

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

**SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 3515/MUM/2023
(Assessment Year: 2012-13)**

**Deputy Commissioner of Income Tax,
19(3), Mumbai,**

513, 5th Floor, Piramal Chambers,
Parel, Mumbai - 400012

..... **Appellant**

Sanjiv Mahedra Parikh

24, Parijat, Marine Drive,
Mumbai - 400002
[PAN: AALPP9470G]

Vs

..... **Respondent**

**CO No. 19/MUM/2024
(Arising out of ITA No. 3515/Mum/2023)
(Assessment Year: 2012-13)**

Sanjiv Mahedra Parikh

24, Parijat, Marine Drive,
Mumbai - 400002
[PAN: AALPP9470G]

..... **Appellant**

**Deputy Commissioner of Income Tax,
19(3), Mumbai,**

513, 5th Floor, Piramal Chambers,
Parel, Mumbai - 400012

Vs

..... **Respondent**

Appearance

For the Appellant/Department : Shri Veerbhandra Mahajan
For the Respondent/Assessee : Shri Vijay Mehta

Date

Conclusion of hearing : 02.05.2024
Pronouncement of order : 24.05.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal filed by the Revenue and Cross-Objection filed by the Assessee arise from the order of Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC), Delhi

[hereinafter referred to as 'the CIT(A)'] passed on 07/08/2023 for the Assessment Year 2012-13, which in turn arose from the Assessment Order, dated 09/12/2019, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

2. The Revenue has raised following grounds of appeal in ITA No. 3515/Mum/2023:

"1. On the facts and the circumstances of the case and in law the Id.CIT(A) has erred in deleting the addition made by the AO without appreciating the facts of the case and modus operandi as a detailed investigation has been carried out by the Investigation Wing in respect of Client Code modification Transactions done by Anand Rathi Commodities Pvt. Ltd. where the assessee name has been surfaced and a detailed finding has been given by the Investigation Wing.

2. On the facts and the circumstances of the case and in law the Id. CIT(A) has erred in deleting the addition made by the AO without appreciating the facts that in such Client Code Modification Transactions, trading transactions of purchase and sales are not affected for commercial purpose but to create artificial loss and gains with a view to evade taxes.

3. On the facts and the circumstance of the case and in law the Id CIT(A) has erred in not appreciating the fact that transaction of client code transaction amount of Rs. 2,14,37,399/- brought on record by recording a statement from the Anand Rathi with whose support, the assessee made transactions.

4. On the facts and the circumstance of the case and in law the Id.CIT(A) has erred in not appreciating the fact of the case and modus operandi as detailed investigation has been carried out by the investigation wing and confirming that the CCMT done by the assessee.

5. On the facts and circumstances of the case and in law the learned CIT(A) has erred in ignoring the direct and circumstantial evidence brought on record by the Assessing Officer to establish that the assessee has indulged in CCMT with the help of Anand Rathi with a view to record Long Term Capital Loss of Rs.

18,05,801 as held by CIT(A).

6. On the facts and the circumstances of the case and in law the Ld.CIT(A) has erred in deleting the addition without appreciating the facts that no prudent person would have entered into this transaction of CCMT for creating just the loss of Rs. 18,05,801/- whereas the transactions in CCMT with the help of Anand Rathi Commodities Pvt. Ltd, have been carried out by the assessee with malafide intention of avoiding of tax and any intention of specific undue gain.

7. On the facts and circumstance of the case and in law the order of the Ld CIT(A) has suffers from perversity as it ignores the facts brought on record establishing that assessee made CCM transactions as part of colourable device to generate fictitious Loss with the aim to evade taxes due.

8. On the facts and circumstances of the case and in law the order of the Ld. CIT(A) has erred in deleting the addition made by AO and hold that that the AO has not discussed the issue, how did he come to conclusion that there is an escapement of income and made addition towards CCM transactions, whereas the Ld. CIT(A) himself accepted in his order that the assessee has not complied with the notices issued u/s 142(1)/143(2) of the Act, which is contradictory."

2.1. The Assessee has raised following grounds of cross objections in CO No. 19/Mum/2024:

"1. The Learned CIT(A) legally erred in upholding the validity of notice issued for re-opening u/s 148."

3. The relevant facts in brief are that the Assessee, an individual proprietor of M/s Alpha Securities, filed return of income for the Assessment Year 2012-13 on 27/09/2012 declaring 'Nil' income. In the computation of income the Assessee had claimed business loss of INR 6,33,969/-. The case of the Assessee was selected for regular scrutiny and assessment under Section 143(3) of the Act was framed on the Assessee. Subsequently, on the basis of information received from Serious Fraud Investigation Office (for

short 'SFIO') about the National Stock Exchange Limited (NSE) scam by the DDIT (Investigation), Unit 6(3), Mumbai highlighting that brokers have performed Client Code Modification (CCM) whereby dummy client code was used to book trades and later on the client code were modified to extend the benefit to various beneficiaries. The Assessing Officer was of the view that the Assessee was also involved in the client code modification transaction to the tune of INR 2,14,37,399/- which had resulted in escapement of income and therefore, reassessment proceedings under Section 147 of the Act were initiated against the Assessee and notice dated, 30/03/2019, was issued to the Assessee. Vide letter dated 24/04/2019, the Assessee submitted that the return has been filed on 18/04/2019 in response to notice issued under Section 148 of the Act and requested for a copy of reasons recorded in writing for reopening the assessment. The Assessing Officer, vide letter dated 22/08/2019, furnished the reasons recorded for reopening the assessment under Section 147 of the Act to the Assessee against which objections were filed by the Assessee contending, inter alia, that the Assessing Officer did not have any fresh tangible material to form the basis of belief that income had escaped assessment. Reassessment proceedings were initiated merely on account of change of opinion on re-examination of the material already on record. The general information received by the Assessing Officer and the statement recorded by president of M/s Anant Rathi Commodities Limited (ARCL) (who were not even the broker of the Assessee) could not form tangible material for reopening the assessment as there was no link between the aforesaid material and the escapement of income, if any. It was highlighted that ARCL had no relation with the Assessee and the Assessee had undertaken transactions through India Infoline Commodities Limited. The aforesaid broker of the Assessee had issued letter to the Assessee stating that the

client code modification was done in the case of the Assessee on account of genuine mistake committed by the broker. It was submitted that the Assessing Officer has initiated reassessment proceedings without due application of mind and in arbitrary exercise of his powers. However, the Assessing Officer was not convinced and therefore, rejected the objections of the Assessee. The Assessing Officer, thereafter, proceeded to conclude the reassessment proceedings vide order, dated 09/12/2019, passed under Section 147 read with Section 143(3) of the Act assessing taxable income of the Assessee at INR 2,14,37,399/- being total value of purchase and sale transaction subjected to alleged client code modification transactions undertaken by the Assessee during the assessment year 2012-13.

4. Being aggrieved, the Assessee challenged the validity of reassessment proceedings as well as merit of the addition of INR 2,14,37,399/- made in the hands of the Assessee. The CIT(A), vide order dated 07/08/2023, rejected the challenge to the validity of reassessment proceedings. However, the CIT(A) granted relief to the Assessee by deleting the addition of INR 2,14,37,399/- made by the Assessing Officer holding that the Assessing Officer had failed to consider the submissions made by the Assessee and return proper findings in the assessment order.
5. Now, being aggrieved, the Revenue has preferred the present appeal before the Tribunal. The Assessee has also filed cross objections challenging the order passed by the CIT(A) upholding the validity of reassessment proceedings since the Ground raised in the cross objection go to the root of the matter we would first take up grounds raised by the Revenue in its appeal. Accordingly, we proceed to examine the reasons recorded for reopening the assessment.

6. During the course of hearing it was contended on behalf of the Assessee that there was no application of mind on the part of the Assessing Officer while recording reasons for reopening assessment. Assessing Officer has failed to appreciate the correct facts. There was no fresh tangible material available with the Assessing Officer. The Assessment was framed on the Assessee under Section 143(3) of the Act and while recording reasons the Assessing Officer had failed to allege that there was any failure to disclose true and correct particulars of income on the part of the Assessee. Thus, it was contended by the Learned Authorized Representative for the Assessee that the reasons recorded were bad in law. Therefore, we proceed to examine the reasons recorded which read as under:

“Subject: Reasons for reopening the case u/s 147 of the IT Act, 1961.

This may be treated as an intimation of change in incumbent u/s 129 of the IT Act, 1961.

The reasons for reopening the case u/s 147 of the IT Act are as follows:

The assessee is an individual and the assessee has filed the return of income for A.Y. 2012-13 on 27.09.2012.

- 1. Brief details of information collected/received by the AQ: The Serious Fraud Investigation Office (SFIO) has prepared a detailed report on National Spot Exchange Ltd. (NSEL) scam which has been shared with the Income Tax Department. This information was received from DDIT(Inv), Unit-6(3), Mumbai vide No.DDIT (Inv)-6(3)/Information/2018-19 dated 15.03.2019 on 16.03.2019 through email. In this report, the findings of SFIO is that the brokers have performed rampant client code modification where the dummy/ghost client code were used to book trades and later the client codes were modified.*

Following the detection of misuse and exploitation of NSEL Exchange platform by unscrupulous brokers/traders, the trading on the NSEL Exchange platform had been suspended from 01.04.2012 till 31.07.2013. At the time of suspension of trading activity, there were various brokers who had made several client code modification through sell and purchase of commodities. During the enquiry, summons u/s131 of the IT Act was issued to the broker Anand Rathi Commodities Pvt. Ltd. (as the maximum client code modifications were done by ARCL) and statement of Shri Chetan Pitamber Bharkhada, President, Anand Rathi Commodities Pvt. Ltd. was recorded on 12.03.2019 wherein he has stated that "no physical delivery of goods took place at any time whatsoever in all trades executed on NSEL ". The same finding has been given by the SFIO in its report that "No physical delivery of the goods were ever taken by their clients."

As per information, the assessee is one of the beneficiaries who have made the contract in CASTKADI3 and CASTKADI36 with the help of misusing the client code modification during the F.Y.2011-12 relevant to A.Y.2012-13. As per information, the assessee with the original client buy the contract CASTKADI3 during the FY 2011-12 amounting to Rs.1,06,65,975/- and sell the contract CASTKAD13 during the FY 2011-12 amounting to Rs.28,68,750/-. Further, the assessee with the original client buy the contract CASTKAD136 during the FY 2011-12 amounting to Rs.9,55,125/- and sell the contract CASTKAD136 during the FY 2011-12 amounting to Rs.69,47,549/-.

2. *Analysis of information collected/received:* *The assessee is one of the beneficiaries who has made the transactions in contract CASTKADI36 and CASTKADI3 with the help of misusing the client code modification during the F.Y.2011-12 relevant to A.Y.2012-13. As per Information, the total trade value transaction was of Rs.2, 14,37,399/- for A.Y.2012-13.*
3. *Enquiries made by the AO:* *The assessee is an individual and the assessee has filed the return of Income for A.Y. 2012-13 on 27.09.2012, declaring total income of Rs. Nil. For AY 2012-13, the assessee has shown income of Rs.3,13,600/- under the head 'Income from House Property and Rs.2,02,281/- under 'Income from Other Sources'. Further, the assessee has claimed business loss of Rs.6,33,968/-, Assessment u/s*

143(3) of the IT Act was completed for AY 2012-13, assessing total income at Rs. Nil.

4. *Findings of the AO; From analyzing the Return of Income filed for AY 2012-13 by the assessee, it is seen that the cumulative transactions in the said account does not commensurate with total income of the assessee.*
5. *Basis of forming reason to believe and details of escapement of income: On the basis of the aforesaid information available with the undersigned, I have reason to believe that income chargeable to tax, as indicated above, to the tune of Rs.2,14,37,399/- or any other income chargeable to tax which comes to notice subsequently in the course of proceedings for re-assessment, has escaped assessment within the meaning of section 147 of the IT Act 1961. The assessee has, therefore, failed to disclose true and complete particulars of income for the year under consideration.*
6. *In this case, return of income was filed for the year under consideration, however, no scrutiny assessment u/s.143(3) of the Act was made. Accordingly, in this case, the only requirement to initiate proceedings u/s.147 is reason to believe which has been recorded above.*

It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration, but no assessment as stipulated u/s 2(40) of the IT Act was made and the return of income was only processed u/s 143(1) of the IT Act. In view of the above, provisions of clause (b) of explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case of where income chargeable to tax has escaped assessment."

- 6.1. We note that in the case of **Hindustan Lever Ltd. vs. R.B. Badkar 268 ITR 332 (Bom)** the Hon'ble Bombay High Court has, while examining re-opening assessment in a case where assessment was previously framed under Section 143(3) of the Act, held as under:

"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully

and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside.” (Emphasis Supplied)

- 6.2. In the above judgment it has been held by the Hon'ble Bombay High Court that the reasons are to be read as they have been recorded by the Assessing Officer. Neither any addition/substitution can be made to the reasons recorded nor can any inference be drawn. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission. Therefore, the reasons recorded must be self-explanatory disclosing application of mind by the Assessing Officer. Further, the reasons recorded must identify the link between the tangible material and formation of belief that income as escaped assessment.
- 6.3. In the present case, the reassessment proceedings have been initiated subsequent to passing of the assessment order under Section 143(3) of the Act and after the expiry of 4 years but before the expiry of 6 years from the end the relevant assessment year. The reasons recorded state that the re-assessment proceedings were initiated on the basis of report received from SFIO through Investigation Wing. We note that the aforesaid report was not available with the Assessing Officer at the time of framing the assessment under Section 143(3) of the Act. In the case of *Raymond Woollen Mills Ltd. vs. Income-Tax Officer*: [1999] 236 ITR 34 (SC), it was held by the Hon'ble Supreme Court that the sufficiency or correctness of the material is not to

be considered at the stage of issue of notice under Section 148 of the Act. The existence of some prima facie material to form a belief that income has escaped assessment is sufficient for initiation of re-assessment proceedings provided other conditions specified in Section 148 of the Act are satisfied. In our view the report of received from the SFIO through Investigation Wing constitutes fresh tangible material for reopening the assessment, and it cannot be said that the re-assessment proceedings have been initiated without there being any fresh tangible material. However, mere reference to such information in the reasons recorded, without application of mind to such information, does not satisfy the requirement of Section 147 of the Act.

- 6.4. During the course of hearing, it was contended on behalf of the Assessee that the Assessing Officer has proceeded on the basis of incorrect facts and has failed to apply his mind before initiating the re-assessment proceedings. We find merit in the aforesaid contention advanced on behalf of the Assessee. In the reasons recorded the Assessing Officer has stated that the Assessing Officer has reasons to believe that income chargeable to tax to the tune of INR 2,14,37,399/- had escaped assessment. The allegation against the Assessee was that the Assessee had originally undertaken some transactions on NSEL. However, subsequently, the client code was modified and the aforesaid transactions were booked in the name of some other person. The Assessing Officer had identified following transaction undertaken on NSEL:

Date	CASTKADI3	Amount (INR)	Amount (INR)
13/03/2012	Buy	1,06,65,975/-	
13/03/2012	Sell	28,68,750/-	(77,97,225/-)
Date	CASTKADI36	Amount (INR)	Amount (INR)
13/03/2012	Buy	9,55,125/-	
13/03/2012	Sell	69,47,549/-	59,92,424/-
	Total	2,14,37,399/-	(18,04,801)

6.5. On perusal of the above reasons recorded we find that the Assessing Officer has formed a belief that the income equal to the aggregate turnover of the above four transaction amounting to INR 2,14,37,399/- has escaped assessment without appreciating the fact that all the four transaction have been undertaken on the same date and in case buy and sell transaction for the same contract are netted-off, the Assessee would have suffered overall loss of INR 18,04,901/-. Therefore, on account of transfer of the above trades by the Assessee to other person, the Assessee has avoided suffering loss of the INR 18,04,901/-. In the return of income the Assessee has already disclosed business loss of INR 6,33,969/-. Therefore, it cannot be said that in the facts of the present case that income of INR 2,14,37,399/- had escaped assessment. Further, the Assessing Officer has taken contradictory position in paragraph 3 and paragraph 6 of the reasons recorded. In paragraph 3 it has been stated that Assessment under Section 143(3) of the Act was completed for the Assessment Year 2012-13 assessing total income of the Assessee at 'Nil'. Whereas, in paragraph 6 of the reasons recorded, it was stated that no scrutiny assessment under Section 143(3) of the Act was made and only intimation under Section 143(1) of the Act was issued to the Assessee after processing of the return. The Assessing Officer has further gone ahead to state that in absence of assessment, it would be deemed to be a case where income chargeable to tax had escaped assessment. The Assessee has placed on record copy of the assessment order passed under Section 143(3) of the Act. In our view the Assessing Officer has proceeded to initiate re-assessment proceedings without any clarity as to the applicable facts. Thus, in our view, there is clearly no application of mind by the Assessing Officer while recording reasons for reopening assessment.

- 6.6. In view of the above, we hold that the reasons recorded fail to satisfy the requirements of Section 147 of the Act. Accordingly, the notice dated 04/03/2015 issue under Section 148 of the Act initiating reassessment proceedings for the Assessment Year 2012-13 under Section 147 of the Act as well as the consequent re-assessment order, dated 30/03/2019, passed under Section 143(3) read with Section 147 of the Act are quashed. Cross Objection preferred by the Assessee is allowed and the grounds raised in appeal by the Revenue are dismissed as being infructuous.
7. In result, appeal preferred by the Revenue is dismissed, while cross-objection by the Assessee is allowed.

Order pronounced on 24.05.2024.

Sd/-
(Narendra Kumar Billaiya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 24.05.2024
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
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai