IN THE INCOME TAX APPELLATE TRIBUNAL "B"
BENCH, MUMBAI

BEFORE SHRI G. S. PANNU, AM &
SH. SANDEEP GOSAIN, JM

आयकरअपीलसं./ I.T.A. No. 1058/Mum/2015
(निर्धारणवर्ष / Assessment Year: 2012-13)

Balraj Prakashchand Bansal, C-3 Runwal Park Sion Trombay Road, Chembur, Mumbai-400 071.	बनाम/ Vs.	DCIT 22(2), 4th floor, Tower No. 6, Vashi Railway Station complex, Vashi, Navi Mumbai-400 703
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABPB0543N		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Ashwani Kumar, AR
प्रत्यर्थीकीओरसे/Respondentby	:	ShriSuman Kumar, DR

सुनवाईकीतारीख/ Date of Hearing	:	08.03.18
घोषणाकीतारीख / Date of Pronouncement	:	19.03.18

आदेश / O R D E R

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the assesseeis against the order of Ld. CIT (Appeal) – 25, Mumbai dated 01.12.14 for AY 2012-13on the grounds mentioned herein below:-

The appeal is directed against the order passed under section 221(2) of Income-tax Act, 1961 by the Deputy Commissioner of Income-tax, 22(2), Mumbal for A.Y.20122013. Following are the grounds of appeals

- *The learned Commissioner of Income-tax, (Appeals) has wrongly upheld penalty u/s.221(1) of Income-tax Act, 1961 Rs,58,88,310 levied by the Assessing Officer.*

- *The learned Commissioner of Income-tax (Appeals) has not considered submissions made by appellant.*

- *The learned Commissioner of Income-tax (Appeals) has not given reasonable and proper opportunity before passing order.*

Your appellant craves leave to add, to alter or to withdraw any ground or grounds of appeal on or before the date of hearing.

2. The brief facts of the case as per the record of AO are that assessee is engaged in the business of Builder and Developer. The assessee had voluntarily filed return of Income for AY 2012-

13 declaring income of Rs 2,45,22,402/-and the total tax liability works out at Rs 80,20,292/-. Against this the assessee has paid taxes by way of TDS of Rs 5,65,990/-and advance tax of Rs 10,00,000/-. The assessee had paid less advance tax as was required by the IT act to be paid by him in three installments. The balance self-assessment tax payable by the assessee was Rs 64,54,300/-.

Summons u/s 131 of the I.T. Act was issued to the assessee by DCIT to pay the self assessment tax. The assessee was also provided opportunity of being heard by issuing show cause notice u/s 221(1) of the I.T.Act,1961 dated 25/02/2013. The assessee had not responded to the summons issued u/s 131 of the I.T. Act nor to the show cause notice u/s 221 (1) of the ITAct.

The assessee defaulted in paying of taxes on his return of income. Accordingly, in view of the above facts, Ld. AO held that the assessee is liable for penalty u/s 221(1) of the I.T.Act. for not paying the Self assessment tax before filing of his tax return of Income and thus imposed Penalty of. Rs.64,54,300/-

which the assessee failed to pay before filing his return of Income.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties, partly allowed the appeal of the assessee and restricted the penalty only to the extent of unpaid tax amounting to Rs. 58,88,310/-.

Now before us, the assessee has preferred the present appeal by raising the above ground.

3. The solitary ground raised by the assesseerelates to challenging the order of Ld. CIT(A) in upholding the penalty u/s 221(1) of the I.T. Act for Rs. 58,88,310/- levied by the AO.

4. At the very outset, Ld. AR appearing on behalf of the assessee submitted before us that the present case is covered by the order of Hon'ble ITAT in the case of **Heddle Knowledge Pvt. Ltd vrs. ITO, Ward-8(1)(4), Mumbai [2018] 90 taxmann.com 376(Mumbai Trib.)** for AY 2009-10, wherein the

identical ground raised in the present appeal had already been decided by Hon'ble ITAT on merits.

5. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities. We find that the identical ground raised in the present appeal had already been decided by the Coordinate Bench of Hon'ble ITAT in the case of **Heddle Knowledge Pvt. Ltd vrs. ITO, Ward-8(1)(4), Mumbai [2018] 90 taxmann.com 376(Mumbai Trib.)** for AY 2009-10on merits. The operative portion of the order of Hon'ble ITAT is contained in para no. 2 to 7 and the same is reproduced below:-

> *2. In this appeal, the solitary dispute is with regard to the penalty imposed u/s 221(1) r.w.s. 140A(3) of the Act of Rs.25,98,646/-. In brief, the relevant facts are that the appellant-assessee filed a return of income for Assessment Year 2009-10 on 30.09.2009 declaring an income of Rs.9,93,58,270/-, which was not accompanied by self-assessment tax payable at Rs.2,59,89,461/-. The Assessing Officer issued a communication to the assessee dated 18.01.2010 requiring the assessee to produce the proof of payment*

of self-assessment tax alongwith the interest thereon. In response, assessee vide letter dated 08.02.2010 sought more time to clear the liability of payment of self-assessment tax. Subsequently, on 11.02.2010, the Assessing Officer show-caused the assessee as to why the penalty u/s 221 r.w.s. 140A(3) of the Act should not be imposed for the failure of the assessee to pay the self-assessment tax within the stipulated time. The orders of the authorities below reveal that the defence of the assessee was primarily the plea of financial stringency and also the fact that the tax was ultimately deposited on 02.03.2010 before the penalty was imposed by the Assessing Officer vide order dated 08.03.2010. The Assessing Officer as well as the CIT(A) did not find the reasons advanced by the assessee to be satisfactory to mitigate the levy of penalty. As per the Assessing Officer, the provisions of Sec. 140A(3) r.w.s 221 of the Act did not provide any discretion to the Assessing Officer not to levy the penalty. Considering that the assessee had defaulted in payment of self-assessment tax within the stipulated period and was thus liable to be treated as "assessee in default" as per the provisions of Sec.140A(3) r.w.s. 221(1) of the Act, he imposed the penalty @ 10% of the delayed self-assessment tax of Rs.2,59,89,461/-, thereby resulting in a penalty of Rs.25,98,946/-. The

said penalty has further been affirmed by the CIT(A) also.

3. Against the aforesaid background, the plea raised by the assessee before us is quite different from what has been raised before the lower authorities. At the time of hearing, the learned representative has given a new twist to the controversy by pointing out that the provisions of Sec. 140A(3) of the Act, as it stood for the year under consideration, did not envisage levy of penalty for the delay in deposit of self-assessment tax. In order to appreciate the point sought to be raised by the learned representative, the following discussion is relevant. 4. Sec. 140A(3) of the Act, as it stands for the year under consideration, reads as under :- "140A(3) If any assessee fails to pay the whole or any part of such tax [or interest or both] in accordance with the provisions of sub-section (1), he shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of the tax [or interest or both] remaining unpaid, and all the provisions of this Act shall apply accordingly." 5. Our attention has been drawn to the erstwhile Sec. 140A(3) of the Act which was operative upto 31.03.1989 and was amended by the Direct Tax Laws (Amendment) Act, 1987, and the erstwhile provision read as under :- "(3) If any assessee fails to pay the tax

or any part thereof in accordance with the provisions of sub-section (1), the Assessing Officer may direct that a sum equal to two per cent of such tax or part thereof, as the case may be, shall be recovered from him by way of penalty for every month during which the default continues;

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard."

Quite clearly, in terms of the provisions of Sec. 140A(3) of the Act as existing till 31.03.1989, the Assessing Officer was empowered to levy penalty in cases where assessee had failed to pay the self-assessment tax, and such penalty was leviable for every month during which the default continued of a sum equal to 2% of such tax or part thereof. At the time of introduction of the new section by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 01.14.1989, the Explanatory notes issued by CBDT vide Circular no. 549 of 31.10.1989 contained the following, which seeks to explain the import of the substitution of new section. The relevant paragraphs of the Circular dated 31.10.1989 (supra) are reproduced as under :-

"Para 4.17 : The old provisions of subsection (3) of the section provided for levy of penalty for non-

payment of self-assessment tax, since the rate of mandatory interest for failure to pay the tax has now been increased, it is not necessary to retain this provision any more. The amending Act has accordingly omitted the said sub section (3).

4.18 : In order to vest the power of recovery of tax and interest due under this section on the basis of the return, amending Act 1987, has inserted a new sub section (3) in the section to provide that if any assessee has not paid self assessment tax and interest in full before filing the return, he shall be deemed to be an assessee in default in respect of such tax and interest."

Quite clearly, if one is to read the earlier Sec. 140A(3) of the Act and the amended section w.e.f. 1.4.1989 alongwith the explanatory notes to the amendment conjointly, it is clear that the earlier provision prescribing for levy of penalty for default outlined in Sub-section (1) of Sec. 140A(3) has yielded place to mandatory charging of interest for such default. The aforesaid legislative intent also gets strength by the fact that simultaneously the legislature prescribed for mandatory charging of interest u/s 234B of the Act for default in payment of self-assessment tax w.e.f. 01.04.1989 onwards.

6. However, a contrary position is taken by the Revenue to the effect that for having defaulted in payment of self-assessment tax within the stipulated period, assessee qualifies to be "an assessee in default" as prescribed in the amended Sec. 140A(3) of the Act and, therefore, if one is to read the same with Sec. 221(1) of the Act, the action of the Assessing Officer in imposing penalty is quite justified. In sum and substance, it is sought to be emphasised on the strength of Sec. 221(1) of the Act that the penalty is leviable so long as the default is in the nature which renders the assessee as an "assessee in default" for payment of tax. Sec. 221(1) of the Act prescribes for penalty when assessee is in default in making the payment of tax. On the face of it, the argument of the Revenue appears to be justified, so however, the same does not merit acceptance if one examines the issue in slight detail. Notably, the penalty envisaged Sec. 140A(3) in the unamended provision was on the statute alongwith the penalty envisaged u/s 221 of the Act. Once Sec. 140A(3) of the Act has been amended w.e.f. 01.04.1989, as we have seen earlier, there is no amendment of Sec. 221 of the Act and it continues to remain the same. What we are trying to emphasise is if the plea of the Revenue is to be accepted, based on the amendment to Sec. 140A(3) of the Act, it would mean

that prior to 01.04.1989 the same default invited penal provisions under two sections, namely, Sec. 140A(3) as well as Sec. 221(1) of the Act, which would appear to be peculiar and unintended. Furthermore, the intention of the legislature at the time of insertion of the amended Sec. 140A(3) makes it clear that the old provisions of Sec. 140A(3) prescribing for levy of penalty for non-payment of self-assessment tax was no longer found necessary because the said default would henceforth invite mandatory charging of interest. Ostensibly, the legislature did not envisage that consequent to the amendment, the default in payment of self-assessment tax would hitherto be covered by the scope of Sec. 221(1) of the Act. The emphasis of the Revenue is to point out that the non-payment of self-assessment tax renders the assessee "in default" in the amended provision which further prescribes that "all the provisions of this Act shall apply accordingly" and, therefore, the default is hitherto (from 01.04.1989) covered by Sec. 221(1) of the Act. In our view, the consequence of the aforesaid two expressions contained in Sec. 140A(3) are also not of the type sought to be understood by the Revenue, and rather the assessee is to be treated as an "assessee in default" for the limited purpose of enabling the Assessing Officer to make recovery of the amount of tax and interest due

and not for levy of penalty, an aspect which has been specifically done away in the new provision. Therefore, considered in the aforesaid light, in our view, the fact that the amended Sec. 140A(3) w.e.f. 01.04.1989 does not envisage any penalty for non-payment of self-assessment tax, the Assessing Officer was not justified in levying the impugned penalty by making recourse to Sec. 221(1) of the Act. Before parting, we may again emphasis that Sec. 221 of the Act remains unchanged, both during the pre and post amended Sec. 140A(3) of the Act and even in the pre-amended situation, penalty u/s 221 of the Act was not attracted for default in payment of self-assessment tax, which was expressly covered in pre 01.04.1989 prevailing Sec. 140A(3). Thus, without there being any requisite corresponding amendment to Sec. 221 of the Act in consonance with the amendments carried out in Sec. 140A(3) of the Act w.e.f. 01.04.1989, the Assessing Officer erred in levying the impugned penalty. Thus, on this aspect, we hereby set-aside the order of CIT(A) and direct the Assessing Officer to delete the penalty imposed u/s 140A(3) r.w.s. 221(1) of the Act. 7. In the result, appeal of the assessee is allowed, as above.

After having gone through the aforementioned orders, facts of the present case as well as considering the orders passed by the revenue authorities and submissions made by both the parties, we find that the identical issue has already been decided by the Coordinate Bench of Hon'ble ITAT in the case of **Heddle Knowledge Pvt. Ltd vrs. ITO, Ward-8(1)(4), Mumbai [2018] 90 taxmann.com 376(Mumbai Trib.)** for AY 2009-10 on merits. Therefore, respectfully following the decision of the coordinate bench of Hon'ble ITAT which is applicable *mutatis mutandi* in the present case, we **allow** this ground raised by the assessee.

6. In the net result, the appeal filed by the assessee stands **allowed.**

Order pronounced in the open court on 19th March, 2018

Sd/-
(G. S. Pannu)
लेखासदस्य / Accountant Member

Sd/-
(Sandeep Gosain)
न्यायिकसदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 19.03.2018
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai