

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI C. N. PRASAD, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 4828/Del/2019
(Assessment Year: 2010-11)**

M/s. Anavya Investments Pvt. Ltd, C/o. Sanjay & Sanjay, A-1-A, 14B, Janakpuri, New Delhi (Appellant) PAN:AAHC4820A	Vs.	ITO, Ward-2(4), New Delhi (Respondent)
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Assessee by :	Shri Sanjay Garg, CA Shri Akarsh Garg, Adv
Revenue by:	Shri Kanv Bali, Sr. DR

Date of Hearing	11/01/2024
Date of pronouncement	08/04/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.4828/Del/2019 for AY 2010-11, arises out of the order of the Commissioner of Income Tax (Appeals)-I, New Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. 398/17-18 dated 29.03.2019 against the order of assessment passed u/s 143(3) r.w.s. 147 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 24.01.2018 by the Assessing Officer, ITO, Ward-2(4), New Deli (hereinafter referred to as 'Id. AO').

2. The assessee has raise the following grounds of appeal before us:-

"1.1 BECAUSE on the facts and circumstances of the case, the CIT(A) has erred in upholding the initiation of reassessment proceedings under section 147 in the absence of "relevant material" so as to form valid "reason to believe." (Tax effect Rs. 4,38,033/-)

1.2 BECAUSE the objections filed were disposed off in a most causal manner.

WITHOUT PREJUDICE TO THE AFORESAID

2.1 BECAUSE the CIT(A) has erred in law and on facts in sustaining the addition of Rs26,33,328/- under section 68 on account of disallowance of loss by using CCM platform. (Tax effect Rs. 4,21,759/-)

22 BECAUSE looking to the peculiar facts and circumstances of the case particularly that

(a) transactions entered into by the appellant are duly supported by the contract notes issued by the respective brokers;

(b) brokers were members of recognised Stock Exchange, National Stock Exchange in the present case;

(c) realizations and/or payments have been made through proper banking channels;

(d) enquires have been made at the back of the appellant;

(e) appellant was never made available with the opportunity to cross examine the brokers from whom such enquires had been made by the Ahmedabad Investigation Directorate;

(f) appellant do not have any control or say on the brokers who have been charged with the allegation of being involved in 'non-genuine activity' of making modifications in client code; and

(g) modifications, if any, had been made by the brokers and are within the permissible norms of National Stock Exchanges, who themselves had vetted such modifications, addition sustained is wholly bad in law and on facts of the case."

3. We have heard the rival submissions and perused the material available on record. At the outset, we find that the assessee is an individual engaged in the business of Trading of shares and securities. The return of income for assessment year 2010–11 was filed by the assessee u/s 139(1) of the Act on 29.09.2010 declaring taxable income of ₹ 29,56,101/- under normal provisions of the Act and book profit of ₹84,48,854/- u/s 115JB of the Act. The Id AO observed that information has been received from Assistant Director of Income Tax, Investigation Wing-13, Ahmedabad vide office letter dated 11/03/2016, wherein, it was informed that some companies have involved in tax evasion practice by claiming fictitious profits/ loss by using Client Code Modification (CCM) facilities in Future & Options (F & O) segment of National Stock Exchange (NSE). Based on this information, the Id AO proceeded to reopen the assessment of the assessee for AY 2010-11 vide issuance of notice u/s 148 of the Act on 26/04/2017 to the

assessee. The assessee vide letter dated 26.04.2017 stated that the return already filed on 29.09.2010 may be treated as a return in response to notice issued u/s 148 of the Act. On 17.07.2017, the assessee company asked for furnishing of reasons recorded for reopening of the assessment which was duly furnished by the Id AO. The reasons recorded for the reopening of the assessment are reproduced below:-

"PROPOSAL FOR RE-OPENING OF CASE OF M/S ANAVYA INVESTMENTS PVT. LTD. U/S 148 OF THE INCOME TAX ACT, 1961 FOR THE A.Y. 2010-11.

1. Information has been received from Director of Income Tax (I&CI), Mumbai vide office letter no: DIT(I&CI/CCM/2014-15 dated 27.02.2015 (placed contra) wherein it was informed that some companies have indulged in tax evasion practices by claiming fictitious profits/ losses by using the 'client code modification' facility in F & O segment on NSE.

2. The report explains at length the modus operandi adopted by these companies. Client Code Modification means modification / change of the Client Codes after execution of trades. The Client Code modification facility as approved by SEBI and provided by the Exchanges to brokers is meant to rectify genuine mistakes of punching of orders of a particular trade given by a particular client in its particular account maintained with the broker. In this facility the broker can change the client code of a particular trade and transfer the trade from one account to another account during the trading hours and time permitted by the Stock Exchange after the trading hours. Over a period of time, some persons, in connivance with brokers started using Client Code Modifications for purposes other than genuine errors. Many brokers misused this facility of CCM for creating artificial/fictitious losses/profits and providing such fictitious profits/losses to various clients by charging some commission. These losses and profits were given to different clients/beneficiaries according to their requirement. The clients had taken fictitious losses to set off against their profits with a view to reduced tax liability. Some of the clients also took fictitious profits to cover up their undisclosed income or to set off these profits against huge losses.

3. In few cases of brokers, on the spot verification u/s 131 (1A) was carried out by DDIT(I&CI), Mumbai and they 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% to 2% on the amount of losses/ profits for transferring such losses/ profits to their client.

4. As per the information, M/s Anavya Investments Pvt. Limited (PAN: AAHCA4820A) has one of the beneficiaries client who has indulged in the Client Code modification activities and has received fictitious profits/loss entries amounting to Rs. 26,33,328/- during the F.Y. 2009-10 from various parties through client code modification in respect of original / modified client. The details of such transactions are as under:-

Particulars of the Beneficiaries of Client Code Modification					FY 2009-10	
PAN of Beneficiary Client	Name of Beneficiary Client	Address of Beneficiary	Name of Broker	When OC (Ascertained profit shifted out)	When MC (Ascertained Losses Shifted In)	Net reduction Income due to CCM
AAHCA4820A	Anavya Investments Pvt. Ltd.	39-DSIDC Complex, Mata Sunderig, Road, New Delhi-110002	Modex International Securities Ltd. A To Z Stock Trade Pvt Ltd	580776.4	-2052551.3	-2633327

5. On perusal of the above table, it appears that M/s Anavya Investments Pvt. Limited has carried out non-genuine CCM to book contrived losses/ gains. The total amount of transactions in the form of fictitious losses/profits involved Rs. 26,33,328/-. As per prevailing practice, commission/brokerage from the parties to whom benefit of fictitious loss/profit amounting has also been charged. The assessee company gave commission in lieu of such facility being provided/ received to it @ 2% of such entry. Such true nature of transactions undertaken by the assessee company has come to light only after detailed investigation wing of the Mumbai. Hence, the transactions Rs. 26,33,328/- and commission of Rs. 52,667/- (@2% on Rs. 26,33,328/-) mentioned in the manner above constitutes fresh information in respect of the assessee which has not been offered to tax by the assessee company in its returned filed.

6. Having perused and considered the information received from the Directorate of Income Tax (IC&I), Mumbai, I am satisfied that the assessee company has failed to disclose fully & truly all material facts necessary for assessment. Therefore, after consideration the information received and facts case, I have reason to believe that income chargeable to tax to the tune of Rs. 26,85,995/- which also includes Rs. 52,667/- @2% commission on Rs. 26,33,328/- has escaped assessment by reason of failure on the part of the assessee to disclose all material facts fully and truly which requires to be now brought for taxation by invoking the provisions of section 147 of the Income Tax Act, 1961.

7. The proposal for reopening of the case u/s 147/148 of the Income Tax Act was earlier sent for approval on 27.01.2016. The Ld. Pr. CIT, Delhi-1, New Delhi has raised a query to furnish the statements of brokers who were examined u/s 131 (1A) of the Act. Thereafter, a letter dated 21/22.02.2016 was written to DDIT(I&CI), Mumbai with a request to provide the statements of brokers who were examined u/s 131 (1A) of the Act. The O/o DDIT(I&CI), Mumbai vide letter dated 23.02.2016 has submitted that in connection of the Pilot Project on client code modification summon proceedings u/s 131 of the Act was conducted in the cases of four brokers only whose name are mentioned below:

(1) Transglobal Securities Ltd.

(II) Crosseas Capital Services P Ltd.

(III) Indianivesh Securities P Ltd.

(IV) Anugrah Stock & Broking P Ltd.

They have further stated that the modus operandi of tax evasion through client code modification was duly established on the basis of on spot verification

conducted in the above four brokers only and accordingly, the CCM data was obtained from NSE for the FY 2009-10 and segregated jurisdiction wise data was disseminated to the respective CCIT.

8. The CCM data circulated by Director of Income Tax (I&CI), Mumbai vide office letter No. DIT(I&CI/CCM/2014-15 dated 27.02.2015 was observed and it was found that name of the assessee company i.e. M/s Anavya Investments P Ltd is appearing the above circulated data of CCM. The Assessee company i.e. M/s(line missing) mentioned above and I am satisfied that the assessee company has failed to disclose fully & truly all material facts necessary for assessment. Therefore, after consideration the information received and facts case, I have reason to believe that income chargeable to tax to the tune of Rs. 26,85,995/- which also includes Rs. 52,667/- (@ 2% commission on Rs. 26,33,328/-) has escaped assessment by reason of failure on the part of the assessee to disclose all material facts fully and truly which clearly attracts the provisions of section 147 of the Income Tax Act and it is a fit case for initiating proceedings u/s 147/148 of the Income Tax Act.

Submitted for kind perusal and approval, please

*Sd/-
21/3/17
(Saddik Ahmed)*

ACIT, Cir. 2(2)''

4. The Id AO completed the reassessment proceedings by observing that the assessee took fictitious profits on account of CCM transactions to the tune of ₹26,33,328/- and further added 2% commission amounting to ₹52,667/- thereon and made total addition of ₹26,85,995/- in that assessment. This action of the Id AO was upheld by the Id CIT(A).

5. At the outset, on perusal of the reasons recorded (supra), we are of the considered opinion that neither the name of the assessee's broker nor the name of the assessee were mentioned as a person who has been involved in fraudulent CCM transactions. The Id AO had given details to the assessee stating on 28 occasions, CCM was done in assessee's case. It is pertinent to note that the total transactions carried out by the assessee during the year in trading of shares and securities was 1647. The assessee reiterated its submission before the Id CIT(A) and a remand report was sought from the Id AO by the Id CIT(A). But no remand report was submitted by the Id AO before the Id CIT(A). The Id CIT(A) proceeded to dispose of the appeal without waiting for the remand report from the Id AO by

making a general observation that CCM is an common issue and remand report had been issued by the Id AO in some other cases.

6. From the side of the assessee, it is not in dispute that assessee has furnished the entire details of contract notes, statement of share trading account with A2Z Stock Trade Pvt. Ltd and Modex international Securities Ltd together with relevant documents. Similar issue was subject matter of adjudication by this Tribunal in the case wherein one of the member herein was the author in the case of Globus Power Generation Ltd in ITA No. 6438/Del/2019 dated 03/05/2023. For the sake of convenience, the entire order is reproduced here in below:-

"1. This appeal of the assessee in ITA No.6438/Del/2019 for A.Y. 2009-10 arises out of the order by the Ld. Commissioner of Income Tax(Appeals)-31, New Delhi in appeal No. 231/18-19/10607-16-17 dated 12.06.2019 (hereinafter referred to as Ld. CIT(A) in short) against the order of assessment passed u/s 147/143(3) the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28.12.2016 by the Ld. ACIT, Circle-6(2), New Delhi (hereinafter referred to as Id. AO).

2. The assessee has raised the following grounds of appeal:-

"1. The Learned Commissioner Of Income Tax (Appeal) has erred on the facts and in law in confirming the disallowance of Rs. 46,07,275/- and assessed the income of the appellant at Rs. 2,22,86,425/- against return income of Rs. 1,76,79,150/-.

2. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (CIT (A)) is bad, both in the eye of law and on facts.

3. On the facts and circumstances of the case, the learned CIT (A) has erred, both on facts and in law in confirming the order under Section 147 read with Section 148, ignoring the fact that the same was bad in the eye of law as the conditions and procedure prescribed under the statute have not been satisfied and complied with.

4. On the and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law in rejecting the contention of the assessee that the reassessment proceedings by the learned AO are bad in the eye of low as the reasons recorded for the issue of notice under Section 148 are bad in the eye of low and are contrary to the facts.

5. On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law in confirming the disallowance made on the basis of the material collected at the back of the assessee without providing copy of the same & providing opportunity to rebut the same.

6. *The Learned Commissioner of Income Tax (Appeal) has erred on the facts and in law in confirming the disallowance of the loss of Rs. 46,07,275/- claimed as expenses in Profit & Loss A/c under the head 'Loss On derivative (F&O)' during the relevant financial year.*

7. *The appellant craves leave to add, amend, alter or withdraw any of the aforesaid Grounds of Appeal before or during the course of the appellate proceedings in case the circumstances so arise."*

3. *The assessee also raised an additional ground of appeal vide letter dated 23.01.2023 which reads as under:-*

"That the reopening under section 147 r/w 148 of the ITA and the subsequent Assessment Order u/s 143(3) of the ITA is illegal, bad in law, and without jurisdiction."

4. *The validity of reopening has been challenged by the assessee in the original ground also. This additional ground raised by the assessee only supports the original ground already raised. In any case, being a legal issue not requiring any verification of the facts, this additional ground is admitted and taken up for adjudication.*

5. *We have heard the rival submissions and perused the materials available on record. The assessee company is engaged in trading of derivatives. The return of income for AY 2009-10 was filed by the assessee on 30.09.2009, declaring total income of Rs. 1,76,79,150/-. The assessment was completed u/s 143(3) of the Act on 23.12.2011 accepting the return of income. Later, this assessment was sought to be reopened by the Id AO on the ground that the assessee was one of the beneficiary of Client Code Modification (CCM) by some broker. This fact got unearthed pursuant to survey conducted in some other case. The reasons recorded by the Id AO for reopening of the assessment are reproduced herein:-*

"The assessee has filed return of income on 30.09.2009 returning a total income at Rs.1,76,79,150/-. The scrutiny assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter "The Act") has been completed on 23.12.2011 determining income at Rs. 1,76,79,150/-.

2. In this case information dissipated by the Pr. DIT(Inv.), Ahmedabad that in survey u/s 133A it was found that some brokers by misusing the client code modification facility of NSE, have indulged in creating non-genuine losses and profits. Thereafter, by misusing client code modification these brokers have indulged in transferring the fictitious losses / profits to and after different clients. After analysis of data received from NSE and after considering the contention of brokers, it was established that the brokers had misused client code modification as a tool for tax evasion and created non-genuine losses and profits. It was revealed that these losses and profits were given to different client/beneficiaries and the beneficiaries had taken fictitious losses to set off against their profits with a view to reduce their tax liability. The client also took fictitious profits to cover up their undisclosed income or to set off these profits against huge losses.

3. As per the above information and list of beneficiaries provided therein, it is seen that the assessee company is one such beneficiary who has availed of such non-genuine client code modification services from brokers

and booked net non-genuine losses to the tune of Rs.46,07,275/- for AY 2009-10."

6. *After recording the aforesaid reasons and obtaining requisite approval u/s 151 of the Act, the Id. AO issued notice u/s 148 of the Act on 30.03.2016 to the assessee. The assessee vide submission dated 12.04.2016 stated that the return filed on 30.09.2009 be treated as return filed in response to notice u/s 148 of the Act and requested for furnishing the reasons recorded for reopening of the assessment. The reasons recorded for reopening of the assessment were provided by the Id. AO to the assessee vide letter dated 29.09.2016. The assessee filed objection to the said reasons recorded and the Id. AO disposed of those objections by way of a speaking order dated 23.11.2016 and thereafter proceeded with the reassessment proceedings. In the reassessment proceedings, the Id AO made disallowance of Rs. 46,07,275/- representing losses claimed by the assessee due to client code modification.*

7. *This action of the Id AO was upheld by the Id CIT(A). From the perusal of the reasons recorded it is very clear that:*

- a. *there is no information provided in the reasons as to in whose hands, a survey u/s 133A of the Act was conducted by Investigation Wing of Ahmedabad ;*
- b. *the reasons only speaks that some survey in Ahmedabad conducted revealed that some broker was involved by misusing the client code modification facility of NSE and engaged in providing non-genuine losses and profits. The reason does not specify whether the broker through whom the assessee had carried out the transaction of trading of derivatives was involved in such malpractices;*

8. *We find that the assessee have been objecting right from the beginning that it is not aware as to how the figure of loss of Rs. 46,07,275/- of income escaping assessment mentioned in the reasons, was even arrived at. This is evident from the reply letter dated 26.12.2016 filed by the assessee before the Id AO wherein, the assessee had categorically denied that the broker had carried out any client code modification in its case to book artificial losses. The assessee had also stated that it is not even aware as to how the figure of Rs. 46,07,275/- regarding alleged artificial loss booked through CCM mentioned in the show cause notice was even arrived at nor is there any information regarding the broker who is alleged to have carried out client code modification. The assessee submitted that it had no details of transaction of Rs. 46,07,275/- in its records. None of these contentions were even sought to be addressed by the lower authorities.*

9. *We find that the reasons recorded by the Id AO for reopening of the assessment in the instant case are very vague without having any live link to form a reasonable belief that the income of the assessee had escaped assessment. The reasons recorded and the assessment order only talk about modus operandi how the client code modification facility could be misused by some broker. Nowhere, neither the assessee nor its brokers were even impleaded in the said reasons. The reasons recorded only gives way to 'reason to suspect' and not 'reason to believe'. The very same issue was even subject matter of adjudication of this tribunal in the case of Stratagem Portfolio (P) Ltd Vs. DCIT in ITA No.*

7878/Del/2019 dated 15.09.2020 and the operative portion of the said tribunal order is reproduced hereunder:-

"4. The ground No. 1 to 1.4 of the appeal relates to validity of the reassessment proceeding. In the ground No. 1.1, the assessee has challenged "reason to believe" on the ground that same are not specific and lacking reliable and tangible material.

5. In support of the ground, the Learned Counsel of the assessee referred to the reasons recorded, which has been reproduced by the Assessing Officer in the impugned assessment order. He submitted that in the reasons recorded, the Assessing Officer has recorded about process of Client Code Modification (CCM) by the brokers under the facility provided by the stock exchanges for rectification of error in punching of the client code while carrying out transaction of purchase and sale of the shares. He further referred to para-12 of the said reasons and submitted that the Assessing Officer has reproduced number of events, where assessee's code was modified by the broker. The learned Counsel submitted that the Assessing Officer on the basis of modification in the client code of the assessee, has jumped to believe that it had been done for shifting of profit of ₹ 6,42,781/- and shifting of loss of ₹ 4,420/-. According to Learned Counsel, this belief of the Assessing Officer is without any tangible material to support that such client code modification has been done for evasion of the tax. Further, he submitted that the Learned Assessing Officer is not justified in making the belief that profit or loss shifted to other persons by way of client code modification by the broker has resulted into any income to the assessee, which could be assessed under section 68 as cash credit.

5.1 He submitted that learned Assessing Officer acted only on the basis of suspicion and it could not be said that it was based on belief that income chargeable to tax had escaped assessment. He referred to page 5 of reasons recorded where the learned Assessing Officer noted that:

"The assessee's code was modified 44 times in OCC to shift out profits Rs. 6,42,781 and one time in MCC to Shift in loss of Rs.4,420/-. The data clearly shows that the modification was not on grounds of feeding in erroneous data."

He further submitted that finally while making the addition learned Assessing Officer at page 16 of order of Assessment, however, concluded that :

"In view of above, the profit of Rs. 6,47,201/- claimed by the assessee in the above mentioned transactions is treated as a contrived profit artificially generated through the misuse of the CCM. The profit is, therefore, liable to be taxed and added to the total income of the assessee as unexplained investment u/s 68 r.w.s. 115BBE of the Income-tax Act, 1961."

5.2 The Ld. Counsel accordingly, submitted that reasons recorded are thus factually incorrect too, or the learned Assessing Officer was not sure about that, the appellant claimed loss or profit by misuse of the CCM.

5.3 He also submitted that there is no live link or direct nexus between alleged material and, inference drawn by the Assessing Officer. The

learned Counsel relied on decision of Hon'ble Bombay High Court in the case of M/s. Coronation Agro Industries Ltd. vs. DCIT reported in 390 ITR 464 and following decisions of the Tribunal to support his contentions:

1. *ITA No. 6809/D/2018 dated 22.10.2019 Simmi Sethi vs. ITO (pages 53-56 of JPB)*
2. *ITA No. 4542/D/2018 dated 29.11.2018 Radiance Stock Traders (P) Ltd. vs. ITO (pages 1-25 of JPB)*
3. *ITA No. 6628/D/2018 dated 12.4.2019 Kamal Kishoree Aggarwal vs. ACIT (pages 92-111 of JPB)*
4. *ITA No. 4395/D/2019 dated 27.2.2020 AKG Securities & Consulting Ltd. vs. ITO (pages 112-127 of JPB)*
5. *ITA No. 825/D/2019 dated 25.7.2019 Sanjay Kumar Jain vs. ITO (pages 57-91 of JPB)*

5.4 The Learned DR, on the other hand, submitted that the reasons have been recorded on the information received from the Director of Income Tax (Investigation), Ahmadabad, which is a credible source of the information. He further relied on the order of the lower authorities to support that reasons have been recorded validly.

5.5 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the instant case, the dispute is whether there is any tangible material to infer that by way of the client code modification, the assessee has escaped the income and evaded the Income-tax. The Learned Counsel of the assessee has referred to the various decisions mentioned above, wherein cases were reopened on the basis of the information of client code modification. In the case of M/s. Coronation Agro Industries Ltd. vs. DCIT (supra), the Hon'ble Bombay High Court quashed reopening of assessment on identical issue. It has been held in the said judgment as under:

"4. We note that the reasons in support of the impugned notice accept the fact that as a matter of regular business practice, a broker in the stock exchange makes modifications in the client code on sale and/or purchase of any securities, after the trading is over so as to rectify any error which may have occurred while punching the orders. The reasons do not indicate the basis for the Assessing Officer to come to reasonable belief that there has been any escapement of income on the ground that the modifications done in the client code was not on account of a genuine error, originally occurred while punching the trade. The material available is that there is a client code modification done by the Assessee's broker but there is no link from there to conclude that it was done to escape assessment of a part of its income. Prima facie, this appears to be a case of reason to suspect and not reason to believe that income chargeable to tax has escaped assessment."

5.5.1 Further, the Tribunal in Radiance Stock Traders (P) Ltd. vs. ITO (supra), has held as under:

"6.1 After perusing the aforesaid reasons recorded, I find that „information“ was received on 21.3.2016 from Asstt. Director of Income Tax (Investigation) Unit- 1(3), Ahmedabad without

conducting any enquiry on the same by Assessing Officer and without considering the fact of the case of assessee in light of the issue is not a tangible and relevant material to form opinion that income has escaped assessment. It is noted that the proceedings u/s. 147 of the Act can be initiated only on the basis of the tangible material and not on the basis of assumptions and presumptions. The recondition u/s. 147 of the Act is "reason to believe" and, the expression is stronger than the word "satisfied". The belief entertained by the AO must not be arbitrary or irrational, however, it must be reasonable. In other words, it must be based on reasons which are relevant and material. The existence of tangible and relevant material is a precondition for assuming jurisdiction, as has been held in the case of CIT vs. Kelvinator of India Ltd. reported in 320 ITR 561 (SC) and ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. reported in 291 ITR 500 (SC). Hence, in this case the proceedings have been initiated on the basis of no material much less any tangible and, relevant material and as such reasons record do not constitute valid reason to believe for initiating proceedings u/s 147 of the Act. It is a case of reason to suspect' and not „reason to believe.”

6.2 I further note that the action of the AO has been taken mechanically on the basis of alleged report of Investigation Wing. The mere recording/ formulation of reasons on the basis of reproduction of information from Investigation Wing and, issuing notice for initiation of re-assessment proceedings does not constitute application of mind much less independent application of mind. Hence, the proceedings are without jurisdiction. It is settled law that AO cannot act mechanically on the basis of report of Investigation Wing and to show that the AO has applied his mind, he must distinct all those materials and he must also show that what was material on record. Hence, initiation of proceedings is also based on non-application of mind much less independent application of mind.....

6.3 I further note that in the reasons recorded assessee has relied upon the information by the Investigation Wing, Ahmedabad, the AO has stated that having perused and considered the information received from Investigation Wing he has reason to believe that income of the assessee has escaped which has not been conformed to the assessee company, in the course of assessment proceedings, though in view of the judgment of Hon“ble Delhi High Court in the case of Sabh Infrastructure Ltd. Vs. ACIT reported in 398 ITR 198 the same was to be confronted alongwith reasons wherein it has been held as under: "(iii) where the reasons make a reference to another document, whether as a letter or report, such document and / or relevant portions of such report should be enclosed alongwith the reasons." 6.3.1 Hence in the absence of such material, the allegation and assumptions are nothing but figment of imagination as they are based on assumption and presumption, apart from being without basis.

4.8 In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, I am of the considered view

that proceedings initiated by invoking the provisions of section 147 of the Act by the AO and upheld by the Ld. CIT(A) are nonest in law and without jurisdiction, hence, the reassessment is quashed."

5.5.2 Similarly, in the case of Kamal Kishoree Aggarwal vs. ACIT (supra), the Tribunal has observed as under:

"7. I find that the reasons recorded for issuance of notice u/s 148 was as under:

"REASONS FOR BELIEF THAT THE INCOME HAS ESCAPED ASSESSMENT IN THE CASE OF SHRI GOPAL GUPTA FOR THE ASSESSMENT YEAR 2009-10

As Survey Report in R/o client code modification (CCM) has been received from ADIT (Inv.) U-1(3) Ahmadabad disseminating of beneficiary clients who have taken contrived losses and shifted out profits during the F.Y.2008-09 to 2011-12....

8. We find that in the case of M/s. Prashant Agencies Pvt. Ltd. And PPN Properties Pvt. Ltd. Vs ITO in ITA Nos. 3059 & 3060/Del/2018, order dated 16.01.2019, the Tribunal dealt with the similar issuance of notice u/s 148 of the Act by following the decision of the Hon'ble Bombay High Court in the case of Coronation Agro Industries Ltd. Vs. DCIT 390 ITR 464 (Bom.). In that case, the reasons recorded were as under:

.....

10. A perusal of the above, shows that Client Code Modification is legally permissible in case of mistake. In the instant case, the observation of the Assessing Officer is to the effect that due to Client Code Modification in two transactions, the assessee's income was reduced by Rs.5,96,176/-.

11. We find that there is no material which has been brought out in the recorded reasons to show that Client Code Modification in the instant case was malafide or the assessee received Rs.5,96,176/- in cash in lieu of the said Client Code Modification. Thus, the above recording at best is a reason to suspect only.

12. It is an established position of law that the validity of reopening is to be decided on the basis of recording made u/s 148(2) of the Act alone and nothing can be added thereto. The recording should be self-contained to withstand the validity of the reopening made.

13. In the circumstances, respectfully following the decision of the Hon'ble Bombay High Court in the case of Coronation Agro Industries Ltd. Vs DCIT (supra) and the above quoted decision of the Tribunal, in our considered opinion, the reasons recorded in the instant case does not satisfy the requirement of law and the same does not constitute the reason to believe for escapement of any income from tax. Therefore, the reason is not valid. The consequential order of reassessment passed in pursuance thereto cannot be sustained. We, therefore, set aside the impugned order of reassessment passed u/s 147 of the Act and allow this ground of appeal of the assessee."

5.3 In the instant case, though the Assessing Officer has reproduced the reasons recorded, for ready reference same are reproduced here as under:

"1. The assessee is a company filed its return of income on 27.09.2010 declaring Rs.5,06,454/- income. The details of the directors of the assessee company obtained from recants are hereunder:-

(a) Alul Sethi

(b) Gautam Jagga

The return has been verified A digitally signed by Shri Atul Sethi.

2. Thereafter, the return was processed under 143(1) of the IT Act. However, the case was not selected for scrutiny/or scrutinized us 143(3) of the Act. Subsequently, information through email was received on 11/03/2016 from Asstt. Director of Income Tax (Investigation), Unit 1(3), Ahmedabad by which a Survey Report was disseminated in cases of beneficiary clients who have taken contrived losses & shifted old profits using Client Code Modification.

3. It is a detailed report of 593 pages. I have gone through the report and gathered that how Client code modification has been done in case of the assessee to evade tax. Client code is unique code which is assigned by a broker to its clients. A broker can issue just one code to a client. Client Code Modification means modification/change of the client codes after execution of trades. Vide Circular no. SMD/POLICY/Cir-/03, dated February 6, 2003 SEBI mandated that the slack exchanges shall not normally permit changes in the client code except to correct for genuine mistakes. The client code modifications permit brokers to rectify human errors when a client inadvertently provides a wrong code or when or a wrong code is punched in by the broker whilst executing the trade. The broker is allowed to change it between 3.30 pm and 4 pm to rectify a genuine error that may have occurred while entering the code, the facility ensures smooth functioning of the system and is to be used as an exception rather than routine. Client code modification means modification of client code after the execution of trade.

3.1 Over a period of time, some persons, in connivance with brokers started using Client Code Modification for purposes other than genuine errors. Contrary to its motive, CCM facility was being misused and brokers transferred gains or losses from one person to another by changing the code, in the garb of correcting an error. These gain or loss-book entries were then used to evade taxes.

4. Non genuine CCM were carried out to book contrived losses. In some cases, this facility was used by brokers to transfer gains or losses from one party to another by modifying client codes in the guise of rectifying an error. It became a practice to book artificial

profits or losses in March to impact lax liabilities. It is generally done by buying or selling stocks intra-day so as to say consciously incur a loss and use that as a tax offset.

4.1 Client code modification (CCM) especially in the Futures and Options Segment (F&O) was being used a device to evade taxes wherein the client codes were modified for booking artificial profits or losses at the fag end (Jan to March of the Financial year when the book profits/losses of various clients have crystallized. This is done with an intention to impact the tax liabilities of the pair of clients whose codes are modified.

5. Enquiries were conducted by DIT (I&CI) Mumbai: On the spot verification u/s 131 (IA) of the Act was conducted in the cases of few brokers. The brokers admitted misuse of Client code modification & receipt of commission of 0.5 to 2%. In addition, following patterns were observed in the I&CI report:

i. Number and percentage of modified trades traded value is significantly higher in the total number of trades/traded value of particular client indulging into CCM.

ii. Profit/loss arising on account of all modifications by client is significant in comparison to the profit/loss in the trades where no modifications have been carried out.

iii. Trades have been modified to unrelated parties indicating that they are non-genuine

iv. Both buy and sell log of different trades have been modified to most of the client.

v. Number of trade client code modifications substantially increased during the closing months of the financial year.

vi. In some cases, the clients in whose accounts trades were transferred after modification did not have enough margin money to trade in the F & O segment.

vii The client code modification was consistently used to always transfer losses in accounts of some clients and profits in the accounts of others.

viii. Many brokers accepted that they charged commission at the rates varying from 0.5% to 2% on the amounts of accommodation entries provided by them to different beneficiaries.

ix. These brokers revised their computation for A.Y 2010-11 and paid taxes accordingly.

x. Some beneficiaries against whom enquiries were conducted have accepted and withdrawn their claim of nun-genuine losses in F&O segment in A.Y-2010-11. They have revised their computation for A.Y.-2010-11 and paid taxes accordingly.

The report of I&CI clearly established that the racket of brokers and beneficiaries foul played and misused CCM for tax-evasion.

6. An action was also undertaken by Ahmedabad Directorate of Investigation Wing. The wing had called for reports from different

exchanges and the data was duly analysed. After analysis, 12 Brokers and their related entities/main clients were identified for survey where the pre-survey analysis indicated more quantum of tax-evasion. Based upon data analysis coordinated surveys u/s 133A of the Income Tax Act, 1961 were carried out at the premises of 12 brokers across India on 23.03.2015.

7. Income-Tax (First Amendment) Rules, 2011 were amended vide Notification No. 14/2011 [F. No. 142/25/2008-So(TPL)], Dated 9-3-2011. The amendment came into force on the 1st day of April, 2011. The amendment required the stock exchanges to ensure that the transactions (in respect of cash and derivative market) once registered in the system are modified only in cases of genuine error and maintain data regarding all transactions (in respect of cash and derivative market) registered in the system which have been modified and submit a monthly statement in Form No. 3BB to the Director General of Income-tax (Intelligence), New Delhi within fifteen days from the last day of each month to which such statement relates.

8. SEBI conducted a probe into 'modification of client ended by brokers, pursuant to observations by the Finance Ministry about many such modifications taking place in derivatives transactions at the NSE during March 2011). With regard to the client code modifications, the trading activities under scanner of SEBI mostly took place between 2009 and 2011 after which SEBI tightened its norms to put a full-stop to such manipulations. Before tightening of the norms, the Indian markets were seeing daily code modifications to the tune of Rs.50,000 – Rs. 60,000 crore a month, which came down to just about Rs.100 crore soon after SEBI action. Quantum of such modifications was much higher during March, compared to the other months, which hinted towards the tax evasion angle due to it being the last month of the fiscal. This showed that a large-scale manipulation was taking place where brokers were making changes in the client details after execution of trades citing 'genuine errors' In April 2012, SEBI passed an order against NSE for being "negligent in discharge of its duties" in a case of modification of client codes.

9. The report of Ahmedabad Investigation Wing has been compiled after taking into account the findings of SEBI, DG I&CI. Data available with department in form of Form no. 3BB and the information collected by way of surveys.

The report points out that the essence of lax evasion through CCM is that if the Broker has punched in both Buy and Sell Orders for a given quantity of a given security then at the end of the trading session he has with him an ascertained loss/gain on this Buy Sell pair that he can shift during the CCM window. The analysis of the Investigation Wing focused on narrowing down on systemic transfer of matched quantities of Buy and Sell Orders from a given Original Client Code (OCC) or to a given Modified Client Code (MCC) for a given Broker

10. The following steps were followed for analysis and computing the quantum of losses profits shifted due to the CCM: for computation of the profits and losses shifted on account of client code modifications the matched combinations of the buy and sell orders, in a given scrip with same expiry on a given date, shifted in (in case of MCC) shifted out (in case of OCC) were taken in a pair of clients. For illustration in case from client X(OCC) transactions of 500 buy orders and 500 sell orders of Nifty with expiry 28.03.2020 modified on 06.03.2010 to client Y(MCC), then in such case the difference in buy and sell trades is taken to be profit/loss shifted from X to Y. All other transactions say where 500 buy and 200 sell trades are shifted front X to Y have been ignored.

- The transactions where exact buy and sell transaction were transferred from one client to another NO PRICE RISK EVER was borne by the client who received the transactions through CCM. Thus such ASCERTAINED LOSSES shifted through CCM for which no price risk ever was borne by a client are nongenuine losses shifted with the motive of tax evasion by setting of such selectively shifted losses against other income.
- Working on the said logic has been made in both scenarios, i.e., when a given client was original client (OCC) and when the client was modified client(MCC).
- It has been seen with regard to all the clients, so identified to have obtained losses/profits consequent to such working on the NSE data, that when a client has received losses as MCC. It has shifted out profits when it was OCC and its code was modified. Thus, the total losses obtained by the client through CCM would be the sum of the losses received as MCC and profits shifted out to other clients as OCC.
- As per the said working, year-wise and client-wise lasses computed for all the diems of different brokers is enclosed al Annexture B, to this report.
- The final figures of the profits and losses shifted due to CCM are at Annexure B to this report,

11. The submissions were requested from the brokers by the Investigation Wing and were duly considered. In case the submission had merits, these were duly honoured. The final set of beneficiaries as compiled contained only such beneficiaries for whom no tenable contention remains standing. To counter the contention of the Brokers that the Department has not taken into account the open positions shifted from one client to another as a result of CCM as the shifting of one leg of trade (i.e. buy or sell open position) from one client to another only CCM wherein equal number of buy and sell trades between two clients have been shifted have been taken for computation of the losses profits shifted due to CCM. To be more specific and in simple terms, modifications which appear to be genuine or resemble at being germane were ignored and not considered in this report. Such benefit has already been given by the department.

12. I have gone through the report as well as the basic data of transaction in respect of my assessee which was supplied with the report. My findings on the issue are as under:

a) The return of the assessee shows that it is involved in sale purchase in stock exchanges and its gross turnover could have included the transactions contrived by way of CCM.

b) The transactions which involved CCM in case of assessee are as under

i) The assessee's code was modified 44 times in OCC to Shift out profits Rs.6,42,781 and one time in MCC to Shift in loss of Rs 4.420/- The data clearly shows that the modification was not on grounds of feeding in erroneous data. The modifications are as under:

To shift out profits. The Assessee's OCC of FSTP have been modified to new codes in MCC as under.

Replaced Code	Number Of Times
I	13
FAMK	5
FBHA	3
FDDI	8
FJRD	9
FKA1	3
TOTAL	44

(ii) Now let us examine the situation in MCC i.e. when some other's OCC was modified to the assessee's code. The assessee did one transaction in which he got OCC of someone else modified to its Code to gather losses. The original codes of 99 were replaced by assessee's codes of FSTP. This resulted in shifting in of losses of Rs.4,420/-

c) Levenshtein Distance or edit distance is that it 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. But if the number of digits changed is more surely it cannot be a genuine typing mistake but a deliberate change. To this extent Levenshtein Distance Analysis or digit edit analysis acts as a clear indicator for genuineness in client code modification. The longer the distance (i.e. number of digits changed), the lesser the chances at genuineness. The analysis of Levenshtein Distance or digit edit analysis, when clubbed with the parameters mentioned in this report establishes the non-genuineness and contrived nature at the code

change. Levenshtein Distance Analysis or digit edit analysis in case of the assessee shows that in all transactions the value was 2 or more.

(d) Beneficiaries who shift out their profits and at the same time, they have also taken losses from others. These tactics are generally resorted to by the persons who already have taxable income in their books and they want to set it off against contrived losses through CCM.

An important finding of the survey is trend analysis The trend analysis show that the profits are shifted out when the person is original client and losses are shifted in when the client is modified client. This trend show that the CCM has been carried out for nongenuine purposes in the case of assessees. The other important finding of the survey is that most of the brokers admitted that CCMs have been done for a purpose other than genuine punching errors.

13. It should also be kept in mind that Rules of evidence do not govern income tax proceedings and the AO is not fettered or bound by technical rules contained in the Indian Evidence Act and is entitled to act on material which may not be accepted as evidence in a court of law. In clandestine transactions, like that of CCM, it is impossible to have direct evidence or demonstrative proof of every move, the AO has no choice but to take recourse to preponderance of evidence available.

14. A careful scrutiny of information received from the investigation wing and subsequent analysis of report of investigation wing, data of transactions and verification at ITR lead to an irresistible conclusion that Client Code Modification had been carried out in the case of assessee to shift in ascertained losses & shift out profits of Rs.6,47,201/- Income Chargeable to tax escaping assessment

15. Considering the above referred credible information, and enquiries and analysts subsequent to the information, I have reason to believe that an amount at least of Rs.6,47,201/- & commission @ 2%, amounting to Rs.12,944/- (@ 2%) has escaped assessment in case the of M/s Stratagem Portfolio P Ltd for the A.Y. 2010-11 within the meaning of Section 147/148 of Income-tax Act, 1961."

5.4 On perusal of the above reasons, it is evident that the material suggests that client code modification has been carried out by the broker in the case of the assessee. According to the information available in the reasons recorded, client code modification is allowed to the brokers by the stock exchange, within a limited window of time after business hours, for rectification of any mistakes in punching of the client code while carrying out transaction of purchase and sale on behalf of the customers. The Learned Assessing Officer, however has alleged in the reasons recorded that client code modification has been done for shifting of the profit or loss by the assessee. But there is no material to infer that such client code modification has been done with malafide purpose of shifting of the profit

or evasion of the tax. There is no material before the Assessing Officer to form such a belief that income had escaped due to such client code modification and thus there is no live link between the material before the Assessing Officer and inference made. The Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. reported in 291 ITR 500 has held that for validity of reason recorded it is essential that there should be a relevant material on which a reasonable person could make requisite belief. In the circumstances, in view of the above decision of the Hon'ble Bombay High Court in the case of M/s. Coronation Agro Industries Ltd. (supra) and decisions of the Tribunal (supra), we are of the opinion that the assessment cannot be reopened validly on the basis of the above reasons recorded in absence of any tangible material to infer that income escaped in the case of the assessee. We, accordingly, quash the reassessment proceedings and set aside the order of the Learned CIT(A) on the issue in dispute. The ground No. 1.1 of the appeal is accordingly allowed.

5.5 Since we have already quashed the reassessment proceeding, we are not adjudicating other ground of the appeal challenging validity of the reassessment as well as on the merit of the additions."

9. In view of the aforesaid observations and respectfully following the judicial precedent relied upon by the assessee hereinabove, we have no hesitation in quashing the reassessment proceedings as they are not sustainable in the eyes of law. Since, reopening is quashed on technical ground there is no need to adjudicate the grounds raised by the assessee on merits and they are left open. The grounds raised by the assessee are allowed.

10. In the result, appeal of the assessee is allowed."

7. We hold that in the decision of Hon'ble Punjab and Haryana High Court relied upon by the Id CIT(A) in the case of Rakesh Gupta Vs. CIT reported in 93 taxmann.com 271 (P&H), there was tangible material available with the Id AO, which enabled him to reopen the assessment. Whereas in the instant case before us, there is absolutely no tangible material available with the Id AO which constitute a live link or nexus with formation of belief that income of the assessee had escaped assessment. No enquiry whatsoever was even resorted to be made with the broker of the assessee through whom transactions were carried out by the assessee. It is pertinent to note that the CCM is done by the broker and not by the assessee and it is a permitted transaction to rectify typo or punching errors carried out by the broker or its staff while entering the trading transaction on behalf of the client within the prescribed time after the trading in a day is over. No violation was found by SEBI on the broker or on the assessee with regard to alleged CCM transactions. In view of the aforesaid observations and

respectfully following the judicial precedents relied upon herein above, we have no hesitation to quash the reassessment proceedings and accordingly direct the Id AO to delete the addition made in the reassessment. Grounds raised by the assessee are hereby allowed.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 08/04/2024.

-Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 08/04/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi