आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री भागचन्द, लेखा सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 911/JP/2016
निर्धारण वर्ष/Assessment Year : 2010-11

M/s. Noble Securities 137, Basant Vihar Scheme No.3, Alwar	बनाम Vs.	The ITO Ward- 1(4) Alwar
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADFN 7322 B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: Shri P.C. Parwal, CA
राजस्व की ओर से/ Revenue by :Smt. Poonam Rai, DCIT-. DR

सुनवाई की तारीख/ Date of Hearing : 14/03/2017
घोषणा की तारीख/ Date of Pronouncement : 23/03/2017

आदेश/ ORDER

PER BHAGCHAND, AM

The assessee has filed an appeal against the order of the ld. CIT(A), Alwar dated 07-10-2016 for the assessment year 2010-11 raising therein following grounds:-

> ''1. The ld. CIT(A) has erred on facts and in law in upholding the validity of notice issued u/s 148.
>
> 2. The ld. CIT(A) has erred on facts and in law in confirming the addition of Rs. 27,63,104/-made by AO by holding that assessee was indulged in transferring fictitious profits/loss to the other clients/ beneficiaries by misusing the client code modification facility to the F&O segment and thereby created a loss of Rs. 27,63,104/- and suppressed the income to that extent.

2.1 The ld. CIT(A) erred on facts and in law in making various incorrect observation in confirming the addition made by AO.

2.1 Apropos Ground No. 1 of the assessee, it is observed from the records that as per information received from the DIT(I&CI), Mumbai through the Addl. CIT Range-1 Alwar vide his office letter No. 1574 dated 17-03-2005 that during the year under consideration a loss of Rs. 27,63,104/- was created in assessee's case due to the modification of transactions made by the assessee in F&O segment to the other persons through the client code modification facility in F&O segment. Accordingly, after recording the reasons, notice u/s 148 of the Act was issued to the assessee firm on 26-03-2015. The assessee firm vide its ARs letter dated 15-04-2015 had requested to provide the copy of reasons for reopening of the case which were provided to the assessee by the Department on 17-04-2015. It is also noted from the records that the assessee firm vide its AR's letter dated 12-05-2015 had raised objections to the initiation of proceedings u/s 148 of the Act and the same was disposed off by the Department vide letter No. ITO/W-1(4)ALW/2015-16/372 dated 28-08-2015 and the letter of the Department was served upon the assessee through Registered Post. It is also noted that the ld.

CIT(A) has taken this fact into consideration but he did not find any merit on the issue in question.

2.3 After hearing both the parties and perusing the materials available on record, I do not find any plausible reason from ld. AR of the assessee that the Department has wrongly invoked the provisions of Section 148 of the Act on the assessee without disposing off the objections. It is noted that the after recording the reasons, the notice u/s 148 of the Act was issued on 26-03-2015 and copy of the reasons for reopening of the case was provided to the assessee on 15-04-2015 by the Department. In such a situation, I do not find force in the arguments of the ld. AR of the assessee and thus Ground No. 1 of the assessee is dismissed.

3.1 Apropos Ground No. 2 and 2.1 of the assessee, the facts as emerges from the order of the ld. CIT(A) is as under:-

> 5.3.1. I have gone through the assessment order as well as submissions made by the appellant. Following facts have emerged.
>
> 1. That the appellant is a partnership firm engaged in the business of trading in share.
>
> 2. That the firm is doing trading on its own behalf and on behalf of its clients.
>
> 3. That on the basis of an information received from Directorate of Income Tax (Intelligence & Criminal Investigation) that the appellant had booked a loss of Rs. 27,63,104/- due to modification made by the assessee in F& O segment to the third parties through the Client Code Modification facility.
>
> 4. That the AO had reopened the case u/s 148 of the Act by duly recording the reasons.

5. That the detail of reopening was provided to the assessee on 17-04-2015.

6. That the assessee firm had raised objections to the reopening proceedings. The objections were duly considered by the AO and a written order disposing the petition of the assessee was passed and served to the assessee.

7. That it was found by the authorities that the firm was found using client code modification facility in F&O segment on NSE during the year under consideration. By doing this, it is alleged that fictitious losses and profits were transferred to its clients.

8. That the appellant has claimed that it was a genuine mistake on the part of its staffs to have punched firm's code instead of its client's code. And that later on when such a mistake was noticed the same was deleted by deleting the trading from the firm's code and credited to the client's code.

9. That the appellant has further submitted that the mistake was done at the broker's level and the firm should not be held responsible for mistake committed by the brokers.

10. That the appellant has further submitted that client code modifications are a very legitimate transactions where if any mistake is committed then it has to be rectified within 15 minutes of the close of trading session.

5.3.2 I have considered the above mentioned facts. I have particularly taken into account the functioning of the stock exchange where a trading is done on the basis of purchase transaction entered by the brokers. The broker does it on the advice of the sub-brokers/ clients. Here in this case the broker i.e. M/s. Artistic Finance (P) Ltd. had booked purchase/ sale of scrip on the advice of the appellant i.e. M/s. Noble Securities using the client code of M/s. Noble Securities. Later, M/s. Noble Securities advised the broker M/s. Artistic Finance (P) Ltd. to modify the client code and book it in the name of the other clients of M/s. Noble Securities. Thus, the transactions which were earlier made in the name of the appellant were transferred to third parties. The appellant has claimed that the purchases were wrongly done in the name of M/s. Noble Securities inadvertently punching its client code and that subsequently it was rectified by the brokers within time allowed by the exchange. So the whole submission of the appellant is hinged upon the inadvertent mistake of the staff in punching the wrong client code i.e. client code of the appellant instead

of client code of its clients. However, the appellant's claim, to my mind, is hollow as clearly made out by the AO in the assessment order that such modifications are done 2380 times involving 55 clients over a period of 197 days during the year under consideration. Mistake cannot be repeated so brazenly over such a number of times. Even if the end of the session, still the facility cannot be allowed to be manipulated for undue gains and create a situation where the income/loss can be diverted. In this regard, I have also taken into account the Apex court judgement in the case of Mcdowell & Co. Ltd. It is worthwhile to quote from the landmark judgement as under:-

''Misra,J. who delivered judgement on behalf of himself and three other Judges (other than Reddy. J.) extracted the following observation from the judgement of Gujarat High Court (ITR pp 200-01) in the case of CIT vs. Sakarlal Balabhai (affirmed by the Supreme Court in CIT vs. Vadilal Lallubhai): (SCC 253-54, para 43)

''Tax avoidance postulates that the assessee is in receipt of amount which is really and in truth his income liable to tax but on which he avoid payment of tax by some artifice or device. Such artifice or device may apparently show the income as accruing to another person, at the same time making it available foruse and enjoyment to the assessee's as in a case falling within Section 44-D or mask the true character of the income by disguising it as a capital receipt as in a case falling within Section 44-E or assume diverse other forms… But there must be some artifice or device enabling the assessee to avoid payment of tax on what is really and in truth his income. If the assessee parts with his income-producing asset, so that the right to receive income arising from the asset which theretofore belonged to the assessee is transferred to and vested in some other person, there is no avoidance of tax liability: no part of the income from the asset goes into the hands of the assessee in the shape of income or under any guise''.

Then, Misra. J. responded: (SCC pp. 254-55, para 45)''45. Tax planning may be legitimate provided it is within the frame work of law. Colourable device cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resortingto dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.''

In this particular case, the appellant is found to be indulged in large use of facility to book a loss in the book by diverting a part of transaction to its clients. This type of transactions particularly gives undue advantage in F& O segment where loss and even income can be booked in clients favour to give advantage to them and also book losses against their own income. At the end of the session when the

relative advantage of a transaction can be easily evaluated and then taking advantage of client Code modification, such transaction can be transferred to client's account depending upon the client's requirement and thus real income from such transactions can be suitably compromised. Therefore, in view of the regularity with which such transactions have been effected, the AO is justified in rejecting the claim of the appellant and added such transaction in the hand of the appellant's income. Accordingly, the addition of Rs. 27,63,104/- is sustained. Appellant's ground of appeal on the issue is dismissed.''

3.2 During the course of hearing, the ld. AR of the assessee prayed for deletion of addition by filing the following written submission.

''1. It is submitted that the assessee is a trading in share business not in the capacity of broker but on its own account and for it clients. The assessee, itself, is a client of M/s Artistic Finance Pvt. Ltd which carried out transactions on behalf of the assessee and the clients of the assessee. Every client is assigned a unique client code which is punched in at the time of transactions. The AO issued notice u/s 131 to M/s Artistic Finance Pvt. Ltd. who vide letter dated 05.03.2016 **(PB 37-38)** explained that the assessee is its major client and provides them with a huge volume of transactions. The operating staff who are not well qualified, to save time had prefixed the client code of the assessee in the system as default which led to error in punching of client codes at the time of transactions. To rectify the error in punching of client code, a facility known as 'Client Code Modification (CCM)' is provided by the stock exchange till 4:15 PM of the trade day itself. This can be done on only written request of the clients **(Copies of letters enclosed at PB 39-46)**.

2. It is submitted that in any given day, thousands of transactions are carried out by brokers. The CCM facility is provided by the National Stock Exchange to rectify the errors / mistakes made at the time of punching trades. The National Stock Exchange of India Limited has provided certain guidelines and penalties relating to the CCM Facility **(PB 20-26)**. As per the stock exchange, CCM facility can be used to modify the client code on the trade day itself till 4:15 PM **(PB 20).** This is also stated in Circular No. 974 dated 10.09.2009 of the National Securities Clearing Corporation Limited for its Futures & Options Segment **(PB 25-26)**. The stock exchange has also drawn a list of the common violations committed and the applicable penalties **(PB 21-24)** where it is stated that *"if the transfer of trades / errors at the time of order entries are in excess of 2% of the number of orders executed, fine of 0.1% of value of trades transferred is applicable"*.

3. The broker on an average executes more than 5000 trades in a day. As is calculated by the AO, the exchange is operative only 260 days in a year. Thus, in a year approximately 13 lakhs trades are carried out by the broker. Therefore, the fact that during the year, the broker had carried out 2380 modifications by using CCM facility is irrelevant as it is only 0.18% of the total trades carried out by the broker during the year. Also, the fact the assessee's client code was set as default in the system is for the convenience of the broker. The assessee has no control over the system. The client brings to the notice of the broker any mistake/ error in the client code.

4. A statement showing the details of modified client names and the profit/loss to the modified client due to CCM is at **PB 27-32.** Also by reply dated 15.02.2016 **(PB 33-34)**, the assessee had submitted the confirmations of its parties in whose case modifications have been carried out. This shows that the profit/loss are of the clients of M/s Artistic Finance Pvt. Ltd. which is wrongly punched by it to the account of the assessee and when pointed out, it was transferred to the respective client account who have shown the same in their return of income. Thus, assessee has nothing to do with this loss and therefore, there does not arise any question to disallow the same.

5. The Ld. CIT(A) only on surmises and conjectures observed that these transactions are of the assessee ignoring that M/s Artistic Finance Pvt. Ltd. has admitted that these transactions are not of the assessee. The reliance placed by him in case of McDowell & Co. Ltd. is thus misplaced and not applicable.

6. Reliance in this connection is placed in the case of **ACIT Vs. Kunvarji Finance Pvt. Ltd. 119 DTR 1 (Ahd.) (Trib.)** where it was held that as per Circular No. MCX/T&S/032/2007 dt. 22.01.2007 issued by the Commodity Exchange, client code modification is permitted intra-day i.e. on the same day. There is no penalty if the client code modification is upto 1 per cent of the total orders. In the present case, client code modifications made by the assessee being only 0.94 per cent i.e. less that 1 per cent of the total trading transactions, cannot be said to be unusually high or mala fide when the modification was made on the same day. Had the client modification been done after the transaction period when the price of the commodity had changed, then perhaps there could have been some basis to presume that client code modification was intentional. Even if the view of the Revenue is accepted that client code modification was done with mala fide intention, then the profit or loss accruing till the client code modification can be considered in the case of the assessee but the profit/loss arising after such modification can by no stretch of imagination be considered in the hands of the

> assessee. Moreover, CIT(A) having found that all transactions at the commodities exchange have been duly accounted in the books of account maintained by the concerned parties, there cannot be any justification for considering that profit/loss in the case of the assessee on the basis of mere presumption or suspicion.
>
> In view of the above, the Ld. CIT(A) is not justified in confirming the addition made by the AO and the same be deleted.''

3.3 During the course of hearing, the ld. DR relied on the orders of the authorities below.

3.4 I have heard the rival contentions and perused the materials available on record. It is noted that the assessee is a partnership firm engaged in the business of trading of trading in shares. It is noted that the assessee itself is a client of M/s. Artistic Finance (P) Ltd. which carried out business on behalf of the assessee and the clients of the assessee. It is noted that every client is provided a unique code which is punched while making the transactions. It is noted that sometime the operating staff is not well versed with the system who at the time of making transactions in shares and in order to save time, prefixed the client code of the assessee in the system as default which sometime led to error in punching of client codes. In order to rectify the punching of client code, a facility i.e. Client Code Modification (in short CCM) is provided by the Stock Exchange till 4:15 PM of the trade day by itself which can be done only on written request by the client. It is also mentioned in Circular No. 974 dated

10.09.2009 of the National Securities Clearing Corporation Limited for its Futures & Options Segment **(PB 25-26)**. The stock exchange has also drawn a list of the common violations committed and the applicable penalties **(PB 21-24)** where it is stated that *"if the transfer of trades / errors at the time of order entries are in excess of 2% of the number of orders executed, fine of 0.1% of value of trades transferred is applicable"*. It is also noted from the records that the during the year the broker had carried out the broker had carried out 2380 modifications by using CCM facility which is only 0.18% of the total trades carried out by the broker during the year. It is noted that the assessee's client code was set as default in the system is for the convenience of the broker. The assessee has no control over the system. The client brings to the notice of the broker any mistake/ error in the client code. It may be noted that ITAT Ahemdabad Bench in the case of ACIT vs. Kunvarji Finance (P) Ltd. 119 ld. DR 1 had observed that the client code modification is permitted intra day i.e. on the same day. The relevant portion of the decision is as under:-

> ''As per Circular No. MCX/T&S/032/2007 dt. 22.01.2007 issued by the Commodity Exchange, client code modification is permitted intra-day i.e. on the same day. There is no penalty if the client code modification is upto 1 per cent of the total orders. In the present case, client code modifications made by the assessee being only 0.94 per cent i.e. less that 1 per cent of the total trading transactions, cannot be said to be unusually high or mala fide when the modification was made on the

same day. Had the client modification been done after the transaction period when the price of the commodity had changed, then perhaps there could have been some basis to presume that client code modification was intentional. Even if the view of the Revenue is accepted that client code modification was done with mala fide intention, then the profit or loss accruing till the client code modification can be considered in the case of the assessee but the profit/loss arising after such modification can by no stretch of imagination be considered in the hands of the assessee. Moreover, CIT(A) having found that all transactions at the commodities exchange have been duly accounted in the books of account maintained by the concerned parties, there cannot be any justification for considering that profit/loss in the case of the assessee on the basis of mere presumption or suspicion.''

Respectfully following the decision of ITAT Ahemdabad Bench (supra), the Ground No. 2 and 2.1 of the assessee is allowed.

4.0 In the result, the appeal of the assessee is partly allowed

Order pronounced in the open court on 23/03/2017.

Sd/-
(भागचन्द)
(Bhagchand)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 23 /03/ 2017
*Mishra
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s. Noble Securities, Alwar
2. प्रत्यर्थी / The Respondent- The ITO, Ward- 1(4), Alwar
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 911/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar