INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "**A**": NEW DELHI
BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER
(Though Video Conferencing)

ITA No. 621& 5237/Del/2018
(Assessment Year: 2011-12)

BagpatBarautKhekra Development Authority, C/o. KapilGoel, Adv, F-26/124, Sector-7, Rohini, New Delhi PAN: AAALB0713B (Appellant)	Vs.	ACIT, Circle-2, Meerut (Respondent)

Assessee by :	ShriKapilGoel, Ld. Adv
Revenue by:	Shri Manu Chourasia, Sr. DR
Date of Hearing	01/02/2022
Date of pronouncement	25/02/2022

O R D E R

PER N.K. CHOUDHRY, J. M.:

1. These appeals have been preferred by the Assessee against the separate orders dated 09.11.2017 and 31.05.2018 impugned herein passed by the Ld. Commissioner of Income of Tax, Meerut (in short "Ld. Commissioner") u/s 250 and 271(1)(c) of the Income Tax Act, 1961 (in short "the Act") respectively, whereby, the ld. Commissioner sustained the addition of Rs. 94,180/- on account of compounding feeand enhanced the income of the Assessee by making a new addition of Rs. 2,14,56,317/- on account of Infrastructure Development fund and in penalty proceedings levied the penalty .

2. Brief facts of the case are that the Assessee had filed its return of income showing income of Rs. 10,95,595/- on dated 30.09.2011 which was processed u/s 143(1) of the Act. Subsequently, the case of the Assessee was selected for scrutiny, which resulted into making of an addition of Rs. 94,180/- on account of compounding fee, in the income of the Assessee.

2.1 The said disallowance was challenged by the Assessee before the Ld. Commissioner who vide impugned order not only sustained the addition made by the AO but also made an enhancement of Rs. 2,14,56,317/- on account of Infrastructure Development fund, to the income of the Assessee against which the Assessee preferred the instant appeal i.e. ITA No. 621 /Del/2018 which is under consideration before us .

2.2 The Ld. Commissioner also imposed the penalty to the tune of Rs. 66,29,913/- @100% of tax sought to be evaded qua enhanced income of Rs. 2,14,56,317/- as determined in quantum appeal by the ld. Commissioner. Against the levy of penalty, the Assessee also preferred the appeal which is also under consideration before us.

3. We will decide the quantum appeal i.e. ITA No. 621/Del/2018, first.

4. At the outset it was submitted by the ld. Counsel, as also appears from the impugned order that during the quantum appeal proceedings before the ld. Commissioner, the Assessee filed an application for withdrawal of the appeal, which was declined by the ld. Commissioner on the reason that there is no provision for withdrawal of appeal filed before the ldCIT(A). Ultimately the Ld. Commissioner in the absence of any reply or details whatsoever, confirmed addition of Rs. 94,180/- made by the AO in the assessment order and also enhanced the income of the assessee by a sum of Rs. 2,14,56,317/- on account of Infrastructure Development fund and also initiated penalty proceedings 271(1)(c) of the act for filing of inaccurate particulars of income.

The Assessee before us relied upon the judgment of the Hon'ble Allahabad High Court, passed in the case of Pr. CIT-1, Kanpur Vs. RB Construction (ITA No. 399/2015 decided on 09.12.2015) and contended that after request of the Assessee to withdraw the appeal, the ld. Commissioner could not have decided the same on merit. It was also claimed by the Assessee that the Ld. Commissioner sustained the addition and made the enhancement without giving any reason and without appreciating the fact that the said amount was received from the Govt. of Uttar Pradesh as an Infrastructural Development Fund, which was supposed to be used and disposed off according to the directions of Govt. of Uttar Pradesh and even otherwise the issue on the basis of which enhancement made, was never the subject matter before the AO, however the ld. Commissioner discovered a new source of income.

5. On the contrary the ld. DR heavily relied upon the orders impugned and submitted that upon the analysis of accounts in balance sheet, the first appellate authority after calling for explanation rightly made the addition as it was in continuation of the addition which was made by the AO.

6. Heard the parties and perused the material available on record. In this case two issues have cropped up:-

a. As to whether the ld. Commissioner is empowered to decide the appeal on merit while sidelining the request of the Assessee for withdrawal of the appeal.

b. *As to whether the Ld. Commissioner while deciding 1st appeal can enhance the income from a new source of income which was not considered by the Assessing Officer,*

6.1 Coming to the first issue'as to whether the ld. Commissioner is empowered to decide the appeal on merit while sidelining the request of the Assessee for withdrawal of the appeal.The Hon'ble Allahabad High Court in the case of Pr. CIT Vs. RV Construction (supra) dealt with identical issue and held *that Ld. Commissioner cannot force the Assessee to*

pursue with the appeal. Once a request has been made by the Assessee to withdraw the appeal the appellate authority has no option but to dismiss the appeal as not pressed at the instance of the Assessee. Hence, respectfully following the aforesaid decision of the Hon'ble High Court, we are of the considered opinion that the Ld. Commissioner has exceeded its power while deciding the appeal of the Assessee and not allowing withdrwal of the appeal.

7. Now coming to the second issue 'as to whether the first appellate authority (ld. Commissioner herein) is empowered to enhance the income on a particular issue which was never a subject matter before the AO. Hon'ble Delhi High Court in the case of CIT Vs. SardariLala and Co., New Delhi {95 (2002) DLT 102} dealt with the identical issue and after considering various judgment, has held as under:-

> *"Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority ……."*

7.1 From the judgment of Hon'ble High Court inference can be drawn thatwhenever thequestion of new source of income is cropped up, which was not considered by the AO, the same can be dealt with u/s 147/148 and 263 of the Act if the requisite conditions are fulfilled but not otherwise in appeal by the first appellate authority. Hence, respectfully following the decision of the Hon'ble Court, the enhancement made by the Ld. Commissioner to the income of the Assessee is liable to be deleted. Consequently, the impugned order is set aside and addition qua enhanced income deleted and the appeal of the Assesseefiled before the Ld. Commissioner is allowed to be dismissed as withdrawn.

8. Now coming to the ITA NO. 5237/Del/2018.

9. This appeal is against the impugned order passed by the ld. Commissioner u/s 271(1)(c) of the Act. As we have already deleted the addition made by the ld. Commissioner by setting aside the impugned order, consequently, the penalty do not survive and therefore the same stands deleted.

10. In the result, both the appeals filed by the Assessee stands allowed.

Order pronounced in the open court on 25/02/2022.

-Sd/-	-Sd/-
(R.K. PANDA)	(N.K. CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 25/02/2022
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi