

THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" Bench, Mumbai  
Before Shri Shamim Yahya (AM)

I.T.A. No. 4595/Mum/2018 (Assessment Year 2009-10)

Mr. Prakash K. Shah 8-B, Rajabhadur Mansion 11/43, Tamarind Lane Fort, Mumbai-400 023.  PAN : AACPS8291F (Appellant)	Vs.	ACIT-17(1) 1 <sup>st</sup> Floor Aayakar Bhavan M.K. Road Mumbai-400 020.  (Respondent)
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Assessee by	Shri N.R. Aggarwal
Department by	Shri Chaitanya Anjaria
Date of Hearing	9.7.2019
Date of Pronouncement	1.10.2019

ORDER

This appeal by the assessee is directed against order of learned CIT(A) dated 2.7.2018 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under :

"Ground No. 1: The learned CIT(Appeals) erred in confirming the addition by ACIT Rs. 22,11,9207- on account of client code Modification.

Ground No. 2 : The learned CIT(Appeals) erred in para No. 3.1 of the order that none of the two grounds raised are about agreed addition for addition by ACIT Rs. 22,11,9207- on account of client code Modification & further erred in treating the appeal as inadmissible & outside the scope of section 246A".

3. In this case learned CIT(A) has dismissed the assessee's appeal both on the ground that the same is not maintainable under section 246A of the Act and also he has upheld the order of the assessing officer on merits.

4. The facts of the case and the action of the authorities below can be gainfully referred to by the order of the learned CIT(appeals) which reads as under :-

"The Grounds of appeal preferred are as under:-

1. The Learned ACIT erred in making addition of Rs.22,11,920/- on account of client code modification.

2. The Learned ACIT erred in not giving full credit of TDS claimed Rs.5,92,102/-.

2.1 ITNS 51 has been served on 26.10.2017 without response from AO. Hence, certifications therein are presumed in order and desire for presence in hearing vide Col.7 is deemed declined.

3. The relevant finding of the AO is as follows:

"5. Information was received from DIT(I&CI), Mumbai that fictitious profits/losses were created by some brokers by misusing the facility of client code modification in F&O segment on NSE. Further, spot verification of few cases of brokers by DDIT(I&C) Unit-1(l), Mumbai, u/s 131(1A) of I.T. Act, 1961 this fact was revealed and they have confirmed having misused the facility of client code modification in order to create fictitious loss/profits. Since, assessee is one of the beneficiary of such bogus loss, hence the case is reopened. Furthermore, during the course of assessment proceedings also, on verification of details of client code modification transactions from NSE, it is found that assessee has entered into many transactions wherein client codes were modified.

The assessee made submissions on 25/10/2016 and 04/11/2016 reiterating the genuineness of the transactions and asking for specific details available with the Department regarding Client code modification done by him. The same was provided to the Assessee. The Assessee, in response filed on 25.11.2016 that though all the transactions entered by him were genuine in order to avoid litigation and to buy peace of mind, he is offering the said amount to tax. The assessee presents the following case laws where Assessee had filed revised return after search to buy peace of mind.

CIT v/s Suresh Chandra Mittal  
CIT v/s Amalendu Paul  
CIT v/s Harsh Kumar

The Assessee in the present case has revised his computation by offering the amount Rs.22.11.920/- to tax for A. Y. 2009-10.

Thus, the amount of Rs.22,11,920/- is added to Income from Business and Profession of the Assessee for A.Y. 2009-10. Penalty proceedings u/s. 271(1)(c) are separately initiated for concealment of particulars of income."

3.1 The issue is one of agreed addition. None of the two grounds preferred by appellant relate to this aspect. Ld. AR has made the fatal mistake of arguing

what is not even a ground of appeal. In view of this legal error made the appeal is liable for dismissal as not maintainable. Nonetheless, in interest of substantive justice the issue of agreed addition is considered as a legal issue and adjudicated first as follows.”

5. Thereafter learned CIT(appeals) referred to several case laws and finally concluded as under :-

“The order of AO is upheld. The appeal is held as inadmissible on grounds of maintainability and is disallowed for admission. Hence the adjudication is not made u/s 250(6) which is for valid appeals but rather u/s 246A(1). The reference by assessee is held outside the scope of s 246A. The adjudication on merit is rendered inapplicable and hors de combat. For statistical purposes only, the appeal shall be treated as dismissed”.

6. Against this order assessee is in appeal before the ITAT. I have heard both the counsel and perused the records. I find that learned CIT(A) in this case has totally erred in dismissing the appeal by holding that the same is not maintainable and thereafter also deciding upon the merits of the case. The order of the learned CIT( appeals) is not sustainable on this account itself.

7. Furthermore I hold that the assessee has filed revised return before the assessing officer. The assessing officer despite noting the revised return and assessee's offer of the amount for taxation has held that the amount offered by the assessee for taxation was added as undisclosed income. In this view of the matter assessee was very much entitled to raise the appeal before the learned commission of income tax appeals. Moreover as settled by the honourable Supreme Court in the case of Bharat Heavy Electricals Vs. Mahendra Prasad Jakhmola and other (Civil Appeal No. 1837 and others vide order dt. 28.2.2019) that on questions of law and mixed questions of law and fact concession by the assessee's counsel will not act as a estoppel for the assessee to challenge the same. In this view of the matter in my considered opinion issue needs to be remitted to the file of the learned CIT(appeals). The learned CIT(A) is directed to consider the issue on merits and pass a speaking order after giving the assessee proper opportunity of being heard.

8. In the result this appeal filed by the assessee stands allowed for statistical purposes.

Order has been pronounced in the Court on 1.10.2019.

SD/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 1/10/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS