

IN THE INCOME TAX APPELLATE TRIBUNAL  
Mumbai "E" Bench, Mumbai.

Before Ms. Kavitha Rajagopal (JM) & Shri Omkareshwar Chidara (AM)

I.T.A. No. 4383/Mum/2023 (A.Y. 2010-11)

Hemant Chheda B-30, Konark Indraprastha CHS Ltd. Sarvodaya Nagar Jain Mandir Road Mulund West Mumbai-400 080.  PAN : AAAPC4858Q (Appellant)	Vs.	ITO-29(1)(4) C-10, Room No. 103, Bandra Kurla Complex Bandra East Mumbai-400 051.  (Respondent)
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Assessee by	Shri Nishit Gandhi
Department by	Shri P.D. Chougule
Date of Hearing	10.06.2024
Date of Pronouncement	26.07.2024

ORDER

Per Omkareshwar Chidara (AM) :-

In the above captioned assessee's appeal, the two issues to be decided are :-

- a) Whether the reopening of assessment u/s. 143(3) r.w.s. 147 is valid ?
- b) Whether the CIT(A) erred in upholding the disallowance of Futures and Options (F&O, for short) Loss ?

2. From the assessment order dated 4.7.2016, it can be seen that the assessment is reopened with the following reasons :-

".....the assessee has filed his return of Income for A, Y. 2010-11 on 29.09.2010 declaring income of Rs.28,80,528/-. Information was received by this office from DIT (I&CI), Mumbai that fictitious profits and losses, were created by some brokers by misusing the Client Code Modification facility (CCM for short), in F&O segment on National Stock Exchange. The brokers were indulging in transferring the fictitious losses to different clients to reduce their tax liability and also fictitious profit to other clients. Some of the clients also took fictitious profit to cover up their undisclosed

income to set off these profits against huge losses. From the details on record, it is found that assessee is also one of the beneficiary of profit/loss of Rs.(-)50,52,690/- by misusing CCM facility during the year 2009-10.

Further on the spot verification of few cases of brokers by DDIT (I&C), Unit-1(1), Mumbai u/s 131(1A) this fact was revealed and they have confirmed having misused the facility of client code modification in order to create fictitious losses/profits. They admitted having received commission at the rate varying from 0.5 Upto 2% On the amount of losses/profits for transferring such losses/profits to their client. Even these brokers had revised their computation of income and paid taxes on such commission income.

From the above, it is evident that the brokers had misused the CCM, facility only for commission and assessee is one of the beneficiaries of such bogus profit/loss to the tune of Rs.(-)50,52,690/-. Thus, the profit/loss obtained by the assessee to adjust eh taxable income and to cover up her unaccounted income. From the modus operandi it is further evident that the assessee has maneuvered unaccounted funds/cash for getting the accommodation entry of profit/loss to reduce the taxable income which remained unascertained considering the meager income-offered by the assessee. Therefore, I have the reason to believe that income chargeable to tax amounting to Rs.(-)50,52,690/- for the A.Y.2010-11 has escaped' assessment within the meaning of Section 147 of the I.T. Act read with explanation thereto. In view of this, proceedings u/s 147 of the IT Act are initiated in this case to bring to tax the income that has escaped assessment. Notice u/s 148-of the I.T.Act, 1961 is issued....." ."

3. Subsequently, the assessment was reopened and notices u/s. 143(2) and 142(1) were issued to call required information. In this case, the assessee is in the business of trading in shares and financial instruments. The learned Assessing Officer (Ld. AO for short) called for the information from NSE and BSE about the client code modifications done by impugned assessee and handed over the same to assessee to calculate the profit/loss separately for each rectified transaction. The learned Authorised Representative of assessee (for short, learned AR) submitted the details to Ld. AO, from where it was observed that the assessee entered into total 439 transactions wherein client codes were modified. Then, the Ld. AO issued a notice u/s. 142(1) of the Act, calling for information such as relation to the broker, total transactions done during the year, details of margin money, reasons for client code modification transactions. In response to the same, the assessee has expressed his inability to furnish the details as the same

are within the knowledge of brokers. So, Ld. AO, issued letters to 3 brokers and they provided partial details.

4. The, the Ld. AO issued a show-cause notice to assessee as to why the alleged loss amounting to Rs. 50,52,690/- should not be disallowed as fictitious loss.

5. In reply to this query, the assessee has filed a letter dated 25.2.2016 and summary of the letter is as follows :-

- a) The details of fictitious loss of Rs. 50,50,690/- were not provided.
- b) The assessee has not claimed loss as mentioned in the show-cause notice.
- c) The allegation of Ld. AO that the brokers are charging 0.5% to 2% commission for misuse of client code modification facility, is vague, general and there is no basis.
- d) The brokers have furnished all details which are available with them.
- e) As the Ld. AO has not substantiated the claim of loss of assessee, proposal for disallowance is not justified.

6. The Ld. AO, then, has mentioned that the assessee is a Director in a Magnum Equity Broking Co. and as Director he rectified transactions in client codes to the extent of Rs. 193.39 crores. It was also mentioned that 47,774 transactions were rectified by assessee as Director of Company. Thus, the Ld. AO concluded that, like all brokers, this assessee also was involved in non-genuine rectifications accruing to the needs of clients. Then, the Ld. AO has considered that the loss incurred by assessee in F&O trading amounting to Rs. 50,52,690/- through client code modification transaction is not genuine and was disallowed.

7. Aggrieved by the addition of Rs. 50,52,690/- as “claim of disallowance of loss”, the assessee filed an appeal before the Ld. CIT(A), challenging the reopening of assessment order u/s. 143(3) r.w.s. 147. The next ground of the appeal of assessee relates to making the addition as above.

8. The Ld. CIT(A) has dismissed the first ground of appeal, which relates to reopening the assessment after quoting several decisions of various High Courts and Supreme Court in his detailed appeal order, vide pages 26 to 38 and held that the Ld. AO has got sufficient material in his possession to form "Reason to Believe" and held that the reopening of assessment as valid.

9. The Ld. CIT(A) has dealt the second ground of appeal, on merits, which deals with "addition relating claim of disallowance of loss" amounting to Rs. 50,52,690/-, the Ld. CIT(A) reproduced the relevant paras of assessment order and also mentioned in detail, the objections raised by Ld.AR of the assessee.

10. It was mentioned by the Ld. CIT(A) at page 44 that as the assessee did not ask for cross-examination of brokers at the time of assessment, the same was not given to him. The Ld. CIT(A) called for the report of Ld. AO who has stated as follows in his report:-

"Loss disallowed on account of being fictitious on client code modification Rs. 50,52,690/-.

During the appellate proceeding, the assessee has stated that AO has not provided the calculation of Rs. 50,52,690/- to the assessee. During the assessment, the assessee was provided the details of client code modification data available with the AO and as discussed in para 4 of the assessment order, the assessee was also provided the data received from NSE in response to notice u/s 133(6) of the Act. As per the submission of the assessee during the course of assessment, the assessee entered into total 439 transactions wherein client code were modified and assessee incurred huge loss in transactions. During the course of assessment, 133(6) were issued to the broker and on perusal of reply of the broker, it is established that these broker were indulge in frequent client code modification. The assessee has aware of the transactions entered into by him with the broker who is indulge in client code modification for providing fictitious loss the clients, the assessee is one of them. Hence, the addition of Rs. 50,52,690/- may be sustained. In view of the above, the issue may be decided as deemed fit."

11. In view of the above, the Ld. CIT(A) upheld the addition made by Ld. AO and dismissed the appeal filed by the assessee.

12. Aggrieved by the orders of Ld. AO and the Ld. CIT(A), the assessee filed an appeal before the Hon'ble ITAT with the following grounds :-

- a) The order passed by Ld. AO, u/s. 143(3) r.w.s. 147 is void ab-initio.
- b) The client code modification, if any, were done by the brokers, and not assessee.
- c) There is no involvement of assessee nor there is any malafide intention on the part of assessee.
- d) Cross-examination opportunity of broker was not provided to the assessee.
- e) Ld. AO has not provided the details of loss arrived at Rs. 50,52,690/-.

13. During the course of hearing before Hon'ble ITAT, Ld. AR of the assessee has filed paper book, which contains copy of computation of income, trading, profit and loss account and balance sheet, copy of original assessment order u/s. 143(3), copy of reasons to believe in case of appellant, copy of "reasons to believe" in the case of Mrs. Bharathi Chheda A.Y. 2010-11, copy of assessment order in the case of Mrs. Bharathi Chheda A.Y.2010-11 and also copy of the Tribunal order in the case of Smt. Bharathi Chheda A.Y. 2010-11. Ld. AR of the assessee has mentioned that in similar circumstances in the case of Mr. Bharathi Chheda, Hon'ble ITAT, Mumbai vide its order ITA No. 187/Mum/2023 A.Y. 2010-11, where it was held that reopening of the case was bad and hence consequent additions made in her case were also set aside and appeal of the assessee was allowed. Since the facts and circumstances in her case and in the impugned assessee's case are same, it was pleaded that the opening of assessment should be held invalid and additions made therein should be deleted consequently.

14. Per contra, Ld. DR has supported the orders of both lower authorities, Ld. AO and the Ld. CIT(A) and pleaded that the order of Ld. AO be confirmed in toto, i.e., on the both the issues of reopening of the assessment as disallowance of loss.

**DECISION OF THE BENCH**

15. Paper book filed by Ld. AR of the assessee during the course of hearing was perused, which contains details mentioned in para 13 of this Order. Facts and circumstances in the case on which Ld. AR relied are different from the impugned assessee. In this case, from the assessment order, it can be seen that the Ld. AO has mentioned reasons for reopening in very detailed manner and copy of same was also sent to the assessee for his objections. The due process laid down by Hon'ble Supreme Court in the case of M/s. GKN Driveshaft India Ltd. was followed by the Ld. AO. From the perusal of the order of the learned CIT(A), it can be seen that several cases law were quoted and reopening was held to be valid and proper. Hon'ble Supreme Court in the case of CIT Vs. Kelvinator India Ltd. (2010) 187 Taxman 312 has held that at the stage of reopening the assessment, it is not necessary that the material before the Court should conclusively be proved or established income has escaped assessment. Reasons to believe at the stage of reopening is whether income had escaped assessment and the Ld. AO had tangible material before him for the formation of that belief. A "reason to believe" is what is relevant, not an established fact of the escapement of income itself. Where the answer is affirmative, it is not appropriate for this Court to preempt an inquiry whatsoever by the Ld. AO, once a tangible basis has been disclosed for reopening the assessment. Similarly in the case of Ideal Associates Vs. ACIT (2023) 146 taxman.com 225 (Bom), Hon'ble Jurisdictional High Court has observed that "if the AO has such tangible material, power to reopen can be exercised." It is settled law that at the stage when the Ld. AO reopens the assessment, it is not necessary that the material before the Court should be conclusively proved or established that income has escaped. Similarly in the case of ACIT Vs. Rajesh Jhaveri Stock Broker Pvt. Ltd. 161 taxman 316 (SC), Hon'ble Supreme Court has held that at the stage of issue of notice, only question is whether there was relevant material on which reasonable person could have formed requisite belief.

Whether material would conclusively prove escapement is not concerned at that stage. This is so because of formation of belief by the Ld. AO is in the realm of subjective satisfaction.”

15. In view of the above ratio-decidenti laid down by Hon'ble Supreme Court and Hon'ble Jurisdictional High Court, it can be seen that Ld. AO in our assessment has recorded reasons in detail and formed a “reasonable belief” to reopen the assessment. Hence, the assessment is validly reopened.

16. Coming to the facts of the case also, Hon'ble ITAT order relied upon by Ld. AR of the assessee, facts are distinguishable, which can be seen from this Order. During the course of hearing, Ld. AR of the assessee has filed computation of total income to prove that the assessee has not claimed loss as alleged by the Ld. AO and hence addition relating to disallowance of loss is incorrect and improper. A copy of the trading account filed at the time of hearing Ld. AR of the assessee is reproduced below :-

#### TRADING ACCOUNT

DEBIT	AMOUNT (Rs.)	CREDIT	AMOUNT (Rs.)
Opening stock	33,041,148.16	Sale	326,640,376.55
Purchase	282,282,893.72	Profit in commodity trading	7,217,355.69
Loss in F/O	4,915,175.07	Closing stock	14,079,458.22
STT & Other charges	4,336,419.15		
Gross profit	23,361,554.36		
	347,937,190.46		347,937,190.46

18. From the above trading account, it can be seen that the assessee claimed loss in “futures and options” to the extent of Rs. 49,15,175/- and if STT on which amount is added, roughly claim of loss would be approximately Rs. 50 lakhs as mentioned by Ld. AO in the assessment order while reopening the assessment. From this trading account of Mr. Hemant N. Chheda, it can be seen that there is some profit in “commodity trading” reflected on the credit side of the accounts and loss in futures and options

segment to the extent of Rs. 49,15,175. After netting the loss, the figures were arrived. Thus, it can be seen that the assessee claimed loss in F&O segment but figures are slightly different. The Ld. AO has not mentioned all these facts in the assessment order but these papers were filed before this Tribunal for the first time. As the figures are tallying approximately, but these facts are not clearly coming out from the assessment order nor from the order of the learned CIT(A), it is decided to set aside the matter to the file of the Ld. AO for proper verification before completing the assessment. An opportunity to put forth the arguments relating to claim of "Loss in F&O Segment" should also be given to the assessee before finalising the assessment. With the above directions the assessment is set aside to the file of the Ld. AO.

19. Assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 26<sup>th</sup> July, 2024.

Sd/-  
(Kavitha Rajagopal)  
Judicial Member

Sd/-  
(Omkareshwar Chidara)  
Accountant Member

Mumbai : 26.07.2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

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