IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI

BEFORE SH. R.K PANDA, ACCOUNTANT MEMBER

ITA No.2497/Del/2018
Assessment Year: 2009-10

Mohan Aggarwal 12/75, Punjabi Bagh West, New Delhi PAN AADPA8839L	Vs	ACIT, Central Circle -15 New Delhi
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. Gautam Jain, Advocate Sh. Peeyush Kumar Karnal, Advocate
Respondent by	Sh. P. S. Thuingaleng, Sr DR

Date of hearing:	12/12/2018
Date of Pronouncement:	31/01/2019

ORDER

PER R.K. PANDA, AM:

1. This appeal filed by the assessee is directed against the order dated 09.02.2018 of the CIT(A)-26, New Delhi relating to A. Y. 2009-10.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from salary, house property, capital gain and income from other sources. He filed his return of income on 07.07.2009 declaring total income of Rs.9,84,190/-. The said return was processed u/s 143 (1) of the IT Act. Thereafter, search action u/s 132 of the IT Act was carried out in the case of the assessee on 17.12.2013 and the order was passed u/s 153 (A) r.w.s 143 (3) on 28.03.2016. Subsequently, the Assessing Officer received information from the Investigation Wing, Ahemdabad vide letter dated 17.03.2016 that survey action u/s 133 A of the IT Act was conducted by the investigation wing of Ahemdabad at the business premises of 12 stock brokers across India on 23.03.2015. As per

analysis of the data received from the national stock exchange and information provided by the stock brokers, the ADIT (Investigation) came to the conclusion that the assessee has misused the facility of Client Code Modification (CCM) provided to the stock brokers to avail contrived loss of Rs.31,90,855/-. The details of all the transactions original as well as modified was provided by the investigation wing are as under :-

Sl. No.	Name of Beneficiary	Address of Beneficiary	PAN	Name of Broker	When OC-(Ascertained profit)	When MC (Ascertained of Losses)	Net Reduction income due
1	Mohan Aggarwal	Advance Chemical Industries 14-Kishan Market-Sirkiwalan-Hauzqazi Delhi-110006	AADPA8839L	Gaurav Investments & Consultancy	1593542.5	-1597312.5	-3190855

3. In view of the above the Assessing Officer issued notice u/s 148 of the IT Act after recording satisfaction note with due approval. The assessee in response to the same filed its return of income declaring total income of Rs.9,84,190/-. The Assessing Officer analysed the modus operandi adopted by the assessee with the connivance of the stock broker. He also issued notice u/s 133(6) to the broker M/s. Gurauv Investment and Consultancy Private Limited on 14.12.2016 calling for certain information. In response to the same the broker M/s. Gaurav Investments & Consultancy Private Limited stated that Client Code Modification was done in his office to rectify the clerical errors /operational lacuna while punching orders and it was done by their staff after consulting the clients and to their satisfaction. Since the concerned staff has left the services they expressed their inability to comment on the conditions prevailing in the trading room at that time. They also submitted that no set pattern of punching errors can be assumed/ ascertained now. In view of the above and rejecting the various explanations given by the assessee the Assessing Officer made addition of Rs.39,90,855/- to the total income of the assessee as his undisclosed income.

3.1 Before CIT(A) the assessee apart from challenging the addition on merit challenged the validity of the reassessment proceedings. However, the Ld. CIT (A) upheld the validity of reassessment proceedings and also sustained the addition on merit.

4. Aggrieved, with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising following grounds of appeal :-

> *1. "That the learned Commissioner of Income Tax (Appeals) has grossly erred both in law and on facts in upholding the initiation of proceedings under section 147 of the Act and, completion of assessment under section 147/143(3) of the Act without appreciating that the same were without jurisdiction and hence deserved to be quashed as such.*
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> *1.1 That the learned Commissioner of Income Tax (Appeals) has also failed to appreciate that since the original assessment was framed under section 143(3) of the Act and proceedings had been initiated after a period of four years from the end of assessment year and in absence of any failure on the part of the appellant to disclose fully and truly all material facts necessary for assessment, initiation of proceedings was not in accordance with law.*
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> *1.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that there was no specific relevant, reliable and tangible material on record to form a "reason to believe" that income of the appellant had escaped assessment and in view thereof the proceedings initiated are illegal, untenable and therefore unsustainable.*
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> *1.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that reasons recorded mechanically without application of mind do not constitute valid reasons to believe for assumption of jurisdiction u/s 147 of the Act*
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> *2That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in sustaining an aggregate addition of Rs. 31,90,855/- representing loss incurred on account of genuine business transaction in futures and options by the appellant*
>
> *2.1 That the learned Commissioner of Income Tax (Appeals) has failed*

to appreciate that the loss incurred is supported by documentary evidence in the shape of contract notes; and payment of applicable taxes. In such circumstances, disallowances made on the basis of surmises, conjectures and suspicion and without bringing on record any specific evidence establishing that loss incurred is not genuine and therefore not allowable is highly arbitrary, unjustified and untenable.

2.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that assessee has never directed the broker namely M/s. Gaurav Investments & Consultancy, to carry out any transaction on their account with client code modification facility during the instant year.

2.3 That further more the learned Commissioner of Income Tax (Appeals) has sustained the addition on mere speculation, generalized statements, theoretical assumptions and allegations and assertions, without there being any supporting evidence and is therefore not in accordance with law.

2.4 That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in failing to appreciate the written submissions furnished by the appellant and overlooking the judicial pronouncements relied upon by the appellant.

2.5 That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in recording various adverse inferences which are contrary to the facts on record, material placed on record and, are otherwise unsustainable in law and therefore, addition so confirmed is absolutely unwarranted.

3. That the learned Commissioner Income Tax (Appeals) has further erred both in law and on facts in upholding the levy of interest of Rs. 10,30,161/- u/s 234B of the Act, and Rs. 1,887/- u/s 234C of the Act which are not leviable on the facts of the instant case

It is therefore, prayed that it be held that assessment made by the learned Assessing Officer and sustained by the learned Commissioner of Income Tax (Appeals) deserves to be quashed as such. It be further held addition made of Rs. 31,90,855/- and upheld by the learned Commissioner of

Income Tax (Appeals) alongwith interest levied be deleted and appeal of the appellant be allowed."

5. The Ld. Counsel for the assessee strongly challenged the order of the CIT(A). So far as the validity of the reassessment proceedings are concerned the Ld. Counsel for the assessee submitted that since the reasons recorded for reopening of the assessment was not supplied during the course of assessment proceedings, therefore, it vitiates the reassessment proceedings. Further these proceedings were initiated u/s 147 of the IT Act on mere change of opinion and were not based on any tangible and relevant material. Reopening has been initiated based on non application of mind and the approval were also granted in a mechanical manner. Therefore, the reassessment proceedings are null and void.

6. So far as the merit of the case is concerned, referring to page 3 and para 4.1 of the assessment order, the Ld. Counsel for the assessee drew attention of the bench to the following observation of the Assessing Officer :-

"4.1 Over a period of time, some persons, in connivance with brokers started using Client Code Modifications 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."

7. Referring to para 6 page 11 of the assessment order, the Ld. Counsel for the assessee drew the attention of the bench to the following observation of the Assessing Officer :-

"6. In response, the broker M/s. Gaurav Investments & Consultancy (Pvt) Ltd. has stated that Client Code Modification was done in his office to rectify the clerical errors / operational lacunae while punching orders and it was done by our staff after consulting the clients on the conditions prevailing in the trading room at that time. No set pattern of punching errors can be assumed ascertained now."

8. He submitted that the word “connivance” is missing in the above finding of the Assessing Officer. This otherwise means that there was no connivance of the assessee with his broker for manipulation of client code modification. Referring to the decision of the Delhi SMC bench in the case of Radiance Stock Traders Pvt Ltd Vs. ITO is vide ITA No.4542/Del/2018 order dated 29.11.2018 and the decision of the Jaipur Bench of the Tribunal in the case DCIT Vs. Gyandeep Khemka vide ITA No.695/JP/2018 order dated 23.10.2018 and cross objection No.15/JP/2018 for assessment order 2009-10, he submitted that the issue stands fully covered in favour of the assessee by the above decisions. He accordingly submitted that the order of the CIT(A) be set aside and the grounds raised by the assessee be allowed.

9. The Ld. DR on the other hand heavily relied on the order of the Assessing Officer and CIT(A).

10. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the Assessing Officer, on the basis of the information received in the shape of the report of the Investigation Wing of Ahemdabad, reopened the assessment u/s 147 of the IT Act on the ground that assessee has misused the facility of client code modification provided to stock brokers to avail contrived loss of Rs.31,90,855/- There is no dispute to the fact that the assessee in the instant case has traded at the stock exchange through the broker M/s. Gaurav Investment and Consultancy Private Limited. There is also no dispute to the fact that the Assessing Officer during the course of assessment proceedings has called for certain information from the said broker who has replied to the queries raised by the Assessing Officer in response to notice u/s 133 (6) of the IT Act and there is no allegation by the Assessing Officer in his findings that there was any connivance between the assessee and the broker.

10.1 I find that the Jaipur Bench of the Tribunal in the case of DCIT Vs. Gyandeep Khemka (supra) under identical circumstances has observed as under:-

11. We have considered the rival submissions as well as relevant material on record. We note that the Assessing Officer has reopened the assessment on the basis of the information in the shape of the report of the Investigation Wing of Mumbai and Ahmadabad. There is no dispute that the assessee has done trade at stock exchange through the stock broker M/s C.M. Goyenka Stock Brokers Pvt. Ltd. and during the year under consideration, there were various instances of Client Code Modification whereby certain transactions were executed in the name of the assessee, were subsequently modified as to the other clients of the said broker. This modification was done as per the norms of the stock exchange which allows the brokers to carry out necessary Client Code Modification after execution of the trade but in a limited period of V2 hour. This facility is no doubt provided to the brokers to rectify the genuine mistakes committed in typing the wrong codes or the mistakes in punching the client codes at the time of trade transactions on the stock exchange. Thus, in simple words, the Client Code Modification facility allows the broker to correct the mistakes which are committed during the course of doing the trade on behalf of the various clients. There may be some instances of misusing this facility by the brokers but it cannot be done by the broker on regular basis as the broker is bound to carry out trading transactions as per the instructions of the client and therefore, until and unless all three parties are hand in gloves or in-connivance, such misuse of Client Code Modification facility cannot be done by a broker. Therefore, all three parties are required to have ccommon intention and design which in normal course is not possible when they are not related parties as the time limit to modify the client code is very limited after execution of trade/transaction at the stock exchange. The meeting of three minds is essential for misusing this facility and doing this mischievous transfer of profits from one hand to another hand. Until and unless two clients and broker are on the same page and involved in doing this mischievous act by misusing the facility of Client Code Modification such transactions are not possible when the parties are not related to each other party and are independent clients of a particular broker. It is possible only when two clients to a broker are closely related parties and controlled by a single person or set of persons then with the connivance with the broker this kind of bogus transactions can be done in the garb of Client Code Modification. Once the parties are independent and have no relation then doing such transaction within such limited window period of 1/2 hour after trading hours is not possible. Thus, the misuse of such facility is possible only

when all three parties i.e. two clients and one broker have the common interest and are closely related party. These transactions are even otherwise cannot be predesigned or planned as it can be done only after transaction is executed on the stock exchange and subsequently once the result and outcome of the transaction is known to the parties, the same can be shifted from one client to another client to serve the interest of parties. Prior to the execution of the transaction, it is not possible to conceive or preconceive the transfer of the transaction from one account to another account.

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11.1 We note that this issue of rectification of the error by using the Client Code Modification facility has been considered and decided by this Tribunal in the series of decisions as relied by the assessee. The Coordinate Bench of this Tribunal in the case of Nobel Securities Vs ITO (supra) has also considered an identical issue in para 3.1 to 3.4 as under:

"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 resorting to 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 intraday 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."

Thus, it is clear that the stock exchange has accepted the reasonable error margin up to 5% and undisputedly in the case of the assessee, the error and rectification of the same by using the Client Code Modification constitute only 0.47%, therefore, the percentage of trade which are rectified are not only within the range but it is on lower side of the range of error margin acceptable in such transactions. The Mumbai Benches of the Tribunal in the case of ITO Vs. M/s Pat Commodity Services P. Ltd. has considered this issue in para 11 to 16 as under:

"11. We have heard rival contentions and perused the record. A careful perusal of the order passed by the Ld CIT(A) would show that the Ld CIT(A) has met each and every point raised by the assessing officer. The Ld CIT(A) has pointed out that the AO has not brought on record any material to show that the client code modification made by the assessee was not genuine one. It was further noticed that none of the clients examined by the tax authorities has disowned the transactions carried on by the assessee. As noticed by the Ld CIT(A), the MCX, the stock ITA No. 695/JP/2018 & CO 15/JP/2018 DCIT Vs. Gyandeep Khemka exchange, is very much aware about client code modifications and hence in order to discourage frequency of modifications, it has brought in penalty mechanism. Even under the penalty mechanism also, no penalty shall be leviable if the modification was less than 1% of the total transactions, meaning thereby, the MCX is also accepting the fact that such kind of client code modification is inevitable.

12. Under these set of facts, the next question that arises is - Whether the client code modification has resulted into shifting of profits, otherwise earned by the assessee. It is a fact that the assessee company has started its operations only in July, 2005 by converting individual membership into corporate membership. Further, the commodity exchange was about 3-4 years old only at the relevant point of time. Hence, the assessee cannot be considered to be an established player in the years under consideration. Further, the movement of prices of commodities cannot be predicted by anyone with accuracy and hence it is inconceivable or unlikely that the assessee could have made profits consistently, even if it is assumed for a

*moment that the assessee had actually carried out the transactions for its own benefit. We notice that the assessee has offered explanations as to why it carried out the transactions in its own code, i.e. since the timing of entering the transactions is crucial in the online trading, the staffs of the assessee company found it convenient to punch its own code. Further, we notice that the fact that the assessee has changed the code to the concerned client's account at the end of the day has not been disproved. If at all any person comes with a request seeking profits, there will normally be time lag and hence the fact that the assessee has changed the codes at the end of the day only shows that the assessee has carried out the transactions on behalf of its clients only. Such kind of transactions shall usually be sporadic transactions, where as in the instant * case, the clients have carried out the transactions continuously. Further, it is pertinent to note that none of the clients, with whom the assessing officer has carried out the examination, has disowned the transactions. Further, all the clients have duly disclosed the profits arising from the transactions as their respective income. Though the AO has alleged that the said profits have been used to set off the past brought forward losses, yet the Ld CIT(A) has made a detailed analysis of this matter and has given a clear finding that the same was not true in all the cases. The Ld CIT(A) has pointed out that majority of the clients have paid tax on the profits. It was further noticed that the some of the transactions have resulted in loss also and the said loss has also been accepted by the concerned clients. Ali these factors, in our view, go to show that the assessee has carried out the transactions on behalf of its clients only, even though the transactions were executed in the code of the assessee initially.*

13. Further, the Ld CIT(A) has pointed out that there was no modification of client code to the tune of Rs.3.31 crores and further there was change of code from one client to another client to the tune of Rs.6.16 crores. In both these cases, the question of shifting of profit earned by the assessee does not arise at all. The action of the AO in assessing the above said profits in the hands of the assessee only show that there was no proper application of mind on the part of the assessing officer.

14. Another important point that is relevant here is that none of the clients was shown as related to the assessee herein. Normally the question of shifting of profit would arise between the related parties only. If the assessee

had really shifted the profits to an outsider, then the human probabilities would suggest that the assessee would have received back corresponding amount from the recipient of profit. However, in the instant case, the AO has not brought any material on record to show that the assessee had received back corresponding amount equivalent to the amount of profit claimed to have been shifted to the clients. The AO has mainly relied upon the report given by the MCX and has drawn adverse conclusions without bringing any material to support his view.

15. The Ld CIT(A) has also pointed out that modifications carried out by the assessee works out to around 3% of the total transactions only and in our view, the said volume, in fact, vindicates the explanation of the assessee. Further none of the clients has been found to be bogus and all of them have complied with KYC norms, meaning thereby the identity of all the clients stand proved. None of them has disowned the transactions and all of them have also declared the income in their respective returns of income. All these factors, in our view, support the contentions of the assessee.

16. In view of the foregoing discussions, we are of the view that the Ld CIT(A) was justified in deleting the additions made in both the years under consideration. In our view also, the assessing officer has drawn adverse conclusions against the assessee without properly bringing any materials to support the view, i.e., the additions have been made on suspicion and surmises only. Accordingly, we uphold the order of Ld CIT(A) in both the years under consideration."

Thus, in the said case, the modification carried out by the assessee were 3% of the total transaction, which was found by the Tribunal as within the permissible limit of error margin. The Ahmadabad Benches of the Tribunal in the case of ACIT Vs. M/s Kunvarjit Finance Pvt. Ltd. (supra) and others in bunch of appeals has analysed the issue in para 8 to 11 as under:

"8. We have carefully considered the arguments of both the sides and perused the material placed before us. The Assessing Officer believed the client code modification to be malafide because in his opinion the client code modification was for unusually high number of cases. Therefore, first thing to be decided is whether there was the client ITA No. 695/JP/2018 & CO

15/JP/2018 DCIT Vs. Gyandeep Khemka code modification for unusually high number of cases. The Commodity Exchange i.e. MCX vide circular No.MCX/T&S/032/2007 dated 22.01.2007, issued guidelines with regard to the client code modification, which reads as under:-

"Circular no. MCX/T&S/032/2007 January 22, 2007

Client Code Modifications

In terms of provisions of the Rules, Bye-Laws and Business Rules of the Exchange, the Members of the Exchange are notified as under:

Forward Markets Commission (FMC) vide its letter no. 6/3/2006/MKT-II (VOL III) dated December 20, 2006 and January 5, 2007 has directed as under.

a. The facility of client code modifications intra-day are allowed.

b. The members are also allowed to change their client codes between 5:00 p.m. to 5:15 p.m., in case of the contracts traded till 5:00 p.m. and between 11:30 p.m. to 11:45 p.m. for the contracts traded till 11:30 p.m. on all the trading days from Mondays to Fridays and on Saturdays the same shall be allowed between 2:00 p.m. to 2:15 p.m.

c. However, on the days when trading in commodities takes place till 11:55 p.m. the client code modification will be allowed only upto 12:00 p.m.

d. At all times, Proprietary trades shall not be allowed to be modified as client trades and client trades shall not be allowed to be modified as proprietary trades.

e. In order to ensure that client codes are entered with alertness and care, a penalty on the client code changes made on a daily basis shall be imposed as under:

S. No	*Percentage of Client Code changed to total orders (matched) on a daily basis*	*Penalty (Rs.)*
1	*Less than or equal to 1% Nil*	*Nil*
2	*Greater than 1% but less than or equal to 5%*	*500*
3	*Greater than 5% but less than or equal to 10%*	*1000*
4	*Greater than 10%*	*10000*

f. It is clarified that the facility of client code modification is allowed as an interim measure only upto March 31, 2007 and after this date the said facility will be completely stopped.

With reference to point C. as referred above, Members may please note that the client code modifications will be allowed only upto 11:55 p.m. international referenceable commodities (i.e. commodities traded upto 11:55 p.m.)

Members are requested to take note of the FMC directives and ensure strict compliance."

From the above, it is evident that client code modification is permitted intra-day, i.e. on the same day. As per Commodity Exchange, if client code modification is upto 1% of the total orders, there is no penalty and if it is greater than 1% but less than 5%, the penalty is Rs.500/-. If it is greater than 5% but less than 10%, penalty is Rs.1000/- and if it is greater than 10%, then penalty is Rs.10,000/-. From the above, the only inference that can be drawn is that as per MCX, the client code modification upto 1% is absolutely normal and therefore, the broker is permitted to modify the client code upto 1% without paying any penalty. Even client code modification upto 5% is not considered unusually high because that is also permitted with the token penalty of Rs.500/-. In the context of the circular issued by Commodity Exchange, let us examine whether the client code modification done by the broker i.e. KCBPL is unusually high. At page No.16 on paragraph No.4.3, the CIT(A) has given the number of transactions entered into by the assessee for the period 2004-05 to 2007-08 and the number of client code modification and percentage thereof. We have also reproduced the same at paragraph No.6 of our order. From the said details, it is evident that the client code modification was done in four years 36,161 times. As an absolute figure, the client code modification may look very high, but if we look it at in terms of total transactions, it is only 0.94%. The total number of trade transactions is 38.58 lacs and the client code modification is only 36,161. Therefore, the client code modification is less than 1% of the total trading transactions. As per circular of Commodity Exchange, client code modification upto 1% is quite normal and is permitted without any penalty. That the Assessing Officer has not given any reason on what basis he presumed the client code modifications to be unusually high. In the light of the MCX circular, we are of the opinion that the client code modification was quite nominal and not unusually high as alleged by the Assessing Officer.

9. The Assessing Officer held the client code modifications to be malafide with the intention to transfer the profit to other person by modifying the client code so as to avoid the payment of tax. From the circular of the Commodity Exchange, it is evident that client code modification is permitted on the same day. Therefore, we are unable to find out any justification for the allegation of the Assessing Officer that the client code modification was with the malafide intention. When the client code was modified on the same day, there cannot be any malafide intention. Had client modification done after the transactions period when the price of the commodity has already changed, then perhaps there could have been some basis to presume that client code modification is intentional. However, when the client code modification is done on the same day, in our opinion, there was no basis or justification to hold the same to be malafide.

10. Moreover, the ld. Assessing Officer has computed the notional profit/loss till the transactions period and not till the period by which the client code modification took place. Even if the view of the Revenue is accepted that the

client code modification was with malafide intention, then the profit or loss accrued till the client code modification can be considered in the case of the assessee but by no stretch of imagination the profit/loss arising after the client code modification can be considered in the hands of the assessee.

11. The ld. CIT(A) in paragraph 4.13 of his order has also recorded the findings that "all transactions at the Commodities Exchanges have been duly accounted in the books of account maintained by the concerned parties. Such profits/loss has been duly accounted whenever the transactions have been closed. Thus, whatever profits have been generated or accounting of actual trade, have been offered and brought to the charge of tax in the cases of concerned assessees." These findings of fact recorded by the ld. CIT(A) has not been controverted by the Revenue at the time of hearing before us. When the transaction has been duly accounted for and the profit/loss has accrued to the concerned parties in whose names transactions have been closed, there cannot be any basis or justification for considering those profit/loss in the case of the assessee on the basis of mere presumption or suspicion. It is not the case of the Revenue that such alleged profit has actually been received by the assessee. In view of the totality of the above facts, we do not find any justification to interfere with the order of the CIT(A) in this regard and the same is sustained; and Ground Nos. 1 and 3 of the Revenue's appeal are rejected.

Thus in the said case, it was found and held that the Client Code Modification up to 1% is quite normal and permissible without any penalty. The case in hand, it was only 0.47%, therefore, there is no reason to doubt the genuineness of the Client Code Modification done by the broker in the transactions where after the execution of the trade, the broker has carried out the correction of mistakes. A similar view has been taken by the Tribunal in the series of decisions as referred above. In view of the above facts and circumstances of the case and following the decisions of the Coordinate Benches of the Tribunals, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue. Hence, both these grounds of revenue's appeal are dismissed."

11. I find the Delhi Bench of the Tribunal in the case of Raidance Stock Traders Pvt. Ltd. (supra) has observed 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 precondition 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. This view is fortified by the decision of the Hon'ble Delhi High Court in the case of Pr. CIT v. G&G Pharma India Ltd. reported at 384 ITR 147 (Del), wherein it has been held as under:-*

"Today when the case was called out, Mr. Sawhney produced before the Court the very same letter of the AO dated 15th September 2010 which has been reproduced in its entirely in the impugned order of the ITAT. He submitted that the AO was himself present in the Court and further efforts would be made to locate the materials on the basis of which the AO formed his opinion regarding reopening of the assessment. The Court was not prepared to grant further time for this purpose since it was not clear that the materials were, in fact, available with the Department.

12. In the present case, after setting out four entries, stated to have been received by the Assessee on a single date i.e. 10th February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated: "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has introduced its own unaccounted money in its bank account by way of above accommodation entries." The above conclusion is unhelpful in understanding whether the AO applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the Assessee, which must have been tendered along with the return, which was filed on 14th November 2004

and was processed under Section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the AO to have simply concluded: "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO must apply his mind to the materials in order to have reasons to believe that the income of the Assessee escaped assessment is missing in the presentcase."

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 assesssee 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.*

6.3 *It is further noted that the approval granted by the competent authority is a mechanical approval and action has been taken mechanically because on perusing the reasons recorded, it demonstrates that Pr. CIT has written* ***"Yes, I am satisfied."*** *which establishes that the competent authority has not recorded proper satisfaction / approval, before issue of notice u/s. 148 of the I.T. Act. Thereafter, the AO has mechanically issued notice u/s. 148 of the Act, on the basis of information allegedly received by him from the (Inv.)), Unit 1(3), Ahmedabad. Keeping in view of the facts and circumstances of the present case and the case law applicable in the case of the assessee, I am of the considered view that the reopening in the case of the assessee for the asstt. Year in dispute is bad in law and deserves to be quashed. My aforesaid view is fortified by the following decisions:-*

(A) ***Hon'ble Delhi High Court in the case of Pr. CIT vs. M/s NC Cables Ltd. in ITA No. 335/2015 has held as under:-***

11. Section 151 of the Act clearly stipulates that the CIT(a), who is the competent authority to authorize the reassessment notice, has to apply his mind and form an opinion. The mere appending of the expression 'approved' says nothing. It is not as if the CIT(A) has to record elaborate reasons for agreeing with the noting put up. At the same time, satisfaction has to be recorded of the given case which can be reflected in the briefest possible manner. In the present case, the exercise appears to have been ritualistic and formal rather than meaningful, which is the rationale for the safeguard of an approval by a higher ranking officer, For these reasons, the Court is satisfied that the findings by the ITAT cannot be disturbed."

(B). Hon'ble High Court of Madhya Pradesh in the case of CIT vs. S. Goyanka Lime & Chemicals Ltd. reported in (2015) 56 taxmann.com 390 (MP) has held as under:-

"7. We have considered the rival contentions and we find that while according sanction, the Joint Commissioner, Income Tax has only recorded so "Yes, I am Satisfied". In the case of Arjun Singh vs. Asstt. DIT (2000) 246 ITR 363 (MP), the same question has been considered by a Coordinate Bench of this Court and the following principles are laid down:-

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"7. We have considered the rival contentions and we find that while according sanction, the Joint Commissioner, Income Tax has only recorded so "Yes, I am Satisfied". In the case of ARjun Singh vs. Asstt. DIT (2000) 246 ITR 363 (MP), the same question has been considered by a Coordinate Bench of this Court and the following principles are laid down:-

"The Commissioner acted, of course, mechanically in order to discharge his statutory obligation property in the matter of recording sanction as he merely wrote on the format "Yes, I am satisfied" which indicates as if he was to sign only on the dotted line. Even otherwise also, the exercise is shown to have been performed in less than 24 hours of time which also goes to indicate that the Commisisoner did not apply his mind at all while granting sanction. The satisfaction has to be with objectivity on objective material

8. If the case in hand is analysed on the basis of the aforesaid principle, the mechanical way of recording satisfaction by the Joint Commissioner, which accords sanction for issuing notice under section 148, is clearly unsustainable and we find that on such consideration both the appellate authorities have interfered into the matter. In doing so, no error has been committed warranting reconsideration."

(C.) Hon'ble Supreme Court of India in the case of CIT vs. S. Goyanka Lime & Chemical Ltd. reported in (2015) 64 taxmann.com 313 (SC) in the Head Notes has held that "Section 151, read with section 148 of Income Tax Act, 1961 - Income escaping assessment - Sanction for issue of notice (Recording of satisfaction) - High Court by impugned order held that where Joint Commissioner recorded satisfaction in mechanical manner and without application of mind to accord sanction for issuing notice under section 148, reopening of assessment was invalid - Whether Special Leave Petition filed against impugned order was to be dismissed - Held, Yes (in favour of the Assessee)."

6.4 *I further note that it is well settled law that reasons alone can be looked into and, cannot be supported by any supplementary or additional material.*

6.5 *I further note that Assessing Officer at page no. 2 of his assessment order*

dated 8.12.2017 u/s. 147/143(3) of the Act stated as under:-

"Obiection to reopening

Assessee filed objection vide letter dated 24.11.2017 to the notice u/s. 148/reason recorded.

Removal of objection

The objection filed by the assessee were rejected vide order dated 27.11.2017."

6.6.1 After perusing the aforesaid extracts from the assessment order, it is evident that the assessee has raised objection to initiation of assessment proceedings u/s. 147 of the Act vide letter dated 24.11.2017 and the aforesaid objections were disposed of by the AO vide order dated 27.11.2017, which shows that the AO did not accept the objections so filed, he shall not proceed further in the matter with in a very short period of service of order disposing off objection, however, he has made the order of assessment u/s. 147/143(3) of the Act on 8.12.2017, which is not in accordance with law and not permissible. This view is fortified by the following decisions :-

i) ITA NO. 5780/D/2014 DATED 6.4.2018 Meta Plast Engineering (P) Ltd. v. ITO

"9. Further, in view of the decision of the Hon'ble Bombay High Court in the case of Bharat Jayant Patel (supra), learned AO held should have allowed four weeks' time to the assessee to seek their legal remedies after rejection of the objections of the assessee. In view of the fact that the AO has disposed of the objections of the assessee on and passed the assessment order on it is clear that no such time was granted to the assessee. Further, the reasons recorded at the time of assumption of jurisdiction by the AO that the assessee has received an accommodation entry of Rs.15 lacs whereas at the time of framing of assessment, the assessee was assessed the share application money to the tune of Rs.2.15 crores. We find reason in the submission of learned AR that in view of the decision in PCIT vs. RMG Polyvinyl (I) Ltd.386 ITR 5 (Bom), such an error indicates non application of mind by the learned AO."

ii) 296 ITR 90 (Bom) Asian Paints Ltd. vs. DCIT

3. *The learned senior counsel for the petitioner pointed out that in some of the cases as soon as the objections were rejected by the concerned*

Income- tax

Officer, even the assessment order has been passed within a very short time whereby the assessee is left without any remedy to challenge such an order of rejection.

4. *Hence we make it clear that if the Assessing Officer does not accept the objections so filed, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee.*

5. *Accordingly, rule is made absolute.*

6. *We also direct that the Income Tax Officer concerned shall follow the above procedure strictly in all such cases of reopening of assessment."*

6.7 *As regards case law cited by the Id. DR is concerned, the same is an exparte order and on distinguished facts and circumstances of the case.*

6.8 *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 Assessing Officer and upheldby the Ld. CIT(A) are nonest in law and without jurisdiction, hence,the re- assessment is quashed. Since I have already quashed the re-assessment, the other grounds have become academic and are therefore not adjudicated and accordingly, the assessee's appeal is allowed."*

12. Since in the instant case action has been taken us/ 147 of the IT Act after completion of the assessment u/s 153 A/ 143 (3) on the basis of report of the Investigation Wing and the Assessing Officer has not conducted any enquiry on the same, therefore, respectively following the decisions of the Tribunal cited (supra) I hold that reassessment proceedings initiated in the instant case are not in accordance with law. Accordingly the same is quashed. Since the assessee succeeds on the legal ground, the grounds of appeal challenging the addition on merit become academic in nature for which these are not being adjudicated.

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

Order pronounced on 31.01.2019

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 31.01.2019

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

ASSISTANT REGISTRAR
ITAT NEW DELHI