**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**

**BEFORE HON'BLE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**
**AND**
**HON'BLE SHRI N.K. PRADHAN, ACCOUNTANT MEMBER**

I.T.A. No.5689/Mum/2017
(Assessment Year: 2010-11)

In the matter of:

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| DCIT CC-8(1), Room No. 656, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020 | Vs. | M/s Comet Investment Pvt. Ltd., 2nd Floor, Office No. 3, 5/7, Kothari House, OAK Lane, Above Gokul Hotel Fort, Mumbai-400023<br><br>PAN/GIR No.AAACC2051Q |
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| (Appellant/Revenu) | : | (Respondent/Assessee) |

I.T.A. No. 5802/Mum/2017
(Assessment Year: 2010-11)

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| M/s Comet Investment Pvt. Ltd., 2nd Floor, Office No. 3, 5/7, Kothari House, OAK Lane, Above Gokul Hotel Fort, Mumbai-400023<br><br>PAN/GIR No.AAACC2051Q | Vs. | DCIT-4(1)(1), Mumbai |
| (Appellant/Assessee) | : | (Respondent/Revenue) |

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| **Revenue by** | : | Shri. Abhiram Karnikeya |
| **Assessee by** | : | Shri. Dr. K. Shivram/Shri. Rahul Hakani |

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| **Date of Hearing** | : | 18.02.2019 |
| **Date of Pronouncement** | : | 13.05.2019 |

**O R D E R**

**SANDEEP GOSAIN, J.M.:**

Both these appeals arising out of a common order of Ld. Commissioner of Income Tax (Appeals)-9, Mumbai dated 28.06.2016 and pertains to the assessment year 2010-11.

2. Brief facts of the case are that the assessee is a company engaged in the business of trading in shares, derivatives and commodities. The appellant electronically filed its return of income for A.Y. 2010-11 on 27.09.2010 declaring total income of Rs. Nil. During the year under reference, the appellant has earned income from Trading in Shares to the tune of Rs. 6,09,70,727/- which was offered as Speculation Income, it has suffered losses in the Commodity market to the tune of Rs. 30,10,050/- and offered the same as Loss from Speculation. Further, the appellant had suffered losses in Derivatives Trading of Rs. 5,11,94,575/- which is shown as Business Loss in the Return of Income.

3. Aggrieved by the order of Assessing Officer, assessee preferred appeal before the learned CIT(A). Learned CIT(A) after considering the case of both the parties had partly allowed the appeal filed by the assessee and deleted the additions made by the Assessing Officer.

4. Aggrieved by the order of learned CIT(A), the Revenue has filed the present appeal before us on the ground mentioned above.

**Ground No. 1 & 2**

5. These grounds raised by the Revenue are inter connected and inter related and relates to challenging the orders of Ld. CIT(A) in deleting the additions made on account of suppression of profit and obtaining fictitious loss by the assessee company by way of Client Code Modification (CCM) and on account of commission paid to brokers to obtain fictitious loss through CCM, therefore we thought it fit to dispose of the same by this common order.

6. We have heard the counsels of both the parties and also perused the material placed on record, judgment cited by the parties and the orders passed by the Revenue authorities. Before we decide the merits of this ground, it is necessary to evaluate the order passed by the learned CIT(A). The learned CIT(A) has dealt with this ground in para no. 6 of this its order. The operative portion is contained in para 6.1.3 to 6.3.17 which is reproduced below:-

> *6.3.1 I have perused the Assessment Order, and various submissions of the appellant filed before me. In the grounds of appeal no. 4 & 5, the Appellant is challenging the addition of Rs. 8,32,28,416/- being the loss claimed by the Appellant on account of CCM.*
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> *6.3.2. From the information provided by the Assessing Officer regarding the details of the transactions it is seen that the allegation of the Assessing Officer that assessee has claimed fictitious losses on account of CCM to the tune of Rs. 8,88,25,335/- is factually incorrect. Infact, there are transactions resulting in profit of Rs. 6,93,60,345/- on account of CCM by the broker. Appellant has no role to play in the same as Appellant gets no loss from those CCM. Thus, to that extent there has been double taxation in the hands of the Appellant and also those to whom the profit pertained.*
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> *6.3.3 . I also find that in the course of the assessment proceedings as well as before me it was pointed out that in the data provided by the AO he had also provided the name and the PAN of the Individuals/HUF/Entities in whose name the profits were transferred or from whose codes the losses were transferred to the Appellant.*

*Appellant had further provided the confirmation from all the three registered brokers, on whose terminal the Client Code Modifications had happened. The brokers confirmation includes ledger account of the parties on whose behalf CCM was made and in whose account profit was credited. The Appellant had also filed confirmation of one sample party. Thus, according to me the transactions where the Assessing Officer is alleging CCM with the malafide intention of creating fictitious losses are actually transactions belonging and done by the registered share brokers' confirmations, and if he still doubted that the CCM transactions actually belonged to the Appellant he should have verified the same since he already had the PAN of the Individual/HUF/Entity to whom the transactions actually belonged. The Assessing Officer has not been able to prove the contents of the confirmation false.*

*6.3.4. Further as regards the loss of Rs. l,94,64,990/-it is seen that said loss is duly recorded in the books of accounts of the appellant. The Assessing Officer has not found any defect in the books of accounts. The books of accounts are not rejected by the Assessing Officer. Further, nothing has been brought on record by the A.O. to show that instructions for CCM was given by the Appellant. A.O.has not established that assessee had control over the brokers.*

*6.3.5. Further, it is seen that CCM carried out by broker BP Equities Pvt. Ltd pertain to the relatives and/or friends of the Directors of the Appellant who had introduced them to the broker and the client codes begin from 43.. .Hence, it cannot be said that the CCM was not genuine. It is further seen that broker transactions in which there was CCM was not done at the end of the year to generate artificial profits and losses but such transactions had taken place through-out the year. Hence, the argument of the Assessing Officer that Appellant has indulged in creating fictitious loss falls flat.*

*6.3.6. Another important factor which is not rebutted by the Assessing Officer is that the % of CCM turnover to total turnover is in the range of 0.35% to 0.55 % in case of another broker. Hence, the instances of CCM are miniscule which clearly demonstrates that the CCM carried out by the brokers would be genuine.*

*6.3.7. I have further considered the rival stands/submissions and perused the order of the Assessing Officer 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 then 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 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 permitted time by concerned Stock Exchange or within the legal framework of 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 all the share market is run by sentiments also.*

*6.3.11. It has been explained by the Ld. AR that there is no proceeding against the Appellant by SEBI or any stock exchanges. It has further, been clarified by the that the broker, through whom the appellant carried on share transactions, were also not imposed any penalty. It has further been argued that even in the assessment order the AO has not mentioned any such thing. Had the broker or the appellant been imposed any penalty by the concerned stock exchange or SEBIor was suspended by SEBI on account of this alleged CCM Transactions so as to term such transaction as illegal or Off the Floor Transactions or violation such as contravention of the Security Contracts (Regulation) Act, 1956, the AO would have definitely mentioned the same in the assessment order.*

*6.3.12. 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, the appellant filed copy of confirmations from the broker*

*confirming all the transactions carried out in the code/name of the appellant were belonging to its other clients (i.e. the client of brokers), before the AO and copy of the same was also filed during the appellate proceedings.*

*6.3.13. 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 asstt. 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.*

*6.3.14. 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.*

*6.3.15. During the course of appellate proceedings the Ld.AR has drawn my attention towards various judicial pronouncements with regard to similar issue where the additions/disallowances were made by the AO on account of CCM and the Hon'ble IT AT of various benches including the jurisdictional IT AT Mumbai, had decided in favour of the assessee. It has been pleaded by the Ld, AR that the facts of the case are similar in nature i.e. with regard to CCM and the ratio of judgment of these cases are fully applicable to the present case of the appellant.*

*(i) At this juncture it would be relevant to consider the judicial precedents on the CCM. In M/S Sambhavanath Investment V ACIT I.T.A. No.3109/Mum/2011 AY 2006-2007 dated 19/12/2013 (Mum.)(Trib.) it was 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."*

*The ratios of the above decisions clearly applies to the facts of the present case.*

*ii) In ACIT v Kunvarji Finance (P) Ltd (2015) 61 Taxmann.com 52(Ahd)(Trib) it is held that CCM within 1 % is absolutely normal. Accordingly the addition was deleted. In the facts of the present case also, CCM is within 1 %.*

*(iii) In ITO vs. Pat Commodity Services P. Ltd. ITA Nos. 3498 and 3499/Mum/2012 dt. 7th Aug, 2015 (Mum)(Trib). Which decision pertains to a broker, it was held that CCM is not illegal. 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 then there is no question of shifting profits and losses. The relevant portion of the decision is 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."*

*6.3.16.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.*

*6.3.17 Keeping in view of the above factual analysis of the case as well as applying the ratio of judgments 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. 8,32,28,416/- as fictitious loss by the Assessing Officer cannot be sustained and is therefore, directed to be deleted. However, the Assessing Officer 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."*

7. After having heard the counsels for both the parties at length and after having gone through the facts of the present case, we find from the records that the assessee is not a registered broker on the Stock Exchange. Only the registered brokers can modify Client code (CCM) of their own clients. Therefore in such circumstances, the allegations of assessee having done or restored to CCM is apparently not correct. The AO has not brought on record that even the instructions for CCM was ever given by the assessee. Hence, in these circumstances, the assessee can't be held responsible for CCM if any done at the end of the broker. The AO except for the fact of receiving information from the DIT (I & CI), has not considered the other aspects of the transaction to be considered as the transactions of the assessee. The other relevant aspect i.e. receipt and /or payments of monies, the time gap between the actual transactions on the stock exchange and the modification of the client code numbers of such transactions by the office of the registered share and stock broker, non-prohibition of client code modification by either the stock exchange or SEBI. In the order of assessment, the AO has stated the complete details of the *Modus Operandi* of creation of fictitious profit and / or losses with a malafide intention of escaping taxes. However, the AO has neither proved nor lead any evidence in case of any single transaction, which he has added to the income of the assessee, being of the type whose *Modus Operandi* is similar to the nature where he alleges to be added to the income of the assessee.

8. It is common knowledge that any transaction either relating to shares or derivatives to be considered as completed and taxable/deductible in the hands of any assessee should *compulsorily* have the following ingredients i.e. :-

i) A valid transaction must have been executed on the Stock Exchange.
ii) The customer of the registered share broker should confirm & agree that the transaction entered into by the broker belongs to him.
iii) The payment lbr purchases and/or receipt of sale proceeds should have happened between the Bank Accounts of the broker & his customer.
iv) The above transaction must have been accounted for in the hooks of account of the registered broker as well as his customer.
v) The eventual profit/loss on the transactions executed on the Stock Exchange & exchange of monies having happened as well as getting accounted in the respective books of account would eventually result into taxable profit and/or loss in the hands of such customers of the registered broker.

9. Whereas, the AO in the present case has mechanically added amounts as *income of assessee* without verifying & furnishing evidences on record that all the above steps have actually happened in the case of all the transactions which he has added as assessee's income. In our view, by no stretch of imagination can any AO consider a transaction on the Stock Exchange as *income of a person* other than the one who has either actually received monies in his bank account (in case of profit) and/or paid any monies from his bank account (in case of losses).

10. For the above proposition, we rely upon the decision in the case of ***M/s.Sambhavanath Investment v. ACIT I.T.A. No.3109/Mum/2011 AY 2006-2007 dated 19/12/2013 (Mum.)(Trib.)***, ***ACIT v Kunvarji Finance (P) Ltd (2015) 61 Taxmann.com 52(Ahd.)(Trib.)*** *wherein it was held that CCM within 1 % is absolutely normal. Accordingly the addition was deleted*. In the facts of the present case also, CCM is within 1 %, ***ITO vs. Pat Commodity Services P. Ltd. ITA Nos. 3498 and 3499/Mum/2012 dt. 7th Aug,2015 (Mum.)(Trib.)***, ***DCIT v Sunil J Anandpara ITA No. 3132/MUM/2015 Assessment Year: 2010-11 Bench I dated 15/9/2017 (Mum.)(Trib.)*** and ***ITO vs. M/s. M.N. Shares & Stock Brokers Pvt. Ltd. IT No. 5399/M/2017, AN. 2009-10 Bench — SMC***.

11. Even nothing has been placed on record by the AO to demonstrate that any proceedings were ever initiated against the assessee by the SEBI or any stock exchange. It was also clarified by the Ld. AR that the broker, through whom the assessee carried on share transactions, were also not imposed any penalty. No co-relation between the assessee on the one hand and the other parties on the other hand has been brought on record to co-relate that the parties to whom the alleged profits or loss is supposed to have been diverted to reduce the taxable income of the assessee, has been brought on record to show that there was any collusion with each other and were known to each, so that one party diverted its profit or loss to the other parties. Even nothing has been brought on record to suggest that the said losses were purchased and the party were given cheque or cash payment in view of such favours.

According to us, such co-relation was necessary to fasten any liability upon the assessee.

12. No new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld CIT. Therefore, there are no reasons for us to interfere into or deviate from the findings so recorded by the Ld. CIT. Hence, we are of the considered view that the findings so recorded by the Ld. CIT are judicious and are well reasoned. Resultantly, these grounds raised by the assessee stands **dismissed**.

13. Since we have dismissed the appeal of revenue by upholding the deletion of addition on merits, therefore the appeal filed by the assessee challenging the order of reopening becomes academic in view of our decision in the appeal filed by the revenue.

14. In the net result, both the appeals filed by the revenue and assessee stands **dismissed** with no order as to cost.

*Order pronounced in the open court on 13.5.2019*

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| Sd/- | Sd/- |
| **(N.K. PRADHAN)** | **(SANDEEP GOSAIN)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Mumbai; Dated : 13.5.2019
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**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai