notices for re-assessment Sufficiency or correctness of material was not to be considered at this stage.

(ii) 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.

6.2 The Appellant has relied on the case law of Signature Hotels wherein the case was re-opened on the basis of annexure only However in the instant case, the A.O. received the information from Ahmedabad Investigation Wing Unit-1(3) vide letter No ADIT (Investigation) 1 3/ahd/ccm/Dissimilaion/EMAIL/15-16 Dated 11.03.2016 Thus the referred case is distinctive in character:

6.3 In view of the referred judicial announcements, it is considered that A O had ample reason to believe that income has assessment and has rightly issued notice u/s 148 to the Appellant after recording reasons for reopening. The AO was well within jurisdiction and acted in accordance with the provisions of the Income tax Act. 1961 This ground of appeal is therefore dismissed.”

After perusal of the facts and findings reported in the decision of Id. CIT(A) it is evident that A.O has made reason to believe that income of the assessee has escaped assessment on the basis of credible material available on record, therefore, we don't find any infirmity in the decision of Id. CIT(A), this ground of appeal of the assessee stand dismissed.

(ii) Ground No. 2 & 3: treating the amount of Rs.12,06,809/- due to client modification as profit shifting:

5. Ground No. 2 and 3 are interconnected and based on similar fact and issue, therefore, both these grounds of appeal are adjudicated together. During the course of assessment the AO noticed client code modification in the security transaction of the assessee wherein the profit was occurred to the assessee to the amount of Rs.12.6 lacs. On query the assessee explained that purchase and sales was usually done by the brokers and because of volume of transaction the mistake in client code occurred due to punching of wrong client code. The A.O has not accepted the submission of the assessee, he stated that the client code of the assessee was 84S47 and the client codes numbers of the original parties were 84V11, 84M12, 84J31, 84J32, 84S72 and 84V1. The AO stated that these numbers had no symmetry with the client code of the assessee, therefore, there was no possibility of entry of wrong client code in this case. The A.O noticed that there were 63 such transaction wherein the original trade was in the name of the assessee and there was a profit in all these trades which was transferred to the other. By way of client code

modification the assessee had transferred out profit of Rs.12,06,809/- and therefore, A.O has added the same to the total income of the assessee.

6. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee the relevant part of the decision of ld. CIT(A) as under:

“I have considered the facts of the case and submissions made by the appellant it is seen from the facts available on record that the case was reopened on the basis of information received form Ahmedabad Investigation Wing that the assessee had reduced its tax liability by shifting its profit of Rs.12.06,000/- to another client by the misuse of CCM facility in connivance with the broker.

10.2 I have gone through the findings of the AO and the submissions of the appellant. The fact in the case is that the AO had information that in the case of transactions entered into by the assessee there was a client code change and therefore apparently the income that should have been booked in the hands of the assessee (a client of the broker) was transferred out to the hands of the other clients of the same broker The volume pace momentum and speed required during the trading hours is strenuous and therefore, the possibility of human error cannot be ruled out. Therefore stock exchange provides for a special facility for modification of client codes of executed trades. This itself recognizes the fact that there is a possibility of human error while punching the trade on the terminal Share transactions are modified in accordance with the SEBI rules and stock exchange regulations. These share transactions could be modified for rectifying genuine errors created during punching the data According to National Stock Exchange circular No. NSE/CMP/207 dated August 31, 2001 issued by National Stock Exchange of India Ltd and BSE operation manual providing for modification of client code. Brokers are allowed to alter the client after trade hours, a 15 minutes session called post closing session to remove genuine punching errors by the employees of stock broker The correction in the data is made on the same day during the time period permitted by the exchange authority. As per the rules and regulations of the stock exchange, modification in the client's code is permitted upto 5% of the value of turnover with minimal penalty. Thereafter it is permitted on levy of prescribed fees Penalty for a client code modification is also waived where a broker produces evidence to the satisfaction of the exchange. This itself recognizes the fact that there is a possibility of human error while punching the trade on the terminal While it is legally permitted to rectify inadvertent errors in punching the errors a scam was unearthed by Ahmedabad Investigation Wing about the misuse of the provision by different broken. After analyses of various data from NSE, SEBI and different brokers ADIT (Inv), Unit-1(3), Ahmedabad published a report concluding that CCM has been misused and 4890 assesseees have availed contrived losses of Rs.1206 Crores from FY 2008-09 to 2011-12 The finance ministry and SEBI were concerned about the scale of tax evasion and far

reaching consequences of the scam and duly addressed by issuing various directions SEBI vide its circular No CIR/ONPD/5/2011 dated 05.07.2011 and NSE vide Circular Nos. NSE/INVG/2011/18281 dated 05.07.2011 NSE/INVG/2011 dated 29.07.2011 and NSE/INVG/2011/18716 dated 26.08.2011 directed that modifications of client codes of non institutional trades are done only to rectify a genuine error in entry of client code at the time of placing/modifying the related order. It is observed that the assessee has not produced any substantial evidence in support of its claim. That the A.O has brought cogent material on record, which establishes that the assessee was involved in the client code modification deliberately to have substantial gain and reduce its tax liability.

10.3 The code of the assessee is 84S47 which was modified to codes 84V11, 84M12, 84J31, 84J32, 84S72 and 84V1 It is noticed that the broker has changed three letters out of five letters in all but one instance and the exchanged numbers are not placed adjacent in the key board. The adjacent key of the 'S' are A, W, D, X and Z whereas the broker has punched V M and J Similarly, modification of last two digits do not involve adjacent keys. In a genuine punching error the fingers are unintentionally put on adjacent keys. However the fact of the assessee shows that it was not a genuine punching error but pre-arranged modus operandi to evade the taxes.

10.4 Livenshtein Distance analysis says the longer the distance (le number of digits changed) covered while changing the keys, the lesser the chances of genuineness. According to the analysis, if the code 0 is changed to 1 then it can be reasonably argued that the OCC(original client code) may have been typed wrongly by mistake. But in the case of the assessee, Lavonshtein distance was 4, 5 and 6 which establishes that the error is pre-arranged one.

10.5 SEBI has recognised that code changes can occur unwittingly within relatives as in the case of a husband's code can unknowingly be replaced with that of wife's or Karta of HUF's individual code can be replace with that of HUFs. However, the assessee does not have any relation with the modified clients.

10.6 The Appellant has contended that SEBI has accepted change of client code as a common practice. The matter has been discussed in the previous paragraph. Due to pressure, the computer operators tend to enter wrong keys in the keyboard during the trading hours and such genuine errors can be rectified within fifteen minutes of closing of the trading session. However, desperate change of the codes of a client to shift its profit element to another client to reduce/evade taxes is not allowed in the instant case the AO has brought a cogent record which establish that the assessee was involved in the scam unearthed by the Ahmedabad Investigation Wing.

10.7 The Appellant has contended against the failure of mentioning the relevant provision under which the addition is made. The head under which the addition is made is also reflected in the calculation sheet provided along with the assessment order. The impugned error cannot be a deciding factor of the assessee's contention and the search operation by the Ahmedabad Investigation Wing which unearthed a huge scam pan India and assessment proceedings

cannot be held as infructuous due to unintentional omission of the head under which the addition is made.

10.8 The Appellant has relied on the judicial pronouncement of Hon'ble ITAT Mumbai's decision in the case of Pat commodity Services Pvt. Ltd. The referred case is not similar to that of the assessee as the assessee has not explained anything about the need for the modification of client code during the course of assessment or appellate proceedings.

10.9 Further changing of the client code delineates that the assessee has used the facility as a routine process and not as an exception to rectify genuine punching/placing errors. From the facts as elucidated by the AO, it is clearly evident that the appellant has failed to provide any credible evidence in support of genuine punching errors and it has not produced sufficient evidence to prove that it is a mere human error. Further merely rebutting the case without any substantial documentary evidence will not support the case of the assessee when incriminating material has been found. The revenue is well aware of the fact that gains and losses are transferred from one account to another under the guise of rectifying errors. In view of the detailed reasons given by the AO, the addition of AO is upheld. This ground of appeal is therefore dismissed.”

7. After hearing the ld. D.R and perusal of the material on record it is evident that code of the assessee was 84S47 which was modified to codes 84V11, 84M12, 84J31, 84J32, 84S72, 84V1. It is evident that the broker has also changed the other alphabets which are not similar to the client code of the assessee. After considering the facts and detailed finding of the ld. CIT(A) it is clear that assessee has not produced any substantial evidences to disprove the facts reported by the lower authorities that assessee has shifted its profit of Rs.12,06.809/- to another clients by modification of clients codes. Therefore, we don't find any merit in the ground no. 2 & 3 of the assessee, therefore, both these grounds of appeal are dismissed.

8. In the result, the appeal of the assessee is stand dismissed.

Order pronounced in the open court on 12.08.2022

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai,
Dated 12.08.2022
PS: Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,
सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai