

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCHES "DB": INDORE
BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER
ITA Nos.218 & 219/Ind/2021
Assessment Years: 2012-13 & 2015-16

The ACIT (Central)-1, Indore 452001	vs.	Manish Agrotech Ltd., 31F, 1-2, Vatsalya Chamber, Sneh Nagar, Indore-452001 PAN AACCM7584Q
(Appellant)		(Respondent)

Cross Objection Nos.5 & 6/Ind/2020
Arising out of
ITA Nos.218 & 219/Ind/2021
Assessment Years: 2012-13 & 2015-16

Manish Agrotech Ltd., 31F, 1-2, Vatsalya Chamber, Sneh Nagar, Indore-452001 PAN AACCM7584Q	vs.	The ACIT (Central)-1, Indore 452001
(Cross Objector)		(Respondent)

For Revenue :	Shri P.K Mishra, CIT (DR)
For Assessee :	Shri Ajay Tulsian, CA Shri Ruchira Singhal

Date of Hearing :	17.11.2022
Date of Pronouncement :	30.01.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

The above appeals by Revenue are been directed against the Order of the Ld. CIT(A)-3, Indore, dated 27.08.2021 relating to the A.Ys. 2012-13 & 2015-16. The assessee has filed the cross objections in support of the order of the Ld. CIT(A). Since common issues are involved in all these appeals, the appeals were heard together and are being disposed of by this consolidated order for the sake of convenience.

Condonation of Delay

2. The learned CIT-DR submitted that due to office procedure for filing appeal, the appeal against the order of learned CIT-3, Bhopal dated 27.08.2021; the appeal could be filed on 15.11.2021 with the delay of 8 days. The learned AR in all fairness, excepted that the delay of 8 days has been cause due to adoption of office procedure and this time falls within the ambit of order of Hon'ble Supreme Court by which the limitation period for filing appeal and other cases

was allowed extending the limitation period. In view of above and keeping in view order of *suo moto* of Hon'ble Supreme Court the delay of 8 days in filing both the appeals by the revenue is taken in to consideration and appeals admitted for hearing as have been filed within the prescribed time limit.

ITA 218/Ind/2021

3. Pressing in to service sole grievance of the Revenue, the learned CIT DR contended that The CIT(A) has erred in law and on facts in deleting the disallowance of contrived losses on NMCE(Rs. 14,89,59,801/-) by overlooking the glaring evidences/findings of synchronized trades executed by the assessee with a cluster of brokers/counterparties on NMCE exchange which had resulted in excessive losses which were then set-off against profits from other exchanges. He further submitted that thus first appellate authority has erred in law on facts in failing to appreciate that the execution of trades on a

recognized exchange (NMCE) as per rules, on screen based platform through banking channels and entries in books had no relevance in deciding the genuineness of losses which were inherently managed/contrived losses. Finally the CIT-DR submitted the learned CIT(A) has erred in facts by placing reliance on allowance of algorithmic trading by SEBI while ignoring the facts that even such transactions resulted in continued losses which otherwise should have been profitable and that ample direct/circumstantial evidences by synchronized trades indulged by the assessee have gone unnoticed in the CIT(A) order.

4. Learned CIT-DR drawing our attention towards relevant part of the assessment order para 8 to 8.41 submitted that the assessee in order to execute synchronized transactions dealt in liquid commodity only, and the transactions executed were synchronized which can be proved by the fact that above 97% transactions were executed within the limit of placing the order. He further drawing our attention towards para 8.40 and 8.41 of

assessment order submitted that the Assessing Officer established beyond doubt that the losses obtained by the assessee on NMCE platform were contrived losses and these losses by incurred by executing synchronized trades dealing in liquid commodity only and the losses were incurred with a specific intention to reduced the taxable income by setting of the same against the profit earned from other exchanges/business activities. The learned CIT-DR, therefore, submitted that the impugned first appellate order being passed without considering the factual matrix of the case may kindly be set aside by restoring that of the AO.

5. Replying to the above the learned assessee representative (AR) submitted that the Ld. CIT(A) has dismissed ground no. 1 to 5 and 7 and 8 raised by the assessee. However, ground no. 6 of the order allowed by the Ld. CIT(A) after considering the reply of the assessee and order of the ITAT Kolkata Bench in the case of ACIT vs. GRD Commodities Ltd. in IT(SS)A Nos.120 to 123/Kol/2018 order 04.12.2020 where identical issue under identical facts

and circumstances have been decided in favour of the assessee by dismissing appeal of the revenue. The learned AR vehemently contended the Assessing Officer made disallowance solemnly on the basis of surmises and conjectures without any justified and reasonable basis and the Ld. CIT(A) rightly considered the same and thereafter allowed relief to the assessee on well accepted principal of tax jurisprudence. Therefore there is no reason to interfere with the findings arrived by the Ld. CIT(A) hence the same may kindly be upheld dismissing the appeal of the revenue.

6. On a careful consideration of rival submission first of all we note that apropos ground no 6, the assessee filed written submission before Ld. CIT(A) which read as follows:-

GROUND NO. 06: The A0 erred in disallowing loss of Rs. 14,89,59,801/-

3.1 That on the facts and in the circumstances of the case the learned A0 has erred in making addition of Rs. 14,89,59,801/- on account of losses incurred by the appellant. The addition is patently wrong and uncalled for and is prayed to be deleted.

3.2 The assessee company has earned a net profit of Rs. 5,94,13,341/-(after setoff of losses) in respect of

derivative trading, commodity transactions and sauda settlements in the financial year 2011-12 relevant to AY 2012-13 as reflecting in note no. 19a of Profit and Loss account. Details of the same were filed before the AO. The appellant has suffered losses to the extent of Rs. 14,89,59,801/- in respect of trades carried out through the following brokers on NMCE platform during the year under consideration:

Name of Broker	Amount
S.N Commodities	Rs. 1,01,41,057
Shublaxmi Commodities	Rs. 3,48,70,652
Shublaxmi Traders (Rs. 10,39,48,092/- less Rs. 1,665/-)	Rs. 10,39,46,427
Total	Rs. 14,89,58,136

3.3 That the transactions with aforesaid brokers were made at the National Multi Commodity Exchange of India Limited (NMCE) through the authorized brokers duly substantiated by the contract notes. Copy of ledger account of broker 'M/s. Shubhluxmi Traders', 'M/s. Shubh Laxmi Commodities' and 'M/s. S.N. Commodities' along with contacts notes were duly filed before the Learned A.O. during the course of reassessment proceedings (copy enclosed at page No. 77 to 229 of the paper book)

3.4 It is further submitted that it is wrongly alleged by the AO that the appellant has obtained contrived artificial losses of Rs. (-) 14,89,59,801/-by synchronized trading in commodities through dubious brokers on National Multi Exchange (NMCE). It is submitted that there is no basis of this allegation and nothing in this respect was ever provided to the appellant and therefore, no adverse view ought to have been taken in this behalf.

3.5 It is reiterated that the transaction of commodity derivatives traded by the appellant resulted into a net gain, which stand duly offered for taxation. In so far as the observations made by the Learned AO while treating the impugned transactions as bogus, it is submitted as under:-

- All the transactions were carried out through various commodity exchanges and through the authorized brokers duly substantiated by the contract notes and also by the payments through proper banking channel.

- The appellant has submitted contract note cum bill which include Order No., Trade No. Trade Time, Quantity, purchase Price, Sale price, contract specification, brokerage charged by broker etc during the course of reassessment proceedings. These transactions are independently verifiable on the concerned commodity exchange also. From the above mentioned information/ documents it is amply clear that the transactions undertaken by the appellant have actually taken place on the said exchange.

3.6 It is submitted that all these trade were undertaken through registered broker of NMCE and duly executed on the said exchange wherein the assessee has earned profits and also suffered losses and have been carried out in the normal course of business, duly supported by the contract notes and also the transaction are through regular. banking channels. The contract notes issued by all these brokers also confirm the transactions.

3.7 On perusal of contract note cum bill, it shall be observed that each contract note cum bill depict Order No., Trade No., Trade Time, Quantity, Purchase Price, Sale price, contract specification, brokerage charged by broker etc. All these transactions with the brokers are

through proper and normal banking channel. It is further submitted that all the trade carried out by the assessee company on NMCE are proper and genuine. These transactions are independently verifiable on the concerned commodity exchange also and it was requested before the AO that in case of any doubt, the same may be confirmed verified from the exchange.

3.8 The appellant has genuinely carried out various trades on NMCE through brokers. The appellant had no access to the trading platform of the brokers but has transacted the trade only through the broker. If at all the brokers have done something wrong, the appellant is neither aware of the same nor a party to it and cannot be held responsible and cannot be questioned for the wrong doings of the brokers.

3.9 On one hand, the learned AO in para 8.5 at page 6 of the assessment order stated that the brokers of the appellant were engaged in suspected non-genuine trade practices and therefore they were penalized during FY 2011-12 and on the other hand at page 7 doubted the very existence of the said brokers. The contention of the AO is self contradictory. The charging of penalty by SEBI proves the identity of the brokers.

3.10 With respect to the observation of the AO that FMC has imposed penalties on the brokers, it is submitted that FMC had imposed token fines on the brokers which seems to be for some procedural irregularities and there is no allegation of wrong doing nor was such fine levied by FMC with reference to the transaction in respect of the appellant.

3.11 Further the above observation of the AO is in clear contradiction to the observations that none of these brokers were found at the given address. Further no details of the penalty orders are available and also other vital facts such as the date of order, the reason of

levying penalty and the final outcome of these penalties. It is further stated by the AO that penalties were levied and the amount of penalties so levied on these brokers is also mentioned in the assessment order. However, no other details are made available in this respect. The penalties levied are in the range of Rs. 75,000/- to Rs. 1,00,000/-only and appear to be very nominal in contrast to the level and magnitude of the allegations made in respect of these brokers. The observations of the 10 made in this behalf are without any proper basis and appears to be too farfetched and imaginary.

3.12 A perusal of the facts incorporated in the assessment order shall entail that the appellant itself was never held guilty of committing any wrong doing by the FMC, nor was the AO able to bring on record any material that the regulatory authority had found the appellant's transaction through such brokers to be ingenuine requiring any penal action, then the losses incurred by the appellant on the MCE platform could not have been doubted on this count.

3.13 As regards AO's contention that the appellant had obtained Loss through synchronized trading with a set of counter-party brokers is concerned, it is submitted that that except for making unsubstantiated averments, the AO did not bring on record any evidence/material which could have supported his conclusion that the commodity transactions conducted by the appellant were bogus. It is noted that the AO did not even spell out the names of these counter-party brokers nor did he bring on record any material which could go on to show that these counter party brokers were engaged in synchronized trading.

3.14 It is noted that the documentary evidences substantiating the commodity transactions, as submitted by the appellant, were never controverted by the AO. Each and every commodity transaction, which

the appellant conducted through NMCE members, was supported by time stamped contract notes which were issued in conformity with the regulations formulated by NMCE. The contract notes provided the specific particulars as required to be spelt out as per NMCE regulations. The learned AO has expressed accepted in the assessment order that there is no fallacy in the documents filed.

3.15 There is nothing on record which establishes that the appellant was acquainted with any counter party brokers which indulged in orchestrated wrong doing for the purpose of claiming bogus losses: Rather the onus casted upon appellant to prove the genuineness of the transactions has been discharged by it and the A could neither point out any infirmity in the document produced nor could adduce any adverse material to shift the burden/onus back on appellant or could disprove the evidence adduced by the appellant to substantiate the transaction. So, the appellant has discharged the primary onus on it to prove the genuineness of the transaction.

3.16 The appellant has produced all evidence to prove that the transactions are genuine. There is no proof of cash changing hands. The Id. 10 has completely ignored the modus operandi of the exchange where the human interventions are not possible and all these terminals are automatically and fully mechanized. Therefore all the presumptions of the AO in rejecting the loss incurred by the appellant are wrong.

3.17 For parity of reasons, the loss suffered in transactions with these three brokers by the appellant cannot be considered as non genuine or purchased loss unless it is proved that the amount paid to these brokers has come back to the appellant. The law is well settled that burden to prove that the apparent is not real is on the person who claims so and the same is required

to be discharged by bringing positive material on record and not on hypothesis surmises and conjectures.

3.18 Your Honour's kind attention is drawn to the fact that, similar documentation was maintained by the appellant in respect of its commodity transactions on other exchanges as well. It is interesting to note that, all these transactions which were supported by similar documentation, were considered to be genuine and bonafide by the AO because the appellant had earned net gains therein. The sole reason for which the AO questioned the genuineness of the transactions conducted on NMCE was only because the appellant reported overall loss. On one hand, the 10 on similar set of documentation accepts the transaction which yielded gains, whereas on similar set of document carried out in electronic platform, when loss occurred, the AO did not accept. Such action of AO cannot be countenanced unless the 10 was able to establish any link between the appellant and the counter party brokers and bring on record some evidence/material to show that the appellant was party to synchronized trading which the A failed to do so, the AO could not have disputed the genuineness of the loss.

It is worth pointing out that the Learned AO has disallowed only the net loss suffered by the appellant in respect of such trades meaning thereby he has accepted the profit earned by the appellant on similar trades through the impugned brokers.

3.19 In the entire order the Id. AO has made general and sweeping remarks based on certain irrelevant materials. The Ld. AO has doubted the genuineness because the transactions were squared off at short durations. It is submitted that this contention of the AO is based on some S\$ Gap Time Analysis of trade applying certain promotion combination and certain filters and the relevant screen shot is given on page 8 of

the assessment order. It is submitted that the said screen shot is not legible and beyond comprehension.

3.20 Moreover, the mere fact that the transactions were squared off in short duration resulting in loss cannot by itself be the reason to question the genuineness of the loss. The facts on record proved that such transactions had in fact been carried out on the Exchange and these were reflected in the records of the Exchange at the material time and no falsity or infirmity is shown therein. The mere fact that the appellant squared off the transactions within a short period of time resulting in loss may raise the question about the appellant's prudence but for such reason one cannot hold that the loss was not genuine or bogus.

3.21 The Learned AO has stated that the transactions were carried out in illiquid commodities. In this respect it is submitted that there is no basis given in the assessment order as to how the particular commodities in which the appellant has traded, were treated as illiquid.

3.22 It is further submitted that it is the case of the AO that the appellant has arranged losses through synchronized trades, which allegation is wrong and categorically denied by the appellant. The fact that such trades were executed at the recognized stock exchange through screen based trading platforms is undisputed. Further in such trades if one party incurs losses, the counter party ought to have earned profits. However, while making the allegation of synchronized trades and contrived losses, the Learned AO made no attempts to identify the counter parties to such trades, who definitely would have earned such huge profits, going by the theory propounded by the Learned AO. In the absence of such an exercise, the allegations against the appellant do not hold any ground.

3.23 *The learned AO has also referred relevant extracts of statement of director of Shri Anandram Chothwani ji. On perusal of the said extract it shall be seen that there was nothing discernable from the statement of the director recorded ws 131 based on which the AO could have inferred that the losses incurred in the commodity transactions were contrived. It is submitted that in the statement so recorded neither there was any admission of any wrong doing nor was there any self incriminating averment made by the director of the appellant.*

3.24 *It is stated in the assessment order that the appellant failed to disclose full and correct facts, which is not correct. It is not mentioned as to what facts were not disclosed fully and correctly. No fault or short coming has been pointed out in the return of income filed electronically by the appellant. Even the reasons recorded for initiating the proceedings does not state that there was any material misstatement on the part of appellant. Further the appellant disclosed all material facts fully and correctly at the time of enquiry conducted in this regard. Therefore, there is no failure on the part of the appellant in disclosing true and correct facts.*

3.25 *There is a reference of some analysis by investigation wing on page 8 onwards of the assessment order which was also never provided to the appellant during the course of re-assessment proceedings. It is submitted that these analysis are also beyond the understanding of the appellant. It is not at all clear as to what the AO wanted to convey with all these analysis and tables. The AO should have confronted the appellant with all the information available with him during the course of assessment proceedings. Using any such information at the time of passing of final assessment order without confronting the same is against the principles of natural justice.*

3.26 The Learned AO has reproduced the show-cause dated 30.05.2019 issued to the appellant in respect of its trades cared out through NMCE. The said show cause notice is very brief and cryptic and did not refer to any cogent material much less any material for the allegation made in the show cause notice. Rather the said show cause notice which happens to be the first and the only notice u/s 142(1) issued in this case only-reflects the predetermined and prejudiced mind set of the AO to disallow the impugned losses.

The material referred and relied upon by the AO neither provided nor confronted ever with the appellant

3.27 Further while discussing the issue in the re-assessment order from para 8 onwards, the AO has referred and relied upon many reports / observations which were never brought to the knowledge of the appellant nor were ever confronted during the assessment proceedings. Some of such references relied upon by the AO are as under

S.No	Para No. of the assessment order	Particulars
1	Para 8	Findings of search and survey operation conducted on the appellant by the Investigation wing Ahmedabad on 18.12.2014.
2	8	Data analysis of the transactions undertaken by the appellant.
3	8.1	Details analysis of the trades found as a result of search and survey operations.
4	8.1	NMCE data and PAN field segregation.
5	8.4	Penalties levied by NMCE on the brokers.

6	8.5	<i>Enquires conducted with regard to the brokers M/s. S.N Commodities, M/s. Subh Laxmi Commodities and Subh Laxmi Traders.</i>
7	8.6	<i>Summon issue u/s 131 dated 21.01.2015</i>
8	8.7 & 8.8	<i>SS Gap Time analysis of trades.</i>
9	8.9	<i>NMCE trade data analysis</i>
10	8.12	<i>Orders of SEBI and the Securities Appellate Tribunal</i>
11	8.14	<i>The MS excel sheet.</i>
12	8.16	<i>Analysis of low high trade.</i>
13	8.17	<i>Series code wise analyses</i>
14	8.18, 8.19 & 8.38	<i>Statement of Shri Anand Ram Chothwani dated 23.02.2015</i>
15	8.22 to 8.23	<i>Counter party broker analysis.</i>
16	8.24 to 8.25 & 8.28	<i>Analysis on the basis of lots.</i>
17	8.26	<i>Clustering pattern.</i>
18	8.27	<i>Day basis analysis.</i>

3.28 All these information/ reports collected on the back of the appellant and used against it were never either referred to in the reasons or ever confronted with the appellant during the course of re-assessment proceedings before using the same in the assessment order.

Even after completion of the assessment, the appellant had specifically requested for the above documents from the learned IO, but the copies of the same have not been provided till date. Copies of request letters filed with the AO in this behalf are enclosed at page no. 231 to 232 of the PB.

It is submitted that the AO was duty bound to have confronted all the reports and information with the appellant during the reassessment proceedings itself

before using the same against the appellant. Having not done so, the A.O. has grossly erred in violating all the canons of natural justice. With due respect it is submitted that such an action ought to be held as fatal not only to the additions made but also fatal to the entire proceedings.

It is submitted that the appellant has not been provided the copy of the said information and the relevant material even after the completion of reassessment proceedings so as to enable the appellant to file a proper and detailed submission there-on before Your Honour.

3.29 It is further submitted that the Learned AO has used various data analysis, analysis of trades, SS Gap Time Analysis of trades, MCE trade data analysis, excel sheets, series code analysis, clustering pattern etc which in stated to have been done on the data seized / impounded from the NMCE Exchange. However, there is nothing on record to establish reliability of such data and also the authenticity and correctness of various analysis used in the assessment order in support of the allegations made by the AO. It is submitted that the mandatory provisions of the Indian Evidence Act 1872 contained in Section 65A and 65B providing for admissibility of electronics records as evidence have not been followed.

3.30 It is further submitted that the theory propounded by the 40 of synchronized trade deals and their reversal and other analysis of the trade data obtained from NMCE are only self serving observations of the Investigation Wing. A perusal of the entire discussion made in the assessment order will reveal that only adverse conclusions have been drawn on the basis of excel workings done by the Investigation Wing which is not supported by any factual / authenticated data of the exchange. The only conclusion which can be drawn is that the NMCE exchange has confirmed that all the

impugned trades were carried out on its screen based platform.

3.31 The AO has placed reliance on the decision of Honourable Supreme Court in the case of SEBI V/s Rakhi Trading Pvt. Lid. in this respect it is submitted that the said reliance is patently misconceived since the said decision was rendered in context of trading in share market and is not in context of trading on commodity exchange such as NMCE. It is submitted that the share market and the commodity market operate on altogether different proposition and circumstances and are not comparable.

In view of the above it is submitted that the transaction undertaken by the appellant are all genuine transactions. The appellant has filed sufficient documentary evidence to substantiate its commodity transactions on NMCE Nothing incriminating was found from the appellant during the operations conducted by the Investigation Wing Ahmedabad and there is no material in possession of the AO and on record which could even remotely suggest that the impugned transactions of the appellant are fictitious.

Therefore, the addition made by the AO is wrong and is prayed to be deleted.

3.32 Heavy reliance is placed on the recent judgment of the Honourable Kolkata ITAT in the case of Ms. GRD Commodities Lid. Vs. DCIT in ITA (SS) A Nos 120 to 123/ Kol. 2018 and CO Nos 123 to 1261 Kol/2018 pronounced on 04.12.2020, copy enclosed at page no. 35 to 78 of the case law PB.

It is pertinent to mention that in this case also assessments were reopened subsequent to the search and survey conducted by the Investigation Wing Ahmedabad on 18.12.2014 and the assessee Ms GRD Commodities Ltd. was covered under section 133A. On

the identical allegations and on the same report received from the Investigation Wing Ahmedabad similar allegation were made that Ms GRD Commodities Ltd. booked losses and managed contrived losses which were not genuine. These facts are evident from reading of Para 36 of the order of Honourable ITAT Kolkata Bench. The Honourable ITAT after discussing the entire matter at length dismissed the appeals filed by the department and upheld the orders of the Learned CIT (4) wherein the losses incurred by the assessee and disallowed by the AO were allowed. The appellant places heavy reliance on this decision rendered in an identical matter on identical facts.

3.33 Reliance is also placed on the decision of Honorable Mumbai ITAT Bench in the case of Suresh Kumar Sharda Vs ACIT ITA No. 3597/M/2017 (copy enclosed at page no. 79 to 94 of case law paper book) wherein also losses in respect of commodity trades, which were disallowed holding the same as in genuine, have been allowed.

Considering the fact that the appellant had filed all the documents required to substantiate its claim and also the fact that the assessing officer has not pointed out any specific defect in the documents filed by the appellant and has relied on material which doesn't speak an iota of appellant's name and which were never confronted with the appellant, the addition made by the AO on the basis of assumption and presumption is wrong and ought not to have been made.

7. Further from the first appellate order we also observed that the Ld. CIT(A) granted relief to the assessee with following observations and findings:

Ground No. 6:- Through this ground of appeal, the appellant has challenged addition of Rs. 14,89,59,801/- made by the AO on account of disallowance of artificial losses. It is seen from the assessment order that a search and survey operation was conducted on commodity traders group including the assessee by the Investigation Wing Ahmedabad on 18.12.2014. During this operation it was found that with the help of members of NMCE exchange the appellant has booked artificial losses in commodity trades on NMCE platform, which have been set off against profits from trading in other exchanges / business activities. A show cause notice on this issue was issued on 30.05.2019 proposing to disallow such losses and after considering the submissions made by the assessee, it was held by the AO that the trades under consideration are synchronized trades on screen based trading platform. All such trades were executed in a short time and always resulted in a loss, therefore cannot be held to be mere coincidence. It is further stated by the AO that the assessee has made profits in commodity trades on other exchanges and exclusively made losses on NMCE only. The A found that the appellant was registered as a client with four different brokers for trades on NMCE and these brokers were penalized by NMCE due to one or the other reasons. It was found that the members of NMCE i.e. the brokers have inconsistently increased the volume of trades towards end of the financial year and therefore, the NMCE had imposed penalties on such members which is in the range of Rs. 75,000/- to Rs. 1,00,000/- in FY 2011-12. Further enquiries were conducted with regard to some of the brokers and it was found that either the given addresses were closed or the brokers were not available on such addresses. Thereafter, the AO has abstracted some analysis of trade and drew the conclusion that the trades executed by the appellant resulting into consisting losses were synchronized trade. It is further stated in the assessment order that the director of the company Shri

Anandram Chothwani was confronted and he gave evasive replies and one line answer that he is working in different exchange and there is no mala-fide intention from such trades. The AO finally reached to the conclusion that the appellant has earned sufficient profits on MCX and NCDEX and incurred losses on NMCE platform so as to set off the profits against such losses and disallowed an amount of Rs. 14,89,59,801/-

4.2.1 *The appellant through its written submissions has contended that all the allegations made in the reassessment order are baseless and the addition has been made purely on surmises and conjectures. The brokers through whom the appellant has transacted were registered broker at the NMCE exchange and the trades are duly substantiated by proper contract notes which include order no., trade no., trade time, quantity, purchase price, sale price, contract specification, brokerage charged etc which were also filed during the course of reassessment proceedings along with the ledger account of the brokers. It is also submitted by the appellant that all the financial transactions are through proper banking channels. It is also contended that the detailed allegations made in the reassessment order were never confronted with the appellant which fact is also evident from the show cause notice dated 30.05.2019 which is also reproduced in the reassessment order. The appellant has contended that the transactions of commodity trades has resulted into a net gain of Rs. 5,94,13,341/- to the appellant which has been duly offered for taxation. Further the trades carried out at NMCE through registered brokers were on screen based trading platform to which the appellant had no access and the counter party to such trades is never known to the appellant. With regard to the observation that the brokers were not found at the given addresses, the appellant has submitted that this stand of the AO is wrong and contradictory. On one hand the AO has*

stated that the brokers were registered at NMCE and NMCE has also levied penalties on such brokers therefore, their existence should not have been doubted. The AO never confronted this fact with the appellant. With regard to the penalties imposed on the brokers, it is contended by the appellant that no details of such penalty orders is given by the AO however, as evident from the reassessment order itself very nominal and token penalties were imposed by NMCE on these brokers. It is the case of the appellant that no default was pointed out by the AO in the contract notes or the transactions of the appellant with these brokers. It is also vehemently contended that during the survey conducted upon the appellant by the Ahmedabad Investigation Wing along with other commodity traders nothing incriminating or adverse was found which could even remotely suggest any wrong doing on the part of the appellant. With regard to the various workings and tables given by the AO in the assessment order, the appellant has submitted that the same were never confronted with the appellant and all the analysis of the trade data obtained from NMCE are self serving observation of the Investigation Wing and there is nothing on record to establish the reliability of such data and also the authenticity and correctness of various analysis and the mandatory provisions contained in section 65A and 65B of the Indian Evidence Act 1872 providing for admissibility of electronic records as evidence have not been followed.

The appellant has also placed reliance on certain decisions wherein, on identical facts, similar addition made have been deleted.

4.2.2 After considering the observation made in the assessment order and also taking into consideration the written submissions of the appellant carefully, it is seen that. the appellant has carried out trading in commodities and derivatives on various exchanges such

as MCX, NCDEX and NMCE and has earned net income from such trading. However, the AO is of the view that the appellant has incurred only losses on NMCE which are artificial losses through synchronize trades undertaken for reducing the profits earned on similar trades on other exchanges. It is undisputed fact that such trading was done by the appellant through registered brokers of the exchange and on screen based trading platform. It is also not disputed that the appellant has filed all the relevant documents such as contract notes of the registered brokers showing order No., trade no., trade time, quantity, purchase price, sale price, contract specification, brokerage charge etc along with ledger accounts of the brokers and all the transactions are through normal banking channels. The respective exchange has also confirmed the traces carried out by the appellant. It is categorically mentioned in Para 7 of the reassessment order that there is no denying to the fact that the assessee has traded on NMCE through registered brokers as their client and the trading details are as per the contract notes issued by them for NMCE transactions.

4.2.3 A survey was conducted on the appellant on 18.12.2014 by the Investigation Wing Ahmedabad along with search / survey operations in commodity traders group. There is nothing on record to suggest that any incriminating material was found in this survey from the appellant indicating any wrong doing on the part of the appellant. It is also seen that the director of the appellant was examined and the relevant part of his statement has also been abstracted by the AO in the assessment order however, there is nothing in the statement which reveals that the appellant had admitted of any wrong doing or had agreed to book contrived losses. The appellant has filed complete details of the commodity transactions with requisite documentary evidences and there is no self-incriminating averment at any stage by the appellant. It is seen that independent enquiries were conducted from

Ms S. N. Commodities and Ms Shubhlaxmi Commodities during the regular assessment proceedings in the case of the sister concern of the appellant i.e. M/s Prakash Oils Ltd. for AY 2011-12, which appeal is also being disposed off simultaneously by this office. In the case of M/s Prakash Oils Ltd. AY 2011-12 the then AO has summoned both these brokers ws 131 who duly complied with the same and represented their matters before the AO of Ms Prakash Oils Ltd. and also confirmed their transactions. Relevant correspondence made in this regard by the AO of M/s Prakash Oils Ltd. during its regular assessment proceedings are also placed on records in the appeal of Ms Prakash Oils Ltd. in its paper book. Further the undisputed fact that the brokers were registered at NMCE and NMCE has also penalized them therefore their identity cannot be doubted. Even the fine levied by NMCE on these brokers is very nominal. There is nothing on record that the appellant was ever held guilty of committing any wrong doing by the FMC or by the NMCE or that the transactions of the appellant through the brokers were held to be in genuine by any regulatory authority so as to have any doubt on the same. The transactions were carried out on screen based trading platform and there is nothing on record to suggest that the counter party to such trades was acquainted with the appellant. The allegations made against the appellant are not based on any sound footing and there is no evidence on record that such commodities transactions are bogus. On the contrary the documentary evidences substantiating the transactions filed by the appellant remain uncontroverted. The onus casted upon the appellant to prove the genuineness of the transactions has been properly discharged by it. Similar documentation was maintained by the appellant in respect of commodities trades on other exchanges which also stand accepted by the AO. In Para 8.19 of the order the AO himself has stated that in some transactions the appellant has also earned profits though the amount is meager. It is also

the case of the AO that the price. discovery mechanism on NMCE platform was rigged and the brokers / clients operated in the clusters with mutual understanding. However, in screen base trading mechanism of any exchange the client or the customer has no excess and the counter party to the trade is never known.

4.2.4 I find that on identical facts the Honorable Income Appellate Tribunal Kolkata Bench in the cases of ACIT Vs GRD Commodities Ltd. in IT(SS)A No. 120 to 123/Kol/2018 vide its recent order dated 04.12.2020 had an occasion to deal with the identical case. The sole issue involved was the disallowance of loss incurred by the assessee in trading of commodities on the NMCE treating it to be bogus. In this case also survey u/s 133A was conducted on 18.12.2014 by the Investigation Wing Ahmedabad in connection with search in the case of commodities traders and the assessment concluded w/s 143(3) were reopened u/s 148 and on the basis of the same set of analysis of trade data and enquiries of the brokers conducted by the Investigation Wing Ahmedabad and the losses incurred by the assessee in commodity transactions conducted on the NMCE platform were disallowed. The disallowances were deleted in the first appeal and the department filed second appeal before the Honourable ITAT. It is also to note that even the assessment years involved are also AY 2010-11 and AY 2011-12. The Honourable ITAT not only quashed the reopening proceedings but also decided the appeal on merits and held that it did not find any infirmity in the order of the CIT(A) deleting the said disallowance. The facts of the case before the Honourable ITAT were para-materia identical in so far as the allegations in this case were also that synchronize transactions were executed by the assessee in illiquid commodities, 97% transactions were executed within a minute, almost all the transactions were squared off within the same day, the transactions were synchronized and executed with a clear intention

to book the contrived losses in the last four months of the respective financial years, 70% of the volume of the trades has been created by only 25 brokers with further concentration to 10 brokers, most of the volume was created by top 100 clients out of which top 25 clients were creating almost 60% volume and clear clustering among the brokers was found. All the brokers through whom the assessee has traded were penalized by NMCE for their involvement in non-genuine trade and some of them were not available on the given addresses etc. In the case before the Honourable ITAT the statement of the director of the assessee company was recorded who did not give any reasonable explanation and submitted only mechanical reply. Thus I find that the observations made by the AO in the present appeal before me are replica of the observations and allegations made by the AO in the case before the Honourable ITAT. The Honourable ITAT affirmed the findings of the CIT(A) and observed and held as under:-

47. As far as the Revenue's grievance viz., the assessee had obtained loss through synchronized trading with a set of counter-party brokers is concerned, we note that except for making unsubstantiated averments, the AO did not bring on record any evidence/material which could have supported his conclusion that the commodity transactions conducted by the assessee were bogus. It is noted that the AO did not even spell out the names of these counter-party brokers nor did he bring on record any material which could go on to show that these counter party brokers were engaged in synchronized trading. On the other hand, it is noted that the documentary evidences substantiating the commodity transactions, as submitted by the assessee, were neither controverted by the AO or the Ld. CIT, DR. Each and every commodity transaction, which the assessee conducted through NMCE members was

supported by time stamped contract notes which were issued in conformity with the regulations formulated by NMCE. The contract notes provided the specific particulars as required to be spelt out as per NMCE regulations. It is noted that each transaction was followed by the payment in due course and in the manner required by the Exchange regulations. We therefore find that all the primary documents and evidences, which the assessee in its capacity as regular dealer in securities was expected to maintain, had been maintained and the same was furnished before the AO. We find that there is nothing brought on record by the Revenue which establishes that the assessee was acquainted with any counter party brokers which indulged in orchestrated wrong doing for the purpose of claiming bogus losses, instead we note that the onus casted upon assessee to prove the genuineness of the transactions has been discharged by it and neither the AO/Ld. CIT, DR could point out any infirmity in the document produced nor could adduce any adverse material to shift the burden/onus back on assessee or could disprove the evidence adduced by the assessee to substantiate the transaction. So, the assessee has discharged the primary onus on it to prove the genuineness of the transaction.

48. The Ld. AR further invited our attention to the fact that, similar documentation was maintained by the assessee in respect of its commodity transactions on other exchanges as well. It is interesting to find that, all these transactions which were supported by similar documentation, were considered to be genuine and bonafide by the AO because the assessee had reported net gains therein. We thus note that the sole reason for which the A.O. questioned the genuineness of the transactions conducted on NMCE was only

because the assessee reported overall loss. In our view, this approach of the AO was clearly untenable on the facts as well as in law. We are of the opinion that AO could not have blown hot and cold at the same time. On one hand, he on similar set of documentation accepts the transaction which yielded gains, whereas on similar set of document carried out in electronic platform, when loss occurred, he did not accept. In such a scenario, the AO is stopped from picking and choosing without having in his possession material or evidence to take a different/adverse view. Such action of AO cannot be countenanced unless the A.O. was able to establish any link between the assessee and the counter party brokers and bring on record some evidence/material to show that the assessee was party to synchronized trading which the AO failed to do so, so we are of the opinion that the AO could not have disputed the genuineness of the loss.

49. We note that the Ld. CIT(A) had examined the relevant data referred to by the AO in the impugned order to infer the act of synchronized trading and found that this information referred to by the AO was a smoke screen and that it did not in any manner suggest that the assessee or any of the counter-party brokers were guilty of synchronized trading. The relevant findings recorded by the Ld. CIT(A) in this regard is as follows:

“10. ... In the entire order the Ld. AO has made general and sweeping remarks based on certain irrelevant materials. E.g. The Ld. AO has doubted the genuineness because the transactions were squared off at short durations. However the mere fact that the transactions were squared off in short duration resulting in loss cannot by itself be

the reason to question the genuineness of the loss, if the facts on record proved that such transactions had in fact been carried out on the Exchange and these were reflected in the records of the Exchange at the material time and no falsity or infirmity is shown therein. The mere fact that the assessee squared off the transactions within a short period resulting in loss may raise the question about the assessee's prudence but for such reason one cannot hold that the loss was not genuine or bogus. In the impugned order the Ld. AO also emphasized on the fact that the assessee had conducted its commodity transactions during the period FY 2008-09 to FY 2013-14 principally through four brokers and the analysis of trades showed that the counter party brokers involved in these transactions numbered twenty. By referring to this statistic the Ld. AO concluded that these twenty-four parties had formed a cartel and through synchronized trading the cartel members had created contrived losses to benefit the appellant. I however find that in the same order the Ld. AO himself has admitted that seventy percent of the entire trade volume during this period on NMCE was conducted by twenty five members. If that be the case, then there was empirical data available on record that substantially major part of the trading on NMCE was conducted by these twenty five members and therefore any member of public who conducted the commodity transactions on this Exchange necessarily transacted through any one of them and therefore no adverse inference could be drawn only against the appellant on the ground that the assessee engaged one of such Members for conducting

its commodity transactions. Rather this information shows that the appellant chose to conduct its commodity transactions on NMCE through its Members who were actively involved in conducting trades and in a position to provide better service being well conversant with the market. The mere fact that the appellant's transactions involved 24 active members does not lead to conclusion that these active Members by themselves had formed a cartel....”

50. The Ld. CIT, DR appearing on behalf of the Revenue was unable to controvert the above findings of the Ld. CIT(A).

51. The settled proposition of law is that, suspicion howsoever strong cannot partake the character of evidence. As held by the Hon'ble Supreme Court in the case of Uma Charan Shaw & Bros Vs CIT reported in 37 ITR 271, howsoever grave the suspicion the AO may entertain, the suspicion cannot take place of the evidence or finding of fact. The suspicion on the AO's part can certainly prompt him to conduct enquiry & investigation but ultimate finding of the authority must be based on the material or evidences gathered by him and which has live nexus with the finding recorded by the authority after objective consideration of facts and evidences gathered. If the material or evidence gathered does not have any proximate cause with the finding ultimately reached, then the finding of the authority has to be held to be perverse and unsustainable. Here in the present case, as noted in the foregoing, the reasoning given by the AO to justify the impugned disallowance was based on mere suspicion and hearsay without bringing on record any tangible evidence/material to support the same. On the contrary, we note that the

assessee had placed on record sufficient documentary evidences which substantiated its commodity transactions on NCME. As noted earlier, both the Director of the assessee as well as the broker were examined u/s 131 of the Act and both of them substantiated the commodity transactions and there was no self- incriminating averment made by either of them or there were any material in the possession of AO or that could be pointed out by Ld. CIT, DR during hearing before us, which would suggest that the assessee's transactions on the NMCE platform was fictitious. Moreover, even the enquiries made by the AO from the brokers u/s 133(6) of the Act, revealed that each of the brokers had affirmed the assessee's transactions with supporting evidences.

52. For the reasons discussed in the foregoing, we therefore do not find any merit in the grievance raised by the Revenue in the grounds taken in the present appeal. In support of these findings, we may gainfully refer to the decision in the case of BLB Cable & Conductors Pvt Ltd in ITA No.1070/Kol/2012 dated 03.02.2016 wherein on similar facts and circumstances, the co-ordinate Bench of this Tribunal had deleted the disallowance of loss incurred by the assessee in commodity transactions on NMCE during FY 2008-09, which was disallowed by the AO on the ground of being bogus in nature. The relevant findings of this Tribunal are as follows:

"4. We have heard both the side and perused the materials available on record. The ld. AR submitted two papers books. First book is running in pages no. 1 to 88 and 2nd paper book is running in pages 1 to 34. Before us the ld. AR submitted that the order of the AO is silent about the date from which the broker

was expelled. There is no law that the off market transactions should be informed to stock exchange. All the transactions are duly recorded in the accounts of both the parties and supported with the account payee cheques. The ld. AR has also submitted the IT return, ledger copy, letter to AO and PAN of the broker in support of his claim which is placed at pages 72 to 75 of the paper book. The ld. AR produced the purchase & sale contracts notes which are placed on pages 28 to 69 of the paper book. The purchase and sales registers were also submitted in the form of the paper book which is placed at pages 76 to 87. The Board resolution passed by the company for the transactions in commodity was placed at page 88 of the paper book. On the other hand the ld. DR relied in the order of the lower authorities.

4.1 From the aforesaid discussion we find that the assessee has incurred losses from the off market commodity transactions and the AO held such loss as bogus and inadmissible in the eyes of the law. The same loss was also confirmed by the ld. CIT(A). However we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported

with the books of accounts and bank transactions. The ld. AR has also submitted the board resolution for the trading of commodity transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal."

53. It is noted that the Hon'ble jurisdictional Calcutta High Court has dismissed the appeal preferred by the Revenue against the above order by their judgment dated 19.06.2018 in GA No.747 of 2017. Respectfully following the law laid down in the aforesaid judgment (supra) which is binding upon us, and applicable to the facts of the present case, thus we do not find any infirmity in the impugned order of the Ld. CIT(A).

4.2.5 In view of the detailed discussions made above and also considering the above order of the Honourable ITAT Kolkata Bench given in a similar case on identical facts, the addition made by the AO of Res. 14,89,59,801/- is Deleted. Therefore, appeal on this ground is Allowed

4.3 Ground No. 9- Through this ground of appeal, the appellant has claimed deduction of education cess actually incurred and paid by the appellant. It is claimed by the appellant that it has paid an amount of Rs. 4,86,124/- as education cess which is an allowable deduction and the same was inadvertently not claimed in the return filed. I find that the said claim is made first time through the appeal proceedings and no such claim was made before the AO in the return or even in the assessment proceedings. Therefore, the same cannot be allowed at this stage. Therefore, appeal on this ground is Dismissed.

8. On a careful consideration of above rival submissions and orders of the authorities below. We note that the impugned addition made by AO on account of disallowance alleged artificial losses and we further note that a search and survey operation was conducted on commodity traders group including the assessee by the Investigation Wing Ahmadabad on 18.12.2014. During said operation it was noticed that the appellant has booked artificial losses in commodity trades on NMCE platform, which have been set off against profit from trading in other exchanges/business activities. In the backdrop of said factual position proceeding u/s. 147 of the Act was initiated against the assessee and the AO passed reassessment order with the conclusion that the appellant has earned sufficient profits in MCX and NCDEX and incurred losses on NMCE platform so as to set off the profits against such losses and disallowed the impugned amount. Before the authorities below it was contended by the assessee that all allegations made in the assessment are baseless and addition has been

made purely on the basis of surmises and conjectures. The assessee also submitted that the appellant has transacted with the brokers registered at the NMCE exchange and trades were duly substantiated by way of proper contract notes including Order number, Trade number, Trade time, Quantity, Purchase price, Sale price, contract specification and brokerage charge etc. which was also filed during the course of reassessment proceedings along with the ledger of accounts of the brokers. The AO has not controverted the very fact that all the financial transactions were through banking channels. It was also a contention of the assessee before the Ld. CIT(A) that the detailed allegations noted in the reassessment order never confronted with the assessee which is evident from the show cause notice dated 30.05.2019 as has been reproduced in the reassessment order.

9. Besides above contentions it was also contended by the assessee that the transactions of commodity trades has resulted into net gain of Rs. 5,94,13,341/- to the appellant

which has been properly offered to taxation before the AO. The assessee also submitted that the transactions carried out at NMCE through registered brokers were on screen based trading platform to which the appellant had no excess and the counter party to such trades were never known to the appellant. Regarding penalty imposed on the brokers the assessee contended that no details of such penalty orders was given by the AO and from the assessment order itself it is clear that the penalty were nominal and token penalties were imposed NMCE on alleged brokers. The assessee also contended that the AO has not pointed any defect and in the contract notes of the transactions undertaken by the assessee through these brokers and during survey operation by the Ahmadabad Investigation Wing nothing incriminating or adverse was found which could even remotely pointed out any wrong doing or malpractice of part of the assessee.

10. The Ld. CIT(A) after considering the entire facts and circumstances of the case first of all noted that the appellant has carried out trading in commodities and

derivatives on various stock exchanges such as MCX, NCDEX and NMCE and has earned net income from such trading. He also noted that the AO was of the view that appellant has incurred artificial losses on NMCE through Synchronized trades undertaken with intention to reduce the tax liability on the assessee by setting off the losses with the profits earned by the assessee on similar trade on other exchanges. Neither the AO nor the learned CIT-DR before us could dispute the fact that such trading was done by the assessee through registered broker of the exchange and on screen based trading platform and all relevant documentary evidence including contact notes were submitted showing Order number, Trade number, Trade time, Quantity, Purchase price, Sale price, contract specification and brokerage charges etc. with ledger accounts of the brokers and all the transactions were undertaken through banking channels by paying brokerage to the respective brokers. We also note a very important fact that the respective exchange has also confirmed the transaction carried by the appellant and there is no allegation by the AO to the fact the assessee

was trading on NMCE through registered brokers as their client and the trading details were as per contact noted issued by them for NMCE transactions.

11. We also find that under identical similar facts and circumstances ITAT Kolkata Bench decided the issue in the case of ACIT vs GRD Commodities Ltd. (supra) and the sole issue involved therein was a disallowance of loss incurred by the assessee in the trading of commodity on NMCE treating the same to be bogus. In this case also a survey u/s. 133A was conducted on 18.12.2014 i.e. is the same date on which similar survey operation was conducted by the Investigation Wing Ahmadabad. The Ld. CIT(A) has reproduced the relevant part of the said order of ITAT Calcutta Bench in para 4.2.4 of first appellate order (supra). From vigilant reading of order of ITAT Calcutta Bench in the case of ACIT vs GRD Commodities Ltd. (supra) paras 47 to 53 we find that the Kolkata Bench has followed its own order in the case of BLB Cable and Conductors Pvt. Ltd. (supra) wherein the Tribunal reverse the order of the

authorities below by holding that the transactions of the commodity exchange have not only been explained but also substantiated from the confirmation of the party. Both the parties were confirming the transactions which have been duly supported with the books of account and bank transactions. The Tribunal also took cognizance of board resolution for trading of commodities transactions. It was categorically held that the expulsion of brokers from commodity exchange cannot be a criteria to hold the transactions as bogus. The Tribunal also noted that the Hon'ble Calcutta High Court has dismissed the appeal preferred by the revenue against the order of ITAT Kolkata Bench in the case of BLB Cabel and Conductors Pvt. Ltd. (supra) by their judgment dated 19.06.2018 in GA No. 747/2017.

12. In view of forgoing discussion we reach logical conclusion that the Assessing Officer proceeding to make disallowance of losses without considering explanation and documentary evidence submitted by the assessee and he

proceeded to make addition on the basis of report of Investigation Wing Ahmadabad. From first appellate order, we clearly observed that the Ld. CIT(A) has considered all facts and circumstances in a totality and also considered and appreciated the documentary evidences file by the assessee dislodging the allegation of the AO in the reassessment order. We are unable to see any ambiguity perversity for any other valid reason to interfere with the findings recorded by the Ld. CIT(A) based on the orders of ITAT Kolkata Bench BLB Cable and Conductors Pvt. Ltd. (supra) and ACIT vs GRD Commodities Ltd. (supra). It is pertinent to mention that the appeal of the revenue against the order in the case of BLB Cable and Conductors Pvt. Ltd. (supra) has been dismissed by Hon'ble Calcutta High Court. Accordingly grounds of revenue fail and thus we dismiss the same. In the result the appeal of the revenue is dismissed.

ITA 219/Ind/2021

13. The Ld. CIT(DR) pressing into service grounds of revenue submitted that in the facts and in the

circumstances of the case the Ld. CIT(A) was not correct and justified in deleting the upwards adjustment made by the TPO in respect of benchmarking specified domestic transaction. He further submitted that the learned first appellate authority has also erred in ignoring the fact that the assessee had failed to benchmark the transactions with its AE as per law thereby failing to discharge the primary onus cast upon it under the provisions of the Act. The learned CIT-DR vehemently pointed out that the Ld. CIT(A) was not justified and right in holding that there is no question of tax evasion by ignoring the very relevant fact that the transfer pricing is concerned with the determination of Arm's Length Price of the specified domestic transactions carried out by the assessee. The learned CIT-DR submitted that the doctrine of *res judicata* does not apply for the tax proceedings. Therefore the Ld. CIT(A) was not correct in deleting the impugned upward adjustment made by the TPO in respect of benchmarking specified domestic transactions of assessee with its AE by considering its order for A.Y. 2014-15 and subsequent A.Y.

2016-17 which is not binding for A.Y. 2015-16. The learned CIT-DR also submitted that the learned first appellate authority was not justified in rejecting the TPOs approach of adopting TNMM method as the MAM, which was contrary provisions of Rule 10C of Income Tax Rules 1963. Therefore impugned first appellate order may kindly be set aside by restoring that of the AO.

14. Replying to the above learned AR drew attention towards written submissions and paper book filed by the assessee spread over 203 pages and submitted that the Ld. CIT(A) has granted the relief to the assessee by considering the written submissions of the assessee in the light of the relevant provisions of the Act and its own order for immediately preceding year A.Y. 2014-15 and immediately subsequent year A.Y. 2016-17 and there is no defect or discrepancy therein. The learned AR also pointed that the AO has referred order of the TPO, out of which it can be gathered that the appellant had applied comparable uncontrolled price (CUP) method for benchmarking its

domestic transaction with its sister concern which was rejected by the TPO and applied transactional net margin method (TNMM) as the most appropriate method after comparing the margins of the comparable companies found the margin of the appellant very less and made the upward adjustment. He further submitted that under identical facts and circumstances for immediately preceding A.Y. 2014-15 and immediately subsequent A.Y. 2016-17 the A.O accepted the CUP method and the nature of transactions clearly reveals that the TNMM method was not at all applicable. The Ld. CIT(A) also considered that the sister concerns were also profit making company and has paid Income Tax at the maximum rate of 30% and had not claimed any deduction to u/s. 80IA of the Act or exemption u/s. 10AA of the Act. Therefore no prejudice has been cause to revenue in any manner. The learned AR also pointed out that the appellant and M/s. Prakash Oils Ltd. have purchased goods from each other and similar TP proceedings were carried out in both the cases wherein heavy additions have been made in both the case in respect of mutual transactions of purchase

and sale and therefore when the CUP method has been adopted by the assessee and accepted by the TPO in A.Y. 2016-17, then as per Rule consistency under identical facts and circumstances the Ld. CIT(A) was right in following its order in the case of assessee for immediately preceding and subsequent assessment year. The learned AR finally submitted that impugned first appellate order may kindly be uphold by dismissing the grounds of revenue.

15. On a careful consideration of rival submissions first of all we may point out that the assessee consistently submitted identical submissions and contentions before the authority below. The Ld. CIT(A) has reproduced the same pertaining the ground no. 4 at pages 21 to 26 which are being reproduced for the sake of completeness in our order, which read as follows:

4. GROUND NO. 4: As regards addition of Rs. 6,83,23,913/- apropos variation in Arms Length Price(ALP) of the transactions proposed by the Learned TPO.

4.1. This ground of appeal is raised against an upward adjustment of Rs. 6,83,23,9131- made by the Learned

A0 on account of adjustment in the arm's length price as determined by the Learned Transfer Pricing officer, Ahmedabad (TPO) in the order passed us 92CA(3).

4.2. The appellant company has entered into transaction of sale and purchase of goods from its sister concern mainly from Ms. Prakash Oils Ltd. and it has purchased goods worth Rs. 27,66, 11,945/- and sold goods worth Rs.32,76,94,054/- to M/s Prakash Oils Ltd.

4.3. It is reiterated that the auditors of the appellant company had, without dwelling upon the share holding pattern of the appellant company and its sister concern, under the common misconceived understanding, treated the said 'sister concern' as 'related party' and transactions with the sister concern as specified domestic transaction and reported the same in Form 3CEB and has adopted Comparable Uncontrolled Price "CUP" as the most appropriate method (MAM) for recognizing its transactions with its sister concern.

4.4. The jurisdictional A0 at Indore referred the matter to the TPO Ahmedabad. It is submitted and clarified that the TPO proceedings were attended by a local counsel at Ahmedabad and it is the case of the Learned TPO that the case was not attended properly and proper and complete details were not filed by the appellant. It is submitted that the counsel at Ahmedabad did attend the proceedings and also filed the written submission and detailed workings, which it seems were not upto the expectation of the TPO.

4.5. At this juncture, Your Honour's attention is also drawn towards the Suet that from the Assessment year 2018-19, with the introduction / amendment in section 271F i.e. mandatory levy of penalty for delay in filing of returns, there was a situation of panic amongst the clients as well as amongst the counsels during mid of

the year 2018. The work which was segregated and divided to be completed till March became all due in the Month of July as all the non audit returns, which could have been filed upto 31\$ March 2019 were required to be filed by 31 July 2018. Then with the extension of due dates us 139(1) for non audit cases till 31 Aug 2018, the pressure got extended till August 2018. Consequentially the audit work pressure also increased. Eventually, looking to the return filing scenario and the difficulties faced by the counsels/ clients and the technological issues with the ITD Portal, the due dates for audit cases which was 30.09.2018 was extended to 15.10.2018 and then to 31.10.2018. The extension of due date by the CBDT substantiates the situation of pressure and chaos prevailing at that time. The above situation was equally applicable to the Chartered Accountants all over India as well as to the assessee. This could be possible reason for delayed / improper compliances by the counsel at Ahmedabad.

4.6. It is submitted that the appellant company was also facing a severe liquidity crunch and some of the bankers have freezed the banking facilities made available to the appellant. This had also serious repercussions on the overall management of the appellant and the accounts department was fully diverted and focused on bringing the bank facilities to normalcy during this period. Hence, timely compliances could not be made in the matter.

4.7. It is submitted that the appellant is based at Indore whereas the jurisdiction of transfer pricing lies with the Transfer Pricing Office at Ahmedabad. The appellant, in order to save time and money appointed a local counsel at Ahmedabad for attending the transfer pricing proceedings. Whenever a notice was received from the TPO, it was forwarded to the counsel at Ahmedabad.

4.8. The appellant had filed substantial documents for vindicating its transactions held with sister concern. This is also evident from the written submission filed before the TPO, copies enclosed at page no. 56 to 93 of paper book. It is submitted that the report in form 3CEB was filed online and was also filed before the Learned TPO and once the said report, which is certified by a Chartered Accountant, is filed, it is a reasonable assurance that the assessee has maintained the required records and details. There is no reason to withhold such information which action will always be detrimental to the interest of the appellant.

4.9. Be that as it may the TPO has rejected the Comparable Uncontrolled Price Method (CUP) and has applied Transaction Net Margin Method (TNMM). The appellant company filed all the requisite documents called for by the TPO but the same were not considered while rejecting the Comparable Uncontrolled Price Method adopted for recognizing the transactions with sister concerns.

4.10. Eventually, ignoring the submissions of the appellant the Learned TPO ended up by proposing an upward addition of Rs. 6,83.23,913/- in his order passed w/s 92CA on account of the purchase transactions of the appellant with its sister concerns Ms Prakash Oil Ltd. of Rs. 27.66 corers.

No tax arbitrage in the transactions with the sister concern

4.11. The Learned TPO also lost sight of the fact that both the appellant and its sister concerns fall in the same tax bracket and there was no reason for not ad-hearing to the overall Arms Length mechanism while transacting with a sister concern. The variations proposed by the TPO are bad for this reason as well.

4.12. It was further submitted that appellant's sister concern Ms. Prakash Oils Limited is regularly assessed to income tax vide PAN AABCP8087G. The said company is profit making company and has paid tax at Maximum Rate i.e. 30% during the year and the appellant company is also paying tax @ 30%. Copy of Income tax Return filed by Ms. Prakash Oils Limited for A.Y. 2015-16 is enclosed at page No. 59 of paper book which was also filed before the TPO and the AO. A perusal of the same will show that the appellant and the said sister concern, both have paid the income tax at the same rate of 30%.

4.13. The Learned TPO also lost sight of the very important facts such as

- (i) both the appellant and its sister concern ie. Ms Prakash Oils Ltd. had positive income and
- (ii) Both the companies have not claimed any losses
- (iii) Both the companies have not claimed any deduction w/s 80(ia) or exemption u/s 10AA etc
- (iv) Both the companies fall in the same tax bracket

Therefore, evidently there was no tax arbitrage and no violation of the basic spirits and intentions behind incorporating the provisions of specified domestic transactions in the statute. There was even otherwise no reason for not adhering to the overall Arms Length mechanism while transacting with the sister concern. The variations proposed by the TPO and the additions made by the AO are bad for this reason as well.

Absurd conclusions of the TPO proceedings

4.14. The appellant and Ms Prakash Oils Ltd. both have purchased goods from each other and similar TP proceedings were carried out in both the cases. The case of the sister concern Ms Prakash Oils Ltd. was also assessed by the TPO for this very year wherein an addition of Rs. 21,31, 14,226/- has been proposed in

respect of purchases made by Ms Prakash Oils Ltd. from the appellant. A copy of the order passed us 92CA(3) dated 15.10.2018 by the TPO 2 Ahmedabad in the case of Ms Prakash Oils Ltd. is enclosed at page no. 101 to 115 of paper book. The appeal filed by M's. Prakash Oils Limited is also pending before Your Honour.

The crux and essence of both the orders of the TPO ie. in the case of the appellant and in the case of Ms Prakash Oils Ltd. is that the appellant has made purchases from Ms Prakash Oils Ltd. by making excessive payment to the tune of Rs. 6,83,23,9131-(addition made in the case of the appellant) and on the other hand the appellant has also received excessive amount of Rs. 21,31,14,226/- from Ms Prakash Oils Ltd. against sales made by the appellant to its sister concern (addition made in the case of Ms Prakash Oils Ltd.).

Learned TPO of the appellant is alleging that the appellant has diverted its profit by making excessive payments to its sister concern and on the other hand the TPO of the same sister concern is alleging that the said sister concern has diverted its profit to the appellant by making excessive payment. Thus the stand of the department and the TPO is self contradictory as evident from the orders passed by the TPO in both the cases.

4.15. With due respect it is submitted that the fact that heavy upward adjustment has been proposed in both the cases in respect of purchases made by one company from the other company in itself reflect the approach of the respective TPO that without making any attempt to understand the basic object and intention of incorporating the provisions of section 404(2)h) and / or 92BA which was primarily that the profits of profit making entity are not shifted to loss making related party or the profits of non eligible entities are not shifted to eligible related party, huge upward adjustment were

proposed and made in case of both the companies in respect of mutual transactions between both the companies, which is patently wrong and uncalled for.

Anomalies in the methodology and approach adopted by the TPO

4.16. In view of the above submissions, the very reference made to the TPO was unwarranted and bad in law and the order passed by the TPO ought to be quashed out rightly. However, even on merits it is submitted that there are various anomalies in the overall methodology adopted by the TPO for working out the ALP variation and proposing a huge upward adjustment of Rs. 6,83,23,913/- to the total income of the appellant in respect of the purchase transactions of Rs. 27,66, 11;955/- as reported in 3CEB. Such fallacies in the approach and methodology of the TPO are as under:-

(i) The learned TO erred in rejecting the Comparable Uncontrolled Price (CUP) method and also erred in applying Transactional net Margin Method (TNMM) for the following reasons:

a. At the outset it is submitted that the Learned TPO has rejected the CUP method and applied the TNMM method in this year which action of the TPO is unwarranted. It is worth pointing out here that the CUP method has been accepted by the TPO in the immediately succeeding assessment year ie. AY 2016-17.

b. It is further submitted that the transactions of the appellant and its sister concern were that of purchase/sale of soyabean seed, DOC and solvent oil and similar transactions have been carried out with outside third party and therefore, their FAR, the availability, coverage and reliability of data necessary

for the application of method, the degree of comparability between the specified domestic transactions and the uncontrolled transactions and other such parameters also support using internal CUP and therefore, CUP was the most appropriate method (MAM).

c. A very high degree comparability of products and functions such as quality, contractual terms, geographical market, embedded intangibles etc was available of the controlled transactions with the comparable uncontrolled transactions in comparable circumstances.

d. Further analysis of each transaction was possible separately and therefore, there bench marking of interlinked transactions on the combined or aggregate basis was neither required nor called for.

e. TNMM has its own limitation and the selection of comparable entities in itself is a challenge since TNMM compares the net profit of the entity with the net profit earned by the comparable entities with ought to be comparable on so many other factors such as appropriate base like assets, product range, turnover etc which data is not readily and easily available. Further differences in the function performed between enterprises are reflected in variations in operating expenses which lead to a wide range of gross profit margin and also net operating profit margins.

f. Moreover, the assets employed by the appellant are much lower than that of the other comparables found and hence, the scale of operations and transactions of the appellant are not comparable under TNMM.

g. Further, adjustment of other income and various items of expenses of entities cannot be made as the

operational cost and revenue can't be traced separately with utmost accuracy. Hence CUP is more appropriate method appears to be most appropriate method for transactions entered into by the appellant company.

(ii) The Learned TPO also erred in the selection of comparable cases which are not comparable either due to their turnover or due to their products.

(iii) The Learned TPO while working out the profit level indicator (PLI) has not given the workings thereof and has apparently not considered the working capital adjustment which ought to have been taken into account for calculating the PLI.

(iv) It is also important to point out that after applying the filters the Learned TPO could find only two comparables for bench marking and surprisingly both the comparables had almost same profit level indicator. Further no other details of these comparables are provided by the TPO.

(v) There are various other fallacies in the working of profit margin of the appellant and the figures considered by the TPO are not reconciling with the actual figures of the appellant. The Learned TPO has not clarified as to how the figures have been calculated or worked out.

In view of the above it is submitted that the AO ought not to have rejected the CUP method and also ought not to have applied TNMM. Further considering the above anomalies in the overall approach and methodology adopted by the AO the huge upward adjustment is apparently wrong and unwarranted.

4.17 Thus the payment made to the said sister concern though not covered w's 40A(2)(b) was at arms length price i.e. market value only and as such there was no planning for reduction of tax incidence of the appellant

by having transaction with the said sister concern by which income tax department have lost the tax and the transactions were tax neutral.

4.18 For all the reasons stated above and in view of the submission made, it is submitted that the Ld. TPO erred in proposing an upward adjustment in arm's length price by Rs. 6,83,23,913/- and Ld. AD erred in making the addition thereof. Neither the impugned transactions are hit by the provisions of section 40(4) (2)(b) nor provisions of section 92BA are applicable, the said provision also stand omitted, both the companies fall in the same tax bracket and the transactions are also at Arms Length Price, therefore, the addition made by the Ld. AO is wrong and uncalled for and ought to be deleted.

In view of the above submissions it is most humbly prayed that the additions made be kindly deleted and the appeal may very kindly be allowed.

16. Further we note that the Ld. CIT(A) has granted relief to the assessee with following observations and finding:

4.2 Ground No. 4:- Through this ground of appeal, the appellant has challenged addition of Rs. 6,83,23,913/- made by the AO on account of upward variation in the ALP proposed by the TPO. The AO has referred to the order passed u/s 92CA(3) of the Act by the TPO and made this addition. From the order of the TPO it is seen that the appellant had applied Comparable Uncontrolled Price (CUP) for bench marking its domestic transactions with its sister concern, which method was rejected by the TPO, who applied Transactional Net Margin Method (INNM) as the Most Appropriate Method (MAM) and after comparing the margins of the comparable companies

found the margin of the appellant very less and made the above upward adjustment.

4.2.1 The appellant per contra has contended that its major transactions with its sister concern was mainly with Ms Prakash Oils Ltd. from whom the appellant has purchased goods and also sold goods to the said sister concern. The appellant has further contended that the CUP method adopted by it in respect of identical transactions was accepted by the TO in preceding year i.e. AY 2014-15 and also in subsequent year i.e. A.Y. 2016-17. Further considering the nature of transactions the TNNM method is not at all applicable. The appellant strongly contended that there was no tax arbitrage in the transactions with the sister concern as the said sister concern is also a profit making company and has paid income tax at the maximum rate of 30% and has not claimed any deduction u/s 801A of the Act or exemption u/s 10AA of the Act. Copy of income tax return filed by Prakash Oils Ltd. for AY 2015-16 is also filed by the appellant. It is the case of the appellant that the appellant and M/s Prakash Oils Ltd. both have purchased goods from each other and similar TP proceedings were carried out in both the cases, wherein heavy additions have been made in both the cases in respect of mutual transactions of purchase and sale. The appellant has also pointed out various anomalies in the approach of the TO in adopting the INN method and ascertaining the ALP of the transactions with its sister concern and challenged the addition made by the AO.

4.2.2 I find that similar upward adjustment has been made in the case of M/s Prakash Oils Ltd. for this very year in respect of its transactions with the appellant and the appeal filed by M/s Prakash Oils Ltd. is also pending with this office. It is seen that M/s Prakash Oils Ltd. has filed its return of positive taxable income and has not claimed any deduction us 80IA of the Act or u/s 10AA of the Act. Further the TPO has proposed and the

AO has made an addition of Rs. 21,31,14,226/- in the case of M/s Prakash Oils Ltd. in respect of purchases made by it from the appellant. Therefore, the TPO of the appellant is of the view that the appellant has shifted its profits to M/s Prakash Oils Ltd. and the TPO of Ms Prakash Oils Ltd. is of the opinion that the said company has shifted its profits to the appellant, which apparently is a contradictory stand. In my view only to avoid this type of situations where addition are proposed in both the sister concerns in respect of mutual domestic transactions between them, where there is no tax arbitrage, the legislation in its own wisdom omitted section 92BA(i) of the Act from the statute without providing any saving clause. There is sufficient merit in the contention of the appellant that the CUP method has been accepted by the TPO in AY 2016-17, which appeal is also pending with this office. Considering the above discussions and also the fact that there is no tax arbitrage and also the fact that addition has been made in the case of the appellant in respect of purchases made by it from M/s Prakash Oils Ltd. and addition has also been made in the case of Ms Prakash Oils Ltd. as well in respect of purchases made by it from the appellant, both the additions having counter effect in the other case and apparently are contradictory and unwarranted, it is held that the addition made is wrong and unwarranted and therefore, addition made by the AO amounting to Rs. 6,83,23,913/- is Deleted. Therefore, the appeal on this ground is Allowed.

17. On a careful consideration of rival submissions findings recorded by the AO in the assessment order and conclusion drawn by the Ld. CIT(A) while granting relief to the assessee, we note that the impugned addition was made

by the AO on account of upward variation in the Arms Length Price propose by the TPO by applying TNNM method and after comparing margins of the comparables companies found the margin of appellant very less and made said upward adjustment. Further we also observe that undisputedly rather admittedly the assessee and its AE's M/s. Prakash Oils Ltd., with whom impugned transactions were carried out, had adopted CUP method which was accepted by the TPO for immediately preceding A.Y. 2014-15 and immediately subsequent A.Y. 2016-17 but for present A.Y. 2014-15 the TPO rejecting the CUP method adopted by the AO, applied TNNM method as the most appropriate method for benchmarking the transactions of assessee with its AE M/s. Prakash Oils Ltd. The Ld. CIT(A) noted that there are sufficient merits in the contention of the appellant that the CUP method has been accepted by TPO in A.Y. 2016-17. In this regard we are of the view that principle of *res judicata* does not apply to the tax proceedings but Rule consistency is always followed by the Tax Officer under identical facts and circumstances. Neither

the TPO nor the learned CIT-DR could submit or brought on record any factual position to show that the facts and circumstances of A.Y. 2014-15 and 2016-17 were not identical to the facts and circumstances for present A.Y. 2015-16. In such a situation, if the TPO had accepted CUP method for A.Y. 2014-15 and 2016-17 then under identical facts and circumstances the CUP method cannot be set aside by applying TNNM method for benchmarking the domestic transactions of the assessee with its AE for making upward adjustment in the intermediary A.Y. 2015-16 under consideration. Therefore, we are inclined agree with the conclusion of the learned first appellate authority that there was no tax arbitrage and the additions has been made in the case of appellant in respect of purchases made from M/s. Prakash Oils Ltd., and similar additions has also been made in the case of M/s. Prakash Oils Ltd., as well in respect of purchases made by it from the appellant, thus both the additions having counter effect in the other case, which are apparently contradictory and unsustainable. Therefore, the learned first appellate authority was right in

deleting the addition. Accordingly, grounds of revenue being devoid of merits are dismissed.

18. In the result grounds of revenue for A.Y. 2015-16 are dismissed.

CO Nos. 5 & 6/Ind/2022

19. The learned AR submitted that the assessee has filed cross objections to support the orders of the Ld. CIT(A) and only wish to press the cross objection regarding deduction of cess incurred during the years under consideration. In view of above the issue of deduction of cess to the assessee incurred during the year under consideration being unsequential is restored to the file of the AO for adjudication as per relevant provisions of the Act for both the AYs' and other cross objections of the assessee are dismissed as not pressed.

20. In the result, cross-objections filed by the assessee for the A.Ys. 2012-13 & 2015-16 are dismissed with the directions as give hereinabove.

21. To sum-up, appeals of the Revenue and Cross Objections of the Assessee are dismissed.

Order pronounced in the open court on 30.01.2023.

Sd/-
[BHAGIRATH MAL BIYANI]
ACCOUNTANT MEMBER
Indore, Dated 30th Jan, 2023
NV/-

Sd/-
[CHANDRA MOHAN GARG]
JUDICIAL MEMBER

Copy to

1.	The appellant
2.	The respondent
3.	Ld. CIT(A) concerned
4.	CIT concerned
5.	DR ITAT "DB" Bench, Indore
6.	Guard File

//By Order//

Assistant Registrar, ITAT, Indore Benches,
Indore.

Date of dictation on	17.01.2023
Date on which the typed draft order is placed before the dictation Member	18.01.2023
Date on which the approval draft comes to the Sr. PS	.01.2023
Date on which the fair order is placed before the Dictation member for pronouncement	.01.2023
Date on which the fair order comes back to the Sr. P.S.	.01.2023
Date on which the final order is uploaded on the website of ITAT	.01.2023
Date on which the file goes to the Bench Clerk	.01.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order.	