

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH  
MUMBAI****BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER  
&  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER****ITA No.3671/Mum/2023  
(Assessment Year :2013-14)**

Kunda Nanda Kiprekar 2902, Tower A D.B. Woods Krishna Vatika Marg Opp. Lakschandi Heights Gokuldhm Goregaon East Maharashtra-400 063	Vs.	ITO INT Tax Ward 3(1)(1), Mumbai Room No.1628, 16 <sup>th</sup> Floor Air India Building Nariman Point Maharashtra-400 021
<b>PAN/GIR No.AVFPK1298Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Kuldip Mehta
Revenue by	Shri Anil Sant
<b>Date of Hearing</b>	<b>28/02/2024</b>
<b>Date of Pronouncement</b>	<b>07/03/2024</b>

**आदेश / O R D E R****PER AMIT SHUKLA (J.M):**

The aforesaid appeal has been filed by the assessee against order dated 28/08/2023 passed by CIT(A)-57, Mumbai for the quantum of assessment passed u/s.147 r.w.s.144C(3) for the A.Y.2013-14.

2. In the grounds of appeal, assessee has raised following grounds:-

1. *The learned CIT Appeal-57, Mumbai, erred in confirming the addition of Rs. 41,72,030 as loss on Commodities transactions on the ground that the same is not genuine due to Client Code Modification done by the Broker. The Appellant submits that there is no such loss claimed by the Appellant in the Return of Income filed and as such the Appellant has offered Short Term Capital Gain of Rs.6,07,780/- on the Commodities transactions entered during the year. The AO, as well as the CIT Appeal has wrongly calculated the loss of Rs.41,72,030 due to Client Code Modification done by the Broker by considering 23 Quantities of Buy transactions and 12 quantities of sell transactions which is completely wrong since for calculating the profit or loss on any transactions, the buy and sell quantity has to be the same. In the Appellants case if we consider entire sales quantities to match with the buy quantities then there is no loss claimed by the Appellant and question of any addition does not arise.*

2. *Without prejudice to the above the Appellant has offered profit on these Commodities Transactions as Short Term Capital Gain and the AO and CIT Appeal ha wrongly confirmed the same as speculative transactions on the ground that there was no physical Delivery of Commodities and also erred in taxing the same u/s 69C of the Income Tax Act.*

3.*The Appellant craves leave to add, to amend, to alter, to withdraw, to modify and/or to substitute any or all the foregoing grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.*

3. Apart from that, assessee has also challenged the validity of proceedings u/s.148. The brief facts are that assessee is a non-residential individual to file return of income in India on 05/08/2013 declaring total income of Rs.6,43,741/- which

consisted of short term capital gains of Rs.6,07,780/- on commodities transaction. The said return was accepted u/s. 143(1) vide intimation dated 10/06/2014. Thereafter, assessee's case was reopened by issuance of notice u/s.148 dated 27/03/2021 based on the following 'reasons recorded':-

*"1. In this case an information is received from DDIT(Inv.)-Unit-6(3), Mumbai vide letter No. DDIT(Inv.)-Unit6(3)Mumbai dated 11/04/2019, As per information, SFIO has carried out investigation in NSEL (National Spot Exchange Ltd), it was found out that an orchestrated misuse for Client Code Modification for tax evasion, was carried out by the 219 Brokers, the details of client code modification were called from NSEL. After analysis of that data and considering the contention of brokers, it was concluded that client Code Modification had been used as tool for tax evasion and only settled trades had been considered to arrive at the beneficiaries*

*2. The above assessee is one of the beneficiaries who had taken benefit of Client Code Modification. During the FY 2013-14, He had made transaction of Rs. 42,44,000/- by way of client Code Modification."*

4. Based on this information, ld. AO issued show-cause notice which reads as under:-

*"...in this case an information is received from DDIT (Inv.) Unit-6(3), Mumbai vide letter No. DDIT(Inv.)-Unit6(3)Mumbai dated 11/04/2019. As per information, SFIO has carried out investigation in NSEL (National Spot Exchange Ltd), it was found out that an orchestrated misuse for Client Code Modification for tax evasion, was carried out by the 219 Brokers, the details of client code modification were called from NSEL. After analysis of that data and considering the contention of brokers, it was concluded that client Code Modification had been used as tool for tax evasion and only settled trades had been considered to arrive at the beneficiaries. 2. As per the information received you are one of the beneficiaries who had taken benefit of Client Code*

*Modification. During the F.Y. 2013-14, you have been benefited to an amount of Rs. 42,44,000/- by way of client Code Modification. 3. As being the beneficiary of client code modification, you have shifted your loss and understated your income to the tune of Rs. 42,44,000/ In view of the above, you are hereby show-caused as to why the above mentioned amount of Rs. 42,44,000/- should not be added to your total income under consideration..."*

5. In response, assessee filed her submissions which has been dealt and incorporated in the impugned assessment order. The ld. AO took note of excel sheet showing CCM from which ld. AO observed that in some of the scrips and total amount of transaction entered into by the assessee on account of client code modification was Rs.1,27,39,970/- holding that assessee had manipulated to show fictitious loss. AO noted that assessee had made purchases amounting to Rs.84,56,000/- and sale amount of Rs.43,83,970/-, thus effecting net loss of Rs.41,73,030/- on the transactions on which CCM was done. Thus, he held that it is a fictitious loss of Rs.41,73,030/- which he treated as unexplained expenditure u/s.69C.

6. The ld. CIT (A) too has confirmed the said addition after referring to various judgments. His relevant finding reads as under:-

*"6.3.3 It is an established fact that SFIO investigation revealed that Client Code Modification was used by various beneficiaries to reduce the profit or loss by the client. Mere confirmation by the broker that Client Code Modification done had not resulted into change in profit or loss in original or modified client, cannot controvert the finding of SFIO investigation. The appellant as well as the broker have accepted that Client Code Modification was carried out in buy and sale transactions by the appellant*

*during the year. Even though all these transactions were incorporated to arrive at short term capital gain of Rs.6,07,780/- earned by the appellant during the year, it cannot prove that the Client Code Modification was bonafide and it was just a typographical error. On the other hand, the AO has carried out Levenshtein Distance Analysis/Digit Edit Analysis and found that distance of Client Code Modification was 05 and it could not be bonafide and a typographical error. From the 7 transactions of buy amounting to Rs.84,56,000/- and 3 transactions of sale amounting to Rs.42,83,970/-, in which Client Code Modification was carried out by the broker, the resultant loss of Rs. 41,72,030/- was not a bonafide loss but it was a loss created by entering into Client Code Modification by the broker. Thus, the loss of Rs. 41,72,030/- arising from the buy and sale transactions in commodity due to Client Code Modification cannot be a genuine loss. Further, in the commodity transactions, there was no physical delivery of the commodity and thus, it was a speculative loss. Thus, the action of the AO treating the loss of Rs.41,72,030/- as non-genuine loss and taking it as speculative loss is upheld.”*

6. Before us ld. Counsel submitted that assessee was retail investor and has entered into small transactions. During the year, there were over all 19 buy transactions and 12 sell transactions, however, ld. AO only took only 7 buy transactions and 3 sell transactions and if cumulatively all the transactions are then over all assessee has gained and declared short term capital gain and no where she has claimed any kind of speculative loss or any kind of trading loss which is the basic premise of the ld. AO to hold that assessee has entered into CCM with the broker to get some fictitious loss. He pointed out that ld. AO has selectively taken 7 buy transactions and 3 sell transactions which are not correct. Further, broker M/s. Anand Rathi Commodities Ltd. had confirmed that CCM did not result into profit / loss to the modified client as the modification did

not permit any change in the price or split in the commodity bought / sold. He also drew our attention to the ledger account of M/s. Anand Rathi Commodities Ltd in the computation of short term capital gain shown by the assessee. Thus, the entire premise by the ld. AO is incorrect.

7. On the other hand, ld. DR relied upon the order of the ld. AO and ld. CIT (A) and had submitted that here there was a specific information that assessee alongwith her broker had entered CCM and she has benefited an amount of Rs.42,44,000/- by way of CCM. Thus, ld. CIT (A) has correctly upheld the said addition made by the ld.AO.

8. After hearing both the parties and on perusal of the material placed on record, we find that the entire case of the ld. AO is that assessee had made purchases amounting to Rs.84,56,000/- and have sold scrips at Rs.42,83,970/- and thereby effecting net loss of Rs.41,72,030/- on which client code modification was done and held that it is a fictitious loss for reducing its total profit on the spot profit quantity as done through NSEL. However, from the details of transactions noted that assessee has made 19 buy transactions and 12 sell transactions and in over all transaction, assessee has earned short term capital gain of Rs.6,07,780/-. There is no loss which has been claimed by the assessee or tried to set off any kind of fictitious loss from gain. In all the transactions, assessee had shown book gain and none of the transactions has entered into loss. Thus, the very basic premise of the ld. AO itself is incorrect. The ld. AO has taken 7 buy

transactions and 3 sell transaction to deduce the loss of Rs.41,73,030/- which is not correct, because scrip wise sale and purchase has to be matched and if that is done, then there is no such loss at all. This is evident from the transaction details filed before us. From the perusal of these transactions, it is seen that majority of the transactions are purchase of commodities and there is no corresponding sale transactions. Apart from that, assessee has also filed confirmation from the broker M/s. Anand Rathi Commodities Ltd for confirming that there have been no transactions originating in the client code of the assessee which has been stated to be modified to some other client. This has not been further enquired or verified by the ld. AO, when Assessee has filed the entire contract note and the confirmations given by the broker. Thus, the entire premise for making the addition made by the ld. AO for treating it as fictitious loss is incorrect. Ld. AO should have taken into consideration all the transaction of the same scrips and if the ld. AO has taken 7 buy transactions, then he should have also taken into consideration corresponding sale to match the quantities of buy and sale. He cannot just take up 3 sell transactions. If the corresponding quantity of buy and sell is taken into consideration, then there is no loss at all even in those 7 transactions taken by the ld. AO. This working has been given by the assessee at page 55 of the paper book. For the sake of ready reference, the working of the loss disallowed by the ld.AO with mismatch quantities are as under:-

Kunda Nanda Kirpekar

A.Y.2013-  
14

Working of loss of Rs.41,75,630/- disallowed by AO with mis-match in quantities

1). Point on 5.5 of Order u/s.147 r.w.144@3 page No.4 & 5  
The CCM of submitted by the assessee is reproduced as follows:

Trade No.	Symbol	Buy	Qty	Trade Price	Multiplier	Trade Date	Value Rs.
152	PDY1121HR2	Buy	2	3440	150	5-Feb-2013	10,32,000
144	PDY1121HR2	Buy	2	3440	150	5-Feb-2013	10,32,000
143	PDY1121HR2	Buy	2	3440	150	5-Feb-2013	10,32,000
145	PDY1121HR2	Buy	1	3440	150	5-Feb-2013	5,16,000
1081	PDYPUDBHR	Buy	4	2340	150	17-Sep-2013	14,04,000
1080	PDYPUDBHR	Buy	6	2340	150	17-Sep-2013	21,06,000
898	PDYPUDBHR	Buy	2	2340	150	25-Sep-2013	7,02,000
1950	RCHILYSAH2	Buy	4	79	2000	12-Feb-2013	6,32,000
	<b>Total</b>		<b>23</b>				<b>84,56,000</b>

Our Remarks	
Contract	VAT
Note No.	Amount rs.
16051	
16051	
16051	
16051	-193334
6037	
6037	-187871
6350	-37,574
16714	-33,828
	<b>-452,606</b>

Trade No.	Symbol	Sell	Qty	Traded Price	Multiplier	Trade Date	Value Rs.
1098	PDYPUDBHR25	Sell	4	2379.9	150	17-Sep-2012	14,27,940
1099	PDYPUDBHR25	Sell	6	2379.9	150	17-Sep-2012	21,41,910
1158	PDYPUDBHR25	Sell	2	2380.4	150	25-Sep-2012	7,14,120
			12				42,83,970

Our Remarks	
6037	
6037	1,7,1890
6350	74,378
	<b>2,06,268</b>

			Qty			Value Rs.
	Total	Buy	23			84,56,000
	Total	Sell	12			42,83,970
Addition made unexplained Expenditure u/s.69C						-
						41,72,030

A

B

A-B

Transactions of Sell and considered by A.O. (in match the quantities of buy and sell):

Trade No.	Symbol	Sell	Qty	Trade Price	Multiplier	Trade Date	Value		Our Remarks	
									Contract Note no.	VAT Amount Rs.
	Paddy Basmati-PY1121HR25	Sell	7	3501.3	150	13-Mar-2013	36,76,365		16050	1,76,882
	RCHLYSAH25	Sell	4	80.39	2000	20-Mar-2012	6,43,120		16113	30,950
	Total	Buy	0							2,07,832
	Total	Sell	11				45,19,485	C	Total VAT No.	

			Qty				Value Rs.		VAT Amount Rs.
	Total	Buy	23				84,56,000	A	4,52,606
	Total	Sell	23				86,03,455	B+C	4,14,100
							1,47,455	A-(B+C)	-38,507

Value to be considered for Short Term Capital gain Rs.1,08,948 A-(B+ -)(1)

9. Thus, if the quantities are matched for the same transaction taken by the ld. AO, then there is no loss. In fact it results into a short term capital gain only. Accordingly, the grounds on which addition has been made cannot be sustained and same is deleted. Accordingly, on merits, appeal of the assessee is allowed.

10. We are not adjudicating the issue of validity of reopening u/s.148 and the same is dismissed as infructuous.

**11. In the result, appeal of the assessee is allowed.**

Order pronounced on 7<sup>th</sup> March, 2024.

**Sd/-**  
**(GAGAN GOYAL)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Mumbai; Dated 07/03/2024  
KARUNA, sr.ps

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**