IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIALMEMBER

ITA No.7482/DEL/2017
(Assessment Year: 2009-10)

ITO, Ward 4, Rohtak.	vs.	M/s. Stratagem Stock Broker Pvt. Ltd., H.No.122/8, Shivaji Colony, Rohtak (Haryana).
		(PAN: AAKCS2610R)
(APPELLANT)		(RESPONDENT)

ASSESSEE BY :	Shri Gautam Jain, Advocate Shri Lalit Mohan, CA Shri Parth Singhal, Advocate
REVENUE BY :	Shri Vivek K. Upadhyay, Sr. DR.

Date of Hearing :	29.08.2024
Date of Order :	18.10.2024

O R D E R

PER S. RIFAUR RAHMAN, AM :

1. This appeal is filed by the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals), Rohtak [hereinafter referred to as 'ld. CIT (A)] dated 10.10.2017 for the Assessment Year 2009-10.

2. Brief facts of the case are, assessee filed its original return of income on 18.08.2009 declaring an income of Rs.1,17,770/-. The return was processed

u/s 143(3) of the Income-tax Act, 1961 (for short 'the Act') pm 31.12.2010 at returned income. Subsequently, the Assessing Officer received information from Pr.DIT (Inv.), Ahmedabad through Office of the Joint Commissioner of Income-tax, Rohtak Range, Rohtak vide office letter No.1831 dated 28.03.2016 that assessee is a beneficiary of Client Code Modification (CCM) and booked losses and shifted out profit during the AY 2009-10 thereby creating non-genuine losses amounting to Rs.1,85,45,456/-. By recording the above reasons, Assessing Officer issued 148 notice recording the reasons to believe that income assessed escaped in this assessment year after obtaining approval of Pr.CIT, Rohtak on 31.03.2016. The Assessing Officer observed that assessee has not furnished its return of income in response to notice issued u/s 148 of the Act and proceeded to issue 142(1) notice and served on the assessee. In response, assessee furnished copy of return of income along with computation and audit report. Notice u/s 143 (2) was served upon the ld. AR of the assessee fixing the date of hearing on 15.08.2016. Subsequently, further notices were issued along with questionnaire to the assessee. In response, ld. AR of the assessee attended the proceedings from time to time and various informations/ documents were furnished and placed on record.

3. Assessing Officer, after considering the submissions of the assessee,

discussed various procedures on CCM and discussed the misuse of CCM by various parties and modus operandi in shifting the profit to other clients. He noticed that broker of the assessee has modified certain transactions using CCM to the extent of Rs.1,85,45,456/- during the year and based on the information from Investigation Wing, Rohtak, he came to the conclusion that assessee has misused the CCM and created a fictitious loss / shifted the profit during the year. Accordingly, he proceeded to disallow the same and added to the returned income of the assessee.

4. Aggrieved with the above order, assessee preferred an appeal before the ld. CIT (A), Rohtak. Assessee has filed various grounds of appeal objecting to reopening of the assessment, non-issue of notice u/s 143(2), non-following the procedures laid down by Hon'ble Supreme Court in the case of GKN Drive Shafts India Ltd. vs. ITO 259 ITR 19, non-application of mind on the information received from Investigation Wing and on merits for disallowance of losses. After considering the detailed submissions and grounds of appeal, ld. CIT (A) decided all the grounds of appeal raised by the assessee in its favour. The relevant findings of ld. CIT (A) relating to all the issues raised by the assessee are given below :-

> *"3.2 I have given careful consideration to the contention of the appellant and find that the gamut of full and true disclosure of facts and circumstances leading to escapement of income is very large. In the present case, on earlier occasion the fact that*

in number of transactions there is Client Code Modification (CCM) which is suspicious. The assessing officer was competent to bank up on nondisclosure of this method in the earlier scrutiny assessment and treated as not true and full disclosure of the facts for assessment.

However, it has been consistently held that for invoking larger period of limitation in the cases which have already been scrutinised under section 143(3) of the Act, the assessing officer must mention failure of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. In case such failure on the part of the assessee is not brought out in the reasons recorded for reassessment of the proceedings, the same would be fatal. In the present case the assessing officer has recorded the following reasons:

> *In this case return of income was filed on 18 August 2099 declaring total income at Rs. 117,770/- for the FY 2008 - 09 relevant to assessment year 2009 - 10, The return was processed under section 143 (one) on 31 December 2010 at the returned income.*
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> *However, this office is in. possession of information from the 0/0 The Pro Director of income tax (investigation), Ahmadabad through the office of the joint Commissioner of income tax Rohtak range. Rohta1c wide his office letter number 1831 dated 28 March 2016 that STATGEM STOCKS & COMODITIES TRADERS PVT. LTD. SHIVAJI COLONY, Rohtak is a beneficiary client who contrived losses and shifted out profits during the financial year 2008 - 09 relevant to assessment year 2009 - 10 through client code modification facilities thereby creating non-genuine losses amounting to Rs.1,85,46,456/-*
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> *After going through the above information and records available in this office, I have therefore reasons to believe that an income of Rs. 1,85,46,456/ -of the assessment year 2009-10 has escaped assessment and also any other income chargeable to tax which has*

> *escaped assessment and which comes to the notice of the Assessing Officer subsequently in the course of proceedings under this section.*

A plain reading of the reasons above clearly demonstrates that the assessing officer has not attributed failure to the assessee In respect of true and full disclosure of the material facts relevant for the assessment in the course of earlier assessment.

Hon'ble Jurisdictional High Court in the case of Duli Chand Singh 269I'fR 192 (P&H) and Mahavir Spinning Mill 270 ITR 290 (P&H) has vociferously held that in the cases of reassessment beyond a period of four year where the earlier assessment has been framed u/s 143(3) of the Act, the assessing officer must mention details of failure on the part of the assessee to disclose full and true facts which has led to escapement of income. In consideration of the discussion above, the ground of appeal is allowed.

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4.2 I have given careful consideration to the contention of the appellant and find that the legal preposition has been laid out in number of cases as in CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 248 CTR 33 (Delhi)(High Court) it was held that Notice issued after the expiry of four years from the end of the relevant assessment year by the Assessing Officer merely acting mechanically on the information supplied by the Investigation wing about the accommodation entries provided by the assessee to certain entities without applying his own mind was not justified. (A.Y. 2004-05, 2006-07) CIT v. Multiplex Trading & Industrial Co. Ltd. (2015) 128 DTR 217 / 63 taxmann.com 170 (Delhi)(HC) and in the case of ACIT v. Dhariya Construction Co (2010) 328 ITR 515 (SC) it was held that the opinion of DVO per se is not an information for the purpose of reopening assessment under section 147 of the Act. Similarly in the case of CIT v. Indo Arab Air Services (2016) 130 DTR 78/ 283 CTR 92 (Delhi)(HC) it was held that mere information that huge cash deposits were made in the bank accounts could not give the AO

prima facie belief that income has escaped assessment. The AO is required to form prima facie opinion based on tangible material which provides the nexus or the link having reason to believe that income has escaped assessment. The AO was also required to examine whether the cash deposits were disclosed in the return of income' to form an opinion that income has escaped assessment. In Aventis Pharma Ltd. v. ACIT (2010) 323 ITR 570 (Born.) it was held that the power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. Hon'ble ITAT Delhi, in Banke Bihar Properties Pvt. Ltd. v. ITO (Delhi)(Trib); observed that the AO has mechanically issued notice u/s. 148 of the Act, on the basis of information allegedly received by him from the Directorate of Income Tax (Investigation), New Delhi. AO has not applied his mind so as to come to an independent conclusion that he has reason to believe that income has escaped during the year.

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5.2 I have given careful consideration to the contention of the appellant and find that the appellant has failed to substantiate its contention because in the Assessment order it is mentioned that notice was issued on Sh. Dharamveer Sachdeva fixing the case for 15/08/2016. This ground of appeal is dismissed.

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6.2 I have given careful consideration to the contention of the appellant and it may be noted in GKN Driveshaft (India) Limited v. ITO (supra), Hon'ble Supreme. Court highlighted the procedure that ought to be followed when the assessment is proposed to be reopened under Section 148 of the Act. It explained that "the proper course of action for the notice to file return and if he so desires, to seek, reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons" the assessee is entitled

to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by, passing a speaking order. The above decision in GKN Driveshaft (India) Limited v. ITO (supra) was dated 25th November 2002. After this date the law is presumed to have been within the knowledge of all and it is incumbent upon the AO to consider the Assessee's objections and pass a reasoned order thereon. No reasoned order on the objections has been passed. The ground is allowed.

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7.2 I have given careful consideration to the contention of the appellant and find that the present assessment is based on information received from investigation wing Ahmedabad stating that the applicant has received accommodation of losses by adopting Client Code Modification (CCM) and a printout of the information received is also extracted in paragraph 5 of the assessment order. A perusal of this information shows that it is r a chart making mention of certain figures without giving details of original client (OC) and original client code (OCC) which has been modified with the name of the appellant (now referred as MC) and its code (now referred as MC). There are no detail of scripts and entry wise loss generated by adopting the aforesaid method. The assessing officer simply taken out the report and pasted in the assessment order without bringing any material on record. The entry wise information was never confronted to the appellant and there is no details of working given by the assessing officer which could show that accommodation losses to the extent of Rs. 1,85,45,456/ - have been generated by adopting the aforesaid method.

Further, from the perusal of the above-mentioned information chart from the investigation Wing no way reflects name of the original client's which have been substituted resulting in loss: It is pertinent to mention here that in the balance sheet filed with the return of income the applicant has clearly mentioned details of profits as well as a losses generated from each activity of trading in each segment. The books of account but available with the assessing officer where in each entry of loss is duly reflected and the assessing officer

did not point out which entry / entries of the books of account is/ are suspicious.

Hon'ble Gujrat High Court in the case of Harikrishan Sunder lal vermani C/SCA/16204/2016 vide order dated 20.12.2016 deleted the addition made which was based on Client Code Modification (CCM). In this judgment Hon'ble High Court has mentioned the following details about this methodology:

> *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 assessees 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 Lavenshtein Distance Analysis*	
Harikishan Sunderlal Virmani	*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.*

It is evident from the discussion above, that there exist tools and utilities namely Lavenshtein Distance Analysis or digit edit analysis utility which can be pressed into service to find out whether or not the modification in client code made by the broker is a genuine mistake or it has been done with design. In the present case, the assessing officer merely relied upon the information but did not carry out any further investigations and analysis either from the books of accounts or from the information received to pinpoint exactly as to which are the entries which are suspicious. The conclusions have been drawn based on surmises and conjunctures, therefore unsustainable. Furthermore, the appeal of the appellant for the Assessment Year 2010 - 11 has been allowed by my ld. predecessor which has similar facts and circumstances, therefore there is no reason to depart from the finding is given in the earlier assessment year. The ground of appeal is allowed."

5. Aggrieved with the above order, Revenue is in appeal before us raising following grounds of appeal :-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition made under section 143(3) / 147 at Rs.1,85,45,456/- on account of Client Code Modification based on the information received from the DIT (I&C1), Mumbai which was based on the detailed examination and verification.

2. The Ld. CIT (A) has erred in believing that addition on account of misuse of Client Code Modification utility has been made without any basis. From the available record and report received from the Investigation Wing, it is revealed that detailed investigation, analysis and research were concluded with the help of experts as well as spot verification under section 131 of the Brokers and beneficiaries who have not only revised their computation but paid taxes also for the assessment year 2009-10 to 2010-11.

3. While allowing Ground no.-l of the appeal, The Ld. CIT(A) has erred in holding that "the assessing officer has not attributed failure to the assessee in respect of true and full disclosure of the material facts relevant for the assessment in the course of earlier assessment". Further the Ld. CIT(A) has failed to appreciate the fact that the reason to belief formed by the A.O. was based on the basis of concrete information based on the

> *detailed investigation, analysis, research, expert assistance and sport enquires.*
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> *4. The Ld. CIT(A) has erred in law in allowing the ground of appeal of the appellant alleging that the assessment has been made violating the procedure laid down by the Hon'ble Supreme Court in the GKN Driveshaft (India) Ltd. Vs ITO. It is evident from the records that the objection raised by the assessee vide its letter dated 26.12.2016 through email has duly been disposed off by passing a speaking order.*
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> *5. That the Ld.CIT(A) has erred in law and on the facts of the case in holding that the A.O. has merely stated that the information was received from Investigation Wing and this income has escaped assessment and has not crystallized the escapement."*

6. At the time of hearing, ld. DR for the Revenue brought to our notice facts of this case and detailed discussion on CCM by the Assessing Officer and submitted that Assessing Officer has received specific information from Investigation Wing on the misuse of CCM by the assessee. He submitted that CCM was widely used to shift the profits by the brokers and since the assessee has modified the client code during the year, it clearly shows that assessee has shifted the profits and declared loss during this year. He submitted that specific information clearly shows that assessee has shifted the losses and based on that, the assessment was reopened. He objected to the findings of the ld. CIT (A) who has deleted the addition based on the submissions of the assessee and heavily relied on the findings of Assessing Officer.

7. On the other hand, ld. AR for the assessee submitted that assessee is engaged in the business of technical research and trading of stocks and commodities.

He brought to our notice page 39 of the paper book wherein the assessee has filed original assessment order u/s 143(3) of the Act wherein the Assessing Officer has completed the assessment u/s 143(3) of the Act accepting the returned income submitted by the assessee. By drawing our attention to the assessment order, he submitted that the assessment was reopened beyond four years u/s 147 of the Act by issue of notice dated 30.03.2016. He also brought to our notice page 40 of the paper book wherein reasons for reopening was enclosed and Assessing Officer has merely reopened the assessment without indicating any allegation of failure on the part of the assessee. He also brought to our notice page 6 of the first appellate order wherein ld. CIT(A) has specifically held that the Assessing Officer has not recorded the reasons of any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of income for the relevant assessment year and also mechanically relying on the information received from Investigation Wing, also not followed the due process and procedure as laid down by Hon'ble Supreme Court in GKN Drive Shafts India Ltd. (supra). He also submitted that even on merit, there is no material on record which shows that assessee has utilised CCM to shift the profit and he prayed that the findings of ld. CIT (A) may be sustained.

8. Considered the rival submissions and material placed on record. We

observed from the record that assessee is a regular trader and during the year, assessee's shares/stocks were traded in the market and the broker has modified the client code for the transactions of the value of Rs.1,85,45,456/-. The information of CCM was received by the Assessing Officer from the Investigation Wing and without making any further investigation, he reopened the assessment after recording reasons that assessee has made CCM and recorded the reasons that assessee has shifted profit to record the loss without even initiating the investigation. As per the procedures laid down for making CCM by the SEBI, the brokers are allowed to make the CCM if they notice any mistake in recording the client code by the end of the day. They can make the modification with proper documentation in two ways i.e. first suo motu of any mistake apparent on record and next is on the request of the client. The broker has to record both the documentations before making any CCM. As per the facts on record, no doubt broker has made CCM and nothing was brought on record whether the CCM was made by the broker himself or on the request of the assessee. Even otherwise, CCM are made by the brokers and unless there is material to show that assessee has requested the CCM and indulged in any shifting of profit, in our view, no such investigations are made in this case and merely on the basis of information from Investigation Wing, the Assessing Officer without making

proper investigation formed the view and recorded reasons that assessee was involved in CCM. In a hurry, Assessing Officer not even issued 143 (2) notice and not followed any procedure laid down for reopening of the assessment and not made proper investigation in this issue. We observed that ld. CIT (A) has given a clear finding on Second Proviso to section 147 of the Act, non-issue of notice u/s 143(2), non-following of procedures laid down by Hon'ble Supreme Court in the case of GKN Drive Shafts India Ltd. (supra) and even on merits gave a reasonable finding. After considering the detailed/reasoned findings of the ld. CIT (A), we are inclined not to disturb the findings of the ld. CIT (A). Accordingly, the grounds raised by the Revenue are dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on this 18th day of October, 2024.

Sd/-	**sd/-**
(SUDHIR PAREEK)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 18.10.2024/TS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals), Rohtak.
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT, NEW DELHI