आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.539/Ind/2023
Assessment Year: 2012-13

Jayantilal Sanghvi, 8/10, Warehouse Road, Patel Bridge, Indore.	बनाम/ Vs.	ACIT, 4(1), Indore.
(Assessee/Appellant)		(Revenue/Respondent)
PAN: AGTPS5825Q		
Assessee by	Shri Venus Rawka, C.A.	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	12.06.2024	
Date of Pronouncement	.06.2024	

आदेश/O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 27.10.2023 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of assessment-order dated 30.11.2019 passed by learned ACIT, Circle-4(1), Indore ["AO"] u/s 147 r.w.s. 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2012-13, the assessee has filed this appeal.

2. The brief facts are such that the assessee-individual is earning income from trading business in proprietary concern named "M/s Lucky Traders". During the year, the assessee also earned income from speculative business

of non-delivery transactions done in commodity-exchange "National Spot Exchange Limited (NSEL)". For the relevant AY 2012-13, the assessee filed his original return of income on 01.10.2012 declaring a total income of Rs. 11,09,020/- which was subjected to scrutiny-assessment and the AO passed assessment-order dated 25.03.2015 u/s 143(3) after making certain additions and assessing total income at Rs. 20,61,370/-. Subsequently, on receipt of an information vide letter dated 16.03.2019 from the office of DDIT (Inv)-6(3), Mumbai revealing that a 'sale-transaction' of Rs. 2,71,85,000/- done on 27.03.2012 in the aforesaid commodity-exchange by some other person was assigned to assessee through 'Client Code Modification (CCM)', the AO recorded reasons of income escaping assessment and issued notice dated 31.03.2019 u/s 148 to re-open assessee's case u/s 147. In response to such notice, the assessee filed return declaring total income of Rs. 20,61,370/- on 02.05.2019. Ultimately, the AO passed assessment-order u/s 147 r.w.s. 143(3) on 30.11.2019 after making a newer addition of Rs. 1,93,49,146/- on account of disallowance of "artificial/bogus loss" alleged to have been claimed by assessee through the process of CCM.

3. Aggrieved, the assessee carried matter in first-appeal but did not get any success. The CIT(A) dismissed assessee's appeal by passing following order:

> "On perusal of the above, it is seen that the Gr. No. 5 are of general in nature. Gr. No. 4 alleges that the rejoinder to the reasons provided to the assessee was not considered. But, it is seen from the assessment-order that the AO passed a speaking order after considering the objections of the appellant. Therefore, this ground is dismissed.

Gr No. 1, 2 and 3 are inter-related to the re-assessment made and the levy of tax u/s 143(3) r.w.s. 147 of the Act and thus all these grounds are taken up together and are adjudicated together below.

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Ground No. 1 challenges the reopened assessment stating that there was no failure on the part of the appellant in disclosing full facts at the time of original assessment. However, it is very clear from the assessment order that the AO received an investigation report from the office of DDIT (Inv)-6(3), Mumbai and this letter revealed the tax evasion involved in the case of the Appellant by CCM to acquire artificial loss to set-off the profits generated during the year. This fact was obviously not revealed by the appellant during the original assessment and therefore claiming that full facts were disclosed is farce. Hence this ground is dismissed.

In ground no. 2, the appellant stated that the Client code modification was not under the control of the assessee and therefore the addition is bad in law. In this regard, it may be relevant to note that the appellant had not produced any document or evidence to show that he objected to the modification of trade before the broker or the exchange. Also, he has not explained why the trade was modified otherwise and the genuineness of such trade where loss was generated not intentionally but in normal course. Further, while the CCM was done by the broker, it was for the benefit of the client on whose behalf the modification was made. Therefore, merely claiming that it was not in the control of the appellant does not exonerate him from his involvement in this scam/tax evasion. Hence, this ground is dismissed too.

In Ground No. 3, the appellant argued that these transactions were duly recorded in the books of accounts and produced before the AO at the time of original assessment and therefore cannot be subject to reassessment. Again, the details recorded in the books and considered during the original assessment were in the absence of the investigation report received by the AO who issued the notice u/s 148 of the Act. The investigation report unearthed the scam that was involved in this case and in fact pierced the veil to show the real purpose and substance of the transactions. This was the new information pointing towards the tax evasion of the appellant and based on this, the case was reopened validly. Hence, this ground is also dismissed.

To conclude, the appellant has not challenged the merits of the assessment order and has not gone to prove that the trade executed by him was genuine. The only issue that was raised in the appeal was that the reopening was bad in law but these grounds have been held against the appellant. Therefore, the impugned assessment order is upheld and no interference is called for."

[Emphasis supplied]

4. Now, the assessee has come in next-appeal before us.

5. The assessee has raised following effective grounds:

> "(1) That the Ld. CIT(A) erred in law and on facts of the case and confirmed the addition made by the AO determining the total assessed income of Rs. 2,14,10,516/- against the returned income of Rs. 20,61,370/-.
>
> (2) That the Ld. CIT(A) erred in law and on facts of the case and confirmed re-opening of complete assessment u/s 143(3) ignoring the fact that there was no failure on the part of the assessee of full facts. The action of the AO for reopening the assessment u/s 148 is illegal on the facts.
>
> (3) That the Ld. CIT(A) erred in law and on facts of the case and confirmed the addition of Rs. 1,93,49,146/- on the basis of client code modification which amounts to artificial or bogus loss, the action of Ld. AO was bad in law. Modification to the client code was not under the control of the assessee.
>
> (4) That the Ld. CIT(A) erred in law and on facts of the case and confirmed the non-observance to consider that the transaction was duly recorded in books of accounts of the assessee and produced before AO at the time of original assessment and in re-assessment proceedings.
>
> (5) That the Ld. CIT(A) erred in law and on facts of the case and confirmed the non-observance to consider rejoinder to the reasons provided to the assessee for re-opening of the assessment."

6. Ground No. 2, 4 and 5 are legal grounds while Ground No. 1 and 3 deal with the merit of addition made by AO. We proceed to adjudicate accordingly.

Ground 2, 4 and 5:

7. In these three grounds, the assessee is assailing the legality of proceeding done by AO on three different scores as mentioned in those respective grounds.

8. *The first stand taken by assessee in Ground 2* is such that the re-opening of assessment by AO is not valid when the original assessment was concluded u/s 143(3) and there was no failure on the part of assessee to disclose full facts.

8.1 Apropos to this claim, Ld. AR submitted that the present case of assessee is concerned with AY 2012-13 for which original assessment was made by department by way of scrutiny-assessment u/s 143(3) and thereafter the case was re-opened vide notice dated 31.03.2019 after expiry of 4 years from end of the AY 2012-13 which is not legal. Ld. AR is basically harping on Proviso to section 147 which prescribes that where an assessment u/s 143(3) has been made for the relevant year, no action shall be taken u/s 147 after expiry of four years from the end of the relevant assessment-year unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. To show as to how the assessee had made full and true disclosure, Ld. AR relied upon two documents:

(i) The DDIT (Inv)-II, Indore issued a notice to assessee u/s 131(1A) raising enquiries qua the transactions of commodity exchanges, which the assessee replied vide letter dated 18.02.2013 (copy at Page 71-72 of Paper-Book).

(ii) During original assessment, the assessee filed reply-letter dated 29.12.2014 (copy at Page 77-78 of Paper-Book) to the AO in response to notice u/s 142(1) giving certain details in Point No. 3.

Taking support from above, Ld. AR contended that the assessee has disclosed all facts fully and truly to the department/AO prior to or during original assessment. Therefore, re-opening of assessment by AO after expiry of four years from end of the relevant assessment-year is barred by Proviso to section 147. Ld. AR also placed a heavy reliance upon ***(i) Principal Commissioner of Income-tax Vs. Prabhu Dayal Aggarwal (2023) 154 taxmann.com 506 (Delhi) and (ii) Harikishan Sunderlal Virmani Vs. DCIT (2017) 88 taxmann.com 548 (Gujrat).***

8.2 Per contra, Ld. DR for revenue strongly opposed the submissions of assessee with following contentions:

(i) The proceeding of section 131(1A) done by DDIT, Indore was not before the AO. It might be a proceeding undertaken by DDIT, Indore as part of exercise done by Investigation Wing, Mumbai. According to Ld. DR, it might have happened that the Investigation Wing, Mumbai had taken help of DDIT, Indore in pursuance of which the DDIT, Indore had issued notice u/s 131(1A) to assessee and sent his comments to Investigation Wing, Mumbai. Thereafter, Investigation Wing, Mumbai had forwarded its final adverse report to the AO for taking necessary action. In any case, Ld. DR submitted, the exercise

of section 131(1A) was neither done by AO nor a part of original assessment u/s 143(3), therefore the same cannot provide any rescue to the assessee for the purpose of Proviso to section 147.

(ii) The information filed by assessee in letter dated 29.12.2014 to the AO during original assessment reads thus:

> *"3) Further as desired by you, my membership No. in NBOT is 89, on which we deal for ourselves as well as for our clients.*
>
> *Regarding dealing in other exchanges in different commodities, our client code with different brokers are as follows:*
>
> *Religare Commodities Limited is – JS6974, Sincere Commodities & Derivative Markets Ltd. – SE648 & Masita Commodity Pvt. Ltd.-MS045."*

This information is a mere disclosure of the agencies for doing assessee's business and nothing more. It is not a disclosure *qua* any transaction much less the alleged transaction.

(iii) Ld. DR further submitted that the Investigation Wing of department has unearthed a new fact, after carrying an extensive investigation, that the transaction of other person was assigned to the assessee through CCM in 'National Spot Exchange Limited (NSEL)', which has led to tax evasion by assessee. The AO has also recorded in the reasons that the operation of NSEL was also suspended due to break of guidelines. Therefore, based on a newer fact showing evasive technique applied for the benefit of assessee, an information was circulated by Investigation Wing to the AO and thereafter the AO acted upon information. Therefore, in the situation, it cannot be said that

the assessee has made true and full disclosure to the AO in original assessment so as to get the protection of Proviso to section 147.

8.3 After a careful consideration, we find sufficient merit in the submissions of Ld. DR for revenue. *Firstly,* we agree that the neither the DDIT, Indore was assessing authority nor the proceeding u/s 131(1A) done by him was a proceeding forming part of original assessment u/s 143(3). That was an independent proceeding and may even be a part of the investigative exercise conducted by Investigation Wing, Mumbai for which the assessee was enquired and the assessee filed letter dated 18.02.2013. *Secondly,* the information filed by assessee in letter dated 29.12.2014 to AO during assessment-proceeding is giving only details of agencies through which the assessee was doing transactions of commodity exchange, it was not an information of transaction. *Thirdly,* the information regarding assignment of transaction of other person to assessee through CCM was a newer information discovered by department after carrying out extensive investigation. Therefore, in such circumstances, it cannot be said that there was a full and true disclosure by assessee in original assessment. Being so, we agree that the AO is not barred by Proviso to section 147 and he was well within his authority to re-open assessee's assessment.

8.4 The decisions relied by Ld. AR are quite distinguishable on facts as is clear from following:

(a) Principal Commissioner of Income-tax Vs. Prabhu Dayal Aggarwal (2023) 154 taxmann.com 506 (Delhi):

We re-produce below this order in entirety to show the facts of case:

"This appeal is directed against the order dated 29-6-2018 passed by the Income-tax Appellate Tribunal [in short "Tribunal"] concerning Assessment Year (AY) 2009-2010.

2. The principal allegation levelled against the respondent/assessee, based on which the reassessment proceedings under section 147/148 of the Income-tax Act, 1961 [in short "Act"] [prior to amendment] were triggered, is that, he had taken illegal benefit of the Client Code Modification (CCM) facilities offered by his broker to register losses in respect of share transactions undertaken by him.

3. The record shows, and *qua* which there is no dispute, that the respondent/assessee, according to the appellant/revenue, had entered into transactions with the help of a share broking entity, namely, Amarpali Adya Trading and Investment Pvt. Ltd. [hereafter referred to as "AATIPL"].

4. According to the appellant/revenue, the trading carried out by the respondent/assessee in the aforementioned AY had resulted in reduction of income *i.e.*, registration of loss, amounting to Rs. 1,62,75,825.90.

5. It is the appellant/revenue's case, that the aforementioned share broking entity had undertaken such illegal activity *i.e.*, CCM, to transfer losses and profits to various persons/entities, which included the respondent/assessee.

5.1 In other words, according to the appellant/revenue the CCM facility was not used for legitimate purposes, such as punching orders, but was used to transfer, as indicated above, illegal profits and losses to its clients.

6. The record shows, and with regard to which, once again, there is no dispute, that the respondent/assessee had filed his return for AY 2009-2010 on 31-7-2009, whereby he had declared his total income as Rs. 1,16,37,353/-.

7. The record shows, that after scrutiny was carried out, an assessment order was passed on 24-12-2011 under section 143(3) of the Act.

8. Interestingly, during the course of the scrutiny, the assessing officer had sought information with regard to the transactions entered into by the respondent/assessee with the aforementioned share broking entity *i.e.*, AATIPL.

8.1 The Tribunal also records, that the respondent/assessee via letter dated 07-12-2011 *i.e.*, prior to assessment order being passed had submitted a copy of the

Client Ledger which adverted to details of settlement arrived between him and AATIPL. This document, admittedly, disclosed that the settlement resulted in a loss amounting to Rs. 1,82,10,431.54.

9. The record shows, that despite an order being framed under section 143(3) of the Act on 24-12-2011, albeit after scrutiny, in the reasons to believe furnished by the appellant/revenue [based on which proceedings under section 147/148 of the Act were triggered], there is no reference to this fact *i.e.*, that assessment under section 143(3) was framed on 24-12-2011 *qua* the respondent/assessee.

9.1 What makes matters worse, is that, when a fresh assessment order reassessment was framed *i.e.*, on 13-12-2016 pursuant to the reopening of the earlier assessment, the AO did not advert to this aspect. In other words, there is, admittedly, no reference in the order dated 13-12-2016, to the fact that section 143(3) assessment order had been framed on 24-12-2011.

10. Admittedly, even according to the appellant/revenue, the reopening of the concluded assessment made under section 143(3) of the Act has occurred after a period of four years commencing from the end of the relevant AY *i.e.*,AY 2009-2010. The circumstances provided for reopening of the assessment under section 147 of the Act (as it then stood) beyond four years from the end of the concerned financial year were:

(*i*)	failure on the part of the assessee to file a return under section 139 or;
(*ii*)	failure to file a return in response to a notice issued under sub-section (1) of section 142 or section 148, or;
(*iii*)	failure to disclose fully and truly all material facts necessary for carrying out assessment.

11. Admittedly, even according to Mr Sanjay Kumar, who appears on behalf of the appellant/revenue, the first two circumstances set out hereinabove, did not arise in this case.

12. The argument advanced by Mr Kumar is, that the instant case falls within the third circumstance referred to hereinabove *i.e.*, failure on the part of the assessee to disclose, fully or truly, all material facts.

13. Mr Kumar has submitted, that the information received by the appellant/revenue through the respondent's/assessee's broker had not been disclosed, and therefore, the reopening of concluded assessment under section 143(3) of the Act was viable in law.

14. Mr S. Krishnan, who appears on behalf of the respondent/assessee, on the other hand, has submitted that the trigger for reassessment in the given circumstances was

available only if the respondent-assessee had not disclosed, fully and truly, all material facts.

15. Mr Krishnan has drawn our attention to that part of the record, in particular, the order of the Tribunal, wherein the Tribunal has noted, that during the course of initial assessment/scrutiny, information was sought with regard to the respondent's/assessee's share broker, which was furnished by the respondent/assessee along with communication dated 7-12-2011.

16. It is Mr Krishnan's contention, that the Client Ledger was placed before the assessing officer, whereupon the assessment order under section 143(3) of the Act was framed on 24-12-2011.

16.1 Furthermore, Mr Krishnan says, something we have noticed hereinabove, that neither in the extract available on record which refers to reasons to believe, nor in the order dated 13-12-2016 passed under section 143(3) read with section 147 of the Act, is there a reference to the fact that assessment under section 143(3) had been framed previously on 24-12-2011.

17. According to Mr Krishnan, there was complete non-application of mind on the part of the assessing officer at the stage at which reassessment proceedings were triggered.

18. Having heard the learned counsel for the parties, we are of the view that the appellant/revenue's appeal will necessarily fail, because of the following reasons:

(*i*)		**The trigger, in the facts and circumstances of this case, to reopen the concluded assessment framed under section 143(3) of the Act, beyond four years commencing from the end of the relevant AY *i.e.*, AY 2009-2010 could only have been founded on the failure on the part of the respondent/assessee to fully and truly disclose all material facts. Concededly, during the framing of the earlier assessment order, the assessing officer had sought information with regard to the respondent/assessee's share broker, which was furnished by the respondent-assessee via communication dated 7-12-2011.**
(*ii*)		**Neither in the extract of reasons to believe which have been placed before us by the appellant/revenue, nor in the reassessment order dated 13-12-2016 passed under section 143(3) read with section 147 of the Act, there is a reference to the fact that previously section 143(3) assessment order had been framed on 24-12-2011.**
(*iii*)		**Lastly and more importantly, the reopening was triggered, based on a statement made by one Mr Sanjeeva Kumar Sinha, Director of AATIPL. Concededly, no opportunity was given to the respondent/assessee to cross-examine the said person.**

19. In our view, given the aforesaid admitted facts, the jurisdictional ingredients for reopening assessment were not available with the concerned assessing officer. The conclusion reached by us is fortified by the view taken in the following judgments:

(*i*)		*CIT* v. *Kelvinator of India Ltd.* MANU/SC/0047/2010/[2010] 187 Taxman 312/320 ITR 561 (SC).
(*ii*)		*CIT* v. *Suren International (P.) Ltd.* [2013] 35 taxmann.com 398/[2014] 225 Taxman 88 (Mag.)/[2013] 357 ITR 24 (Delhi)
(*iii*)		*Wel Intertrade (P.) Ltd.* v. *ITO* [2009] 178 Taxman 27/308 ITR 22 (Delhi).

20. Thus, for the foregoing reasons, we are not inclined to interfere with the impugned judgment passed by the Tribunal. According to us, no substantial question of law arises, in the present appeal, for our consideration.

21. The appeal is, accordingly, dismissed."

[Emphasis supplied]

(b) Harikishan Sunderlal Virmani Vs. DCIT (2017) 88 taxmann.com 548 (Gujrat):

We re-produce below the relevant paras of this order to show the facts of case:

"5. Heard the learned advocates appearing on behalf of the respective parties at length.

5.1 At the outset, it is required to be noted that the impugned notice under section 148 of the Act to reopen the assessment in exercise of the power under section 147 of the Act, has been issued beyond the period of four years. Therefore, considering the proviso to section 147 of the act, unless and until it is found that there was a failure on the part of the assessee in not disclosing truly and fully relevant material for assessment, reopening beyond four years is not permissible. It also cannot be disputed that even to reopen the proceedings, there must be satisfaction of the A.O. and the A.O. himself, on the basis of the material before him is required to form an opinion that the income has escaped assessment due to failure on the part of the assessee in not disclosing truly and fully material necessary for the assessment.

5.2 The reasons recorded to reopen the assessment are as under :—

"2. Reasons for reopening of the assessment - A.Y. 2009 reg.

Assessee had e-filed his return of income for the Asstt. Year 2009-2010 on 30.09.2010 declaring therein total income of Rs. 2,09,39,600/-. Subsequently, the case was selected in CASS within the meaning of section 143(3) of the act. Assessment proceedings was completed u/s. 143(3) of the Act on 30/11/2010 determining the assessed income at Rs. 2,09,60,910/-.

2. Thereafter, information has been received from the Principal Director of Income Tax (Investigation), Ahmedabad vide confidential letter No. PDIT (Inv)/AHD/CCM/Dissemination/15-16 dated 08.03.2016.

On perusal of the data supplied by the office of the Pr. Director of Income Tax (Investigation), Ahmedabad it is noticed that assessee carried out share trading through the broker, Guiness securities Limited. And as per the guidelines of the SEBI the client code of the assessee with the aforesaid broker was WW/2647. In order to verify the genuineness of the modification of client code in the case of the assessee, by applying Lavenshtein Distance Analysis or digit edit analysis utility, in those cases where the assessee is original client and transactions were carried out from assessee's client code then subsequently client code was modified to other client the details of such case are as under :-

OC	*OCC*	*MC*	*MCC*	Distance *as per Lavenshtein Distance Analysis.*	*Net reduction in income due to CCM*
HarikishanSunderlalVirmani	WW/2647	Binay R. Chaturvedi	WW/2108	3	Rs. 1,19,848/-

In order to verify the genuineness of the error, the Lavenshtein Distance analysis or digit edit analysis utility is also provided by the investigation Wing. This utility gives a clear indication as to whether the code is wrongly typed or is completely replaced. If the number of digits changed from original code to modified code is 1, then it can be reasonably argued that the OCC (Original Client Code) may have been typed wrongly by mistake. Similarly, if the number of digits changed is more say 4 or 5,it cannot be genuine mistake but a deliberate change. To this extent, Levenshtein Distance Analysis or digit edit analysis act as a clear indicator for genuineness in client code modification. In short, the longer the distance (i.e. number of digits changed), the lesser the chance of genuineness.

3. Hence, the editing of client code above it is termed as deliberate change and establishes the non-genuineness and contrived nature of the code change.

4. In view of the above facts, I have reason to believe that the income to the extent of Rs. 1,19,848/- has escaped assessment, which required to brought under tax. Therefore, this case is a fit case for initiating the proceeding u/s. 147 of the Act."

5.3 Thus from the reasons recorded, the reopening of the assessment is on the information/data supplied by the office of the Principal Director of Income Tax (Investigation), Ahmedabad and the information received from the Principal Director of Income Tax (Investigation), Ahmedabad vide his confidential letter dated 8/3/2016. From the information received, it appears that though the client code of the assessee with the broker - Guinness Securities Limited was WW/2647, modified client code was found to be WW/2108 and therefore, to verify the genuineness of the modification of the client code, by applying Lavenshtein Distance Analysis or digit edit analysis utility, distance was found to be 3 and therefore, it is believed that the code is not wrongly typed and it is termed as deliberate change and establishing non-genuineness and contrived nature of the code change. From the reasons recorded, it does not appear that verification of the material on record there is independent formation of opinion by the A.O. and that any income has escaped assessment due to any failure on the part of the assessee in not disclosing truly and correct facts/material necessary for assessment. From the reasons recorded, it appears that the impugned reopening proceedings are on the borrowed satisfaction. No independent opinion is formed. On the plain reading of the reasons recorded what emerges is that the A.O. on considering the information received from the Principal Director of Income Tax (Investigation), Ahmedabad, reassessment proceedings have been initiated on the ground that the income escaped assessment. However, there is no assertion regarding the basis on which material on record, he has come to such conclusion. Therefore, the material on the basis of which the A.O. seeks to assume the jurisdiction under section 147 if the Act is the information received from the external source viz. the Principal Director of Income Tax (Investigation), Ahmedabad. **It cannot be disputed that on the basis of the information received from another agency, there cannot be any reassessment proceedings. However, after considering the information/material received from other source, A.O. is required to consider the material on record in case of the assessee and thereafter is required to form an independent opinion on the basis of the material on record that the income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment for the verification.**

5.4 At this stage it is required to be noted that even in the reasons recorded, there is no allegation that there was any failure on the part of the assessee in not disclosing truly and fully material facts necessary for assessment. Under the circumstances, the assumption of the jurisdiction to reopen the assessment beyond the period of four years in exercise of powers under section 147 of the Act is bad in law and contrary to the provisions of section 147 of the Act. Under the circumstances, on the aforesaid ground alone, the impugned reassessment proceedings deserve to be quashed and set aside.

5.5 In view of the above and for the reasons stated above, present petition succeeds."

[Emphasis supplied]

In assessee's case, the categorical facts are such that (i) there is no evidence to show that during original assessment the assessee filed contract-note or ledger a/c of the broker/intermediary to explain the transactions, there was a disclosure of the agencies for doing assessee's business only and no disclosure about transactions, and (ii) the AO has vehemently recorded in reasons that the original assessment of assessee was made u/s 143(3), that an order u/s 143(3) was passed however the facts were not disclosed by assessee and the escapement is due to failure on the part of the assessee to disclose all material facts necessary for assessment of his case. Therefore, the decisions relied by Ld. AR which are on different facts, cannot help assessee.

8.5 That brings us to find that there is no merit in the stand taken by assessee, therefore the same is rejected and accordingly Ground 2 is dismissed.

9. *The second stand taken by assessee in Ground 4 is such that* the allegation made by AO in the reasons that the sale-transaction of Rs. 2,71,85,000/- was not recorded in assessee's books was itself wrong, consequently the reason recorded by AO is not valid.

9.1 To buttress assessee's stand, Ld. AR drew our attention to the copy of reasons supplied by AO to assessee on 14.11.2019 filed at Page 119-122 of Paper-Book; the same is scanned and re-produced below for an immediate reference:

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
DCIT/ACIT 4(1),IND

To,	
JAYANTILAL SANGHVI 8/10 WAREHOUSE ROAD PATEL BRIDGE,- - INDORE 452007,Madhya Pradesh India	

PAN:	Assessment Year:	Dated:	Letter No :
AGTPS5825Q	**2012-13**	**14/11/2019**	**ITBA/AST/F/17/2019-20/1020403895(1)**

Sir/ Madam/ M/s,

Subject: Supply of Reasons for re-opening of case for AY-2012-13

The assessee has filed his return of income for AY:2012-13 declaring total income for Rs.11,09,020/- on 01.10.2012.Further case was selected in scrutiny through CASS and the assessment u/s 143(3) was completed on 25.03.2015 on assessed income for Rs.20,61,370/-.

Now the office of DDIT(Inv.)-6(3), Mumbai has forwarded information vide letter dated 16.03.2019 through email.

As per information available with the department, it is gathered that during the period relevant to the A.Y. 2012-13, the assessee through his broker i.e. Sincere Commodities & Derivatives Market had carried out some transactions in commodities on National Spot Exchange Limited (NSEL). NSEL was an on-line Exchange in Commodities which had provided electronic platform and had started its operation in the year of 2008. On some reports of discrepancies therein,an extensive enquiry was conducted which has yielded that there were serious lapses and breach of established guidelines meant for NSEL, which has resulted into suspension of its operation since 31.07.2013.

Further perusal of records reveals that on 27.03.2012,the assessee Shri Jayantilal Sanghvi, through client code modification (CCM) as code was assigned originally someone else's transaction, has traded in commodities on NSEL and sale of Rs. 2,71,85,000/- not shown in the return of income.

Here it is pertinent to mention that on 27.03.2012, the assessee has started transaction through sale of commodities to the tune of Rs. 2,71,85,000/-. Further perusal of records as well as profit & Loss

Note: If digitally signed, the date of digital signature may be taken as date of document.
,AAYAKAR BHAWAN, OPP. WHITE CHURCH, WHITE CHURCH ROAD, RESIDENCY AREA, INDORE, Madhya Pradesh, 452001
Email: INDORE.DCIT4.1@INCOMETAX.GOV.IN,

* The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

(120)

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A.Y. 2012-13
ITBA/AST/F/17/2019-20/1020403895(1)

account for the year under consideration clearly reveals that such entire transactions/turnover are executed out of books and not disclosed in regular books of accounts. Therefore, taking into facts, as stated in preceding para, it is established that not only introduction of initial transaction amount for Rs.2,71,85,000/- is unaccounted income and this accommodation entry income of Rs. 2,71,85,000/- has escaped from assessment.

Contd: Page-2

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In this case an order u/s 143(3) of the IT Act, was passed however these facts were not disclosed by the assessee. the escapement of income is due to failure on the part of the assessee to disclose all material facts necessary for the assessment in his case.

In view of explanation 2(b) of section 147 of the Income Tax Act,1961, it is clear cut case of suppression of taxable income in return of income by not declaring correct information therein, in return of income for the year under consideration, even sources of transacted amount is not disclsoed. Thus it is discernedthatthe assesseehas filed its return of income but gain received in trading of shares has not been disclosed.

4. Thus, such an amount of transaction of Rs.2,71,85,000/-, in the name of the assessee is unexplained or unaccounted income which was not offered for taxation, andthus the same has escaped from assessment.

5. Therefore, I have reason to believe that the income of the assesseeto the extent of Rs. 2,71,85,000 /-and also any other income chargeable to tax whichhas escaped from assessment for the A.Y. 2012-13 within the meaning of section 147 of the Income Tax Act, 1961.

NOTE: Despite multiple reminders and opportunities ,you have still not submitted reply to the questionnaire given on 07.08.2019. And since, the reasons have been given to you , you are hereby given last chance to submit your reply by 19.11.2019 failing which an ex-parte order u/s 144 of the Income-Tax-Act, 1961 will be done and Rs. 2,17,85,000/- will be treated as unaccounted income and added to your total income .

(21)

AGTPS5825Q- JAYANTILAL SANGHVI
A.Y. 2012-13
ITBA/AST/F/17/2019-20/1020403895(1)

PRACHI AILAWADHI
DCIT/ACIT 4(1),IND

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

INCOME TAX DEPARTMENT

This document is digitally signed.
Signer: PRACHI AILAWADHI
Date: Thursday, November 14, 2019 12:02 PM

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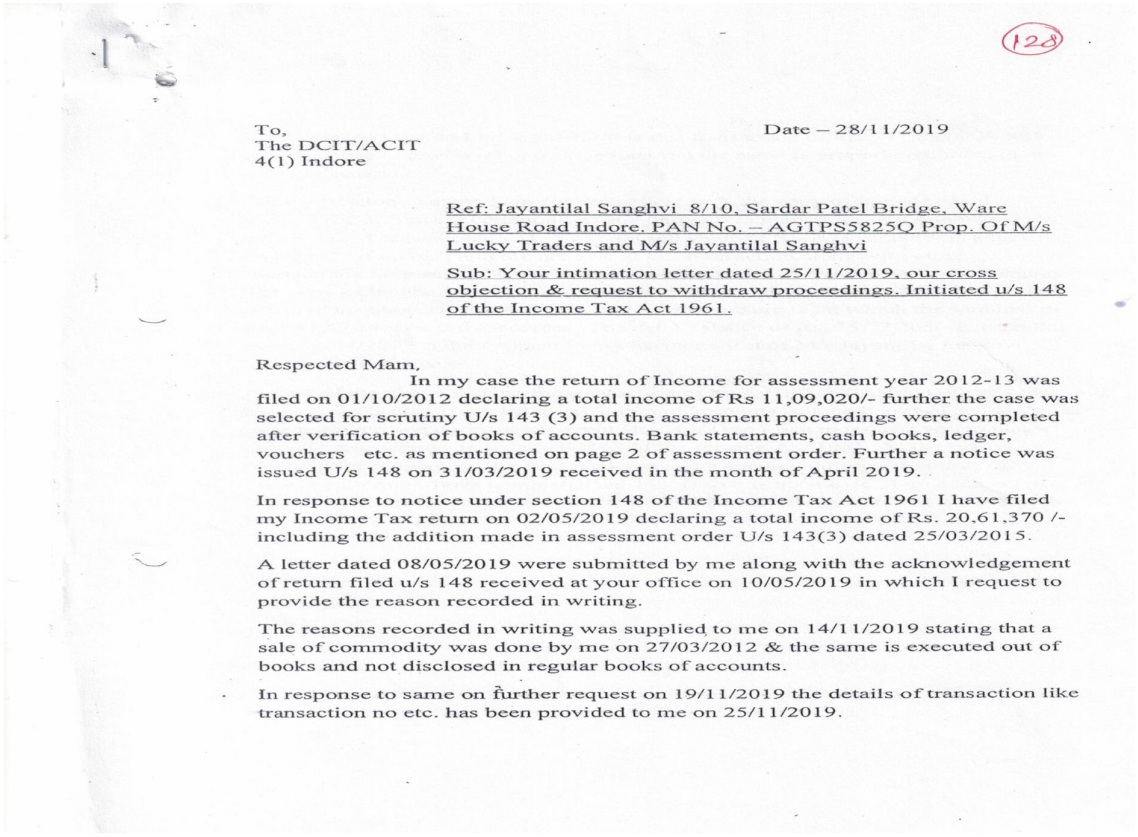
Please find attached the details of the transaction.

Note: As information is submitted to you today and questionnaire u/s 142(1) was sent on 07.08.2019. Since there is lapse of 3 months, you are hereby requested to submit reply in response to questionnaire by 28.11.2019, else Ex-parte Order u/s 144 of IT Act, 1961 will be done.

Sino	Name of the Boker	Date of Transaction	Transaction ID (Trade No.)	Original UCC	Modified UCC	Name of the Original Client	PAN of the Original Client	Name of the Modified Client	PAN of the modified client
46888	SINCERE COMMODITIES & DERIVETIVES MARKET	27/03/2012	3175	SE323	SE468	WEST WELL TIE UP PVT LTD	AAACW5564E	JAYANTILAL	AGTPS5825Q

Contract	Qty Traded	Value of one unit	Total Value of transaction	Buy or Sell	AO	CITY	EMAIL
GOLDPTN4	10	27185	27185000	Sell	ITO 4(1), IND	INDORE	indore.ito4.1@incometax.gov.in

Referring to above, Ld. AR submitted that the AO has recorded that a sale-transaction of Rs. 2,71,85,000/- done on 27.03.2012 was not recorded in assessee's books and the same represented assessee's unaccounted income which was not offered for taxation. But the correct position is such that the impugned transaction stood recorded in assessee's books and the same was already included in assessee's audited P&L A/c as is evident from various documents filed in Paper-Book. The assessee vehemently explained this factual state to the AO in his reply-letter 28.11.2019 filed at Page 128-129 of Paper-Book; the same is also scanned and re-produced below for an immediate reference:



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To,
The DCIT/ACIT
4(1) Indore

Date – 28/11/2019

Ref: Jayantilal Sanghvi 8/10, Sardar Patel Bridge, Ware House Road Indore. PAN No. – AGTPS5825Q Prop. Of M/s Lucky Traders and M/s Jayantilal Sanghvi

Sub: Your intimation letter dated 25/11/2019, our cross objection & request to withdraw proceedings. Initiated u/s 148 of the Income Tax Act 1961.

Respected Mam,

In my case the return of Income for assessment year 2012-13 was filed on 01/10/2012 declaring a total income of Rs 11,09,020/- further the case was selected for scrutiny U/s 143 (3) and the assessment proceedings were completed after verification of books of accounts. Bank statements, cash books, ledger, vouchers etc. as mentioned on page 2 of assessment order. Further a notice was issued U/s 148 on 31/03/2019 received in the month of April 2019.

In response to notice under section 148 of the Income Tax Act 1961 I have filed my Income Tax return on 02/05/2019 declaring a total income of Rs. 20,61,370 /- including the addition made in assessment order U/s 143(3) dated 25/03/2015.

A letter dated 08/05/2019 were submitted by me along with the acknowledgement of return filed u/s 148 received at your office on 10/05/2019 in which I request to provide the reason recorded in writing.

The reasons recorded in writing was supplied to me on 14/11/2019 stating that a sale of commodity was done by me on 27/03/2012 & the same is executed out of books and not disclosed in regular books of accounts.

In response to same on further request on 19/11/2019 the details of transaction like transaction no etc. has been provided to me on 25/11/2019.

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In this regard I would like to submit that this transaction of Rs 2,71,85,000/- was done by me along with other transactions and the same is properly recorded in my books of accounts.

For verification of same I am enclosing here with the copy of invoice dated 27/03/2012 of Sincere commodities and derivatives market ltd. As(Annexure I) In which transaction no 3175 of total sell value of RS 2,71,85,000/- is appearing on page 2 of invoice and the net loss of this transaction along with other transactions for a sum of Rs 1,93,49,146/- is recorded in regular books of accounts. The copy of ledger A/c of Sincere commodities and derivatives market Ltd in our books of accounts is enclosed here with (As Annexure II)in which the said loss of Rs 1,93,49,146/- is duly recorded. The debit balance of Rs. 35,77,805/- outstanding as on 31/03/2012 is duly appear in my balance sheet of M/s Jayantilal Sanghvi already in your record.

In light of the above facts as the transaction of Rs 2,71,85,000 along with all other transactions is duly recorded in my books of accounts and the books of accounts have been verified during assessment U/s 143(3) so I like to request you to please drop the proceedings initiated U/s 148 of the Income Act 1961. As the reason recorded for reopening of assessment were duly verified during the course of assessment proceedings completed u/s 143(3) so it is not a case of escapement of Income , Therefore we request you to droop the proceedings initiated u/s 148 of the Income Tax Act 1961.

Thanking You

Yours Faithfully

Jayantilal Sanghvi

Therefore, Ld. AR contended, the very basis of re-opening assessee's case is based on a wrong foundation.

9.2 Replying to this, Ld. DR submitted that the AO has clearly noted in the reasons that a 'sale transaction' actually done by some other person was assigned to the assessee by CCM. The AO has further noted that from perusal of P&L A/c, it was revealed that entire transaction was out of books. It is also a fact that the P&L A/c does not show the impugned transaction separately although there might be consolidated figures. There is no further document in AO's record from which it can be discerned that the transaction was duly recorded in books of assessee. Therefore, the AO was right in inferring that the impugned transaction had given rise to unaccounted income which had escaped assessment. Hence, at the time of formation of belief to re-open assessee's case u/s 147 and for that matter recording reasons, there was no mistake, perversity or infirmity whatsoever.

9.3 After a careful consideration, we find sufficient merit in the submissions of Ld. DR for revenue. On perusal of reasons recorded by AO, we find that the AO got information that a 'sale transaction' of Rs. 2,71,85,000/- relating to other person was assigned to the assessee through CCM. At the end of reasons, re-produced in foregoing para, there is also a sheet giving the details of impugned 'sale transaction' of Rs. 2,71,85,000/-. The AO has also noted about his perusal of assessee's P&L A/c. Since it was a 'sale transaction', the AO was right in forming belief that there was 'unaccounted income' to the assessee which had escaped assessment. Thus,

there is no mistake at the stage of formation of belief or recording of reasons by AO. Since we are unable to find any fallacy in the action of AO, we hardly find any merit in the stand taken by assessee, therefore the Ground 4 is also dismissed.

10. *The third stand taken by assessee in Ground 5 is such that* the CIT(A) has erred in confirming the non-observance to consider rejoinder/objection to the reasons provided to the assessee for re-opening of the assessment.

10.1 On perusal of order of CIT(A), we find that the assessee raised following ground before him:

> "4. That the Ld. Assessing Officer failed to consider rejoinder to the reasons provided to the assessee for re-opening of the assessment."

The CIT(A) dismissed assessee's ground by passing following order:

> "Gr. No. 4 alleges that the rejoinder to the reasons provided to the assessee was not considered. But, it is seen from the assessment-order that the AO passed a speaking order after considering the objections of the appellant. Therefore, this ground is dismissed."

10.2 During hearing before us, Ld. AR for assessee has not made any submission qua this ground. Therefore, this ground is unpressed/ unpleaded. Consequently, we do not find any perversity in the order passed by CIT(A) and the assessee's ground 5 is dismissed.

11. In view of above discussions, we find that all grounds raised by assessee to impugn the legality of proceeding done by AO are devoid of any merit. Therefore, the claim by assessee in so far as legality of proceeding is concerned, is rejected.

Ground N'o. 1 and 3:

12. In these grounds, the assessee challenges the merit of the addition of Rs. 1,93,49,146/- made by AO on account of disallowance of "artificial/bogus loss".

13. Ld. AR makes following submissions apropos to these grounds:

(i) That the AO issued 'final show-cause notice' dated 28.11.2019 to assessee (copy separately filed before us). In this notice, the AO show-caused assessee to make addition of Rs. 2,71,85,000/- as unexplained income u/s 68 but while passing assessment-order on 30.11.2019, just after 2 days, the AO changed his stand and disallowed loss of Rs. 1,93,49,416/- suffered by assessee terming the same as 'artificial/bogus loss'. Therefore, the disallowance made by AO is patently wrong.

(ii) That, the assessee has undertaken transactions through approved intermediary of commodity-exchange. The CCM was done at the level of intermediary and the assessee has no role, control or access. Therefore, the department is grossly wrong in blaming assessee for CCM. The assessee is very much against the allegation levelled by department.

(iii) Without prejudice, the department's/AO's case of CCM was for a single transaction of Rs. 2,71,85,000/- but while passing assessment-

order, the AO has disallowed a loss of Rs. 1,93,49,176/- suffered by assessee from all transactions done on the day of 27.03.2012. Referring to the contract-note for the whole day of 27.03.2012 filed at Page 131-133 of Paper-Book, Ld. AR submitted that the assessee suffered loss of Rs. 16,82,000/- [Rs. 2,71,85,000 (-) 2,88,67,000/-] only from the alleged sale-transaction of Rs. 2,71,85,000/-, therefore the AO could at best make a disallowance of Rs. 16,82,000/- only.

14. Per contra, Ld. DR made following submissions:

(i) The assessee did not make compliance to various notices issued by AO u/s 142(1) and lastly filed only one reply dated 28.11.2019 which again was on the very same day on which the AO issued show-cause notice dated 28.11.2019.

(ii) That the assessee has nowhere denied the factum of CCM, therefore it was a clear-cut case of artificial/bogus loss obtained by assessee with the help of intermediary. He submitted that it is a fact that some intermediaries have benefited their clients by mis-using the technique of CCM.

(iii) So far as the disallowance of loss of entire day of 27.03.2012 to the tune of Rs. 1,93,49,176/- made by AO is concerned, Ld. DR submitted that the AO has categorically mentioned in para 10 of assessment-order that he made such disallowance on perusal of the submission and information by assessee:

> "10. In the present case of assessee, **on perusal of the submission and information,** it is seen that on 27/03/2012, the assessee has made a total loss of Rs. 1,93,49,146/- by the practice of Client Code Modification (CCM) using modified UCC as SE468 (whereas the original UCC for original transaction was SE323 in the name of West Well Tie Up Pvt. Ltd.) through his broker Sincere Commodities & Derivatives Market, all over the day."

Ld. DR dutifully relied upon the noting of AO but, however, agreed that the assessee's point is not meritless.

15. We have considered rival submissions of both sides and perused the material held on record including the orders of lower-authorities. At first, we find from assessment-order that the AO issued notices u/s 143(2)/142(1) dated 06.08.2019, 07.08.2019, 30.09.2019 which remained uncompiled with by assessee. Ultimately, the AO issued notice dated 25.11.2019 giving time upto 28.11.2019 with a strong indication that in case of non-compliance, the assessment shall be made ex-parte u/s 144. On the appointed day of 28.11.2019, the AO again issued a "final show-cause notice" mentioning in para 1 thereof *"Further an intimation letter u/s 142(1) was issued electronically on 25.11.2019, whereby you have given time to submit your reply till 28.11.2019, else ex-parte order u/s 144 of the IT Act, 1961 will be done. Again, no compliance is made in this regard till date"*. It is also a fact that assessee filed his reply on 28.11.2019 in response to the notice dated 25.11.2019 issued by AO, copy of assessee's reply is already re-produced in earlier part of this order. Thus, the issuance of 'final show-cause notice' by AO as well as filing of reply by assessee, both events occurred on 28.11.2019. Therefore, what transpires is such that the AO issued 'final show-cause notice' without being aware of assessee's reply or

prior to filing of assessee's reply on that particular day. In this very notice, the AO show-caused assessee for making addition of Rs. 2,71,85,000/- as unexplained income u/s 68 on the basis of information available with him. However, subsequently while passing assessment-order on 30.11.2019, the AO perused submission made by assessee in letter dated 28.11.2019 and on that basis made disallowance of entire loss of Rs. 1,93,49,176/- suffered by assessee on the whole day of 27.03.2012 as is evident from Para 10 of assessment-order. From these facts, we find that the assessee is himself responsible for not making compliances to the repeated notices issues by AO. The assessee filed only one reply dated 28.11.2019 countering AO's objection that the impugned transaction of sale of Rs. 2,71,85,000/- was already recorded in books and filed documents to that effect. From assessee's documents/submission only, the AO further came to know about full picture of transaction that it has resulted in giving loss to assessee. This led the AO to disallow the loss. But then there is some fallacy on the part of AO also. Firstly, the AO has not show-caused the assessee again after being aware of full picture of transaction and proceeded to make disallowance without confronting. Secondly, the AO disallowed entire loss of Rs. 1,93,49,176/- suffered by assessee on the whole day of 28.11.2019 which was a loss suffered from several transactions whereas the department's allegation of CCM was *qua* one transaction of Rs. 2,71,85,000/-. We also accept Ld. DR's submission that the assessee has nowhere denied the factum of CCM. Even the assessee has not made any submission qua the

CCM. Therefore, there are several fallacies or deficiencies at the assessment stage attributable either to the assessee or AO. Hence, in our considered view, the case of assessee needs a proper examination on merit at the level of AO after giving opportunity to assessee. We therefore remit it back to the file of AO for adjudication afresh on merit after giving opportunity to assessee to make all submissions. The assessee is also directed to make compliances on the hearings fixed by AO to enable the AO to take a well-informed conclusion. These grounds are thus allowed for statistical purposes.

16. Resultantly, this appeal is partly allowed for statistical purpose.

Order pronounced in open court on 27.06.2024

Sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 27.06.2024
CPU/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore