IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 6235/MUM/2017
Assessment Year: 2010-11

Income Tax Officer-1(3)(3), Room No. 528, Aayakar Bhavan, Mumbai-400020.	Vs.	M/s Techno Broking and Financial Services Pvt. Ltd. Ground Floor, 1 Vikas Building, 11 Bank Street, Mumbai-400 001. **PAN No. AACCT3286G**
Appellant		**Respondent**

Revenue by	:	Mr. Vijay Kumar P. Menon, DR
Assessee by	:	Mr. Madhur Agarwal, AR
Date of Hearing	:	11/11/2020
Date of pronouncement	:	07/12/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-3, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s. 147 the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the Revenue read as under :

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made on account of suppression of profit made by way client code modification amounting to Rs.1,60,53,332/-.
2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made without appreciating the fact that the stock broker who carried out the client code modification was a group concern of the assessee and therefore the contention that there occurred a punching error in large scale entering the trade is remote.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2010-11 on 06.09.2010 declaring total loss of Rs.1,10,349/-. The return was processed u/s 143(1) of the Act. On the basis of information received from the Director of Income Tax (I&CR), Mumbai that fictitious profits and losses were created by some brokers by misusing the client code modification facility in F&O segment on National Stock Exchange (NSE) during March 2010 and that one of the beneficiaries was the assessee having taken a loss of Rs.1,60,53,332/-, the Assessing Officer (AO) reopened the assessment by issuing notice u/s 148 of the Act. During the course of assessment proceedings, the assessee filed a copy of its ledger account, contract note and bank statement reflecting payment and receipt transactions with the stock broker M/s Techno Shares & Stocks Ltd. Further the assessee filed a reply vide letter dated 01.03.2016 which is reproduced at page 3-7 of the assessment order. However, the AO was not convinced with the said reply of the assessee and made an addition of Rs.1,60,53,332/- claimed as bogus loss.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 25.07.2017, the Ld. CIT(A), following the order of the Tribunal in the case of *M/s Alpha Commodities P. Ltd. v. Asst. Commissioner of Income Tax, Central Circle-46* (ITA No. 2119/Mum/2010); *Asst. Commissioner of Income Tax v. Amar Mukesh Shah* I.T. (SS) A. Nos. 92 & 93/AHD/2011 (2016-46 ITR (Trib.) 234; *Income Tax Officer 9(2)(4) v. M/s Pat Commodity Services P. Ltd*. (I.T.A. Nos. 3498 and 3499/Mum/2012) deleted the addition of Rs.1,60,53,332/- made by the AO.

5. Before us, the Ld. Departmental Representative (DR) submits that the AO has rightly made an addition of Rs.1,60,53,332/- on the basis of information received from the Director of Income Tax (I&CR), Mumbai that fictitious profits and losses were created by some brokers by misusing the client code modification facility in F&O segment on NSE during March 2010 and the assessee was one of the beneficiaries of such fictitious losses. Thus the Ld. DR submits that the order passed by the AO be restored.

6. On the other hand, the Ld. counsel for the assessee submits that the assessee is assessed to tax for many years and derives income from business and profession (i.e. derivative share trading and speculation income) and income from capital gains. It is stated that during the year under consideration, the Broker had billed them only those transactions for which orders were placed by the assessee. Further it is explained that the assessee had paid required margins as per mandatory rules and guidelines of NSE and further, all these transactions had been carried out on the NEAT (National Exchange for Automated Trading) System i.e. fully automated screen based trading system transaction. Also it is explained that all the transactions have

been settled by cheques or bank transfer ; the Department has failed to prove the undisclosed income for the impugned assessment year ; evidence, if any with the Department has not been furnished to the assessee to rebut the same and therefore, such evidence cannot be used against the assessee, which would be violation of principles of natural justice. Thus the Ld. counsel submits that the Ld. CIT(A) has rightly deleted the addition of Rs.1,60,53,332/- made by the AO.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

On similar facts, the Tribunal in the case of *M/s Pat Commodity Services P. Ltd.* (supra), has held that :

> "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.
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> 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. All 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 suppor 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."

7.1 In the instant case, as mentioned earlier the assessee filed a reply dated 01.03.2016 regarding client code modification. The AO has only produced the said reply in his assessment order. The AO has not made even a preliminary/elementary inquiry to verify the contentions of the assessee.

In such a situation, facts being identical, we follow the above order of the Co-ordinate Bench and affirm the order of the Ld. CIT(A).

8. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 07/12/2020.

Sd/-	Sd/-
(RAVISH SOOD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 07/12/2020.
Rahul Sharma, Sr. P.S.

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.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai