

**IN THE INCOME TAX APPELLATE TRIBUNAL  
 DELHI BENCH "E": NEW DELHI**

**BEFORE Ms. MADHUMITA ROY, JUDICIAL MEMBER  
 AND  
 SHRI MANISH AGARWAL, ACCOUNTANT MEMBER**

**ITA No. 2782/DEL/2023  
Assessment Year: 2010-11**

<b>Income-tax Officer, Ward-43(6), New Delhi.</b>	<u>Vs</u>	Munish Bajaj and Sons HUF, C-619, Sarasvati Vihar, Pitampura, Delhi-110034. <b>PAN: AAHHM 2371 P</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Assessee represented by</b>	Shri Ruchesh Sinha, Adv.	
<b>Department represented by</b>	Shri Virender Kumar Singh, Sr. DR	
<b>Date of hearing</b>	07.05.2025	
<b>Date of pronouncement</b>	30.06.2025	

**ORDER**

**PER Ms. MADHUMITA ROY, JM:**

The instant appeal, filed by the Revenue, is directed against the order dated 29.05.2023 (DIN & Order No. ITBA/NFAC/S/250/2023-24/1053267308(1) passed by the National Faceless Appeal Centre (NFAC), Delhi, arising out of the order

dated 29.12.2017 passed by the ITO, Ward-3, Sonapat, under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), for assessment year 2010-11.

2. The shorts facts of the case are that on the basis of information available with the Department during the year under consideration the assessee was involved in earning fictitious profit by misusing Client Code Modification Facility in F&O segment and the, therefore, was reopened under Section 148 of the Act upon recording reasons and necessary approval from the PCIT. The notice under Section 148 of the Act was issued on 30.03.2017 followed by several notices issued under Section 142(1) of the Act. The assessee complied with the notice issued under Section 148 of the Act and filed his return on 18.09.2017 declaring income of Rs. 14,44,830/- against the taxable income of Rs. 6,37,150/- declared in the original return filed on 31.07.2010. Show cause notice was issued to the assessee to explain the following:

*"As per information in possession of the department, during the financial year 2009-10 relevant to Asstt. Year 2010-11, you were involved in earning fictitious profit by misusing Client Code Modification Facility in F&O segment and by doing so, earned a profit of Rs. 4,03,83,930/- and shown the same as speculation business profit. Further, you have adjusted your speculation business loss of Rs. 3,47,97,111/-against this profit of Rs. 4,03,83,930/-. The profit earned by misusing Client Code Modification Facility in F&O segment, denotes the income from undisclosed sources, which shown by you in the guise of speculation business profit. As per the*

*provisions of section 73(1) of the Income Tax Act, 1961, any loss, computed in respect of speculation business carried on, shall not be set off except against profits and gains, if any, of another speculation business. In view of these provisions, you were not entitled to set off/adjust speculation business loss of Rs. 3,47,97,111/- against income/profit earned of Rs. 4,03,83,930 earned by misusing of Client Code Modification Facility in F&O segment being your income from undisclosed sources. Please explain as to why your set off amount of Rs. 3,47,97,111/- may not be disallowed and added to your taxable income, being income from undisclosed sources and not entitle to set off against speculation loss".*

3. The assessee duly submitted his reply as follows:

*"Please refer to your representative letter dated 29.11.2017 received through mail on 29.11.2017 vide which you have raised objection on reopening of assessment in your case for the Asstt. Year 2010-11.*

*Vide above referred letter dated 29.11.2017, your representative Sh. Suraj Garg CA has objected to the reopening of the assessment proceedings stating that the AO should have reason to believe that any income chargeable to tax has escaped assessment and that in the instant case, there is no income which has escaped assessment.*

*3. In this regard it is pertinent to mention that the information was received from the DGIT(Inv.)/DIT(Inv.) (after their thorough investigation) that you are the beneficiaries of earning profit to the extent of Rs. 4,03,83,930/- by misusing of client code modification facility in F&O segment on NSE. In the investigation, it has also been proved that the beneficiaries are involved in generating such loss or profit by paying commission to the broker varies from 2% to 6% The fact and information available on record lead to form belief that you are the beneficiary of earning profit to the extent of Rs. 4,03,83,930/- by misusing of client code modification facility in F&O segment on NSE. This fact also fortified from the statement of Sh. Munish Kumar recorded by the DDIT(Inv.). Panipat wherein Sh. Munish Kumar agreed to pay tax @2% on the of Rs. 4,03,83,930/-, which itself proved that the assessee has earned this profit of Rs. 4,03,83,930/- by misusing of client code modification facility in F&O segment. Hence, the profit earned by the assessee by misusing of client code modification facility in F&O segment is*

*his income from other sources and cannot be set off against speculation loss in view of section 73(1) of the Income Tax Act. Therefore there was a reason to believe that you have understated your income and hence reasons in this regard were recorded and accordingly the case was reopened. after invoking provisions of Section 147 of the Act. The same facts have been duly mentioned in the reasons recorded for reopening.*

*4. As per the decision rendered by the Hon'ble Supreme court in the case of Rajesh Jhaveri Stocks Brokers Pvt. Ltd (292 ITR 500) at the stage of initiation of assessment proceedings u/s 147 of the IT Act, it is not required to be conclusively prove that income has escaped assessment. The only requirement is that whether there was any relevant material on which a reasonable person can form the requisite belief that taxable income has escaped assessment*

*5. Further reliance is also placed on M/s Raymond woolen mills Ltd 236 ITR 34 wherein the Hon'ble High Court has held that at the stage of initiation of assessment, the only thing required to be seen is that whether there is any prima facie material on the basis of which a case can be reopened. It is further held that the sufficiency or correctness of material is not a thing to be considered at this stage.*

*6. Reliance is also placed on the decision of CIT Vs Usha International 348 ITR 485 (Delhi) and Bombay High Court decision on 11th January 2013 in the case of Export Credit Guarantee Corporation of India Ltd Vs Addi CIT 350 ITR 651 (Bom.). To quote extensively from the decision of the Bombay High Court cited supra:*

*Even in absence of assesses failure to disclose material facts where there is complete failure on part of assessing officer to apply his mind during original assessment proceedings to points on which assessment is sought to be reopened, it can be said that there is tangible material and reason to believe that income has escaped assessment- held yes (Para 10)*

*At the stage when the assessing officer reopens an assessment, it is not necessary that the material before the court should conclusively prove or establish that income has escaped assessment. A reason to believe at the stage of reopening is all that is relevant. (Para 7)*

*To hold that the assessing officer must be deemed to have accepted what he has plainly overlooked or ignored in the assessment order would be to stretch the interpretation of Section 147 to a point where the provision would cease to have meaning and content. Such an exercise of excision by judicial interpretation is impermissible.*

*When an assessment is sought to be reopened within a period of four years from the end of the relevant assessment year the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An assessing officer who has plainly ignored relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within jurisdiction (Para 8).*

*At this stage, the test to be applied is whether there was reason to believe that income had escaped assessment and whether the assessing officer had tangible material before him for the formation of that belief. A reason to believe is what is relevant not an established fact of escapement of income (Para 9).*

*The salient aspect of the case that merits emphasis is that the order of the assessment that was passed by the Assessing officer under section 143(3) was completely silent in respect of each one of the five points on the basis of which the assessment is sought to be reopened. There is merit in the contention which has been urged on behalf of the revenue that no query had been raised during the course of assessment and the assessment order would ex- facie disclose that the assessing officer has not applied his mind at all to any of the points on the basis of which the assessment is now sought to be reopened. That there exists tangible material for the Assessing officer to reopen the assessment in the present case is evident from the record*

*All that is relevant is whether there is reason to believe on the part of the Assessing officer that income had escaped assessment. Where the answer is in the affirmative, it would not be appropriate for this court to preempt an inquiry whatsoever by the assessing officer, once a tangible basis has been disclosed for reopening of assessment.”*

*7. In view of the above discussion, the objection with regard to reopening of the assessment in your case is hereby rejected.*

*8. Since from the investigation conducted by Investigation Wing and from the statement of Sh. Munish Kumar Bajaj recorded by the DDIT(Inv) Panipat, it is established that you had earned profit of Rs. 4,03,83,930/- by misusing of client code modification facility in F&O segment on NSE, which your income from other sources, you are, therefore, requested to please show cause as to why your claim of setting off of your speculation loss of Rs. 3,47,97,111/- against the income from other sources of Rs. 4,03,83,930/- may not be disallowed in view of section 73(1) of the Income Tax, 1961.*

*Your case is now finally fixed for 6.12.2017 at 11.30AM. Notice u/s 142(1) enclosed for compliance. Please note, as you are aware, assessment in your case is barred by time on 31.12.2017 and this is the final opportunity and no further opportunity will be allowed.*

*As a part of government initiative for e-proceedings, you are not required to attend the office personally or through your AR and may file your reply through mail on my mail id mentioned above”.*

4. Ultimately, the AO completed the assessment at total income of Rs. 4,26,36,440/- as against returned income of Rs. 14,44,830/- with following additions/disallowances:

- Disallowance of speculation loss of Rs. 3,47,97,111/- set off by the assessee;
- Disallowance of expenses of Rs. 55,86,819/-
- Disallowance of commission of Rs. 8,07,680/-

5. Aggrieved against it the assessee preferred appeal before the Ld. CIT(A) who deleted the additions/ disallowances made by the AO. Hence, this appeal by the Revenue before us.

6. It is relevant to mention that before the Ld. AO the assessee had raised following objections:

*“That there are following mis-conceptions on the part of the ITO while recording "Reasons", namely,*

*(a) that 'there is failure/omission on the part of the assessee to disclose fully and truly all necessary facts essential for his assessment'.*

*(b) that the assessee was involved in earning fictitious profit by mis-using Client Code Modification Facility in F&O segment and thereby earned profit of Rs.4,03,83,930/- and shown the same as speculative business profit'.*

*(c) that the assessee was not entitled to set off/adjust speculation business loss of Rs.3,47,97,111/- against income earned from undisclosed sources of Rs.4,03,83,930/-'.*

*First, no particulars were concealed by the assessee and there is no omission any alleged information on the part of the assessee. All disclosures as required by law, were made by the assessee in his return as well as books of accounts.*

*Second, the assessee is not a Share Broker. The assessee is in the business of sale/purchase of shares based on delivery as well as without delivery. The assessee has no control over Client Code Modification Facility in F&O hence he could not have earned fictitious profit by the alleged misused of the Client Code.*

*Third, the assessee has rightly claimed adjustment of his speculative loss against speculative income, as provided u/s 73 (1) of the Act. The income and the loss, as claimed by the assessee, are speculative by nature, hence the adjustment thereof is within law.*

*4. That the assessee while facing enquiry u/s 131 of the Act, was persuaded by the I.O. to surrender 2% of Rs.4,03,83,930/- in order to get finality of the assessment, accordingly, the assessee tendered a sum of Rs.2,49,581 as tax vide Chalan No. 30856 dated 27/06/2015 with a view to buy peace and to avoid further litigation..*

*5. That from the aforesaid facts, it is evident that the notice u/s 148 dated 30.03.2017 is void. Accordingly, the return filed by the assessee on 18.09.2017 in pursuance to the notice u/s 148 is also void. The excess tax deposited by the assessee pursuant to investigation u/s 131I.T. Act is also without authority in law and the same is liable to be refunded to the assessee with Interest for which the assessee is applying separately.*

*Under the circumstances and also in view of the facts disclosed in our submissions dated 29.11.2017 and aforesaid submissions, It is most respectfully prayed that the proposed reassessment proceedings u/s 147/148 may kindly be dropped. Prayed accordingly.*

*It is submitted that the assessee has made an application u/s 144-A of the IT Act before Hon'ble Joint Commissioner of Income Tax, Panipat for her guidance/directions in the disposal of the above matter along with a request for personal opportunity of hearing. Accordingly, it is further prayed that the matter may finally be decided in consultation with the Hon'ble Joint Commissioner of Income Tax, Panipat.”*

7. The sole issue of the addition is surrender of income by the assessee during investigation proceedings which is a violation of the ratio laid down in the case of Sir Shadilal & Sugar Mills, wherein it has been held that mere agreeing to such addition by earlier authority just to avoid litigation and to buy peace of mind does

not prove the income to be unexplained or concealed income where the assessee does not dispute to any previous addition does not absolve the revenue of proving mens rea as the case made out by the assessee.

8. In fact from the records made available before us, even from the order of the Ld. AO the same does not establish the fact of mens rea, which is the crucial element in the case in hand, on the part of the assessee in earning the disputed income by indulging into Client Code Modification Facility as alleged by the Ld. AO.

9. In fact the addition to the returned income to the tune of Rs. 3,47,97,111/- was made on account of disallowance of set off of speculation loss only on the suspicion basis that the speculation profit is earned by mis-using Client Code Modification Facility in F& O segment; Rs. 55,86,819/- on account of disallowance of expenses claimed; and further addition to the tune of Rs. 8,07,680/- on account of alleged commission paid for booking bogus profit.

10. The Ld. CIT(A) upon going through the entire set of records allowed the appeal upon deleting the addition made by the Ld. AO with the following observations:

*“5. FINDINGS & DECISION*

5.1 I have gone through the Assessment Order and submissions of the appellant. The learned AO carried out addition of sum of Rs.4,11,91,610/- on account of disallowances of fictitious F&O loss and allied expenses thereto. The appellant is engaged in the business of share trading, F&O transactions, commodity trading through recognized stock/commodity exchange. The learned AO alleged that the appellant was engaged into client code modification activity through which it has earned profit of Rs.4,03,83,930/- which was set off against speculative loss of Rs.3,47,97,111/-.

5.2 Since the profit of Rs.4.03 crores were earned from undisclosed sources therefore the learned AO did not allow setting off the same against speculative loss of Rs.3.47 crores. Further, the learned AO carried out addition of Rs.55,86,819/- (being difference between Rs.4,03,83,930/- and Rs.3,47,97,111/-) without allowing any expenses incurred by the appellant.

5.3 In addition to above two enhancements the learned AO also added Rs.8.07,680/-(2% of Rs.4,03,83,930/-) towards payment of commission to earn fictitious profit of Rs.4.03 crores.

5.4 On perusal of the Assessment Order it is observed that the learned AO has received information from DDIT (Inv.) wherein a statement of Mr. Munish Bajaj was recorded, an oath about client code modification in F&O segment and earning bogus profit and there from. On perusal of Assessment Order wherein relevant extract of statement of oath was reproduced, it is observed that Mr. Munish (Karta) has denied indulgence into client code modification activities and in order to buy peace of mind he had agreed to pay tax on commission element (i.e. 2% of Rs.4,03,83,930/-).

5.5 It is also observed that the learned AO has not carried out any independent investigation nor he has brought anything on record as evidence that appellant was engaged into client code modification activity. He has merely relied on information received from investigation unit and he has not paid any regards to appellant's submission. Primarily the onus is casted upon learned AO to demonstrate that the appellant is engaged into client code modification and earning fictitious profit/loss.

5.6 *In this regard it is worth referring following judicial pronouncements*

*M/s. Kundan Rice Mills Ltd., Panipat. [ITA.No.853/Del./2020]*

*"Considering the totality of the facts and circumstances of the case in the light of material/evidences available on record and in the absence of any investigation carried-out by the authorities below, we are of the view that assessee has been able to establish that assessee company has suffered genuine business loss as had also been suffered in earlier years, therefore, authorities below should not have disallowed the same against the assessee. In view of the above findings, we set aside the Orders of the authorities below and delete the entire addition. In the result, Ground No. 1 of the appeal of Assessee is allowed"*

*Further, reliance can be placed on following judicial precedents wherein it has been upheld those additions based on gathered from premises of third party cannot be considered for making additions unless the AO has carried out independent finding based on such material:*

- *Add. CIT Vs Lata Mangeshkar (97 ITR 696)*
- *CBI vs V.C. Shukla (3 SCC 410)*
- *Shri Mustafamiya H. Sheikh (Vide ITA NO. 2588/Ahd/2012)*
- *DCIT Vs H.S. Chnadramouli (ITA No. 1551/Bang/2012)*
- *M/s Mohd. Ayub Mohd. Yakub Perfumers Pvt. Ltd (ITA NO.388/LKW/2013)*
- *DCIT Vs Pawan Kumar Agarwal (ITA 413 LKW/2012)*
- *M/s Bhola Nath Radha Krishan 9ITA 5149/Del/2012)*
- *Pradeep Amrutlal Runwal (149 ITR 548).*

5.7 *In view of the above I am of the considerate view that in the absence of independent investigation by the learned AO the addition made by the learned AO is bad in law specially when there is no adverse finding on submission made by the appellant. Therefore, the addition made by the learned AO for Rs. 4,11,91,610/- on account of setting off loss (Rs.3,47,97,111/-), commission (Rs. 8,07,680/-) and other expenses (Rs.55,86,819/-) is deleted."*

11. It is the case of the Revenue that the assessee is engaged in the business of share trading, F&O transactions and commodity trading through recognized sector/commodity exchange was engaged into Client Code Modification Facility and therefrom earned profit of Rs. 4,03,83,930/- which was set off against speculation loss of Rs. 3,47,97,111/-. As the profit of Rs. 4,03,83,930/- was earned from undisclosed sources, the Ld. AO did not allow the set off and further proceeded in making addition in respect of expenses incurred by the assessee. The commission payment to earn such alleged fictitious profit was also added to the tune of Rs. 8,07,680/- i.e. 2% of the undisclosed income of Rs. 4,03,83,930/-. It is the further case of the Revenue that there was statement made by the assessee before them in regard to Client Code Modification Facility and expenses incurred and commission paid in earning the bogus profit by him whereas it appears from the records rather the statement made by the assessee that he has denied indulgence into Client Code Modification Facility and in order to buy peace of mind agreed to payment of commission element of Rs. 8,07,680/-. It further appears from the records that the Ld. AO has not carried out any investigation on the issue under consideration particularly the engagement of the assessee into Client Code Modification Facility rather relied upon the information received from the Investigation Wing, the Ld. AO failed to demonstrate that the assessee was actually engaged into Client Code

Modification Facility and earned fictitious profit/loss. In that view of the matter, relying upon the ratio laid down in several judgments as is evident from the order passed by the Ld. CIT(A), the addition based on information available with the Department and searched documents from premises of third party in the absence of independent investigation carried out by the Ld. AO as found to be not sustainable by the Ld. CIT(A), in our considered opinion, is just and proper so as to not warrant any interference. In that view of the matter the order of Ld. CIT(A) deleting the additions made by the AO is upheld. The appeal preferred by the Revenue is devoid of any merit and is liable to be dismissed. We order accordingly.

12. Appeal of the Revenue in ITA No. 2782/Del/2023 is dismissed.

Order pronounced in open court on 30.06.2025.

**Sd/-**  
**(MANISH AGARWAL)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(Ms. MADHUMITA ROY)**  
**JUDICIAL MEMBER**

**Dated: 30.06.2025.**

\*MP\*

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI

