आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।

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

श्री शक्तिजीत दे, न्यायिक सदस्य **एवं**

श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE SHRI SAKTIJIT DEY, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आ□करअपील सं./ I.T.A. No.5688/Mum/2017

(**निर्धारण वर्ष** / Assessment Year:2010-11)

DCIT-Central Circle -8(1) Room No.656, 6th floor Aaykar Bhavan, M.K. Road Mumbai-400 020	**बनाम**/ Vs.	**Shri Vipul D. Shah** 1303, Imperial Residency Gulmohar, Cross Road No.12, JVPD, Near Juhu Circle & Axis bank Parle (W), Mumbai-400 056.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAUPS-0598-M**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

Cross Objection No.350/Mum/2018

Arising out of I.T.A. No.5688/Mum/2017

(**निर्धारण वर्ष** / Assessment Year:2010-11)

Shri Vipul D. Shah 1303, Imperial Residency Gulmohar, Cross Road No.12, JVPD, Near Juhu Circle & Axis bank Parle (W), Mumbai-400 056.	**बनाम**/ Vs.	**DCIT-Central Circle -8(1)** Room No.656, 6th floor Aaykar Bhavan, M.K. Road Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAUPS-0598-M**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Revenue by	:	Chaudhary Arun Kumar Singh-Ld. DR
Assessee by	:	Dr. K. Shivaram and Rahul Hakani – Ld. ARs

सुनवाईकीतारीख/ **Date of Hearing**	:	06/05/2019
घोषणाकीतारीख / **Date of Pronouncement**	:	03/07/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member):-

1. Aforesaid appeal by revenue for Assessment Year [in short referred to as 'AY'] 2010-11 contest the order of Ld. Commissioner of Income-Tax (Appeals)-9, Mumbai, [in short referred to as 'CIT(A)'], *Appeal No. CIT(A)—9/Cir.4/131/2016-17* dated 23/06/2017. The assessee has filed cross-objection against the same.

The grounds raised by the revenue read as under: -

1. The Ld. CIT(A) erred in law and on facts in deleting the disallowance of Rs. 2,31,82,203/- made on account of suppression of profit and obtaining fictitious loss by the assessee by way of Client Code Modification (CCM) by the brokers in large number of commodity transaction.
2. The Ld. CIT(A) erred in law and on facts in deleting the addition of Rs. 6,95,466/- made on account of commission paid to brokers to obtain fictitious loss through Client Code Modification without considering the fact that a significant percentage of transaction is charged from clients by the brokers to obtain such fictitious loss.

The grounds raised in cross-objections reads as under: -

1. The learned CIT(A) failed to appreciate that reopening of assessment is bad in law as A.O. did not have reason to believe that income has escaped assessment and he merely relied on information received from Investigation wing and further reopening is nothing but change of opinion and hence reopening is bad in law.
2. The learned CIT(A) failed to appreciate that A.O for justifying reopening relied on information not contained in recorded reasons and hence, reopening is bad in law.
3. The learned CIT(A) failed to appreciate that reopening of assessment is bad in law as notice u/s 143(2) was issued before disposing objections to reopening thereby violating the mandatory procedure laid down in GKN Drive-shafts (India) Ltd v ITO (2003) 259 ITR 19(SC) and hence reopening is bad in law.
4. The order of the learned CIT(A) deleting addition of Rs. 2,31,82,003/- is in accordance with law and justified.

2.1 Brief facts are that the assessee being *resident individual* stated to be engaged in *share trading activities* was assessed for impugned AY u/s 143(3) r.w.s. 147 of the Act on 22/03/2016 wherein the income of the assessee was determined at Rs.622.61 Lacs after certain additions /

disallowances as against assessed income of Rs.383.83 Lacs determined u/s 143(3) r.w.s 154 on 23/01/2013. The addition of Rs.231.82 Lacs representing fictitious loss & another addition of Rs.6.95 Lacs on account of unexplained expenditure is the subject matter of present appeal before us. The assessee, by way of cross-objections, has contested the legality of reassessment proceedings.

2.2 The reassessment proceedings got triggered pursuant to receipt of certain information from *The Directorate of Income Tax (Intelligence and Criminal Investigation)* [DIT (I&CI)], that the assessee stood beneficiary of misuse of client-code modification [CCM]. Accordingly, the case was reopened by issuance of notice u/s 148 on 17/03/2015. The assessee, vide response dated 05/04/2015, requested to treat the original return filed on 19/09/2010 as return in compliance to notice u/s 148 and asked Ld. AO to supply reasons for reopening of assessment, which were duly supplied to the assessee. Subsequently notice u/s 143(2) was stated to be issued to the assessee on 14/07/2015. The assessee raised objections against the reopening which were disposed-off by way of a speaking order on 10/08/2015.

2.3 Pursuant to receipt of aforesaid information, it transpired that the assessee was identified as a beneficiary of misuse of client-code modification. The investigation arm of the department having conducted spot verifications by way of surveys and inquiries noticed that some of the brokers and their clients have indulged in the practice of misuse of client-code modification thereby artificially shifting profits and losses from original client code to modified client code with an intention to reduce the legitimate

tax liability which would have been arisen had the original trades not been modified.

2.4 Proceeding further, it was also noted that the client-code modification facility was approved by SEBI and provided by the exchanges to brokers so as to enable rectification of genuine mistakes of punching of orders of a particular trade given by a particular client in its particular account maintained with the broker. In this facility, the broker could change the client-code of a particular trade and transfer the trade from one account to another account during the trading hours & within time limit permitted by the stock exchange after the close of trading hours. After the modification in client-code is made, it was submitted to the stock exchange for information and necessary modification / up-dation in the data. However, many brokers misused this facility for creating artificial losses / profits and provided such fictitious profits / losses to various clients by charging some commission. An expert opinion was obtained from NSE to indicate the existence of genuine and non-genuine client-code modification.

2.5 In the above background, Ld. AO formed an opinion that the assessee company was a beneficiary of such practice and has reduced its overall profit by taking fictitious losses to the extent of Rs.231.82 Lacs from the concerned brokers. The assessee was asked to provide complete details of client-code modification done by the broker in his account. The assessee was also confronted with details of fictious loss *alleged* to taken by the assessee by way of client-code modification and the assessee was directed to prove that the said losses were genuine. The assessee defended the same by submitting that the modification was done by the broker as

permitted by law and the assessee was not aware about the same. The assessee gave confirmations from few parties in whose name the trades were ultimately booked stating that CCM was done at their directions. It was further submitted that mainly transactions were modified in the name of some other client from its name and therefore, there was no impact on assessee's profits from such CCM. However, the same could not find favor with Ld.AO, who treating the loss as fictious / non-genuine loss, added the same to the income of the assessee. Consequently, Ld.AO formed an opinion that the assessee paid certain commission to obtain such transactions. The same was estimated @3% which resulted into another addition of Rs.6.95 Lacs as unexplained expenditure u/s 69C in the hands of the assessee.

3.1 Aggrieved, the assessee contested the validity of reassessment proceedings before Ld. CIT(A) vide impugned order dated 23/06/2017 which was dismissed in view of the fact that Ld. AO was in receipt of certain information from investigation wing about misuse of CCM facility and therefore. Ld. AO had no choice but to reopen the case for examining the issue and taking further steps to verify the same and come to conclusion regarding the said allegations.

3.2 On merits, it was, *inter-alia,* submitted that the impugned additions were made on mere assumption, surmises and presumption without any concrete evidence. The attention was drawn to the fact that all the transactions were duly supported by bills / contract notes and the assessee could not and has not done any client-code modifications. The attention was drawn to the fact that data provided to him by Ld. AO neither pertained

to assessee nor any modification was carried out at the behest of the assessee. Few confirmations of the persons / beneficiaries whose name appear in the said data, confirming that the transactions belonged to them and had been carried out on their instructions, were also submitted.

3.3 After considering the material on record and assessee's submissions, Ld. CIT(A) concurred with assessee's stand by observing as under: -

> 6.3.1. I have perused the Assessment Order, and various submissions of the appellant filed before me. Assessing Officer reached the conclusion that Appellant has obtained non genuine loss of Rs 2,31,82,203/- in Shares trading i.e. Derivatives (F&O) trading with the intention to reduce tax liability on the basis that CCM is misused at the end of the year to shift profits and losses. However, this observation is factually incorrect as it is found from the records that CCM was carried out by the broker on daily basis throughout the year and not at the year end.
> 6.3.2. The Assessing officer has not brought on record any material to show that the broker was in connivance and under the control of the Assessee and that the Assessee had given any instructions for CCM to be done in his name.
> 6.3.3. It has been explained by the Ld. AR that the Appellant had done a genuine business in trading in Derivative (F&O) through registered Share Brokers and all transactions are supported by bills/contracts and all transactions are recorded in the books of accounts. The Assessing officer has not found any defect in the books of accounts.
> 6.3.4. It has been explained by the Ld.AR that when the file was reopened by the AO on whatever information supplied to him by the I&CI, the AO was required to make verification from all the concerned parties and come to a logical conclusion after rebutting the submissions of the appellant made during the assessment proceedings. However, the Ld. AR has pointed out that the AO has not rebutted the detailed submissions of Assessee, which go to the root of the matter, made vide letter dated 7/3/2016, particularly the following:
>
> *(i) Data provided does-not pertain to assessee.*
> *(ii) CCM is not done by broker at the instance of assessee.*
> *(iii) Reasons for invoking CCM by brokers such as executing large no of trades in time bound manner resulting in punching errors etc.*
> *(iv) Example given by assessee from the data given by AO to highlight the fact that CCM executed by the broker was genuine.*
> *(v) Confirmation of persons/beneficiaries whose name appear in the data confirming that the CCM transactions belong to them.*
>
> 6.3.5 Further the Assessing Officer has not brought on record any information regarding any action against the broker or the Assessee by the SEBI or the Stock Exchange. Thus, the conclusion drawn by the AO is not inconformity with the policy of the SEBI to allow CCM.

6.3.6. Hence, without rebutting the replies of the Assessee the AO has in a mechanical and unilateral manner made the addition on basis of assumptions, surmises and conjectures based on the information of I&CI.

6.3.7. I have further considered the rival stands/submissions and perused the order of the A.O. and on the relevant material evidences brought on record before me. I am of the opinion that the entire allegation of the AO revolves around the modification in client code by the assessee so that the appellant could book losses. At this stage, it will be difficult to understand as to how can the assessee modify the client code when the appellant or its staff is not sitting on the Terminal of the said stock exchange as only the member share brokers are authorized to handle the same and it would be out of reach for the appellant to do so. The transactions are to be carried out by the authorized broker. A person transacting through a registered broker cannot have any access to the terminal of the registered broker with the exchange be it stock exchange or commodity exchange. Thus, the allegations that the assessee has modified the client code, does not have any basis.

6.3.8. Further, it was held that due to huge volume of transaction CCM become inevitable. Further if CCM is done at the end of the day/same day within the SEBI, then there is no question of shifting profits or losses.

6.3.9. The AO has not brought on record any material to show that the client code modification made by the assessee was not genuine one. It has been pointed out that that none of the clients has disowned the transactions carried on by the assessee. As noticed, the stock exchange is very much aware about client code modifications and hence in order to discourage frequency of modifications, it has brought in penalty mechanism. Even under the penalty mechanism also, no penalty shall be leviable if the modification was less than 1% of the total transactions, meaning thereby, the Stock Exchange is also accepting the fact that such kind of client code modification is inevitable. The AO has not brought on record that in the relevant case the ratio between gross total transactions trades and the CCM trade were abnormally high. On the contrary, the Ld. AR has submitted that the ratio is quite small compared to the total transactions, otherwise the SEBI or the concerned stock exchange would have imposed penalty on the appellant or its brokers or both but the AO has not brought any such thing on record in the assessment order.

6.3.10. Further, the movement of prices of shares cannot be predicted by anyone with accuracy and hence it is inconceivable or unlikely that the assessee could have made profits / Losses consistently, even if it is assumed for a moment that the assessee had actually carried out the transactions for its own benefit. Since the timing of entering the transactions is crucial in the online trading, the staffs of the Broker found it convenient to punch one code because if the broker has to punch every transactions/ every set of shares in all the names of the client, it will take lot of time and by the time the punching of a particular share scrip for all the clients, are finally finished, by that time there would be lot of changes in the price and in the process there would be many clients with different amounts of share price of same scrip within that given time and the broker will have to bear the brunt of various clients and their allegations that why the price of that particular client was higher or lower compared to his price. This may lead to erosion of confidence of clients with the brokers and ultimately the brokers will have to lose their business because after the entire share market is run by sentiments also.

6.3.11 Further, if at all any person comes with a request seeking profits, there will normally be time lag and such kind of transactions and shall usually be sporadic transactions, where as in the instant case, the appellant's broker has carried out the transactions continuously. Further, it is pertinent to note that none of the clients, with whom the assessing officer has carried out the examination, has disowned the transactions. Further, all the clients have confirmed the transaction and duly disclosed the profits arising from the transactions as their respective income.

6.3.12. It was held that the addition on the basis of Client Code Modifications was on the basis of assumption and surmises and was not on the basis of concept of real income. When transaction had been duly accounted for and profit/loss had accrued to concerned parties in whose names transactions had been closed, there could not be any basis or justification for considering that profit/loss in case of assessee on basis of mere presumption or suspicion. There is no material on record in the assessment order to prove that the other parties, alleged to be counterparts/ beneficiary of Profit or Loss/ received the Profit but did not include the same while computing P&L a/c or they were fictitious and were mechanism to siphon off the Profit of the appellant.

6.3.13.While the AO has taken cognizance of the general information provided by I&CI and thereafter reopened the file. However, the AO has not brought any material on record to prove that that the parties to whom the alleged profits or loss is supposed to have been diverted to reduce the taxable income of the appellant. No correlation between the appellant, on the one hand and the other parties, on the other hand, has been brought on record to correlate that these parties were in collusion with each other and were known to each other so that one party diverted its profit or loss to the other parties. There is nothing on record to suggest that the said losses were purchased and the other parties were given cash or cheque payment in view of such favours. Hence, the correlation of such transactions also, is not established in the assessment order.

6.3.14. Thus it may be seen that the assessment order does not bring out the following facts, namely, percentage of modified trade value being significantly higher than the total credit value of the appellant; number of modified trade being significant to total number of trades of the appellant; profit/loss arising on account of such modifications by the appellant being significant in comparison to the profit/loss in the trades were no modification were carried out by the appellant; profit/loss arising due to CCM being in significant ratio; buying and selling leg off different trades to have been modified to same clients by the appellant; the same set of clients being involved in making profits/loss due to CCM; total number of trade modifications being increased before closing of the Financial Year so as to reduce the genuine taxable income of the appellant etc. and unless the same is brought on record in the assessment order and the correlation of transfer/receipt of profit/loss is established to be illegal or having quid pro quo type of transaction where one party receives profit/loss by making certain payment to the other party out of their undisclosed income and in the process the taxable income has escaped or artificial or illegal loss have been purchased through Off the floor transactions being in contravention of SEBI Act, 1992 or the Securities Contracts (Regulation) Act, 1956, the disallowance/additions made by the AO cannot be sustained because in the reassessment proceedings onus is upon the AO to prove that the transactions claimed by the appellant and income/loss disclosed by the appellant in its return of income, was not correct, and more particularly because the

same were accepted in the original assessment proceedings and assessment order passed u/s 143(3) earlier.

6.3.15 Keeping in view of the above factual analysis of the case as well as applying the ratio of judgements of Hon'ble Courts, as referred in the appellants submission in earlier paragraphs, more importantly the decision of Hon'ble Jurisdictional ITAT, Mumbai in the case of ITO vs. Pat Commodity Services P. Ltd. ITA Nos. 3498 and 3499/Mum/2012 dt. 7th Aug,2015 (Mum)(Trib), the disallowance of Rs.2,31,82,203/- as fictitious loss by the AO cannot be sustained and is therefore, directed to be deleted. However, the AO will be free to take remedial measures in case the decision of Hon'ble ITAT, Mumbai in the case of Pat Commodity Services P. Ltd. (supra) is reversed or modified by the Hon'ble High Court of Bombay or Supreme Court.

In the result this ground of the appellant on the above issue is Allowed.

Consequently, the estimated addition of 3%, being alleged commission paid by the assessee to procure the above transactions, was also deleted.

Aggrieved the revenue is in further appeal before us.

4.1 The DR, relying upon the stand of Ld. AO, submitted that the assessee failed to establish the genuineness of the transactions and therefore the additions were justified. Reliance has been placed on the decision of Hon'ble High Court of Calcutta rendered in **Pr.CIT V/s India Finance Ltd. [81 Taxmann.com 135]** & Hon'ble Delhi High Court rendered in **CIT V/s Vashishth Chay Vyapar Ltd. [66 Taxmann.com 371].** The Ld. DR also justified the validity of reassessment proceedings in view of the fact that Ld. AO was in receipt of tangible information which, *prima-facie,* indicated escapement of income.

4.2 The Ld. Sr. Counsel, Dr.K.Shivram, controverting the same, submitted that nothing on record would establish that the loss transactions were not genuine. Arguments have been made to submit that the assessee was not registered broker and could not do modification in the client code. Nothing has been brought on record by Ld. AO to establish that the modifications were done at assessee's behest and therefore, the assessee could not be

held responsible for CCM done at broker's end. The attention was also drawn to the fact that persons whose names appear in the information have filed confirmations that transactions were done through the brokers at their instance. It has also been submitted that CCM was not done at year-end to generate artificial profits / losses but transactions have taken place throughout the year which would controvert the stand of Ld. AO that the assessee indulged in creating fictitious loss so as to set-off the gains earned during the year. It has been submitted that Ld. AO has mechanically made impugned additions. Reliance has been placed, *inter-alia,* on the decision of this Tribunal rendered in **ITO V/s. Pat Commodities Services P.Ltd. [ITA Nos. 3498/Mum/2012 07/08/2015] & M/s Sambhavnath Investment V/s ACIT [ITA No.3109/Mum/2011 19/12/2013].**

4.3 On legal grounds, it has been submitted that there was no failure on the part of the assessee to disclose material facts during original assessment proceedings and the reassessment proceedings were nothing but mere change of opinion. It has also been submitted that Ld. AO acted on borrowed satisfaction.

5.1 We have carefully heard the rival submissions. So far as legal grounds raised in assessee's cross-objections are concerned, we find that the case has been reopened by issue of notice u/s 148 on 17/03/2015 which is within 4 years from the end of relevant AY i.e. 2010-11. Therefore, the only requirement, in such a case, to acquire reassessment jurisdiction, was that Ld. AO had reasons to believe that certain income escaped assessment. We find that subsequent to completion of assessment u/s 143(3), Ld. AO was clinched with tangible information from investigation wing which

suggested possible escapement of income in the hands of the assessee. At this stage, nothing more was required and Ld. AO was not required to carry out detailed investigation so as to reach a conclusive finding that the income, in fact, escaped in the hands of the assessee. Therefore, we are not convinced with these submissions. In Ground No.2 of cross-objections, it has been asserted that reopening was bad since notice u/s 143(2) has been issued prior to disposing off the objections raised by the assessee. However, we find that there was no bar under law for issue of notice u/s 143(2) prior to disposal of assessee's objections and the disposal-off of the objections was not pre-requisite for the issue of notice u/s 143(2). Accordingly, Ground Nos. 1,2 & 3 of cross-objections stand dismissed.

5.2 Coming to the merits of the case, we find that client-code modification is a facility granted by stock exchanges / SEBI to brokers so as to take care of the punching errors which take place during trading hours. It is undisputed fact that the assessee was not a registered broker and could not carry out any modifications at his end. Another fact is that nothing on record establishes the fact that the said modifications were done at assessee's behest. The transactions of the assessee's were duly supported by bills / contract notes. The assessee placed on record confirmation of few parties whose name appear in the data provided to the assessee wherein they have confirmed the transactions as belonging to them only. No evidence has been brought on record to establish that any of the party disown the transactions. The assessee maintained that the data did not pertain to the assessee which has not been rebutted by Ld. AO. No nexus of the said data has been established with the losses suffered by the assessee.

Nothing on record establishes any collusion / connivance of the assessee with the share broker. It is trite law that additions could not be made merely on the basis of presumption, conjectures or surmises without bringing on record any concrete material to dislodge the assessee's claim. Therefore, the allegations as levelled by Ld. AO, in our opinion, are without any cogent or supporting evidences and therefore, the same could not be sustained in the eyes of law.

5.3 We find support from the decision of this Tribunal in **M/s Sambhavnath Investment V/s ACIT [supra]** wherein it has been held as under: -

> 7. We have carefully considered the rival submissions and perused the orders of the lower authorities and the relevant material evidences brought on record before us. The AO has annexed the transactions of RSBL with the assessee as part of the assessment. The entire allegation of the Revenue authorities revolves around the modification in client code by the assessee so that it could book losses. At this stage, we failed to understand how can the assessee modify the client code or the details of transactions which have been transacted by the authorized broker RSBL on MCX. A person transacting through a registered broker cannot have any excess to the terminal of the registered broker with the exchange be it stock exchange or commodity exchange. Thus, the allegations of the Revenue authorities that the assessee has modified the client code does not have any basis. On the contrary, the transactions of the assessee with RSBL who in turn has transacted with MCX are supported by various contract notes.

Also, in **ITO V/s. Pat Commodities Services P.Ltd. [supra],** it has been held as under: -

> 11. We have heard rival contentions and perused the record. A careful perusal of the order passed by the Ld CIT(A) would show that the Ld CIT(A) has met each and every point raised by the assessing officer. The Ld CIT(A) has pointed out that the AO has not brought on record any material to show that the client code modification made by the assessee was not genuine one. It was further noticed that none of the clients examined by the tax authorities has disowned the transactions carried on by the assessee. As noticed by the Ld CIT(A), the MCX, the stock exchange, is very much aware about client code modifications and hence in order to discourage frequency of modifications, it has brought in penalty mechanism. Even under the penalty mechanism

also, no penalty shall be leviable if the modification was less than 1% of the total transactions, meaning thereby, the MCX is also accepting the fact that such kind of client code modification is inevitable.

12. Under these set of facts, the next question that arises is – Whether the client code modification has resulted into shifting of profits, otherwise earned by the assessee. It is a fact that the assessee company has started its operations only in July, 2005 by converting individual membership into corporate membership. Further, the commodity exchange was about 3-4 years old only at the relevant point of time. Hence, the assessee cannot be considered to be an established player in the years under consideration. Further, the movement of prices of commodities cannot be predicted by anyone with accuracy and hence it is inconceivable or unlikely that the assessee could have made profits consistently, even if it is assumed for a moment that the assessee had actually carried out the transactions for its own benefit. We notice that the assessee has offered explanations as to why it carried out the transactions in its own code, i.e. since the timing of entering the transactions is crucial in the online trading, the staffs of the assessee company found it convenient to punch its own code. Further, we notice that the fact that the assessee has changed the code to the concerned client's account at the end of the day has not been disproved. If at all any person comes with a request seeking profits, there will normally be time lag and hence the fact that the assessee has changed the codes at the end of the day only shows that the assessee has carried out the transactions on behalf of its clients only. Such kind of transactions shall usually be sporadic transactions, where as in the instant case, the clients have carried out the transactions continuously. Further, it is pertinent to note that none of the clients, with whom the assessing officer has carried out the examination, has disowned the transactions. Further, all the clients have duly disclosed the profits arising from the transactions as their respective income. Though the AO has alleged that the said profits have been used to set off the past brought forward losses, yet the Ld CIT(A) has made a detailed analysis of this matter and has given a clear finding that the same was not true in all the cases. The Ld CIT(A) has pointed out that majority of the clients have paid tax on the profits. It was further noticed that the some of the transactions have resulted in loss also and the said loss has also been accepted by the concerned clients. All these factors, in our view, go to show that the assessee has carried out the transactions on behalf of its clients only, even though the transactions were executed in the code of the assessee initially.

13. Further, the Ld CIT(A) has pointed out that there was no modification of client code to the tune of Rs.3.31 crores and further there was change of code from one client to another client to the tune of Rs.6.16 crores. In both these cases, the question of shifting of profit earned by the assessee does not arise at all. The action of the AO in assessing the above said profits in the hands of the assessee only show that there was no proper application of mind on the part of the assessing officer.

14. Another important point that is relevant here is that none of the clients was shown as related to the assessee herein. Normally the question of shifting of profit would arise between the related parties only. If the assessee had really shifted the profits to an outsider, then the human probabilities would suggest that the assessee would have received back corresponding amount from the recipient of profit. However, in the instant case, the AO has not brought any material on record to show that the assessee

had received back corresponding amount equivalent to the amount of profit claimed to have been shifted to the clients. The AO has mainly relied upon the report given by the MCX and has drawn adverse conclusions without bringing any material to support his view.

15. The Ld CIT(A) has also pointed out that modifications carried out by the assessee works out to around 3% of the total transactions only and in our view, the said volume, in fact, vindicates the explanation of the assessee. Further none of the clients has been found to be bogus and all of them have complied with KYC norms, meaning thereby the identity of all the clients stand proved. None of them has disowned the transactions and all of them have also declared the income in their respective returns of income. All these factors, in our view, support the contentions of the assessee.

16. In view of the foregoing discussions, we are of the view that the Ld CIT(A) was justified in deleting the additions made in both the years under consideration. In our view also, the assessing officer has drawn adverse conclusions against the assessee without properly bringing any materials to support the view, i.e., the additions have been made on suspicion and surmises only. Accordingly, we uphold the order of Ld CIT(A) in both the years under consideration.

5.4 So far as the case laws being relied upon by the revenue is concerned, we find that the decision of Hon'ble High Court of Calcutta rendered in **Pr.CIT V/s India Finance Ltd. [81 Taxmann.com 135]** deals with validity of jurisdiction u/s 263 and therefore, has no application. The decision of Hon'ble Delhi High Court rendered in **CIT V/s Vashishth Chay Vyapar Ltd. [66 Taxmann.com 371]** deals with a situation wherein the assessee booked fictitious losses through related entities and the transactions were found to be *bogus* transactions, which is not the case here.

5.5 Keeping in view the entirety of facts and circumstances, we find no infirmity in the impugned order. Accordingly, revenue's appeal stands dismissed. Ground No. 4 of assessee's cross-objections stands allowed.

6. In nutshell, the revenue's appeal stands dismissed whereas assessee's cross-objection stand partly allowed.

Order pronounced in the open court on 03rd July, 2019.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 03/07/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

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