IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri A. Mohan Alankamony, Accountant Member

ITA Nos.122 & 834/Hyd/2016		
Assessment Year: 2010-11		
Dy. Commissioner of Income Tax, Circle 3(1) Hyderabad	Vs.	M/s. Sanghi Industries Ltd, RR Distt PAN: AAECS5510Q
(Appellant)		(Respondent)
C.O.No.31/Hyd/2016 (Arising out of ITA No.122/Hyd/2016) AY 2010-11		
Dy. Commissioner of Income Tax, Circle 3(1) Hyderabad	Vs.	M/s. Sanghi Industries Ltd, RR Distt PAN: AAECS5510Q
Revenue by:	Sri Solgy Jose T. Kottaram, DR	
Assessee by:	Sri K.A. Sai Prasad	
Date of hearing:	23/09/2019	
Date of pronouncement:	01/10/2019	

ORDER

Per Smt. P. Madhavi Devi, J.M.

Both the appeals as well as the Cross Objections are filed against the order of the CIT (A)-Guntur, dated, 24/10/2013.

2. Brief facts of the case are that the assessee company filed its return of income for the A.Y 2010-11 on 23.09.2010 declaring total loss of Rs.2,22,41,970/- under the normal provisions and Rs.19,27,91,633/- u/s 115JB of the Act. The tax liability as per the assessee's own computation was Rs.2,74,18,745/- and after claiming credit of TDS of

Rs.18,14,935/-, the assessee determined its net aggregate liability at Rs.2,56,03,810/-.

3. The assessee filed its return of income without making payment of self-assessment tax. Therefore, the AO initiated the proceedings u/s 221(1) of the Act, by issuing a notice dated 21.01.2011, to show cause as to why the penalty u/s 221(1) should not be imposed for failure to pay taxes. The assessee company, vide letter dated 1.2.2011, submitted that the industry is in financial crunch and requested time to pay the taxes by 14.03.2011. The AO however, held that the tax liability, in question, was admitted by the assessee on its own and it is not the result of an assessment nor is it disputed. Since the assessee did not make payment of advance tax in any of the four quarters and filed the return of income without making payment of self-assessment tax, he held that the provisions of section 221(1) of the Act are attracted. He, therefore, levied penalty equivalent to 25% of the aggregate tax liability which is Rs.64,00,953/- and raised the demand accordingly.

4. Aggrieved, assessee preferred an appeal before the CIT (A), who granted partial relief to the extent of Rs.54,00,953/- and restricted the penalty to Rs.10.00 lakhs. Against the relief granted by the CIT (A), the Revenue is in appeal before us and against the confirmation of the penalty to the extent of Rs.10.00 lakhs, the assessee has also filed the cross objection before us. Thereafter, the assessee has filed the cross appeal in ITA No.834/Hyd/2016. Both the C.O and Cross Appeal are filed with delay of 792 and 892 days respectively.

5. The learned Counsel for the assessee has filed the affidavits in support of the condonation of delay petitions, stating that since the CIT (A) had granted partial relief to the assessee, and the assessee has also paid the penalty of Rs.10.00 lakhs confirmed by the CIT (A), the assessee had not filed the cross appeal or cross objection. But, since the Revenue had launched prosecution proceedings subsequently, the assessee was advised to file the cross objection the cross appeal and therefore, there is a delay of 792 and 892 days in filing of the C.O and appeal by the assessee. He also submitted that the assessee has a strong case on merits because there was a fire accident in the industry and the industry itself had to be shifted to another place due to which there was a financial crunch and subsequently the assessee had paid the entire self-assessment tax due. He, therefore, prayed that the delay in filing of the cross appeal and cross objection may be condoned. Further, he also submitted that since the relief sought in the C.O and Cross Appeal is the same, only one appeal may be considered. Therefore, we are considering the relief sought for in the C.O only.

6. The learned DR was also heard who objected to the condonation of delay.

7. Having regard to the rival contentions and the material on record, we find that the assessee had reasonable cause for not filing the appeal in time and therefore, the delay is condoned. As regards the merits of the appeal, i.e. the reasonable cause shown by the assessee for non-payment of self-assessment tax at the time of filing the return of income, we find that the CIT (A) has considered the issue at length and particularly the fact that in

August, 2010, the company had suffered a major fire accident in its premises located in Gujarat and that there was an explosion in the boiler leading to damage to the machinery and there were issues regarding liabilities which arose as a result of the accident. He also considered the insurance surveyor's report regarding the accident and the assessee's plant & machinery and also the financial crunch in the Industry, due to which the assessee, could not make payment of self-assessment tax. The CIT (A) also observed that the penalty u/s 221(1) is not automatic but is subject to the satisfaction of the AO that the default was for good and sufficient reasons. He considered the factual position of the assessee as a reasonable cause and also after considering that the assessee has made the payment of tax including interest i.e. at Rs.58,00,000/- between January and March, 2011 he deleted the penalty partly. It is seen that the CIT(A) has accepted the assessee's contention of the liabilities arising out of the major accident and also the financial crunch in the industry as a reasonable cause to delete the penalty to the extent of Rs.58.00 lakhs. Having accepted the said reason, we are of the opinion that the CIT (A) ought to have deleted the entire penalty of Rs.68,00,000/- and should not have restricted it to Rs.10.00 lakhs. Therefore, Revenue's appeal is dismissed and the assessee's cross objection is allowed.

8. Another point raised by the learned Counsel for the assessee is that after 1.4.1989, there is no provision for levy of penalty for non-payment of admitted or self-assessment tax. He brought to our attention, the CBDT Circular No.549 of 31.10.1989, wherein it is mentioned that by virtue of the introduction of sections 234A, 234B and 234C into the Act, the

provisions of section 140A were made inapplicable from such date. He also placed reliance on the decision of the Mumbai Bench of the ITAT in the case of Heddle Knowledge (P) Ltd vs. ITO reported in (2018) 90 Taxmann.com 376 wherein it has been held that after the amendment of section 140A(3) w.e.f. 1.4.1989, no penalty for non-payment of self-assessment can be levied u/s 221(1) of the Act. For the sake of clarity and ready reference, the relevant paras of the order in Heddle Knowledge Ltd are reproduced hereunder:

> *"**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 emphasise 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."

9. The learned DR was also heard on this point. We find that this issue has been extensively discussed and hence is covered in favour of the assessee by the decision of the Coordinate Bench of Mumbai (cited Supra). Respectfully following the same, we hold that, even on this ground, the penalty u/s 221(1) is not leviable as after 1.4.1989, there is no provision for levy of penalty

for non-payment of admitted tax. Thus, Revenue's appeal is dismissed and the Cross Objection filed by the assessee is allowed.

10. In the result, Revenue's appeal is dismissed and the assessee's C.O. is allowed and Cross Appeal is dismissed on account of duplication of appeals.

Order pronounced in the Open Court on 1st October, 2019.

Sd/-	**Sd/-**
(A. MOHAN ALANKAMONY) **ACCOUNTANT MEMBER**	**(P. MADHAVI DEVI)** **JUDICIAL MEMBER**

Hyderabad, dated 1st October, 2019.
Vinodan/sps
Copy to:

1 Dy. CIT, Circle 3(1) Room No.714, 7th Floor, Signature Towers, Opp: Botanical Garden, Kondapur, Hyderabad
2 M/s. Sanghi Industries Ltd, Koheda Village, Ranga Reddy Distt.501511
3 CIT (A)-Guntur
4 Pr. CIT - Guntur
5 The DR, ITAT Hyderabad
6 Guard File

By Order