

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)

ITA No. 2239 & 2240/MUM/2023
Assessment Year: 2010-11

Mrs. Rajani S Iyer,
14/222, Bhaskar Bhavan,
Sri Balachandra Road,
Matunga,
Mumbai-400019.

PAN No. AAOPI 9178 D

Appellant

ACIT-20(3),
Mumbai-400001

Vs.

Respondent

Assessee by
Revenue by

: Mr. Haridas Bhat
: Mrs. Mahita Nair, DR

Date of Hearing : 11/10/2023
Date of pronouncement : 25/10/2023

ORDER

PER OM PRAKASH KANT, AM

These appeals by the assessee are directed against two separate orders, both dated 25.4.2023, passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2010-11, against proceedings by the Assessing Officer for quantum assessment and penalty respectively.



2. The grounds raised by the assessee in quantum proceedings in ITA No. 2239/Mum/2023 are reproduced as under:

The Learned ACIT 20(3) has erred in disallowing loss in F&O amounted to Rs.37,28,681/- due to change in client code modification done by broker. The Learned ACIT 20(3) has erred in addition of loss of Rs.37,28,681/- due to change in client code modification done by broker to normal business income instead reducing the same from speculation loss of Rs.73,86,173/- determined as per assessment order passed u/s 143(3).

3. Briefly stated facts of the case are that the assessee is engaged in trading activity of the shares including both delivery based transaction and non-delivery based transactions. For the year under consideration, the assessee filed return of income on 24.09.2010 declaring Rs. Nil. In the return of income, the assessee shown net income of Rs.72,18,534/- from the trading activity after adjusting net of loss of Rs.49,76,807/- from non-delivery based transaction future and options (F&O) against profit of Rs.1,21,95,341/- from delivery based transactions. For both these transactions, the assessee incurred BSE/NSE charges of Rs.26,19,632/- which was debited to the profit and loss account. In the case of the assessee assessment u/s 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 28.03.2013 determining total income at Rs.72,57,400/-. In said assessment order, the Assessing Officer disallowed the loss of Rs.49,76,807/- incurred on non-delivery based transaction to be set off against delivery based transactions trading holding the same as speculation loss. The Assessing Officer also disallowed



proportionate BSE/NSE charges by allocating the same in proportion of turnover of delivery and non-delivery based transaction which amounted to Rs.24,09,366/-. In this manner, the Assessing Officer made total disallowance of Rs.73,86,173/- (i.e. speculation loss of Rs.49,76,807/- + BSE/NSE charges of Rs.24,09,366/- incurred toward speculation transaction) and said loss of Rs.73,86,173/- was allowed to be carried forward for subsequent years.

4.1 Subsequently, the Assessing Officer had received information from the office of the Director of the Income-tax, Mumbai that assessee was one of the beneficiary of tax evasion by way of client code modification on stock exchange and taking excess loss of Rs.37,28,681/-. In view of the information, the Assessing Officer recorded reasons to believe that income escaped assessment and issued notice u/s 148 of the Act on 18.03.2015. The reassessment proceedings u/s 147 of the Act was completed on 23.03.2016 wherein the Assessing Officer disallowed the loss of Rs.37,28,681/- and also disallowed proportionate brokerage charges which was worked out to 1,49,147/-. On further appeal, the Ld. CIT(A) upheld disallowance of Rs.37,28,681/- observing as under:

“6.1 The appellant contended that the Learned ACIT20(3) has erred in addition of loss of Rs. 37,28,681/- due to change in client code modification done by broker to normal business income instead reducing the same from speculation loss of Rs. 73,86, 173/- determined as per assessment order passed u/s 143(3).



In support the appellant submitted in reference to loss of Rs.37,28,681/- through changes in client code modification we would like to state that we have executed all the transactions through broker and it is not the duty of client to see what changes are done by broker in system of stock exchange as client have no access to system. All the entries in our client code were made as per the contracts and bills of our brokers and our client has no knowledge of the changes made and also our client had neither made payment nor received payments for the trade from the broker.

From the records available it is observed that the Assessing Officer disallowed the loss of Rs. 37,28,681/- obtained by the appellant through client code modification on by invoking the provision of section 69C of the Act. This facility of client code modification is approved by SEBI and provided by the exchanges to brokers is meant to rectify genuine mistakes of punching of order of a particular trade given by a particular trade from one account to another account during the trading hours and time and time permitted by the stock exchange after the trading hours. Many broker misused this facility of CCM for creating artificial losses/profits and providing such fictitious profits/losses to various clients by charging some commission. In the submission the appellant admitted the transaction not recorded in the books of account which means the financial impact involved in it is settled out of the resources not disclosed to Income Tax. The decision of the Assessing Officer of disallowed the loss of Rs. 37,28,681/- is right and legal and no need to interfere. In view of the above the appeal is dismissed.”

4.2 Before us the Ld. Counsel for the assessee submitted that the Ld. Assessing Officer has reopened the case merely for the reason to suspect that client code modification has been done for non-genuine purpose but without any evidence to support and there



was reason to believe that income chargeable to tax had escaped assessment. The Ld. Counsel submitted that in the reasons recorded details of transaction of client code modification by the broker has not been pointed out and therefore entire reasons to believe being based on the suspicion , the reassessment is bad in law and need to quashed. The Ld. Counsel for the assessee in support of his contention relied on the decision of the Hon'ble Bombay High Court in the case of M/s Coronation Agro Industries Ltd. v. DCIT in WRIT PETITION NO. 2627 OF 2016, wherein it is held the reason does not indicate basis for the Assessing Officer to make reasonable belief that there had been an escapement of the income due to client code modification by the broker of the assessee was on account of non-genuine error originally occurred while punching the trade.

5.1 As far as the ground of the assessee on merit is concerned, the ld Counsel of the assessee submitted that the Assessing Officer in the impugned order has provided detail note on the client code modification procedure but nowhere mentioned the list of the transaction in the case of the assessee where client code modification has been alleged carried out by the broker of the assessee. The Assessing Officer has also nowhere mentioned that for what purpose client code modification was carried out by the broker and not substantiated with evidence that same was for not rectifying genuine error for punching of the trade but was for giving



benefit of losses to the assessee. Before the Ld. CIT(A), the assessee submitted that all the transactions had been executed by the broker and it was not the duty of the client to make changes on the stock exchange. The assessee had no access to the system of stock exchange. All the entries in client code were made as per the contracts and bills of the broker and the assessee had no knowledge of the changes made. Therefore, the AO and Ld CIT(A) are not justified in disallowing the loss to the assessee.

5.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Assessing Officer has disallowed the loss of Rs.37,28,681/- on the allegation of the client code modification on exchange portal was carried out by the broker of the assessee for benefitting the assessee by way of loss provided . But the Ld. Assessing Officer has nowhere provided details of the transactions where client code modification was carried out nor he given reasons as why the said client code modification was not for genuine purposes and for the purpose of the evasion of the tax. In absence of providing any such material to the assessee, the addition by the Assessing Officer is against the principle of natural justice. The Ld. Assessing Officer has neither called for the broker and made any inquiry and made addition simply on the basis of the report of the Director of the Investigation. Thus the addition made being on presumption that the client code modification carried out was for non-genuine



purposes. Accordingly, the addition made by the AO and upheld by the Ld. CIT(A) being based on the presumption and being without supporting any documentary evidence that assessee has evaded the tax on those transactions and shown fictitious loss, is deleted and the order of Ld CIT(A) is set aside. The grounds of appeal of the assessee are accordingly allowed.

6. As far as appeal No. 2240/M/2023 is concerned the assessee is aggrieved against the penalty u/s 271(1)(c) of the Act levied by the Assessing Officer and upheld by the Ld. CIT(A). The grounds raised by the assessee are reproduced as under:

“The Learned ACIT 20(3) has erred in levying penalty of Rs. 27,11,625/- levied on certain disallowances made while passing order u/s 143(3).”

7. Before us, the Ld. Counsel of the assessee raised the additional ground challenging the validity of the penalty levied on the ground that relevant limb for levy of the penalty i.e. *concealment of the particulars of income or furnishing of inaccurate particulars of the income*, has not been stricken off in the notice u/s 274 r.w.s. 271(1)(c) of the Act and thus penalty is not sustainable. The additional ground raised being legal in nature and no investigation of the fresh facts required same was admitted for adjudication.

8. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee has filed a copy of the notice dated



28.03.2013 issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act. On perusal of the said notice, we find that the Assessing Officer has not stricken off the relevant limb for levy of the penalty and not specified whether the penalty has been initiated for concealment of particulars of income or furnishing inaccurate particulars of income. The Hon'ble Bombay High Court in the case of **Mohd Farhan A Shaikh Vs DCIT in 125 taxmann.com 253 (Bom)** held that where penalty notice has not specified for charges for levy of the penalty, whether it is for concealment of the particulars of the income or furnishing inaccurate particulars of income, in such circumstances, levy of the penalty is bad in law and accordingly cancelled. The relevant finding of the Hon'ble High Court is reproduced as under:

188. We may, in this context, respectfully observe that a contravention of a mandatory condition or requirement for a communication to be valid communication is fatal, with no further proof. That said, even if the notice contains no caveat that the inapplicable portion be deleted, it is in the interest of fairness and justice that the notice must be precise. It should give no room for ambiguity. Therefore, Dilip N. Shroff disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays nonapplication of mind. And, therefore, the infraction of a mandatory procedure leading to penal consequences assumes or implies prejudice.

189. In Sudhir Kumar Singh, the Supreme Court has encapsulated the principles of prejudice. One of the principles is that "where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, "except in the case of a mandatory provision of law which is conceived not only in individual interest but also in the public interest".



190. Here, section 271(1)(c) is one such provision. With calamitous, albeit commercial, consequences, the provision is mandatory and brooks no trifling with or dilution. For a further precedential prop, we may refer to *Rajesh Kumar v. CIT*[74], in which the Apex Court has quoted with approval its earlier judgment in *State of Orissa v. Dr. Binapani Deif* 75]. According to it, when by reason of action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice must be followed. In such an event, although no express provision is laid down on this behalf, compliance with principles of natural justice would be implicit. If a statue contravenes the principles of natural justice, it may also be held *ultra vires* Article 14 of the Constitution.

191. As a result, we hold that *Dilip N. Shroff* treats omnibus showcause notices as betraying non-application of mind and disapproves of the practice, to be particular, of issuing notices in printed form without deleting or striking off the inapplicable parts of that generic notice.”

8.1 Following the finding of the Hon’ble Bombay High Court in the case of **Mohd Farhan A Shaikh Vs DCIT (supra)**, penalty levied u/s 271(1)(c) of the Act and upheld by the Ld. CIT(A) is cancelled. The grounds of appeal of the assessee are accordingly allowed.

9. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 25/10/2023.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 25/10/2023
Rahul Sharma, Sr. P.S.



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai