आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, RAJKOT BENCH)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,
And
SHRI TR SENTHIL KUMAR, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 38/Rjt/2018**
With
C.O No.16/Rjt/2018

निर्धारण वर्ष/Asstt. Years: 2009-2010

D.C.I.T., Central Circle-2, Rajkot.	Vs.	Shri Nilesh Natwarlal Sheth, Prop. Of M/s.Kruna Finvest, 403-Star Chambers, Harihar Chowk, Rajkot. **PAN: AGYPS1051P**

Revenue by	:	Shri Shramdeep Sinha, CIT. D.R
Assessee by	:	Shri Mehul Patel, A.R

सुनवाई की तारीख/**Date of Hearing : 21/09/2022**
घोषणा की तारीख **/Date of Pronouncement: 31/10/2022**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue and CO filed by the assessee against the order of the Learned Commissioner of Income tax (Appeals)-11, Ahmedabad, dated 29/11/2017 arising in the matter of assessment order passed under s. 143 r.w.s. 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2009-10.

2. The only issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition made by the AO on account of client code modification done by the broker to shift the profit.

3. The facts in brief are that the assessee in the present case is an individual and engaged in the business of trading shares & securities. The AO in the present case received the information from investigation wing that the survey under section 133A of the Act was carried on the premises of several stock broker wherein it was found that they were engaged in shifting profit and loss to investors in order to evade taxes by making client code modifications as a tool. As per the data received from the NSE, the assessee is one of the beneficiaries of client code modification. On analyzing the information/data received from the NSE, it was revealed that in case of the assessee, the aggregate profit amounting to Rs. 1,78,91,279/- was shifted out. Similarly loss amounting to Rs. 72,55,556/- was shifted in. Accordingly, the AO made the addition of Rs. 2,51,46,835/- to the total income of the assessee and also made addition of commission expenses of Rs. 5,02,937/- only.

4. Aggrieved assessee preferred an appeal to the learned CIT (A).

5. The assessee before the learned CIT (A) contended that the AO has made the addition on account of client code modification in arbitrary manner. The entire thrust of the AO's allegation was based on survey proceeding carried in the case of certain group of brokers where modus of operandi of client code modification was explained as a tool of tax evasion. However, the broker of the assessee was not part of any such survey proceedings. Likewise, there is no evidence on record that the money was exchanged or the code was modified at the behest of the assessee. The assessee also submitted that the instances of code modification constitute less than 1% of total transaction carried out by him. Further, all the codes were modified during second quarter and third quarter except one occasion which was modified in last quarter. Therefore, the profitability of the assessee for the year was not known

at the time of modification. Hence, it is not possible to shift profit out or loss in to evade tax when profit for the year form the business of trading shares & securities itself was not known. The assessee also submitted that similar allegation of code modification was made in AY 2010-11 for shifting out loss for Rs. 66,24,369/- but profit was not reduced by the AO. This fact also establishes that there was no intention to evade tax by employing tool of client code modification.

6. It was also submitted that the AO has clearly admitted that the code was modified by the broker. Therefore, no adverse inference can be drawn against assessee for the mistake committed by the staff member of broker, especially in a condition when the assessee was not related to the broker entity in any manner.

7. The learned CIT (A) after considering the facts in totality deleted the addition made by the AO by observing as under:

> *5.4 On careful consideration of entire facts, it is observed that during the course of assessment proceedings, appellant has submitted details of transactions carried out by him which are supported by contract notes issued by broker and ledger account of appellant is also confirmed by broker. The AO has proceeded to make entire addition on the basis of data received from NSE wherein original code of appellant was modified with code of other party and according to such data, AO worked out that appellant has reduced its taxable income by shifting profit to other party or loss was shifted to account of appellant. However, such observation of AO was not supported by any other cogent evidences which can prove that appellant has obtained such accommodative entries for which cash settlement is done. The AO has also referred to various inquires carried out DIT (I & CI), Mumbai in the hands of various brokers wherein it is proved that CCM was carried out to evade taxes but no such inquiry has been carried out in the case of appellant's broker nor AO has proved that SEBI/NSE has made any inquiry in the case of appellant or his broker. The inquiry in the hands of brokers which have no relation with appellant's transaction does not mean that appellant has also carried out such transactions at his own instance to evade taxes. The ARs of the appellant has submitted that AO issued notice u/s 133(6) dated 22/11/2016 to the broker of the appellant wherein broker has furnished details being transactions executed with the appellant along with evidence, bank statement and copy of return of income vide letter dated 30/11/2016. Even broker vide letter dated 13/12/2016 has stated that appellant has not requested for client code modification during the year under consideration and even explained why CCM are carried out to rectify genuine errors. The AO has not brought any evidences which can prove that broker, appellant and other parties have arranged these transactions to evade taxes and there is cash movement from one hand to other hand.*
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> *Even, AO' has referred to search in the case of Amrapali Group of Ahmedabad wherein was found that CCM was used as a tool so as to systematically shift profits and losses but such search has no connection in the hands of appellant nor AO has proved that appellant has carried out such transactions with Amrapali Group. Hon'ble Supreme Court Decision in Omar Salav Mohamed Salt v. CIT (37JTR 1511 and Union of India and Others v.*

Playworld Electrgnic s Pvt. Ltd. and Another 184JTR 308 has held that assessment has to be based on evidence and not even on 'a great deal of suspicion'.

5.5 While passing the assessment order, AO has discussed general modus operand! of CCM but not brought any material facts relating to appellant to prove that such transactions are bogus or unaccounted transactions entered by appellant nor nothing has been brought on record that NSE has made inquiry in the hands of broker of appellant. ***Hon'ble*** *Ahmedabad ITAT in the case of Kunvarji Fjnance Pvt Ltd & Group 27* ***cases*** *IT(SS)A No. 615/Ahd/2010 dated 19/03/2015*

"11. The learned Commissioner (Appeals) 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 assesses. These findings of fact recorded by the learned Commissioner (Appeals) 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 Commissioner (Appeals) in this regard and the same is sustained; and Ground Nos. 1 and 3 of the Revenue's appeal are rejected."

5.6 On the basis of details of CCM provided by AO during the assessment order, appellant has submitted month wise details of CCM Transactions V/s total transactions as under:

Alleged Loss In (Included In books/Return of Income)			
Month	***Total Trade* as per Contract***	***Alleged Loss In***	***% of CCM***
Apr-08	***1214***	***0***	***0.0000%***
May-08	***3634***	***0***	***0.0000%***
Jun-08	***825***	***0***	***0.0000%***
Jul-08	***12675***	***0***	***0.0000%***
Aug-08	***6152***	***0***	***0.0000%***
Sep-08	***5545***	***0***	***0.0000%***
Oct-08	***1604***	***5***	***0.3117%***
Nov-08	***1124***	***10***	***0.8897%***
Dec-08	***5795***	***1***	***0.0173%***
Jan-09	***7789***	***_____ (T***	***0.0000%***

Feb-09 ,	***7228***	***ol***	***0.0000% '***
Mar-09	***2997 0***		***0.0000%***
56582 16			
Alleged Profit Out (Not accepted/included by Assessee)			
Month	***Total Trades as per Contract***	***Alleged Profit out***	***% of CCM***
Apr-08	***1214***	***1***	***0.0824%***
May-08 1	***3634***	***0***	***0.0000%***
Jun-08	***825***	***0***	***0.0000%***
Jul-08	***12675***	*11*	***0.0868%***
Aug-08	***6152***	***8***	***0.1300%***
Sep-08	***5545***	***5***	***0.0902%***
Oct-08	***1604***	***2***	***0.1247%***
Nov-08	***1124***	***2***	***0.1779%***
Dec-08	***5795***	***0***	***0.0000%***
Jan-09	***7789***	***0***	***0.0000%***
Feb-09	***7228***	***1***	***0.0138%***
Mar-09	***2997***	***5***	***0.1668%***
	56582	***35***	

The above data clearly prove that CCM transactions in the case of appellant even as per data of ***NSE is*** *very insignificant and cannot be held to entered to evade* ***taxes as*** *held by Ahmedabad ITAT in the case of Kunvarji Finance Pvt. Ltd & Group 27 cases IT{SS)A No. 615/Ahd/2010 dated 19/03/2015 wherein it is clarified -*

"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 Commissioner (Appeals) 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."

It is also observed that in the case of ACIT Vs Amar Mukesh Shah 81 taxman.com 450 wherein Assessee was an individual stated to be carrying out the business of trading in shares and investments and on identical facts, the Hon'ble Ahmedabad ITAT has heldjis under:

Section 69A of the Income-tax Act, 1961 - Unexplained moneys etc. (Others) - Assessment years 2005-06 and 2007-08 - Where client code modifications done by assessee-share broker were in negligible number, addition made by reversing such modifications was to be deleted [In favour of assessee]

Hon'ble Kolkata Bench in case of AmratbhaiInvestra Pvt. Ltd, in ITA No. 758/Kol/2014 dated 03/05/2017 has held as under:

"The AO held the client code modifications to be mala fide with the intention to transfer the profit to other persons by modifying the client code so as to avoid the payment of tax. It is undisputed fact that the client code was modified fewer number of times and this fact was very much in the knowledge of the stock exchange. It is because that the information
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carried out in March 2010 as same pertains to A.Y. 2009-2010. Even, in case of appellant, total CCM as reported by AO was 51 out of which only 6 transactions were carried out in last quarter and majority transactions are in second and third quarter. It is observed that any assessee can know his profit only at the feg end of the year and if there is profit, it may resort to method for reducing taxable income whereas in present case, no significant CCM has been carried out in last quarter. Thus presumption of AO that CCM was carried out to reduce taxable income does not survive in present case.

5.8 While passing the assessment order AO has relied on the analysis of Levenshtein Distance or digit edit analysis and stated that since there are edits ranging from three to five in the client code it is obvious that the code is not modified but actually replaced. However, this is only presumption and does not prove that CCM was made to reduce taxable income. It is also observed that such issue was dealt by Hon'ble Gujarat High court in the case of Geetatax vs DCIT SCA No.20977 of 2016 dated 20/12/2016 (though in said case, notice u/s 148 was challenged but finding is relevant for adjudicating the observation made by AO) as under:
"........,....... Even the reasons given by the Assessing Officer that if the
number of digits are changed from original code to modified code is 1, then it can be reasonably argued that the original client code may have been typed wrongly by mistake. Similarly, if the number of digits changed is more say 4 or 5, it cannot be a genuine mistake,

but a deliberate change. There cannot be any presumption that if the number of digits changed from original code to modified code is 1, then and then only it can be said that the same have been typed wrongly by mistake and if the number of digits changed is for more than one, that Is to say 4 or 5, then it cannot be said to be a genuine mistake, but a deliberate change. Under the circumstances, even the reasons recorded by the Assessing Officer to reopen the assessment, which Is beyond the period of four years, cannot be sustained."

5.9 Considering the facts discussed herein above and relying upon decisions referred supra, it is held that AO has made entire addition on the basis of presumption and nor proved that appellant has evaded taxes hence addition made by AO for Rs 1,78,91,279 for shifting out profit and Rs 72,55,556 for obtaining fictitious loss is deleted. As entire addition made based upon CCM is deleted, consequential addition for unaccounted expenditure for Rs 5,02,937/- being 2% being commission payment for such transaction do not survive. In nutshell, all the additions made by AO are deleted. The related grounds of appeal are allowed.

8. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

9. The learned DR before us vehemently supported the stand of the AO by reiterating the findings contained in the assessment order.

10. On the other hand, the learned AR before us filed a paper book running from pages 1 to 114 and before us vehemently supported the stand of the ld. CIT-A by reiterating the findings contained in the appellate order.

11. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the assessee was alleged to have diverted his profit amounting to Rs. 2,51,46,835/- on account of client code modification by shifting in losses and shifting out profit. Accordingly, the AO made the addition of Rs. 2,51,46,835/- to the total income of the assessee and also an addition of Rs. 5,02,937/- being commission expenses in consequent to client code modification. The view taken by the AO was subsequently reversed by the learned CIT (A). Client Code Modification means modification / change of the client codes after execution of trades. Stock Exchanges provide a facility to modify any client code after the trade has been executed to rectify any error or wrong data entry done by the brokers at the time of punching orders.

However, such Client Code modification is subject to certain guidelines as to the time limit within which the client code modification is to be carried out, terminal / system on which such modifications can be done etc. The facility is mainly to provide a system for modification of client codes in case genuine errors in punching / placing the orders. It is to be used as an exception and not a routine. To prevent misuse of the facility Stock Exchanges levy penalty / fine for all non-institutional client code modifications.

11.1 Coming to the facts of the present case, admittedly client codes were modified of the assessee as per the Data received from the NSE. However, the first question that arises whether such client codes were modified at the instance of the assessee or there was some punching error at the end of the share broker. It is because the stock exchange permits the share broker to rectify the mistakes occurred while punching the data. If that be so, then there cannot be any fault which can be attributed to the assessee for the mistakes committed by the share broker.

11.2 Furthermore, the client code modifications give rise to the doubt/ suspicion which requires detailed investigations from the parties concerned to reveal the truth. Merely, there were client codes modifications carried out by the broker, the same cannot be the basis to draw an inference against the assessee. In fact, in the case of client code modification the code of the other party is entered at the place of the assessee. Thus the other party also required to be investigated whether the other party was involved in such transaction. Besides this other corroborative evidence has to be brought on record suggesting that there was the exchange of cash among the parties involved in such client code modification transaction. But we note that no such exercise has been carried out by the authorities below. As such there is no whisper in the order of the authorities below that there was the cash transfer between the parties for transferring the income of the assessee to the other party.

Thus, in the absence of such verification/examination carried out by the authorities below, we are not inclined to uphold their findings.

11.3 Further, the assessee during the year made total trade for 56,582 time whereas client code was modified at 51 instance only and majority of the same were done in second and third quarter only. Thus, the instances of code modification are very insignificant to hold that the same was done with the intention to evade tax.

11.4 In view of the above and after considering the facts in totality, we are not inclined to interfere in the findings of the learned CIT (A). Accordingly we hereby confirm the finding of the learned CIT (A) and direct the AO to delete the addition made by him. Hence, the ground of appeal raised by the Revenue is hereby dismissed.

Coming to CO No. 16/Rjt/2018 for A.Y. 2009-10 by the assessee:

12. The assessee has raised the following cross objection:

1. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has erred in upholding validity of proceedings u/s 147 initiated by the AO without appreciating that such proceedings carried on in case of appellant are bad in law and deserves to be quashed.

2. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has erred in upholding validity of proceedings u/s 147 ignoring the findings of Jurisdictional High Court in case of M/s Geetatax Vs DCIT in SCA No.20977 of 2016 dated 20/12/2016. The Ld. CIT(A) ought to have appreciated that Reassessment Proceedings u/s 147 have been initiated by AO without producing any tangible material on record which proves that income of appellant has escaped assessment and merely relying on the information received from outside party and without application of mind.

3. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) while upholding the validity of Reassessment Proceedings u/s 147, ought to have appreciated that objections raised by the appellant challenging validity of Reassessment proceedings have been rejected by AO in an arbitrary manner which is against the principles laid down in the decision ***of Hon'ble*** *Supreme Court in case* ***of GKN Driveshaft*** *(India)* ***Ltd v/s ITO*** *(2003) 179 CTR (SC) 11, (2003)* ***259*** *ITR* ***19 (SC)*** *which renders entire reassessment proceedings u/s 147 invalid.*

4. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) while upholding the validity of Reassessment Proceedings u/s 147, ought to have appreciated that notice u/s 148 was issued to the appellant without obtaining necessary

approval as per the provisions of section 151 of the Act which renders entire reassessment proceedings u/s 147 invalid.

5. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) while upholding the validity of Reassessment Proceedings u/s 147, ought to have appreciated that reasons for reopening Assessment Proceedings were furnished by AO after delay of nearly eight months which is not in accordance with the principles laid down in the decision of the Hon'ble Supreme ***Court in GKN Driveshafts*** *(India) Ltd v/s ITO (2003) 179 CTR (SC)* ***11,*** *(2003) 259 ITR 19 (SC) which renders entire reassessment proceedings u/s 147 invalid.*

6. The appellant craves leave to add, alter, amend and/or withdraw any of the grounds or ground either before or at the time of appeal hearing.

13. The assessee in the CO has challenged the validity of the assessment framed under section 143(3) read with section 147 of the Act on the reasoning that it was made without having tangible material on record suggesting income has been escaped. However, we have already decided the issue in favour of the assessee on merit in the appeal preferred by the Revenue in ITA No. 38/RJT/2018 *vide* Paragraph No. 11 of this order. Thus, we refrain ourselves from deciding the issue raised by the assessee in its CO on the validity of the assessment. Hence, the grounds raised by the assessee in its CO are dismissed.

13.1 In the result, the CO filed by the assessee is dismissed.

14. In the combined result, the appeal filed by the revenue is dismissed and the CO filed by the assessee is also dismissed.

Order pronounced in the Court on 31/10/2022 at Ahmedabad.

Sd/-	**Sd/-**
(T.R SENTHIL KUMAR)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 31/10/2022
Manish