

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM

आयकरअपीलसं/ I.T.A. No.2352/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2009-10)

Nikita Nimesh Shah 105 A Simla House, Nepean Sea Road, Malabar Hill Mumbai- 400003.	बनाम/ Vs.	ITO Ward 19(2)(4) Matru Mandir, Tardeo Road Mumbai-400007.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AAMPS4532R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Satyaprakash Singh	
Revenue by:	Shri Mahender Ahuja	

सुनवाईकीतारीख / Date of Hearing: 22/11/2022
घोषणाकीतारीख /Date of Pronouncement: 21/12/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against order of the CIT(A)/NFAC dated 26-07-2022 for A.Y. 2009-10.

2. The main grievance of the assessee is against the action of the Ld.CIT(A) confirming the action of AO in respect of the addition made of Rs.13,89,812/- on account of misuse of client modification facility in F & O segment. Brief facts are that the assessee has earned income from salary, income from house property and also on investment in shares and has shown to have income from capital gains. The assessee had filed his return of income on 24.03.2010 declaring total income of Rs. 8,37,512/- which was processed u/s 143(1) of the Income tax Act, 1961(hereinafter "the Act").

3. Subsequently the case of the assessee was reopened by issuance of notice u/s 148 of the Act on 30.03.2016; and after giving copy of the *reasons recorded* for reopening the assessment, the AO called for the explanation/details from the



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assessee in respect of certain information which he received alleging the loss of Rs.13,89,812/- which was due to certain wrong doings by the broker namely M/s Dani Shares and Stop Private Limited who had misused client code modification facility in F & O segment while trading in National Stock Exchange (NSE). According to the AO, assessee was one of the beneficiary of the alleged client code modification; and based on investigation report from Ahmedabad, the AO reopened the assessment; and after hearing the assessee as well as taking into account certain information from survey action of Amrapali group which was related to twelve (12) brokers, the AO was of the opinion that assessee's broker M/s. Dani has misused that the client code modification (CCM) in large scale. After discussing the *modus-operandi* followed by certain brokers for booking fictitious loss/gains, the AO was pleased to disallow the loss of Rs. 13,89,812/-.

4. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A) who was pleased to confirm the action of the AO. Aggrieved by the aforesaid action of the Ld.CIT(A), the assessee is before this Tribunal.

5. Having heard both the parties and after perusal of the records it is noted that the main grievance of the assessee is against the action of the lower authorities especially the AO in not inquiring about the alleged the misuse/wrong doing of client code modification suppose to have been done by assessee's broker M/s Dani Share & Stock broker Private Limited. According to the Ld AR, before the AO the assessee pleaded for summoning the broker and to conduct enquiry as to whether the broker of assessee has committed any wrong doing as alleged by him (investigation/AO). However, the AO/CIT(A) didn't do so and without summoning



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the broker, and based on the investigation report submitted by the investigation wing Ahmedabad which was related to 3rd party survey/search, the lower authorities had concluded that the assessee's broker had also indulged in misuse of client code modification in F & O segment which led to assessee booking fictitious loss of Rs. 13,89,812/-. According to the assessee, solely based on the investigation report [which was not related to the assessee] relating to 3rd party Amrapali which were surveyed/searched, no disallowance could have been made by AO and the Ld.CIT(A) erred in confirming the same.

6. I have perused the assessment order as well as the impugned order of the Ld.CIT(A). I find that the disallowance of Rs.13,89,812/- has been made by the AO after reopening the assessment which was based on the investigation report submitted by the DDIT (Inv.),Ahmedabad which was in-turn based on the information collected during search action of Amebrapali group and other related survey actions on twelve (12) brokers, which revealed that some brokers were modifying the client code and misusing the same in large-scale for booking fictitious losses/gains. And the investigation by the National Stock Exchange F& O segment also revealed that some brokers were indulging in misusing the same. Based on these reports, the assessment of the assessee was reopened since assessee had claimed to have incurred loss of Rs. 13,89,812/- from share transaction through his broker M/s Dani shares Stock Private limited. During the reassessment proceedings, the assessee pleaded to AO for summoning M/s Dani Share & Stock broker Private Limited [in short, M/s Dani Stock Broker] and examine them i.e, to conduct enquiry, but the AO did not do so. It was also brought to my notice that the M/s Dani Stock broker is still doing trading (as on date) and the NSE has not



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black listed it till date. It was also brought to my notice that assessee's broker M/s Dani Shares and Stock Broker has nothing to do with Amrapali Group; and therefore based on 3rd party statement which does not in any way alleges wrong doing of assessee or its broker has been taken as gospel truth in order disallow the loss claimed by the assessee. According to this Tribunal, when there was the adverse information from the DDIT investigation [misuse of client code modification by some brokers], and it ought to have been the starting point of inquiry i.e, *reason to suspect* and the AO ought to have made inquiries with the assessee's broker M/s Dani Shares/stock brokers and un-earthed the wrong doings of the broker if any and the part played by the assessee. But in this case, the AO has not carried out any inquiry and based on the 3rd party information alone has disallowed the assessee's claim of loss of Rs.13,89,812/-. It is noted that such an impugned action of AO/CIT(A) cannot be accepted as held by the Hon'ble Supreme Court in the case of CIT vs Odeon Builders Pvt Ltd (481 ITR 315) (SC) wherein it was held that the additions/disallowance made on the strength of 3rd party information without subjecting in to further scrutiny and denying cross examination of the 3rd party, renders the addition/disallowance bad in law. Therefore, I direct deletion of the addition of Rs. 13,89,812/-.

In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on this 21/12/2022.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 21/12/2022.
Vijay Pal Singh, (Sr. PS)



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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार / (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai