

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA Nos. 1868, 1869/Del/2018
Asstt. Years: 2010-11, 2011-12

Spirit Global Construction Pvt. Ltd. Plot No. 1, T/Floor, LSC Site No. 37- 38, Morland, Kalkaji, New Delhi – 110 019 PAN AAICS2757B	Vs.	ACIT, Circle 15 New Delhi
(Appellant)		(Respondent)

ITA Nos. 1870, 1871/Del/2018
Asstt. Years : 2011-12, 2011-12

Spirit Infrastructure Pvt. Ltd., Plot No. 3, 2 nd Floor, LSC Vasant Kunj, New Delhi – 110 070 PAN AAICS8333B	Vs.	ACIT, Central Circle-17, New Delhi.
(Appellant)		(Respondent)

Assessee by:	Ms. Roli Chaubey, CA
Department by :	Ms. Nidhi Srivastava, CIT (DR)
Date of Hearing	08/07/2021
Date of pronouncement	08/07/2021

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeals have been filed by the assessee against separate impugned order of even date, 15.1.2018, passed by Ld. CIT (Appeals)-XXVI, New Delhi in relation to penalty proceedings u/s 271

(1) (c) read with order u/s 154 of the Income Tax Act, 1961. In all the appeals the common ground raised by the appellant assessee reads as under:-

1. *“That in rejecting the application for rectification u/s 154, the Learned CIT (A) has erred in facts inasmuch as he has failed to correctly interpret the provision of law as applicable to the facts of the case.*
2. *That in rejecting the application u/s 154 of the assessee, the Learned CIT(A) has erred in law in as much as he has failed to judiciously and responsibility exercise the powers granted to him under the Income Tax Act.*
3. *That in rejecting the application for rectification u/s 154, the Learned CIT (A) has, based on fact of the case, acted injudiciously and unlawfully and against the principles of natural justice.*
4. *That in rejecting the application for rectification u/s 154, the Learned CIT (A) has failed to correctly interpret the facts existing in the case. “*

2. Brief facts qua the issue are that the assessee had earlier filed appeal before the Ld. CIT (A) against the levy of penalty u/s 271(1)(c). During the course of the appellate proceedings, assessee filed a letter stating that in the quantum proceedings up to the stage of Tribunal, all the additions made in the impugned assessment years which are the subject matter of penalty have been deleted and all the additions have been quashed. However, assessee on some wrong notion requested to withdraw the appeal filed before Ld. CIT (A) against the penalty order. Ld. CIT (A) accepted the assessee’s letter of withdrawal of appeal on the ground that assessee seeks no remedy and the appeal of the assessee was dismissed.

2. Thereafter assessee filed an application u/s 154 before the Ld. CIT (A) as noted in the impugned order stating as under :-

“The assessee has filed this rectification application and through it, the assessee wishes to point out that the withdrawal of the above referred appeal against the order of penalty U/s 271(l)(c) has been erroneously and unlawfully accepted merely on the application signed by the counsels for the assessee, and not on an application signed by the assessee as is required by the provision of section 148 r.w.s. 249 relevant in this matter. Consequently, the order u/s 250 (6) dt. 23.10.2017 passed by your Hon’ble self accepting the withdrawal of the appeal on the application which was not made in accordance with the relevant provision of law, ought to be cancelled and the appeal ought be reinstated and called for hearing.

Moreover, based on the record of the assessee as available and in face of the order of the Hon’ble ITAT dt. 4/8/2017 which is also on the file of your Hon’ble self, it is apparent that the penalty levied is non est as the assessment proceedings and consequent order have been declared void by the H’nble ITAT vide such order. Considering this, the counsels for the assessee, under the impression that the cancellation of the penalty order would automatically be effected by the Deptt., ignorantly requested merely for the withdrawal of the appeal against the penalty order. However, even in the face of these facts, no mention of the penalty order being scrapped and non-tenable was made and suitable direction was not given to the Learned Assessing Officer in the order passed U/s 250(6) to cancel the order. Consequently, to that extent, the order was not a speaking order also.

The situation now is that the Learned Assessing officer refuses to annul the penalty order until so directed under an order by your Hon'bleself. Consequently, the LAO continues to uphold the penalty order and the demand raised thereunder against the assessee.

This prayer is now being made to re-instate the appeal of the assessee since, on technical grounds, it's withdrawal has been incorrectly accepted, and to pass a speaking order cancelling the penalty based on the invalidation of the assessment proceedings and assessment order as ruled by the Hon'ble ITAT vide its order Dt. 4.8.2017.

Consequent to the Hon'ble ITAT granting relief in the quantum case it was opined that the penalty levied on the basis of quantum addition in that case would stand automatically deleted and in that view of the matter our Authorized Representative had sought your permission to withdraw the appeal which you acceded to in terms of your order dated 23.10.2017.

It now transpires that the Assessing Officer is unprepared to annul the penalty order without your specific direction in that behalf. Consequently, the Appellant is left without any relief on a sheer technicality although the charge does not survive due to the vacation of the addition made in the quantum case by the Tribunal.

This application is now being made with a prayer that the appeal may kindly be taken back on the roster after recalling the order as passed on 23.10.2017 which thereafter may please be heard and disposed off on merits.

Placed for the most favourable consideration.

NB: Two issues arise:

Firstly, the withdrawal to be effective had to be under the signature of the appellant which it is not - Sec. 140/249.

Secondly, no advice to the effect that withdrawal will be futile, in the circumstances, was received from any Authorities and so resultantly this act has, culminating out of ignorance, resulted in this lapse. Kindly consider these circumstances also.”

4. Ld. CIT (A) held that the present application for rectification u/s 154 is against the withdrawal of the appeal by the applicant himself, therefore, there is no mistake apparent from record if the assessee has consciously withdrawn its appeal and once the withdrawal of appeal has been filed then there is no mistake apparent from record.

5. Before us, Ld. Counsel for the assessee submitted that this Tribunal on similar facts, in assessee's own case has accepted the assessee's plea and the penalty levied has been cancelled by the Tribunal. She further submitted that it was purely a bonafide mistake that instead of praying before the Ld. CIT (A) that penalty levied by the AO u/s 271(1)(c) has become infructuous because all the additions have been quashed by the Tribunal in the quantum proceedings, it has erroneously withdrawn the appeal filed before the Ld. CIT(A) in the appeals filed against penalty order proceedings u/s 154. Accordingly, assessee should not be penalised for its own mistake when penalty levied u/s 271(1)(c) cannot stand as no addition subsists. She thus requested that the penalty should be quashed.

6. On the other hand, Ld. DR submitted that once assessee itself has chosen to withdraw the appeal which has been allowed by the Ld. CIT (A) then it cannot seek to rectify its own withdrawal application

under the terms and scope of section 154. Therefore, there is no error in the order of the Ld. CIT (A).

7. After considering the facts on record and from the perusal of the impugned orders, we find that it is an undisputed fact that in the appeals relating to penalty proceedings u/s 271(1)(c), all the additions which made in the quantum proceedings by the AO stands deleted / quashed from the stage of the Tribunal. Thus, there is no addition sustaining which can warrant levy of penalty u/s 271(1)(c). The assessee had filed appeal before the Ld. CIT(A) against the penalty order passed by the AO levying penalty u/s 271(1)(c) for the same quantum of addition. Before the Ld. CIT (A) assessee do brought to the notice to the Ld. CIT(A) that in the quantum proceedings all the additions have been deleted. Instead of praying for quashing of the penalty, it requested to withdraw the appeal which was allowed. Thereafter, when the AO refused to cancel the penalty, the assessee filed an application u/s 154 before the Ld. CIT (A) praying that penalty should be deleted/ quashed in the light of the ITAT order in the quantum proceedings whereby all the additions have been deleted. Even if for the technical reason the Ld. CIT(A) has refused to entertain the application u/s 154 filed before him, but the fact of the matter is that, once the entire edifice for levy of penalty has been knocked down, that is, the additions on which penalty was levied has been deleted / quashed by the Tribunal which is an admitted fact and also brought to the notice of Ld. CIT(A) at the first stage itself, then there was no reason that penalty should not have been deleted/quashed. There cannot be a scenario where the addition in the quantum proceedings have been quashed or have been deleted and at the same time the penalty for the same addition is sustained, even if it is due to acquiescence or ignorance of the assessee. Thus, in the interest of substantial justice we deem fit that the penalty levied should have

been quashed by the Ld. CIT (A) and the doors for remedy should not have been closed for some technical reasons. Once the levy of penalty itself has no legs to stand, then penalty also cannot subsist. We accordingly delete the penalty levied in all the impugned assessment years before us. Thus, the appeals of the assessee are allowed.

8. In the result all the appeals of the assessee are allowed.

Order pronounced in the Open Court on 8th July 2021.

sd/-

(N.K. BILLAIYA)
ACCOUNTANT MEMBER

Dated: 08/07/2021

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, New Delhi