

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.7591/M/2019  
Assessment Year: 2010-11**

Smt. Mayuri A. Shah, C/o G.P. Mehta & Co. CAS, 807, Tulsiani Chambers, Nariman Point, Mumbai – 400 021 <b>PAN: AAJPS1897A</b>	Vs.	The Income Tax Officer, Ward 19(2)(3), Matru Mandir, II Floor, Tardeo, Nana Chowk, Mumbai - 400007
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri G.P. Mehta, A.R.  
Revenue by : Shri Pramod Nikalje, D.R.

Date of Hearing : 10 . 11 . 2022  
Date of Pronouncement : 23 . 01 . 2023

**O R D E R**

**Per : Kuldip Singh, Judicial Member:**

The appellant, Smt. Mayuri A. Shah (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 27.09.2019 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2010-11 on the grounds inter-alia that :-

*"1. The orders passed by the learned lower authorities are bad in law and bad in facts.*

*2. The assessment order passed by recourse to sec. 147 of the I.T. Act 1961, is ab-initio void, inasmuch as, said notice has not been issued on the basis of any tangible material available on record and without*

*providing to the appellant, material based on which, belief of escapement of income was formed.*

*3. The assessment order passed is ab-initio void, inasmuch as, notice issued u/s 148 of the IT Act, 1961, was not issued in the manner prescribed vide section 151 of the IT Act, 1961.*

*4. The assessment order passed is ab-initio void, inasmuch as, while the notice u/s 148 of the IT Act, 1961, was issued by one officer reasons are recorded by another officer. The order is also bad in law, inasmuch as it suffers from many anomalies.*

*5. The assessment order passed is ab-initio void in as much as same has been passed without providing any material/ documents/evidences based on which impugned addition of Rs.9,88,861/- has been made.*

*6. The assessment order passed making an addition of Rs. 9,88 861/- is ab-initio void, inasmuch as, in spite of specific request, no opportunity to cross examine the share broker was granted, based on whose alleged testimony impugned addition has been made. Thus the order under appeal suffers from the vice of non-observance of principles of natural justice.*

*7. The learned lower authorities have grossly erred in making/ upholding an addition of Rs.9,88,861/- to the returned income without bringing any material or evidence on record to support the aforesaid additions.*

*8. Having regard to the facts of the case, provisions of law and judicial proposition, impugned addition of Rs 9,88 861/- is untenable in law.*

*9. The appellant may please be permitted to raise any addition or alternative ground on or before the hearing of appeal.”*

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : original return filed by the assessee declaring total income of Rs.38,409/- was processed under section 143(1) of the Income Tax Act, 1961 (for short 'the Act'). Subsequently on the basis of information received from Additional Director of Income Tax (Investigation) (ADIT (Inv.)), Ahmedabad that fictitious profits and losses were credited by some brokers by misusing the client code modification facilities in F&O segment on

National Stock Exchange (NSE) and the assessee is one of the beneficiaries of the said client code modification, reopening proceedings were initiated against the assessee by invoking the provisions contained under section 147/148 of the Act. In response to the notice issued under section 148 of the Act the assessee opted that original return of income filed by her maybe treated as reply to the notice under section 148 of the Act. Reasons recorded were supplied to the assessee, notices under section 143(2) and 142(1) were served upon the assessee. It is brought on record by way of investigation and verification by ADIT (Inv.) that some of the brokers have confirmed that they have misused the facility of client code modification in order to create fictitious losses and profits resulting into tax evasion and they have been receiving commission at the rate of 0.5% to 2% on the amount of losses/profits transferred to their clients. It has also come on record that M/s. BP Equities Pvt. Ltd. provided a loss in share transactions of Rs.9,84,630/- and profit of Rs.1,41,056/- to the assessee. Declining the contentions raised by the assessee the Assessing Officer (AO) proceeded to hold that original code was 11420 which was modified to 27271, 27309 and 27311 which are codes of the assessee with M/s. BP Equities Pvt. Ltd. which are completely different. Consequently the AO made addition of Rs.9,84,630/- by way of disallowance of the loss claimed. The AO also disallowed 3% of the commission expenses on overall transactions in F&O trading amounting to Rs.4,231/- and added the same back to the income of the assessee and thereby framed the assessment under section 143(3) read with section 147 of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition made by the AO by dismissing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

4. I have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. Undisputedly the assessee has claimed a loss of Rs.9,84,630/- and profit of Rs.1,41,056/- during the year under assessment from the loss in share transaction.

6. It is also not in dispute that the assessee's original code was 11420. It is also not in dispute that as per investigation carried out by the ADIT(Inv.) client code of M/s. BP Equities Pvt. Ltd. are 27271, 27309 and 27311.

7. In the backdrop of the aforesaid undisputed facts on the basis of investigation carried out by different investigation wings the AO brought on record in para 6.7 of the assessment order the detail of client code modification qua the transaction of the assessee with client code of M/s. BP Equities Pvt. Ltd. which are as under:

BR_ID	BR_NAME	NAME_ORG_CL	PAN_ORG_CL	MOD_CL_CD	NAME_MO D_CL	PAN_MO D_CL	SCRIPT_NAME	EXP_DT
11420	BP EQUITIES PRIVATE LIMITED	TEJPALSHA	AJNPS9435M	27271	MAYURI AJAY SHAH	AAJPS1897A	NIFTY	31-DEC-09

FINAL_DT	BQTY	BTOTAL	SQTY	STOTAL	BASE_EQUIVALENT	BASE_VALUE	NET_P_L	FY
27-NOV-09	12500	61889450	12500	60904820	12500	60904820	-984630	2009-10

## CCM for Profit

BR_ID	BR_NAME	NAME_ORG_CL	PAN_ORG_CL	MOD_CL_CD	NAME_MODAL_CL	PAN_MODAL_CL	SCRIPT_NAME	EXP_DT
11420	BP EQUITIES PRIVATE LIMITED	SANTOSH Y MOKASHI	AKIPM7137N	27271	MAYURI AJAY SHAH	AAJPS1897A	STERLINBIO	28-JAN-10
11420	BP EQUITIES PRIVATE LIMITED	MAYURI AJAY SHAH	AAJPS1897A	27309	SHARMILA PRAMODKUMAR JAIN	ACYPJ4548E	PTC	28-JAN-10
11420	BP EQUITIES PRIVATE LIMITED	MAYURI AJAY SHAH	AAJPS1897A	27309	SHARMILA PRAMODKUMAR JAIN	ACYPJ4548E	SUZLON	28-JAN-10
11420	BP EQUITIES PRIVATE LIMITED	MAYURI AJAY SHAH	AAJPS1897A	27311	HASUMATI SHASHIKANTH JHAVERI	AADPJ0268Q	TATAMOTORS	25-MAR-10
11420	BP EQUITIES PRIVATE LIMITED	MAYURI AJAY SHAH	AAJPS1897A	27311	HASUMATI SHASHIKANTH JHAVERI	AADPJ0268Q	BANKNIFTY	29-APR-10

FINAL_DT	BQTY	BTOTAL	SQTY	STOTAL	BASE_EQUIVALENT	BASE_VALUE	NET_P_L	F.Y.
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14-JAN-10	2500	284875	2500	285500	2500	285500	625	2009-10
23-DEC-09	2350	267195	2350	271307.5	2350	271307.5	4112.5	2009-10
23-DEC-09	3000	257100	3000	260250	3000	260250	3150	2009-10
26-FEB-10	2550	1733660	2550	1817512.5	2550	1817512.5	83852.5	2009-10
26-MAR-10	500	4706895	500	4756212.5	500	4756212.5	49317.5	2009-10
							141058	

8. It was categorical case of the assessee in reply to the show cause notice issued by the AO that loss of Rs.9,51,762/- claimed by the assessee is a genuine loss incurred by the assessee. Initially it was a punching error by the broker but the same was rectified by

the broker by rectifying correct client code. It is also admitted fact on record that there is only one transaction entered into by the assessee through his broker M/s. BP Equities Pvt. Ltd. as mentioned at serial number 1 of the table extracted in the preceding paras and all other transactions mentioned in the table were found to be correct.

9. First of all the assessee challenged the reopening by the AO by raising additional grounds which are admitted being a purely legal ground on the ground that reason in this case was recorded by Mr. Sandeep Kumar Singh Income Tax Officer – 19(2)(3), Mumbai as available at Page 3 of the paper book whereas notice under section 148 of the Act as available at page 1 of the paper book was issued by Mr. Nilesh Talkar, Income Tax Officer wherein he has specifically mentioned that he has reason to believe that assessee's income chargeable to tax for the assessment year 2010-11 has escaped assessment within the meaning of section 147 of the Act. Furthermore the assessee has demanded the statement of M/s. BP Equities Pvt. Ltd. on the basis of which entire case/reopening has been rested which has not been supplied. Then the assessee filed an application under RTI Act and then order was issued by the Income Tax Department available at page 4 of the paper book stating therein that the statement recorded in the case of M/s. BP Equities Pvt. Ltd., if any, was not provided to this office and as such not available with Assistant Director of Income Tax (Inv).

10. It is very strange that when the AO was not having any statement of M/s. BP Equities Pvt. Ltd. alleged to have been recorded by the investigation wing then how he has formed his

opinion as to reopening the assessment in case of the assessee. In other words in the absence of statement of M/s. BP Equities Pvt. Ltd. the AO has no material whatsoever with him to form the opinion. Furthermore, when I go through the reasons recorded in this case available at Page 3 of the paper book the same are undated. When I examine order sheet entry available at page 5 of the paper book dated 14/6/2016 there is no mention of recording of reasons.

11. All these facts go to prove that the AO was not in possession of any material to reopen the assessment but merely acted upon the half baked information supplied by DIT(Inv.) to him. Even statement of M/s. BP Equities Pvt. Ltd. which is mainly relied upon by the investigation agency to reach the conclusion that in case of assessee client code modification has been carried out by M/s. BP Equities Pvt. Ltd. is not there before the AO to apply his mind as already pointed out in the preceding para. Reasons were recorded by some different persons and notice under section 148 was issued by some other person. All these facts go to prove that the AO has no material whatsoever to form his opinion to carry out the re-opening. Even reasons recorded are undated which shows that the entire exercise as to reopening the assessment was carried out in a mechanical manner without applying his mind.

12. Honourable Bombay High Court in case of Pr. CIT vs. Shodiman Investments (P.) Ltd. by deciding the identical issue held that “reopening notice has to be issued by the AO on his own satisfaction and not on borrowed satisfaction”. Here in this case it is proved on record that the AO was having no material whatsoever

before him except the information sent by DIT(Inv.) by recording the fact that certain brokers, one such broker is M/s. BP Equities Pvt. Ltd., were carrying out non genuine profits and losses by misusing the client code modification in F&O segment. Merely on the basis of this information the AO hurriedly proceeded to reopen the assessment which is not sustainable in the eyes of law.

13. Identical issue as to the reopening on the basis of client code modification has been decided by the co-ordinate Bench of the Tribunal in case of M/s. Stratagem Portfolio (P.) Ltd. vs. Dy. CIT in ITA No.7878/Del./2019 in favour of the assessee by returning following findings:

*“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 mala fide 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.”*

14. So in view of what has been discussed above and following the order passed by the coordinate Bench of the Tribunal, I am of the considered view that assessment cannot be re-opened on the basis of reasons recorded that client code modification has been done for shifting of profit and loss by the assessee particularly when there is no material on record that such client code modification was done with malafide purpose of shifting of profit to evade the tax nor any such material was there before the AO.

15. In view of what has been discussed above, I am of the considered view that initiation of reopening proceedings under section 147/148 are bad in law and the subsequent assessment order framed by the AO is not sustainable in the eyes of law, hence ordered to be quashed without entering into the merits of the case and consequently impugned order passed by the Ld. CIT(A) is set aside.

16. Resultantly, the appeal filed by the assessee is allowed.

**Order pronounced in the open court on 23.01.2023.**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

Mumbai, Dated: 23.01.2023.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai

The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.