

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'G', NEW DELHI**

**Before Sh. N. K. Saini, AM and Smt. Beena A. Pillai, JM**

**ITA No. 2711/Del/2016 : Asstt. Year : 2007-08**

ACIT, Central Circle-30, New Delhi	Vs	M/s DMA Investment Pvt. Ltd., 910, Ansal Bhawan, 16, K.G. Marg, New Delhi-110001
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCD5111H</b>		

**Assessee by : Sh. Deepesh Garg, Adv. &  
Sh. Somil Agarwal, Adv.  
Revenue by : Sh. S. S. Rana, CIT DR**

<b>Date of Hearing : 27.12.2017</b>	<b>Date of Pronouncement : 28.12.2017</b>
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**ORDER**

**Per N. K. Saini, AM:**

This is an appeal by the department against the order dated 29.02.2016 of ld. CIT(A)-30, New Delhi

2. The only grievance of the department in this appeal relates to the deletion of penalty of Rs.21,24,671/- levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

3. Facts of the case in brief are that the assessee filed the original return of income on 31.03.2008 declaring Nil income. Thereafter, the assessee filed the return of income u/s 153A of the Act on 09.11.2011 declaring Nil income.

However, the assessment was framed by the AO at an income of Rs.64,66,360/- vide order dated 29.10.2012 by making the addition of Rs.63,82,746/- on account of share trading income and Rs.83,609/- on account of disallowance u/s 14A of the Act. The assessee preferred an appeal against the assessment order of the AO before the Id. CIT(A) who held that profit on sale of shares held for less than 30 days amounting to Rs.68,77,295/- and loss on sale of shares held for more than 30 days amounting to Rs.5,55,454/-, therefore, gain of Rs.68,77,295/- was to be taken as business income. The short term loss of Rs.5,59,454/- was to be carried forward and long term capital gain of Rs.64,905/- was exempt from tax. The AO issued the notice u/s 274 r.w.s. 271(1) of the Act to the assessee, asking for explanation. In response, the assessee requested to drop the proceedings. The AO, however, held that in view of the decision of Id. CIT(A) that profit on sale of shares held for less than 30 days amounting to Rs.68,77,295/- was to be taken as business income, therefore, it was confirmed that the assessee did not furnish the accurate particulars of income. The AO levied the penalty of Rs.21,24,671/- u/s 271(1)(c) of the Act.

4. Being aggrieved the assessee carried the matter to the  
Id. CIT(A) who deleted the penalty by observing as under:

*“5.4 I have carefully considered the penalty order, written submissions, case laws relied upon and oral arguments of Ld. AR. The objections/arguments of the appellant are discussed as under:-*

*(i) In the statement of income, the assessee has shown from sale of shares long term capital gain at Rs. 64,905/- and short term capital gain at Rs. 63,17,841/-. However, in the assessment order u/s 153A dated 29.10.2012, the A.O. considered entire income of Rs. 63,82,476/-(Rs. 64,905 + Rs. 63,17,841) from sale of shares as business income.*

*(ii) Against the above addition for treating the capital gain from sale of shares, as business income, assessee filed appeal before CIT(A)-XXXIII. Ld. CIT(A), vide order dated 05.7.2013 in appeal no. 57/12-13/1083, upheld the order of the A.O. and confirmed the nature of such income as business income amounting to Rs. 68,77,295/-, where holding is upto 30 days and loss on sale of shares held for more than 30 days amounting to Rs. 5,55,454/-.*

*(iii) The A.O. in the penalty order u/s 271(1)(c) dated 28.3.2015, levied the minimum penalty @ 100% at Rs. 21,24,671/-, stating in para 4 (supra) that addition on account of share trading has been confirmed by CIT(A), as business income and therefore, penalty u/s 271(1)(c), is imposable.*

*(iv) During the appellate proceedings, it has been submitted by the appellant that entire facts relating to share transactions were fully disclosed and mere changing the head of income from capital gain to business income, will not attract concealment penalty u/s 271(1)(c). It has also been submitted by the appellant that addition made by the A.O., while completing assessment u/s 153A, is not based on any incriminating document found during action u/s 132, and therefore, same is illegal, in view of the Hon'ble Jurisdictional High Court of Delhi, in the case of CIT Vs. Kabul Chawla 61 Taxmann.com 412 (Del).*

*In view of the above facts and circumstances, it is submitted by the appellant that the A.O. erred both in facts and in law in imposing penalty of Rs. 21,24,671/-, u/s 271(1)(c) of the Act, as the appellant has disclosed all the facts and there is no concealment of particulars of income or furnishing inaccurate particulars of such income. Hence, penalty of Rs. 21,24,671/-, imposed u/s 271(1)(c) of the Act, is bad in law.*

#### **CONCLUSION:**

*From the above discussion, following facts emerge:*

- (i) The appellant has disclosed all the particulars, relating to the share transactions.*
- (ii) There is no deliberate or willful attempt by the appellant to furnish inaccurate particulars or to conceal the income.*
- (iii) Mere confirming the addition by Ld. CIT(A), on which penalty has been imposed, does not*

*tantamount to a ground for imposing penalty u/s 271(1)(c).*

*In view of the above facts and circumstances, I am of the considered opinion that provision of section 271(1)(c), are not attracted and accordingly, penalty order cannot be sustained. In view of above, penalty order u/s 271(1)(c), is hereby cancelled. Accordingly, all the grounds are hereby allowed.”*

5. Now the department is in appeal. During the course of hearing, the Id. Counsel for the assessee at the very outset stated that the addition on the basis of which the impugned penalty was levied by the AO has been deleted. Therefore, there is no merit in this appeal of the department.

6. In her rival submissions, the Id. Sr. DR supported the order of the AO.

7. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is an admitted fact that the quantum additions have been deleted by the ITAT Delhi Bench -Bø New Delhi in ITA Nos. 5688 to 5691/Del/2013 for the assessment years 2006-07 to 2009-10 vide order dated 05.04.2016 by following the judgment of the Honøble Jurisdictional High Court in the case of CIT Vs Kabul Chawla reported at (2016) 380 ITR 573. The relevant findings have

been given in para 9 of the aforesaid order dated 05.04.2016 which read as under:

*“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.”*

8. In the present case, it is an admitted fact that after the order dated 05.04.2016 of the ITAT Delhi Bench -BØ, New Delhi in assessee’s own case, no addition survives for the year under consideration. Therefore, there was no question of levying the penalty u/s 271(1)(c) of the Act.

9. On a similar issue the Hon’ble Supreme Court in the case of K. C. Builders & Others Vs ACIT (2004) 265 ITR 562 wherein it has been held as under:

*“Where the additions made in the assessment order on the basis of which penalty for concealment is levied, are deleted, there remains no basis at all for levying penalty for concealment and, therefore, in such a case no penalty can survive and the penalty is liable to be cancelled. Ordinarily, penalty cannot stand if the assessment itself is set aside.”*

10. In view of the above, we do not see any valid ground to interfere with the impugned order passed by the ld. CIT(A). Accordingly, we do not see any merit in this appeal of the department.

11. In the result, the appeal of the department is dismissed.

(Order Pronounced in the Court on 28/12/2017)

Sd/-

**(Beena A. Pillai)**

**JUDICIAL MEMBER**

Sd/-

**(N. K. Saini)**

**ACCOUNTANT MEMBER**

**Dated: 28/12/2017**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**