

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM ]

I.T. A No. 2295/Kol/2018 A.Y 2009-10

M/s. Vivek Bhaia  
PAN: AEDPB3153Q  
(Appellant)

V/s. I.T.O. Ward 36(4), Kolkata  
(Respondent)

For the Appellant : Shri S.M. Surana, Advocate, Id.AR  
For the Respondent : Shri C.J. Singh, JCIT, Id.DR

Date of Hearing : 07-03-2019  
Date of Pronouncement: 15-05-2019

**ORDER**

1. This Assessee’s appeal for assessment year 2009-10 arises against the CIT(A), 10, Kolkata’s order dated 19-09-2018 passed in case no. 127/CIT(A)-10/W 36(4)/09-10/2016-17/Kol. involving proceedings u/s. 147/ 143(3) of the I.T Act, 1961 (in short ‘Act’).

Heard both the parties. Case file perused.

2. It transpires at the outset that the Assessee’s two substantive grounds in the instant appeal challenge validity of the impugned reopening / re-assessment and correctness of both the lower authorities’ action making addition in question of Rs. 7,36,530/- under the head entire loss made in the course of the assessment as affirmed by the lower appellate authority. Both the authorities’ view on merits is that the assessee has contrived loss amounting to Rs.7,36,530/- by taking recourse to client code modification through his broker, namely M/s. C.M. Goenka Stock brokers Pvt. Ltd. I notice in these backdrop of facts this tribunal’s Co-ordinate Bench’s decision in M/s. Ratnabali Commodities Pvt. Ltd V/s. ITO, W 12(3), Kolkata decided on 16-06-2017 has deleted the identical addition stated to be modification of client code by following detailed discussion:-

*“3. Sole issue raised by assessee in its grounds of appeal is that Ld. CIT(A) erred in holding the loss of ₹19,76,538/- in the transactions of derivatives as bogus loss.*

*4. Briefly stated facts are that the assessee is a private limited company and engaged in the business of dealing in commodities. The assessee in the year under consideration has incurred loss of ₹45,23,943/- in derivatives transactions of shares. The above loss was incurred by the assessee at the fag-end of the relevant Assessment Year i.e. from 18.03.2009 to 26.03.2009. All the transactions were carried out through a broker namely M/s Ratnabali Capital Markets Ltd. (RCML for short) a member of National Stock Exchange (NSE for short). The director in the assessee-company and RCML were common and the name of RCML was appearing in the list of specified person as envisaged u/s. 40(A)(2)(b) of the Act. The assessee has also paid brokerage to RCML for ₹92,566/- only for the above stated transactions. The Assessing Officer during the course of assessment proceedings to verify the veracity of the loss claimed by assessee has confirmed from NSE by issuing a notice u/s. 133(6) of the Act. As per the confirmation received from NSE, the AO observed that the name of the client and code has been modified during the process of said transactions. Therefore, the AO had a doubt about the genuineness of the impugned loss and therefore has sought the explanation from the assessee. In compliance thereto the Director of the assessee- company and RCML namely, Shri Vikash Somani in his statement recorded dated 22.12.2010 submitted that the name of the client and code was modified due to punching errors by the clerical staff. It was also submitted that all the modification in the name of client and its code were carried out within the time permitted by the Stock Exchange. The assessee also submitted that the Security Transaction Tax (STT) was paid in respect of all the transactions giving rise to the impugned loss. However, AO disagreed with the contention of assessee on account of following reasons:-*

*(a) The impugned loss was incurred by the assessee at the fag-end of the year and similar loss was also incurred in the immediate preceding AY 2008-09 at the fag-end of the year which was also disallowed.*

*(b) The client code and name were modified by RCML without having instruction from the assessee.*

*(c) The nature of modification carried out in the client's name and code do not suggest that it was a clerical punching error rather it is suggesting that the loss was taken by the assessee in order to reduce its profit which is not permissible in the eyes of law.*

*In view of the above, AO treated the impugned loss of ₹19,76,538/- as bogus and accordingly added to the total income of assessee.*

*5. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that the client's name and code were modified within the time permitted by National Securities Clearing Corporation Ltd., (NSCCL short) which is the wholly owned subsidiary of NSE. The assessee also submitted that there is always huge rush during the marketing hours and therefore there is high possibility of human errors due to extremely high volume of orders which are placed on screens on real time basis. The assessee also submitted that all the transactions were carried out through banking channel and this was supported with the contract notes. The assessee also produced Form No.10BB which evidenced the payment of STT on the impugned transactions in recognized Stock Exchange. However, Ld. CIT(A) disregarded the contention of assessee and confirmed the order of AO by observing as under:-*

*"... .. The facts in this case have been considered and it is apprehended that there is a possibility that the modifications might have been made to accommodate the appellant as the broker of the appellant was a sister concern. Even though apparently it has not been established that the such modification had been done in violation of rules and regulations prescribed by SEBI and the AO had proceeded on suspicion, however at the same time it also cannot be concluded either that the loss would not be attributable to these "modifications". Thus, I find merit in the contention of the AO. Therefore, the appellant's contention in respect of the claim of loss cannot be acceptable as the same pertained to the modified transactions being entered into by the appellant's sister concern who was the Broker and helped in manipulation for the benefit of the Appellant. I also find that similar addition was made by the AO on the same ground in the previous AY 2008-09 and the CIT(A)-XXX, Kolkata has partly confirmed the addition so made by the AO vide Appeal Order dated 23.11.2012. Hence disallowance made by the AO for the loss of*

*Rs.19,76,538/- claimed to be incurred by the appellant company is confirmed as it was done with the intention of reducing appellant company's taxable income manipulation of transactions entered into by the Appellant's sister ITA No.191/Kol/2015 A.Y. 2009-10 M/s Ratnabali Commodities Pvt. Ltd. Vs. ITO Ward-12(3) Page 4 concern who was the Broker and helped in manipulation for the benefit of the Appellant. Hence, this ground of appeal of the appellant is dismissed."*

*Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.*

*6. Ld. AR for the assessee filed paper book which is running pages from 1 to 20 and cited case law. Ld. AR for the assessee reiterated the arguments that were placed before Ld. CIT(A). Further, he also submitted the copies of contract notes in support of the transactions giving rise to the impugned loss which are placed on pages 1 to 5 of the paper book. He also submitted the evidence for the payment of STT on such transactions which is placed on pages 6 of the paper book. Ld. AR also submitted the copy of bank statement of the assessee and RCML along with the ledger copy of the broker and the assessee in the respective books of accounts which are placed on pages 7 to 20 of the paper book.*

*On the other hand, Ld. DR vehemently relied on the order of Authorities Below.*

*7. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. The issue before us revolves for the amount of loss claimed by assessee for ₹19,76,538/- which was treated by the Authorities Below as bogus mainly due to the modification carried out in the name and code of the assessee by the broker. The director of the assessee-company and the director of the broker company listed with NSE are same person. The impugned loss was treated as bogus due to several reasons such as it was incurred at the fag-end of the year, to reduce the taxable profit earned by assessee during the year and similar kind of loss was also disallowed in the immediate preceding year.*

*7.1 From the foregoing discussion, we find that indeed the client's code and name were modified in respect of transactions claimed by assessee. However, on perusal of record, we find that the impugned transactions were carried out through banking channel and all the supporting evidence such as contract note, payment of STT were filed at the time of assessment proceedings. We also find that Ld. CIT(A) confirmed the order of AO on the basis of his guess-work as evident from his appellate order which is reproduced below:-*

*"there is a possibility that the modifications might have been made to accommodate the appellant as the broker of the appellant was a sister concern."*

*Further the ld. CIT-A has observed in his order as under:-*

*"Even though apparently it has not been established that the such modification had been done in violation of rules and regulations prescribed by SEBI and the AO had proceeded on suspicion, however at the same time it also cannot be concluded either that the loss would not be attributable to these "modifications"*

*On perusal of the order, we find that Ld. CIT(A) has confirmed the order of AO on his own surmise and conjecture which is not permissible in the eyes of law. Ld. DR has also not brought anything on record contrary to the advance arguments placed by Ld. AR for the assessee as well as no defects of whatsoever has been pointed out in the documents produced by assessee in support of its impugned loss. We also find whatever modifications were carried out by the broker they were carried out within the time permitted by the NSE for the purpose of modification. Thus, we are of the view that the order of Authorities Below is based on surmise and conjecture and same is not based on tangible material to treat the impugned loss as bogus loss. 7.2 Moreover, we also find that the details furnished by the assessee in respect of transactions giving rise to the loss were exactly matching with the details furnished by the NSE. In none of the case, Authorities Below have brought on record where any mismatch is found between the books of the assessee and the confirmation received from NSE. Had there been any manipulation in the impugned loss then it could have been revealed from the confirmation received from NSE. Therefore, the modifications in the client's name and code cannot justify*

*the impugned loss as bogus. Thus, we conclude that the impugned addition has been made by the Authorities Below on the basis of surmise and conjecture which is not permissible in the eyes of law as held by the Hon'ble Supreme Court in the case of [Lalchand Bhagat Ambica Ram vs. CIT Bihar and Orissa](#) (1959) 159 ITR 289 (SC). Therefore, we hold that the impugned loss cannot be subject-matter of addition on the basis of suspicion. In this regard we also rely in the case of [CIT vs. Kundan Investment Ltd.](#) reported in 263 ITR 626 (Cal) where Hon'ble jurisdictional High Court has held:-*

*"The Tribunal had found that all relevant documents relating to contract notes, bills, the quoted price and other materials were produced. The transactions were made through cheques. All the shares related to the reputed companies and were quoted shares in the stock exchanges and were purchased and sold at the prevalent quoted market rates, which was verified from the statement of the stock exchanges. On these basis, the Tribunal found that the CIT(A) had proceeded on the basis of suspicion that there might be some ingenuity in the transactions. On the basis of the materials produced, the Tribunal came to a finding of fact, which does not seem to be perverse. Whether the shares could be sold immediately on the date of purchase or not was a question of business expedience. Whether the decision was correct or wrong cannot be a question, which can be a subject-matter of decision in such a case. In order to find out whether the transaction is genuine or ingenuine, it is neither the expedience or correctness of the decision nor the business expertise of the person to be considered. It is to be considered on the basis of the materials that there was no such transaction and that these share transactions were paper transactions. The suffering of loss could not be a factor for such purpose. Having regard to the facts and circumstances of the case, the view taken by the Tribunal allowing share loss cannot be said to be erroneous or perverse.--[CIT vs. Emerald Commercial Ltd. & Anr.](#) (2001) 171 CTR (Cal) 193 : (2001) 250 ITR 539 (Cal), [CIT vs. Dhawan Investment & Trading Co. Ltd.](#) (1999) 238 ITR 486 (Cal) and [CIT vs. Currency Investment Co. Ltd.](#) (2000) 158 CTR (Cal) 361 : (2000) 241 ITR 494 (Cal) relied on." Respectfully following the same, we hold that the impugned loss claimed by assessee is genuine loss in the above facts and circumstances of the case and therefore eligible for deduction. Accordingly, AO is directed. This ground of assessee's appeal is allowed*

3. Shri C.J. Singh, JCIT, Id.DR/Revenue fails to point out any distinction on fact or law in the instant case those involved in any Co-ordinate Bench's decision. I therefore delete the impugned addition by adopting above co-ordinate bench's detailed reasoning *mutatis mutandis*. The assessee succeeds in this substantive ground on merits. His former ground seeks to challenge validity of impugned re-opening/re-assessment is rendered infructuous.

5. This Assessee's appeal is partly allowed in above terms.

Order pronounced in the Court on 15 -05-2019

Sd/-

[ S.S.Godara ]  
Judicial Member

Dated : 15 -05-2019

\*\*PRADIP, Sr. PS

Copy of the order forwarded to:

1. Appellant/Assessee: Vivek Bhaia 33/1 Netaji Subhas Road, Marshall House, R. No. 527, 5<sup>th</sup> Fl., Kolkata-1.
2. Respondent/Department: Income Tax Officer, Ward 36(4), Aaykar Bhawan Poorva, R. No. 815, 110 Shantipally, E.M Bypass, Kolkata-107.
- 3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar  
H.O.O/D.D.O Kolkata