

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 2692/MUM/2023  
(Assessment Year: 2010-11)**

**M/s Mangal Keshav Securities Limited,**  
501, Heritage Plaza, J.P. Road,  
Opp. Indian Oil Colony, Andheri (West),  
Mumbai - 400053  
[PAN: AAACM8957F]

..... **Appellant**

**The Deputy Commissioner of Income  
Tax – 2(2)(1), Mumbai,**  
Aaykar Bhavan, M.K. Road,  
Mumbai - 400020

Vs

..... **Respondent**

**Appearance**

For the Appellant/Assessee : Shri Jigar Mehta  
For the Respondent/Department : Smt. Mahita Nair

**Date**

Conclusion of hearing : 09.01.2024  
Pronouncement of order : 30.01.2024

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**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeal the Assessee has challenged the order, dated 11/07/2023, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2010-11, whereby the Ld. CIT(A) had dismissed the appeal of the Assessee against the Assessment Order, dated 30/03/2016, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised following grounds of appeal:

1. *"(a) The Ld. National Faceless Appeal Centre (hereinafter referred to as "the NFAC) erred in law and facts in upholding the reassessment proceedings u/s. 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") initiated on the basis of factually incorrect reasons.*  
  
*(b) Without prejudice, the Ld. NFAC erred law and facts in upholding the validity of assessment order u/s. 143(3) r.w.s. 147 of the Act dated 30.03.2016 without appreciating the fact that the Ld. Assessing Officer had made additions on altogether different ground without making any additions on the actual reasons for which the case was reopened.*
2. *The Ld. NFAC erred in law and facts in adding a sum of Rs.21,82,003/-, being 3% of Rs.7,27,33,427/- as unexplained expenditure paid by the appellant without appreciating the facts of the case and merely on surmises and conjectures.*
3. *All the above grounds are independent and without prejudice to each other.*
4. *The Appellant craves leave to add, amend, delete and modify the above grounds of appeal".*

3. The relevant facts in brief are that the Appellant is an Indian Company engaged in the business of providing share and stock broking and depository participant services. The Appellant filed return of income for the Assessment Year 2010-11 on 28/09/2010 declaring total income of INR 8,27,20,450/-. The case of the Appellant was selected for regular scrutiny and assessment under Section 143(3) of the Act was framed on the Appellant vide order dated 22/03/2013 assessing total income of the Appellant at INR 8,29,37,950/-.

4. Subsequently, information was received from Director of Income Tax (Intelligence & Criminal Investigation) [hereinafter referred to

as 'DIT(I&CI)'] that some of the brokers and their clients have indulged in the practice of misuse of Client Code Modification (CCM) and had, thereby, artificially shifted profits/losses within intention to reduce tax liability. Generally, losses were shifted to clients having profits, while profits were shifted to clients having losses by way of CCM to neutralized tax liability. As per the information received from DIT(I&CI) the Appellant had also provided profit/loss adjustment entries worth of INR 7,27,33,427/- in F&O and Cash Segment by the way of CCM. After recording reasons, assessment for Assessment Year 2010-11 was reopened under Section 147 of the Act and notice, dated 26/03/2015, was issued under Section 148 of the Act. In response, the Appellant requested that the return filed on 28/09/2010 be treated as the return filed in response to the notice under Section 148 Act. A copy of the reasons recorded was furnished to the Appellant. The Appellant filed objections to reopening of the assessment which were rejected by the Assessing Officer vide order, dated 05/02/2016. Vide order dated 30/03/2016, passed under Section 147 read with Section 143(3) of the Act, the Assessing Officer made addition of INR 21,82,003/- in the hands of the Appellant holding as under:

*"6. In this context, the assessee has not provided any details called for. In case, if the assessee filed such submissions, it would have drawn whether the assessee has done these transactions genuinely or given the benefits to the clients. From the report of the I&CI, it is noticed that the brokers who have facilitated client code modification to the clients have charged certain percentage of the transaction value as brokerage/commission which ranges from 0.5% to 6%. Thus, it must be noted that the assessee has paid certain commission to obtain such transaction. Considering these facts commission @ 3% of the Rs. 7,27,33,427/- i.e. Rs. 21,82,003/- is treated as unexplained expenditure and added back to the total income. Penalty proceedings are initiated separately for furnishing inaccurate particulars of income and concealment of income."*

5. Being aggrieved, the Appellant preferred appeal before CIT(A) against the order dated, 30/03/2016, passed under Section 147 read with Section 143(3) of the Act challenging the initiation of reassessment proceedings as well as the addition made on merits. However, the CIT(A) upheld the action of the Assessing Officer of initiating reassessment proceedings under Section 147 of the Act and declined to grant any relief on merits. Thus, confirming the addition of INR 21,82,003/- made by the Assessing Officer on merits vide order, dated 30/03/2016.
6. Being aggrieved, the Appellant has now carried the issue in appeal before the Tribunal. Ground No. 1(a)&(b) are challenge the validity of the reassessment proceedings while Ground No. 2 is directed against the addition of INR 21,82,003/- on merits.
7. We would first take up Ground No. 1 raised by the Appellant which challenges the validity of the reassessment proceedings since the same goes to the root of the matter.
8. During the appellate proceedings before us it was, inter alia, contended on behalf of the Appellant that the reasons recorded were vague and non-existent. The Appellant was acting as a broker and could not be regarded as the beneficiary of fictitious profits/losses of INR 7,27,33,427/- pertaining to the alleged misuse of the CCM facility. The reassessment proceedings were initiated merely relying upon the information received from DIT(I&IC) without independent application of mind. No independent inquiry was conducted to verify the information received from DIT(I&IC). The additions made by the Assessing Officer were on a ground completely different from the ground on which the reassessment proceedings were initiated which is contrary to the judgment of the

Hon'ble Bombay High Court in the case of CIT – 5 Vs. Jet Airways (India) Private Limited: 331 ITR 236.

9. Per contra, it was contended by the Ld. Departmental Representative that the Assessing Officer had sufficient tangible material to initiate reassessment proceedings. She submitted that in the reasons recorded it was clearly stated that the Appellant was involved in misusing CCM facility to provide artificial profit/loss entries to the beneficiaries and had earned cash commission in respect of the same. The addition made by the Assessing Officer also pertained to the same transactions. Therefore, the reliance by the Appellant on the judgment of the Hon'ble Bombay High Court in the case of Jet Airways (India) Private Limited (supra) was misplaced.

10. We have considered the rival submission and perused the material on record. We note that the Assessing Officer has recorded following reasons for reopening the assessment for the Assessment Year 2010-11 under Section 147 of the Act:

*"1. The assessee filed return of income on 28.09.2010 declaring total income at Rs.8,27,20,450/-. The assessment was completed on 22.03.2013.*

*2. On the basis of information received from the O/o DIT (Intell. CR Inv), Mumbai on 27.02.2015 through the O/o The Commissioner of Income Tax-4, Mumbai Information were received that fictitious profits and losses were created by some brokers by misusing the client code modification facility in F&O Segment on NSE during March, 2010. The brokers were alleged to be indulging in transferring the fictitious losses to different clients to reduce their tax liability and also fictitious profit to other clients. On detailed analysis it was established that the brokers had misused client code modification facility and created non-genuine losses and profits. These losses and profits were given to different clients/beneficiaries accordingly to their requirement. The clients had taken fictitious losses to set off against their profits with a view to reduce their tax liability. Some of the clients also took fictitious profits*

*to cover up their undisclosed income or to set off these profits against huge losses. The brokers have earned commission income by indulging/misusing the client code facility, as far as commission charged by the broker on transferring the entries of fictitious loss/profits is concerned, it actually varies between 3% to 6% although the brokers in their statements have admitted receipt of commission upto 2% only before DDIT. Remedial action has been initiated on the following issues:-*

- i) The clients have used the fictitious losses for the purpose of reducing their taxable income, the claim of losses needs to be disallowed and the payment of commission also needs to be included in their income.*
- ii) As regard entries of profits obtained by clients, the return of income has to be examined to ascertain whether profits have been obtained to adjust the losses in their return of income or to cover up their unaccounted Income in the garb of fictitious profit. As they have also paid commission to the brokers, the same may also require inclusion in their income.*

*The information in the case of the assessee to have received profit/loss created by client code modification is as under-*

S No.	Broker Name	Broker Code	Profit/loss because of client code modification		Total
			Cash Market	F&O Segment	
1	Mangal Keshav Securities Ltd.	9774	136,356	72,597,071	72,733,427

3. From the above facts, it is clear that the assessee had failed to disclose fully and truly all material facts in respect of profit/loss for the A.Y.2010-11. In view of the above facts, I have reason to believe that income to the extent of Rs. 72,733,427/- chargeable to tax has escaped assessment by the reason of failure on the part of the assessee to disclose fully and truly all material facts within the meaning of section 147 of the I.T. Act, 1961.

4. In order to bring to tax above mentioned escaped Income, as well as any other income which might have escaped assessment, found

*during the course of proceedings, notice u/s.148 is issued.” (Emphasis Supplied)*

11. On perusal of the above we find that as per paragraph 3 of the reasons recorded the Assessing Officer had concluded that (a) the Appellant had failed to disclose fully and truly all material facts in respect of profit/loss for the Assessment Year 2010-11, and (b) the Assessing Officer had reasons to believe that income to the extent of INR 7,27,33,427/-had escaped assessment on account of the aforesaid failure. Whereas on perusal of the paragraph 6 of the Assessment Order [*reproduced in paragraph 4 above*] , we find that the Assessing Officer has made an addition of INR 21,82,003/- being 3% of the aforesaid amount of INR 7,27,33,427/- by treating the same as unexplained expenditure. The Assessing Officer has also returned a finding that the Appellant had paid aforesaid amount as commission. Thus, clearly, the reasons recorded for reopening the assessment and income that was believed to have escaped assessment are different from with the addition made by the Assessing Officer and the reasons thereof. In our view, the judgment in the case of Jet Airways (India) Private Limited (*supra*) would apply to the facts of the present case wherein it was held by the Hon’ble Bombay High Court as under:

*"15. Parliament, when it enacted the Explanation (3) to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of*

any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd.'s case (supra) and of the Punjab & Haryana High Court in Vipin Khanna's case (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh's case (supra), Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT v. Atlas Cycle Industries [1989] 180 ITR 3191. The decision in Atlas Cycle Industries' case (supra) held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries' case (supra) and of the Rajasthan High Court in Shri Ram Singh's case (supra) would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.-

16. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the

assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee”(Emphasis Supplied).

12. In the above judgment the Hon'ble Bombay High Court has held that in case after issuing a notice under Section 148 of the Act, the assessing officer holds that the income in relation to which the Assessing Officer had formed reason to believe that had escaped assessment has not escaped assessment and does not make addition in respect of the same, it was not open to the assessing officer to independently assess some other income. In the present case, the Assessing Officer was of the view that income of INR 7,27,33,427/- being artificial profit/loss created by misuse of CCM facility had escaped assessment. However, while making the reassessment no addition was made on this account. The Assessing Officer made a disallowance of INR 21,82,003/- being 3% of the aforesaid amount of INR 7,27,33,427/- holding the same to be the commission paid by the Appellant for obtaining the artificial profit/loss entry by way of CCM. In the aforesaid facts and circumstances, we hold that as per the judgment of Hon'ble jurisdictional High Court in the case of Jet Airways (India) Pvt. Ltd. (supra) the Assessing Officer could not have made addition of INR 21,82,003/- in the hands of the Appellant on account of change in the quantum as well as nature of the addition. Accordingly, Ground No. 1(b) raised by the Appellant is allowed. In view of the aforesaid, all the other grounds raised by the Appellant are disposed off as being infructuous.

13. In result, in terms of paragraph 12 above, the present appeal is allowed.

Order pronounced on 30.01.2024.

**Sd/-**  
**(Prashant Maharishi)**  
**Accountant Member**

**Sd/-**  
**(Rahul Chaudhary)**  
**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 30.01.2024  
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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