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

श्री रमेश सी. शर्मा, लेखा सदस्य एवं श्री विजय पाल रॉव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C. SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 223/JP/2019
निर्धारण वर्ष/Assessment Year : 2010-11.

Shri Sandeep Sharma, 49, Vivek Vihar, Bajaj Nagar, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward-6(3), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. ADUPS 5851 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal (CA)
राजस्व की ओर से/ Revenue by: Shri Ashok Khanna (JCIT)

सुनवाई की तारीख/ Date of Hearing : 16.05.2019.
घोषणा की तारीख/ Date of Pronouncement : 21/05/2019.

आदेश/ ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 8th January, 2019 of ld. CIT (A), Ajmer for the assessment year 2010-11. The assessee has raised the following grounds :-

" 1. The ld. CIT (A) has erred on facts and in law in upholding the validity of the order passed u/s 147 of IT Act, 1961.

2. The ld. CIT (A) has erred on facts and in law in confirming the addition of Rs. 3,12,790/- made by AO alleging that assessee was indulged in transferring fictitious profits/loss to the other clients/beneficiaries by misusing the client code modification facility in the F&O segment and thereby creating a loss of Rs. 3,12,790/- and suppressing the income to that extent.

3. The ld. CIT (A) has erred on facts and in law in confirming the addition of Rs. 6,056/- on account of alleged commission paid to brokers for providing alleged entries through CCM.

4. The appellant craves to alter, amend and modify any ground of appeal.

5. Necessary cost be awarded to the assessee.

First, we take up ground nos. 2 & 3 regarding addition made by the AO on account of transferring of fictitious profits/loss to other clients in the garb of client code modification.

2. The assessee is an individual and engaged in the business of trading in shares and securities as well as doing trading in derivative segment. The assessee filed his return of income on 20th September, 2009 declaring total income of Rs. 3,51,16,730/-. The return was processed under section 143(1) on 05.05.2011. Subsequently, the AO reopened the assessment by issuing notice under section 148 on 27th March, 2017 by recording the reasons that information has been received from the ADIT (Investigation) Unit-1(3), Ahmedabad regarding fictitious profits and losses were created by some brokers by misusing client code modification facility in F&O segment on NSE. The AO accordingly proposed to assess an amount of Rs. 1,04,985/- on account of shifting out profits in the garb of client code modification. The AO completed the assessment under section 143(3) read with section 147 whereby an addition of Rs. 3,12,790/- was made on account of shifting of profits and F&O trading in the garb of client code modification as well as 2% commission on the said amount which comes to Rs. 6,056/-. The assessee challenged the action of the AO before the ld. CIT (A) but could not succeed.

3. Before us, the ld. A/R of the assessee has submitted that the assessee has declared the total income of Rs. 3,51,16,730/- which includes business income from trading in shares at Rs. 3,06,60,317/-, on such a huge income from trading of shares why the assessee would indulge in claiming some bogus loss on account of client

code modification for a meager amount of Rs. 3,12,790/-. The ld. A/R has further submitted that the client code modification is done by the broker and is not carried out by the assessee. Therefore, if some punching error happened during the course of trading on the part of the broker on various clients, then the Stock Exchange provides the facility to rectify the same by using the client code modification facility so that the transactions can be accounted in the right clients name which were wrongly punched in the name of some other client. Further, the stock exchange has also drawn a list of common violations committed and the applicable penalties 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". Thus the ld. A/R has submitted that the error in the case of the assessee is about only 1% which is less than even 2% of the total trading turnover and, therefore, it is even less than the limit of 2% for which even the Stock Exchange is not penalized the stock broker. Even otherwise, a reasonable tolerance range of punching error is considered as 5% of the total trades executed. The ld. A/R has relied upon the decision of Ahmedabad Bench of the Tribunal in case of ACIT vs. Kunvarji Finance Pvt. Ltd., 119 DTR 1 (Ahd. Trib.) and submitted that the Tribunal has held that loss on account of client code modification less than 1% of the total transaction cannot be said to be unusually high or malafide when the modification was made on the same day. He has also relied upon the decision of Delhi Benches of the Tribunal in case of ITO vs. M/s. Abhishek Fincap Services Pvt. Ltd. in ITA No. 2750/Del.2017 (Del. Trib.) dated 13.09.2017 as well as decision of Coordinate Bench of this Tribunal in case of Noble Securities vs. ITO in ITA No. 911/JP/2016 dated 23.03.2017. The ld. A/R has also relied upon the decision of

Hon'ble Bombay High Court in case of Coronation Agro Industries Ltd. vs. DCIT, 97 CCH 372 (Bom.).

4. On the other hand, the ld. D/R has relied upon the orders of the authorities below and submitted that the AO has received the information from Investigation Wing whereby it was found that certain brokers were indulged in shifting the fictitious profits/losses in the garb of client code modification in the Stock Exchange. The assessee has also claimed loss on account of client code modification, therefore based on the material as gathered during the investigation, the disallowance made by the AO is justified.

5. We have considered the rival submissions as well as the relevant material on record. There is no dispute that it is a matter of regular business practice that a broker in the Stock Exchange makes modification in the client code on sales and purchases of securities after the trading is over so as to rectify the error, if any occurred during the course of trading and while punching the orders. The Stock Exchange permits modification of client code only for a limited period on daily basis after trading hours and, therefore, the task of modification is done by the brokers on daily basis only within the permitted period by the Stock Exchange. It cannot be an after-thought planned activity for shifting the profit until and unless all the clients of a broker have a common meeting of mind of shifting the profit or loss from one account to another account with the involvement of the broker. Therefore, in order to holding that a particular loss on account of client code modification is bogus, the AO has to prove and establish that there was a common intention of all the parties which are the number of clients of a single broker to shift the profit or loss to one account to another account. A stray incident of broker involved in manipulating the

facility for shifting the profit from one account to another account cannot be considered as a general practice when nothing is on record to show that the assessee as well as the other clients are actively involved in the practice of shifting the fictitious profit or loss from each other's account in the garb of client code modification facility provided by the Stock Exchange. In the case in hand, the gross profit declared by the assessee on account of share trading is more than Rs. 3.41 crores and, therefore, the loss on account of client code modification of Rs. 3,12,790/- is negligible in comparison to the volume of the trades executed by the assessee. We further noted that the Tribunal in a series of decisions has considered this issue and find that a normal amount of error in punching the trading orders during the course of trade hour is a regular feature and, therefore, the Stock Exchange also permits a modification of the client code on daily basis upto 2% of the number of order executed and beyond the 2% of error, a fine of 0.1% of value of trades transferred is applicable. Hence upto the limit as allowed by the Stock Exchange without any levy of fine is considered as reasonable and normal error happened during the course of large volume of trades executed by the broker on behalf of various clients. Therefore, this is a normal business practice on daily basis as per the guidelines of the NSE. The Coordinate Bench of this Tribunal in case of DCIT vs. Gyandeep Khemka in ITA No. 695/JP/2018 and C.O. No. 15/JP/2018 dated 23.10.2018 has considered an identical issue in para 11 and 11.1 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 ½ 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 common 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 ½ 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. We note that the Assessing Officer has not conducted any enquiry in this matter but has passed the assessment order based on the report of the Investigation Wing. The assessee has specifically raised objection and demanded cross examination which was denied by the Assessing Officer in para 4.8 of the assessment order as under:

"4.8 The Ld. A/R also contended for cross examination of brokers u/s 131 by placing reliance upon certain case laws and requested for providing relied upon documents viz. statements etc. The relied upon details were provided from time to time to the Ld. A/R during the course of hearing and the modus operandi was discussed in detail. The Ld. A/R was also made aware of the Hon'ble Supreme Court judgment in the case C Vasantlal & Co. V/s CIT 45 ITR 206(SC) (3 Judge Bench) wherein the Apex court had observed that "...the ITO is not bound by any

technical rules of the law of evidence. It is open to him to collect material to facilitate assessment even by private enquiry. But, if he desires to use the material so collected, the assessee must be informed about the material and given adequate opportunity to explain it..." The statements were material on which the I.T. Authorities could act provided the material was disclosed and the assessee had an opportunity to render their explanation in that regard.

Further, the Ld. A/R was made aware of Hon'ble Supreme Court decision in the case of Dhakeshwari Cotton Mill Ltd. Vs. CIT reported at 26 ITR 775 wherein Hon'ble Supreme Court held that right to cross examine is not absolute and that the requirement of law for valid assessment would be met if all the evidence collected which is to be used against the assessee while framing the assessment order is placed before Tie assessee and given opportunity to rebut the evidence. Here, it is also worth to state that the share brokers u/s 131(1A) in Mumbai is not sole basis for reopening the case, there is material and circumstantial evidences which prove that assessee was indulged in misuse of CCM facility. All the material including trade data has been provided to the ld. A/R on 30/11/2016 itself."

Thus, when the assessment order is based on the report of the Investigation Wing without any fresh and independent enquiry conducted by the Assessing Officer and the report of the investigation wing in turn is based on the statement of the brokers then without giving the opportunity to the assessee to cross examine the brokers whose statements were recorded by the Investigation Wing it would amount to violation of principles of natural justice. Though, the cross examination may not be an absolute right but once statement is recorded in the back of the assessee and is being used against the assessee then the order passed by the Assessing Officer based on such statement is not sustainable in absence of cross examination. The

Hon'ble Supreme Court in the case of Amdaman Timber Industries Vs CCE 127 DTR 241, while dealing with the issue of non-grant of opportunity to cross examine the witness has held as under:

"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to

presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

Accordingly, the order of the Assessing Officer is not sustainable when the assessee was not granted an opportunity to cross examine the brokers. In the case in hand, the Assessing Officer has not given any finding that the assessee and the other parties in whose account, the transactions are treated as transfer of profit are in collusion alongwith the broker. There is nothing on record or any fact or finding by the Assessing Officer to suggest that the assessee and the other parties as well as the brokers are in collusion to carry out these transactions of transfer of profit from the account of the assessee in the accounts of other parties by misusing the client code modification facility. Therefore, even if the broker might have involved in such mischievous practice but to make such addition in the hands of the assessee it is necessary to establish that the assessee and the other parties alongwith brokers are in collusion. Further there should also be exchange of money between the parties as a consideration for such a transfer of profit. Even otherwise when it is not found that originally these trades were carried out by the broker as per the instructions of the assessee and subsequently these were transferred in the account of the other persons to shift the profit.

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 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 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. in 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."

In the case in hand, the AO has disallowed the claim of loss on the basis of the information received from the ADIT (Inv.) Unit-3, Ahmedabad without conducting any independent enquiry or to bring anything on record to show that a particular transaction of client code modification is bogus. Further, when the entire exercise is done by the broker and assessee is having no control over it, then in the absence of any material or fact to show the involvement of the assessee for shifting the alleged bogus loss/profit, the disallowance made by the AO is not sustainable in law. The AO has just reproduced the report of the Investigation Wing wherein general observations were made based on the investigation that some of the brokers are indulged in transferring fictitious profit/loss from one client to another client in the garb of client code modification. The AO has discussed the modus operandi of the broker for doing these activities. However, nothing has been brought on record to show that the assessee has done anything wrong in respect of the claim of loss of Rs. 3,12,790/- whereas the assessee has declared a gross profit of more the Rs. 3.41 crores on account of share trading. Accordingly, in the facts and circumstances of the case and following the earlier order of this Tribunal in the case of DCIT vs. Gyandeep Khemka (supra), the disallowance made by the AO is deleted.

6. Ground No. 1 is regarding validity of order passed u/s 147 of the Act has become academic in nature in view of our finding on merits in favour of the assessee. Accordingly, we do not propose to adjudicate ground no. 1 of the assessee.

7. In the result, appeal of the assessee is partly allowed.

Order is pronounced in the open court on 21/05/2019.

Sd/-	Sd/-
(रमेश सी. शर्मा)	(विजय पाल रॉव)
(RAMESH C. SHARMA)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 21/05/2019.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Sandeep Sharma, Jaipur.
2. The Respondent – The DCIT, Circle-6, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 223/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar