

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 7301/Del/2019
(Assessment Year: 2009-10)

Success International, C/o. Raj Kumar & Associates, CA L-7A,)LGF), South Extn, Part-II, New Delhi (Appellant)	Vs. ITO, Ward-51(4), New Delhi (Respondent)
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PAN: AAXFS3915K

Assessee by :	Shri Raj Kumar, CA
Revenue by:	Shri Abhishek Kumar, Sr. DR

Date of Hearing	07/11/2022
Date of pronouncement	16/11/2022

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The present appeal has been preferred by the Assessee against the order dated 05.08.2019 of Ld. CIT(A)-17, New Delhi (hereinafter referred as Ld. First Appellate Authority) arising out of an appeal before it against the assessment order dated 23.12.2016 passed u/s 147/143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the AO, ITO, Ward-51(4), New Delhi (hereinafter referred as the Ld. AO).

2. The brief facts of the case are that appellant is a firm and has declared income from business and profession of earning commission

from Birla Sunlife and Modus International Securities Ltd. The appellant has also traded in Gold Coins. During the year it has traded in future and options resulting in loss which has been set off against business income. Return declaring an income of Rs. 7,99,750/- was filed on 24.09.2009. The Ld. AO has initiated the reassessment proceedings u/s 147 on the basis of the specific information received from DIT (Investigation), Ahmedabad. Ld. AO has issued notice u/s 148 and in response to the notice appellant has filed return on 21.04.2016. The Ld. AO has completed the assessment u/s 147/143(3) vide order dated 23.12.2016 (/ after making addition of Rs. 11,73,784/- on account of profit/loss through CCM and Rs. 1,73,484/- on account of expenditure incurred out of the books to obtain such entry u/s 69C.

3. The Id CIT(A) had sustained the addition of Rs. 11,73,784/-, however, the addition of commission of Rs. 1,73,484/- was reduced and confirmed up to Rs. 11,734/- only. The assessee is in appeal before Tribunal raising following grounds of appeal:-

- "1. *That under the facts and circumstances, of the case initiation of proceedings U/s.147 is without jurisdiction, without application of mind, mechanical, on borrowed satisfaction and unwarranted in law as well as on merits.*
2. *That under the facts and circumstances, the approval U/s. 151 of Pr. CIT is mechanical, non - speaking and without application of mind, which approval cannot provide a valid jurisdiction to proceed under section 147 / 148.*
3. *That under the facts and circumstances, the Ld. AO erred in law and on merits in disallowing the F & O business loss of Rs. 11,73,484/- on the allegation of manipulative change in Client Code (CCM) by the assessee.*
- 3.1 *That without prejudice, the disallowance of Rs.11,73,484/- made without fully confronting the alleged adverse material and without providing for the cross examination of required persons, is unwarranted.*

4. *That there is no legality, no justification and no basis for estimating and assuming alleged unexplained expenditure at Rs. 11,734/- being @1% of Rs. 11,73,484/-."*

4. Heard and perused the record.

5. On behalf of the assessee it was argued that the reasons recorded are not sufficient and do not permit reopening. Referring to copy of reasons recorded u/s 148 available at page Nos. 2 to 3 of the paper book it was submitted that the reasons only mention of the loss through client code modification (CCM) and do not mention that this client code modification was taken with any culpable intend or not on account of genuine error. Referring to the reasons it was submitted that there is no link between material available and the reasons recorded to show escapement of income. It was submitted that client code modification is a permissible mode to correct bona fide errors for punch the code of the client while executing share transactions and merely on the basis of loss in the transactions where client code modification was modified cannot be basis for reopening.

6. It was submitted that in fact the reasons carry incorrect facts as a loss amount has been taken at Rs. 9,18,794/- while in the assessment it was calculated at Rs. 11,73,484/-. It was submitted that, although not admitted but taken to be correct, the amount of loss would go to Rs. 8,90,425/- only and amounts of loss taken by the assessee have also been included. In regard to effect of factually wrong information in the reasons reliance was placed on the judgment of CIT Vs. Kamdhenu Steel & alloys Ltd (2012) 248 CTR (Del) 33, Ganesh Ganga Investments Pvt. Ltd ITa NO. 1579/Del/2019, SNG Developers Ltd 404 ITR 312 (Del), Ankita A. Choksey Vs. ITO & Ors 411 ITR 207, M/s. KLA Foods (India) Ltd & Ors ITA No. 2846/Del/2015, PCIT Vs. RMG Polyvinyal (I) Ltd 396 ITR 5 (Del), Vijay Haishchandra Patel Vs. ITO 400 ITR 167, Shree Balkishan Agarwal Glass Industries Ltd ITA No. 5798/Del/2016

7. Referring to the copy of approval u/s 151 available at page 3 of the paper book it was submitted that Id Pr. CIT has given mechanical approval without application of mind. As with regard to mechanical sanction of reopening he relied on the judgment PCIT Vs. NC Cable Ltd 391 ITR (Delhi) 11, United Electrical Company (P) Ltd Vs. CIT & Ors 258 ITR 317 (Del), Chhugamal Rajpal Vs. SP Chaliha & Ors 79 ITR 603 (SC), Arjun Singh & Anr Vs. ADIT & Ors 246 ITR 363 (MP), Shri Amarlal Bajaj Vs. ACIT (ITA No. 611/Mum/2004, Mumbai ITAT order dated 24.07.2013).

8. It was also submitted that assessee was not given opportunity for cross examination of witness relied by the Ld. AO and the request was brushed aside on the ground that the statement were recorded by Director of Investigation so let assessee have opportunity from the said authority only. In this context he relied on M/s. Andaman Timber Industries 281 CTR 241 (SC), Pradeep Kumar Gupta 207 CTR (DEL) 115.

9. Ld DR defended the orders of Ld CIT(A) by submitting that there is detailed discussion in the reasons as stand recorded. Computation error if any in the escaped income cannot be ground for interference and to hold the reasons as bad in law. He submitted that the law relied were distinguishable on facts.

10. Appreciating the matter on record it can be observed that in the reasons recorded u/s 148 of the Act the Id AO had made following noting:-

" An information was received from ADIT (Investigation), Unit-1(3), Ahmedabad that a survey was carried out on 23.03.2015 in the case of Amrapali Group of Ahmedabad. Detailed analysis of the client codes modified by ACFL (a group entity involved in Broking) was carried out and it Was found that CCM was used as a tool so as to systematically shift profits and losses. On further analysis of the accounts and return of income of the persons whose codes were modified, it was found that without exception

the persons who had got books profits in their books has obtained losses so as to set off their book profits through CCM. The profits were found to be systematically shifted to the codes of persons who had book losses and did not pay any substantial taxes on the profits gained. The entire analysis of CCM of only one broker led to detection of shifting of losses and resulted reduction of book profits aggregating to Rs. 46.57 Crores. The issue of CCM was dealt with in section 5 of the AR. In the AR it was quantified that profits to the tune of Rs. 46.57 Crores were artificially reduced by booking contrived losses through CCM. One peculiar feature of the CCM done by ACFSL was that many a beneficiary of the CCM were closely related entities. It is pertinent to mention here that the Amrapali Group has accepted income to the tune of over Rs. 40 Crores before the Settlement commission primarily on account of CCM. As per information, M/s Success International has taken entry of Loss amounting to Rs. 9,18,794/- from M/s Amrapali Aadya Trading & Investment Pvt. Ltd. And has set off income during the A.Y. 2009-10.

The assessee has filed ITR for A.Y. 2009-10 on 24.09.2009 declaring income of Rs. 7,99,750/-. Therefore, I have reason to believe that income of Rs. 9,18,794/- and above has escaped assessment for A.Y 2009-10 within meaning of section 147 of the IT Act, 1961. I am satisfied that this is a fit case for issued of notice u/s 148 of IT Act, 1961."

11. Now when the aforesaid noting is considered to understand if the reasons recorded had any foundation for a belief of escapement of income, what transpires is that the assessee being one of the persons with whom M/s. Amrapali Group was having transaction the CCM transaction of the assessee to the tune of Rs. 9,18,794/- were considered to have escaped income. As such there is no matter out of return of the assessee been considered to reach this conclusion.

12. In this regard the judgment dated 23/11/2016, of Hon'ble Bombay High Court in **M/s. Coronation Agro Industries Ltd. Vs. DCIT** Writ Petition No 2627 of 2016 is relevant where in, under identical facts, in para No. 4 it was observed:-

"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."

13. This judgment and another judgment of Hon'ble Bombay High Court in **PCIT Vs. Pat Commodity Services Pvt. Ltd**, ITA No. 1257/2016 with ITA No. 1383 OF 2016 order dated 15.01.2019, have been considered by co-ordinate bench at Delhi in **Rekhi Holding Pvt. Ltd Vs. ACIT** in ITA No. 4675/Del/2018 vide order dated 16.05.2019 and the bench observed in relevant para No. 15 and 16 as below:-

"15. I find the Hon'ble Bombay High Court in the case of PCIT vs. PAT Commodity Services Pvt. Ltd. (supra) has dismissed the appeal filed by the Revenue against the order of the Tribunal in deleting the addition being the profits of the company on account of large-scale client code modification. The relevant observations of the Hon'ble High Court vide para 3 of the order reads as under:-

"3. The respondent assessee is a private limited company engaged in the business of providing commodity services to its clients. In the return of income filed by the assessee for the Assessment Year 2006-07, the Assessing Officer noticed that there were instances of client code modifications. The Assessing Officer believed that the same was done to indulge in circular trading to pass on profits or losses to the clients of the assessee company as per requirements. After hearing the assessee, the Assessing Officer made additions in the income of the assessee on such basis. The issue eventually reached to the Tribunal. The Tribunal did accept the Revenue's theory of misuse of clients code modification facility. However, the Tribunal accepted the assessee's explanation and discarded the Revenue's theory that profit of the assessee's company were passed on to the clients. It

was also noticed that the Revenue has not contended that the client code modification facility is often misused by the assessee to pass on losses to the investors, who may have sizable profit arising out of commodity trading against which such losses can be set off. The Revenue normally points out number of such instances of client code modifications as well as nature of errors in filling of the client code. At any rate, what can be taxed in the hands of the present assessee is the income escaping assessment. Even if the Revenue's theory of the assessee having enabled the clients to claim contrived losses, the Revenue had to bring on record some evidence of the income earned by the assessee in the process, be it in the nature of commission or otherwise. In the present case, the Assessing Officer has added the entire amount of doubtful transactions by way of assessee's additional income, which is wholly impermissible. We do not know the fate of the individual investors in whose cases, the Revenue could have questioned the artificial losses. Be that as it may, we do not think entertaining these appeals would serve any useful purpose."

16. The various other decisions relied on by the Id. counsel for the assessee also support the case of the assessee. Since, in the instant case, the Assessing Officer has not pointed out any basis or material or evidence to support his finding that the assessee has received entry of fictitious losses and has not spelt out in the reasons recorded as well as the assessment order as to on which scrips the assessee has taken loss entries and in the order nowhere it has been mentioned of any statement of broker of the assessee regarding the admission of any fictitious client code modification, therefore, I am of the considered opinion that the addition made by the Assessing Officer and sustained by the CIT(A) is not justified. Accordingly, the ground raised by the assessee on merit is also allowed."

14. In **Kamal Kishore Agarwal Vs. ACIT** 6628/Del/2018 vide order dated 12.04.2019 another coordinate bench of Delhi was dealing with identical issue arising out of Investigation Division report and observed in para 10 to 13 as below:-

"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."

15. In **Stratagem Portfolion (P) Ltd Vs. Dy. CIT**, ITA No. 7878/Del/2019 the coordinate bench by order dated 15.09.2020 decided a identical issue with following findings in para No. 5.4 as under:-

"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."

16. The aforesaid adjudications on identical issues leaves no doubt in the mind of this bench that the reasons recorded by the Id AO as reproduced above lack legal sanctity for the purpose of reopening of a concluded assessment. The Id AO has proceeded to reopen the assessment on mere disclosure of certain facts during the survey of Amrapali Group. Not an iota of evidence or circumstances of transactions between Amrapali Group and the assessee were examined in context to the return filed by the assessee, to justify the reasons independently and which can be said to have been foundation of belief that a certain income of the assessee has escaped assessment.

17. It is rightly contended on behalf of the assessee that CCM was a permissible mode to correct bona fide errors and unless a culpable act is reflected in the CCM transactions of the assessee, then on a presumption that assessee may also have been one of the beneficiaries of the alleged illegal act of the Amrapali Group, the assessment could not have been reopened. The onus was on Ld. AO to actually show that something which otherwise is legal has been done illegally.

18. The Bench is of firm view that AO must cover the distance between mere suspicion and belief through the reasons recorded to

show escapement of income and reflect the same while recording the reasons. However, same is not done here.

19. Thus, the bench is of considered opinion that reassessment reasons are not sustainable and that makes the whole reopening assessment vitiated. Ground No. 1, concerning exercise of jurisdiction u/s 147/148 of the act is decided in favour of the assessee and the other grounds become infructuous. The appeal is allowed. Impugned re-assessment order is set aside.

Order pronounced in the open court on 16/11/2022.

-Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 16/11/2022
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi