IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B", NEW DELHI
BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A. Nos. 5688-5691/DEL/2013	
	A.YRS. : 2006-07 – 2009-10	
M/s DMA INVESTMENT PVT. LTD. 910, ANSAL BHAWAN, K.G. MARG, NEW DELHI – 110 001 (PAN: AABCD5111H)	VS.	DCIT, CENTRAL CIRCLE-14, NEW DELHI
(APPELLANT)		**(RESPONDENT)**

AND

	I.T.A. Nos. 6326-6329/DEL/2013	
	A.YRS. : 2006-07 – 2009-10	
ACIT, CENTRAL CIRCLE-14, ROOM NO. 320, 3RD FLOOR, ARA CENTRE, JHANDEWALAN EXTN., NEW DELHI	VS.	DMA INVESTMENT PVT. LTD. 910, ANSAL BHAWAN, K.G. MARG, NEW DELHI – 110 001 (PAN: AABCD5111H)
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Dr. Rakesh Gupta, Adv.
Department by : Sh. Sunil Chander Sharma, CIT(DR)

Date of Hearing : 21-03-2016
Date of Order : 05-04-2016

ORDER

PER H.S. SIDHU : JM

These are the Cross Appeals by the Assessee and Revenue emanating from the common order of the Ld. CIT(A) dated 05.7.2013 relevant to

assessment year 2006-07 to 2009-10. Since the issues involved in these cross appeals are common and identical, hence, these appeals were heard together and are being disposed by this common order for the sake of convenience, by dealing with Assessee's Appeal No. 5688/Del/2013 (AY 2006-07) and Revenue's Appeal No. 6326/Del/2013 (AY 2006-07).

2. The common grounds raised in all the 4 Assessee's appeals read as under:-

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding the validity of the order passed by the AO u/s. 153A on 29.10.2002.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that gain/ loss on account of share transaction where the holding period is less than 30 days constitutes business income / loss, as against the capital gain / loss claimed by the appellant.

3. The ld. CIT(A) further erred in not following the order of his predecessor for assessment year 2008-09, dated 1.6.2012, wherein the issue had been decided in favor of the appellant.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding the disallowance of (Rs. 20,530/- AY 2006-07;

Rs. 83,609/- AY 2007-08; 43,312/- AY 2008-09 & Rs.52.814/- AY 2009-10), u/s. 14A in assessment of the I.T. Act, 1961.

5. The appellant may kindly be allowed to raise any additional ground in the course of hearing of the appeal."

3. The common grounds raised in all the 4 Revenue's appeals read as under:-

"*1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in directing the AO to treat the gain on shares as short term capital gain, if the period of holding the shares by the assessee company was more than 30 days and gain on shares as business income, if the holding period is upto 30 days.*

2. The order of CIT(A) is erroneous and is not tenable on facts in the law.

3. The appellant craves leave to add, alter or amend any / all of the grounds of appeal before or during the course of hearing of the appeal."

Assessee's Appeal No. 5688/Del/2013 - Assessment Year 2006-07

4. The brief facts of the case are that a search and seizure operation was carried out u/s. 132 of the Income Tax Act, 1961 on 22.03.2011 in the case of

Amtek Group of Cases. The assessee company i.e. M/s DMA Investments Pvt. Ltd. was also covered u/s. 132(1) of the Income Tax Act, 1961 which is a group company of Amtek Group. Subsequently, the case was centratlized with Central Circle-14, New Delhi. Accordingly, notice u/s. 153A of the Income Tax Act was issued to the assessee on 26.9.2011. In response to the said notice, return declaring an income NIL was filed on 9.11.2011. Notices u/s. 143(2) and 142(1) of Income Tax Act, 1961 were issued alongwith a questionnaire dated 16.2.2012 and case was fixed for hearing on 29.2.2012. In response to various statutory notices, necessary details were filed by the Assessee's Authorised Representative from time to time. Thereafter, the AO completed the assessment at Rs. 50,000/- for making the disallowance u/s. 14A of the I.T. Act, 1961 vide Order dated 29.10.2012 passed u/s. 153A/143(3) of the I.T. Act, 1961.

5. Against the aforesaid assessment order dated 29.10.2012, assessee preferred an appeal before the Ld. CIT(A), who vide impugned order dated 05.7.2013 has partly allowed the appeal of the asseseee.

6. Aggrieved with the order of the Ld. CIT(A), the Assessee is in appeal before the Tribunal.

7. At the threshold, Ld. Counsel of the assessee stated that the issue raised vide ground no. 1 relating to upholding the validity of the order of assessment passed u/s. 153A on 29.10.2012, is squarely covered in favor of the assessee by the decision dated 28.8.2015 of the Hon'ble Delhi High Court passed in the case

CIT(Central)-III vs. Kabul Chawla in ITA No. 707, 709, 713/Del/2014 wherein the Hon'ble High Court has held that if the additions are made, but not based on any incriminating material found during search operation, then these additions are not sustainable in the eyes of law. He further stated that the additions have no relation with any incriminating material found and undisclosed income or property discovered in the course of search and as such are bad in law being beyond the scope of jurisdiction u/s. 153A of the I.T. Act.

In order to support his case, Ld. Counsel of the assessee draw our attention towards the assessment order pages 1, 2 & 7 and the impugned order of the Ld. CIT(A) page no. 1 & 2. He stated that during the search and seizure operation, no documentary evidence has been found by the Investigation Wing of the Department on the issue in dispute. The Search and Seizure operation u/s. 132 of the I.T. Act was conducted by the Investigation Wing of the Department on 22.3.2011 in the case of Amtek Group of cases and the assesse was also covered under the search which is a group Company of Amtek Group. He further stated that during the year under consideration the Company has not conducted any business in real estate, but engaged in sale / purchase of shares. During the course of assessment proceedings, the AO found that assessee has made the investment of Rs. 3,23,05,820/- in shares and has earned dividend income of Rs. 7,29,200/- on account of investment and he applied the provisions of Section 14A of the Act which is not based on the basis of the incriminating

material found during the search operation. He further draw our attention towards the impugned order of the Ld. CIT(A) vide para no. 4.1 which clearly states that AO had not found any incriminating material in the course of search and as such erred in initiating the assessment proceedings u/s. 153A of the Act. He finally stated that the additions in dispute has been made without any incriminating material, hence, this issue is squarely covered by the decision dated 28.8.2015 of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (Supra) and draw our attention towards the para 17 of the said judgment wherein decision in the case of CIT vs. Anil Kumar Bhatia has also been discussed. He also draw our attention towards the ITAT, 'C' Bench decision in the case of Smt. Rashmi Wadhwa vs. DCIT in ITA No. 5184/Del/2014 (AY 2005-06) wherein the decision in the case of CIT vs. Kabul Chawla (Supra) was followed.

7.1 At the time of hearing, Ld. DR relied upon the order of the authorities below and stated that the provision of section 153A has rightly been applied in the case of the assessee on the material available with them and further stated that the case of the assessee is covered against the assessee by the decision dated 23.5.2007 of the Hon'ble Supreme Court of India in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. in Appeal (Civil) No. 2830 of 2007 reported in 291 ITR 500 (SC). He further stated that in the case of CIT vs. Kabul Chawla (Supra) the assessment was completed u/s. 143(3) of the I.T. Act

and not under section 143(1) of the I.T. Act, because on the date of search the said assessment has already been stood completed.

8. We have heard both the counsel and perused the relevant records available with us, especially the orders of the revenue authorities. We find that the case law viz. ACIT vs. Rajesh Jhaveri (Supra) cited by the Ld. DR is distinguished from the facts of the case in hand, because in the present case the addition was made, without incriminating material found during the search and assessment was completed u/s. 153/143(3) of the Act. However, in the case of ACIT vs. Rajesh Jhaveri (Supra), cited by the Ld. DR, the notice was served u/s. 148 of the Income Tax Act and assessment was completed accordingly. Admittedly in the present case, no incriminating material was found or seized during the course of search and seizure operation u/s. 132 of the Act in the case of the assessee. Under the circumstances, we find that the issue is covered in favour of the assesee and against the Revenue by the decision dated 28.8.2015 of the Hon'ble Delhi High Court in the case of ***CIT vs. Kabul Chawla*** passed in ITA No. 707, 709 and 713/2014 wherein the Hon'ble High Court has held has under:-

> *"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned ITA Nos. 707, 709 and 713 of 2014 of decisions, the legal position that emerges is as under:*
>
> *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six Ays immediately preceding the previous year relevant to the AY in which the search takes place.*

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an ITA Nos. 707, 709 and 713 of 2014 of assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each

AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

9. Respectfully following the precedent of the Hon'ble Jurisdictional High Court as aforesaid, we allow the appeal of the Assessee, because AO has completed the assessment and made the addition in dispute without any incriminating material found during the search and seizure operation and the addition in this case was purely based on the material already available on record. Hence, the addition in the case is deleted and the ground raised by the assessee in the appeal is allowed.

10. Following the consistent view in assessment year 2006-07 in Appeal no. 5688/Del/2013, as aforesaid, the other Appeals of the Assessee being ITA No. 5689, 5690 & 5691/Del/2013 (AYrs 2007-08, 2008-09 & 2009-10) stand allowed.

11. ***Revenue's Appeal No.6326/Del/2013 - Assessment Year 2006-07***

The only issue raised in the Appeal of the Revenue is that Ld. CIT(A) has erred in directing the AO to treat the gain on shares as short term capital

gain, if the period of holding the shares by the assessee company was more than 30 days and gain on shares as business income, if the holding period is upto 30 days. We find that Ld. CIT(A) has adjudicated this issue as under:-

> *"I have considered the entire facts of the case. In fact, I have decided the appeals on similar facts in the associate concern of the appellant namely M/s Dreamland Buildtech (P) Ltd. for various assessment years (namely……) relying on the decision of CIT(A)-XIII, New Delhi, where he has held that if capital gain / loss on account of share transaction should be assessed as business loss/income, if the period of holding is less than 30 days. In present case, also the facts are identical where the source of deployment of fund is own and holding of shares is as less than even two days. In view of the above facts, I rely on my own decision in the case of M/s Dreamland Buildtech (P) Ltd. vide order cited supra and direct the AO to treat the capital gain/loss arising out of share transaction as business income /loss on account of share transaction will remain short / loss for various assessment years where the holding of shares are less than 30 days. as a result, this ground of appeal is partly allowed for various assessment years.*

12. After going through the aforesaid findings of the Ld. CIT(A), we find that Ld. CIT(A) has followed his own order passed in the case of M/s Dreamland Buildtech (P) Ltd. and rightly directed the AO to treat the capital gain/loss arising out of share transaction as business income /loss on account of share transaction will remain short / loss for various assessment years where the holding of shares are less than 30 days as a result, this ground of appeal was partly allowed for various assessment years. We do not find any flaw or

infirmity to take a contrary decision. Accordingly, Ld. CIT(A)'s order is upheld on this issue and Appeal filed by the Revenue stand dismissed.

13. Following the consistent view in assessment year 2006-07 in Revenue's Appeal no. 6326/Del/2013, as aforesaid, the other Appeals of the Revenue being ITA No. 6327, 6328 & 6329/Del/2013 (AYrs 2007-08, 2008-09 & 2009-10) stand dismissed.

14. In the result, all the 4 Appeals filed by the Assessee stand allowed and all the 4 Appeals filed by the Department stand dismissed.

Order pronounced in the Open Court on 05/04/2016.

SD/-	**SD/-**
[N.K. SAINI]	**[H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date 05/04/2016
"SRBHATNAGAR"
Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

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By Order,

Assistant Registrar, ITAT, Delhi Benches