

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "G" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.7686/Del./2017  
Assessment Year 2011-2012

M/s. Spirit Infradevelopers Pvt. Ltd., Plot No.9, Block-B, Pocket-I, LSC, Vasant Kunj, New Delhi – 110 070. PAN AAMCS2351M	vs.,	The Assistant Commissioner of Income Tax, Central Circle-15, New Delhi.
(Appellant)		(Respondent)

ITA.No.7687/Del./2017  
Assessment Year 2011-2012

M/s. Spirit Infrastructure Pvt. Ltd., Plot No.9, Block-B, Pocket-I, LSC, Vasant Kunj, New Delhi – 110 070. PAN AAICS8333B	vs.,	The Assistant Commissioner of Income Tax, Central Circle-15, New Delhi.
(Appellant)		(Respondent)

ITA.Nos.7688 & 7689/Del./2017  
Assessment Years 2010-2011 & 2011-2012

M/s. Spirit Global Construction Pvt. Ltd., Plot No.9, Block-B, Pocket-I, LSC, Vasant Kunj, New Delhi – 110 070. PAN AAICS2757B	vs.,	The Assistant Commissioner of Income Tax, Central Circle-15, New Delhi.
(Appellant)		(Respondent)

For Assesseees :	Shri K. Sampath and Shri V. Rajkumar, Advocates
For Revenue :	Shri S.S. Rana, CIT-D.R.

Date of Hearing :	30.08.2018
Date of Pronouncement :	05.09.2018

## **ORDER**

**PER BHAVNESH SAINI, J.M.**

This Order shall dispose of all the above appeals filed by three different assesseees challenging the levy of penalty under section 271(1)(c) of the I.T. Act, 1961.

2. We have heard the Learned Representatives of both the parties and perused the material available on record. Both the parties mainly argued in ITA.No.7686/Del./2017 (Spirit Infradevelopers Pvt. Ltd., New Delhi) and submitted that the issue is same in the remaining appeals and Order in that case may be followed in the remaining three appeals. We, therefore, for the purpose of disposal of all the appeals, proceeded to decide ITA.No.7686/Del./2017 as under.

ITA.No.7686/Del./2017 - A.Y. 2011-2012

Spirit Infradevelopers Pvt. Ltd.,

3. This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-XXVI, New Delhi, Dated 23.10.2017, for the A.Y. 2011-2012, challenging the levy of penalty under section 271(1)(c) of the I.T. Act, 1961.

4. Briefly, the facts of the case are that assessment in this case was completed under section 147 read with section 143(3) of the I.T. Act, 1961, on 31.03.2014 at an income of Rs.8,49,91,422/- against returned loss of Rs.8,578/- declared by the assessee-company. The assessee-company has shown in the books of account unsecured loans to the tune of Rs.8.50 crores from M/s. Puneet Oils & Chemicals Pvt. Ltd., and M/s. Tanish Tradecom Pvt. Ltd., at Rs.4.25 crores. The A.O. noted that assessee-company has not proved the loan transaction of Rs.8.50 crores which was added under section 68 of the I.T. Act, 1961. The Ld. CIT(A) dismissed the appeal of assessee-company vide Order dated 12.12.2014. The A.O. accordingly,

initiated the penalty proceedings under section 271(1)(c) of the I.T. Act, 1961. The assessee-company submitted before the A.O. that it has preferred an appeal before the ITAT, therefore, penalty may be kept in abeyance. However, A.O. decided the penalty matter and vide separate order levied the penalty on the aforesaid addition vide Order dated 17.03.2016.

5. The assessee-company challenged the penalty order before the Ld. CIT(A). The Ld. CIT(A) noted in the impugned order that Assessee's Representative made submission in writing which is reproduced in the appellate order. In the submission of the assessee, the heading was 'withdrawal of appeal'. It was submitted in the letter that the assessee-company was in appeal before ITAT against the addition made in the assessment order and the Tribunal vide Order dated 04.08.2017 has accepted the appeal of assessee-company. Copy of the Order was also filed before Ld. CIT(A). It was, therefore, submitted that as on date, all additions made during assessment stands quashed. It was, therefore,

submitted that the impugned penalty order has become non-est and therefore, the assessee-company wishes to withdraw this appeal filed before the Ld. CIT(A). The assessee-company, therefore, prayed before Ld. CIT(A) to accept the withdrawal of this appeal filed by the assessee-company and take suitable action and to kindly inform the assessee-company of any obligation required to be discharged on its part. The Ld. CIT(A) in view of the submission of the assessee-company dismissed the appeal of assessee-company as withdrawn. The assessee-company is in appeal, challenging the penalty order.

6. Learned Counsel for the Assessee submitted that in this case the A.O. passed the re-assessment order under section 147/143(3) of the I.T. Act making the addition under section 68 of the I.T. Act, 1961, The assessee-company preferred appeal before ITAT, Delhi G-Bench in ITA.No.732/Del./2015 which have been decided by the Tribunal vide Order dated 04.08.2017 along with quantum appeals of other assessees M/s. Spirit Global Construction

Pvt. Ltd., New Delhi and M/s. Spirit Infrastructure Pvt. Ltd., New Delhi and the Tribunal quashed the re-assessment proceedings initiated by the A.O. as void. Copy of the Order is placed on record. Learned Counsel for the Assessee submitted that the same Order of the Tribunal was also placed before Ld. CIT(A) intimating that appeal of the assessee-company has been allowed by the Tribunal, therefore, Ld. CIT(A) should not have dismissed the appeal of the assessee-company as withdrawn. He has submitted that Counsel for Assessee has made a request for withdrawal of the appeal without consent of the assessee-company and that it was a mistake committed by the Counsel for the Assessee appeared before Ld. CIT(A). He has submitted that once re-assessment order have been quashed, the authorities below were bound to modify the penalty order in terms of Section 275(1A) of the I.T. Act. He has submitted that once re-assessment order have been quashed, there were no reason to withdraw the appeal and assessee-company requested that suitable action may be taken in this regard. Affidavit of the C.A. Ms. Roli Chaubey is

filed on record in which she has affirmed that she had inadvertently mentioned in the letter for withdrawal of the appeal as she was not aware of the procedure. Learned Counsel for the Assessee, therefore, submitted that since quantum addition have been deleted, therefore, no penalty order would survive.

7. On the other hand, Ld. D.R. relied upon the Order of the Ld. CIT(A) and submitted that once appeal have been withdrawn by the Counsel for the Assessee, assessee-company cannot file appeal before the Tribunal. The Ld. CIT-D.R. however, did not dispute that re-assessment proceedings have been quashed by the Tribunal vide Order dated 04.08.2017.

8. We have considered the rival submissions and perused the material available on record. It is not in dispute that in this case re-assessment order was passed by the A.O. under section 143(3)/147 of the I.T. Act making addition under section 68 of the I.T. Act which was the basis for levy of the penalty against the assessee-company. The assessee-

company admittedly preferred appeal before ITAT, Delhi Bench and the Tribunal in the case of assessee-company and two other assessee-company's, have quashed the re-assessment proceedings initiated by the A.O. vide Order dated 04.08.2017. Therefore, all additions made in the re-assessment order would not survive which was the basis for levy of the penalty against the assessee-company. Thus, on the face of it, the foundation to levy penalty against the assessee-company has disappeared and have gone. Hence, there is no justification for levy of the penalty against the assessee-company in such circumstances. Learned Counsel for the Assessee, therefore, rightly contended that even as per Section 275(1A) of the I.T. Act, the penalty shall have to be modified in terms of the quantum Order passed on the appeal decided by ITAT. Once, the re-assessment order have been quashed and no additions survives, the authorities below shall have to modify the penalty order by cancelling the penalty in the matter. However, the impugned Order of the Ld. CIT(A) shows that Counsel for the Assessee filed letter before Ld. CIT(A) explained therein



that the Tribunal has allowed the appeal of assessee-company and all additions have been deleted and as such, penalty order has become non-est, therefore, Counsel for Assessee wishes to withdraw the appeal. It appears to be a blatant mistake committed by the Counsel for Assessee by making a request for withdrawal of the appeal. However, the things are very clear that the Counsel for Assessee explained all the facts before Ld. CIT(A) that the Tribunal has quashed the re-assessment order and as such, all additions stands deleted. The assessee-company also pleaded in the same letter before Ld. CIT(A) that suitable action may be taken and assessee-company may be intimated of any obligation required to be discharged on its part. Therefore, in such circumstances, the Ld. CIT(A) instead of allowing the withdrawal of the appeal through Counsel for Assessee, should have cancelled the penalty order in the matter by going through the Order of the Tribunal. There were no justification for Ld. CIT(A) to have allowed the Counsel for Assessee to withdraw the appeal. The Hon'ble Calcutta High Court in the case of Bhartia Steel &

Engineering Co. Pvt. Ltd., vs. ITO, 'K' Ward, Companies

District-I, Calcutta (1974) 97 ITR 154 held as under :

*“Held, that it has been held in King v. Income-tax Special Commissioners ([1936] 1 K.B. 487 (C.A.)) and Commissioner of Income-tax v. Rai Bahadur Hardutroy Motilal Chamaria ([1967] 66 I.T.R. 443 (S.C.)) that an assessee, having once filed an appeal, cannot withdraw it. Consequently, the appellate authority could not allow such withdrawal. The taxing authorities are not deciding a case inter parties ; they are assessing or estimating the amount on which, in the interests of the country at large, the tax-payer ought to be taxed. Therefore, the Appellate Tribunal acted without jurisdiction in allowing the application of the company praying for withdrawal of the appeal. The Tribunal was under an obligation to dispose of the appeal on merits.*

*No doubt it was on the prayer of the company that the Tribunal allowed the appeal to be withdrawn and*

*dismissed the same. It is a well-established principle of law that jurisdiction cannot be conferred by consent of parties. If under the Income-tax Act, the Tribunal had to dispose of the appeal on the merits and had no power to allow the withdrawal of the appeal on the prayer of the company, it is no argument that such withdrawal having been allowed on the prayer of the company itself, the order of the Tribunal, though invalid, will have to be upheld. There is no estoppel against a statute and an order which is invalid on the ground of want of jurisdiction cannot become valid by consent. The company was not, therefore, precluded from challenging the jurisdiction of the Tribunal in allowing it to withdraw the appeal. The said order was a void order and it had to be held that the appeal to the Tribunal was still pending. The company had given sufficient explanation for not taking steps for restoration of the appeal or for moving the High Court earlier. The Tribunal was directed to hear and dispose of the appeal.”*

8.1. The Hon'ble Supreme Court in the case of CIT vs. Mahalaxmi Sugar Mills Co. Ltd., (1986) 160 ITR 920 (SC) held that *"duty caste on A.O. to apply relevant provisions of Law for the purpose of determining the true figure of assessee's taxable income"*.

8.2. Considering the facts of the case and above discussion, it is evident in this case that the assessee-company submitted a copy of the Order of the Tribunal dated 04.08.2017 before Ld. CIT(A) explaining that ITAT has accepted the appeal of assessee-company and all additions made in the re-assessment order stands quashed. If there were mistake in the letter of the Counsel for Assessee, the Ld. CIT(A) should have gone by the Order of the Tribunal and by following the Order of the Tribunal should have set aside and delete the penalty in the matter because there were no foundation exist for levy of the penalty against the assessee-company. The Ld. CIT(A), in such circumstances, should not have allowed withdrawal of the appeal by the Counsel for the

Assessee. If the Counsel for Assessee has committed a blatant mistake that should not have been allowed to continue by the First Appellate Authority and he was required by Law to follow the Order of the Tribunal to do substantial justice between the parties. Thus, there were no justification for Ld. CIT(A) to dismiss the appeal of assessee-company as withdrawn because it is well settled Law that assessee-company having once filed an appeal cannot withdraw it. The assessee-company under such circumstances was fully justified for filing appeal before the Tribunal. We, therefore, reject the contention of the Ld. CIT-D.R. that assessee-company cannot file appeal before the Tribunal in such circumstances. Considering the facts of the case and above discussion, we set aside the Orders of the authorities below and cancel the penalty.

9. In the result, ITA.No.7686/Del./2017 of the Assessee is allowed.

*ITA.Nos.7686, 7687, 7688 & 7689/Del./2017 Spirit  
Infra developers Pvt. Ltd., New Delhi & Others.*

ITA.No.7687/Del./2017

Spirit Infrastructure Pvt. Ltd., - A.Y. 2011-12

AND

ITA.Nos.7688 & 7689/Del./2017

Spirit Global Construction Pvt. Ltd.,

A.Ys. 2010-11 & 2011-12

10. All the above appeals by two different assessee-company's are directed against different Orders of the Ld. CIT(A)-XXVI, New Delhi, Dated 23.10.2017, for the A.Ys. 2010-2011 and 2011-2012, challenging the levy of penalty under section 271(1)(c) of the I.T. Act, 1961.

11. The issue is same as have been decided in ITA.No.7686/Del./2017 in the case of Spirit Infra developers Pvt. Ltd., New Delhi (supra). Following the reasons for decision of the same case, we set aside the Orders of the authorities below and cancel the penalty.

12. In the result, ITA.Nos.7687, 7688 & 7689/Del./2017 of the assessees are allowed.

13. To sum-up, all the Appeals of three Assesseees are allowed.

Order pronounced in the open Court.

Sd/-  
(L.P. SAHU)  
ACCOUNTANT MEMBER

Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

Delhi, Dated 05<sup>th</sup> September, 2018

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "G" Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches :  
Delhi.