

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SUNIL KUMAR SINGH (JUDICIAL MEMBER)**

**ITA Nos. 1786, 1951 & 1950/MUM/2024
Assessment Year: 2013-14, 2015-16 & 2017-18**

First Global Stockbroking Pvt. Ltd.,
Ratnam Square,
Plot No. 38/39, Sector 19A, Vashi,
Navi Mubmai-400703.

PAN NO. AAACF 0661 K

Appellant

Dy. CIT 4(1)(1),
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

Vs.

Respondent

Assessee by : Mr. Satish Mody
Revenue by : Ms. Rajeshwari Menon, Sr. DR

Date of Hearing : 08/07/2024
Date of pronouncement : 22/08/2024

ORDER

PER OM PRAKASH KANT, AM

These appeals by the assessee are directed against separate orders dated 08.02.2024, 16.02.2024, and 16.02.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2013-14, 2015-16 and 2017-18 respectively, wherein the Ld. CIT(A) has upheld the penalty levied u/s 221(1) of the Income-tax



Act, 1961 (in short 'the Act') by the Assessing Officer for delayed payment of self assessment tax.

2. Identical grounds have been raised in all the years and therefore, for brevity grounds of appeal raised by the assessee for assessment year 2013-14 are only reproduced as under:

1. The Ld. CIT Appeals has erred in confirming the order of the Assessing Officer imposing a penalty of Rs.3,75,960/- u/s 221 of the I.T. Act, 1961.

3. Briefly stated, facts of the case are that the assessee filed return of income for the year under consideration on 28.09.2013 declaring total income at Rs.118,47,210/-. The return of income filed by the assessee was processed u/s 143(1) of the Income-tax Act, 1961 (in short 'the Act') on 30.12.2014. The Assessing Officer found that the assessee was liable to pay self-assessment tax amounting to Rs.3,75,960/- but the assessee failed to pay the said self-assessment tax before filing of return of income. The Assessing Officer referred to section 140A(3) of the Act *which prescribe that is an assessee fails to pay whole or part of self assessment tax , he shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of tax remaining unpaid.* Accordingly, the Assessing Officer issued show cause notice for levy of penalty u/s 221 of the Act. However, same was not complied by the assessee and therefore, the Assessing Officer passed impugned penalty order and levied penalty of



Rs.3,75,960/- i.e. equivalent to amount of self assessment tax remaining unpaid on the date of filing return of income.

4. Before the Ld. CIT(A), the assessee submitted that the self-assessment tax of Rs.3,75,960/- could not be paid before filing of return of income due to temporary liquidity issue and subsequently inadvertently remained unpaid for two months and on realizing mistake, same was paid on 25.11.2013 voluntarily. The Ld. CIT(A) however rejected the contention of the assessee and upheld the levy of the penalty.

5. Before us, the Ld. counsel for the assessee **firstly**, submitted that there is a sufficient cause for not depositing the tax before filing of return of income. However, subsequently, the assessee has paid the self-assessment tax and notice for levy of the penalty was issued after a period of five years from the period of self-assessment tax whereas the assessee has already discharged its liability and therefore, penalty should have been dropped by the Assessing Officer. **Secondly**, the Ld. counsel for the assessee referred to the provisions of section 140A(3) of the Act post amendment by way of Direct Tax Amendment Act, 1987. He relied on the decision of the Co-ordinate Bench of the Tribunal in the case of **Hedde Knowledge Pvt. Ltd. in ITA No. 7509/M/2011 for assessment year 2009-10** and submitted that in view of amended provision of section 140A(3) of the Act, no penalty was envisaged for delay in deposit of the self-assessment tax. The Ld. counsel also relied on



the decision of the Tribunal in the case of **M/s Sanghi Industries Ltd. in ITA No. 122 & 834/Hyd/2016 and CO No. 31/Hyd/2016 (ITA No. 122/Hyd/2016)** for assessment year 2010-11 and ITA No. 6897 & 6898/Mum/2019 for assessment years 2011-12 and 2012-13, wherein the Co-ordinate Bench has followed the decision in the case of Heddle Knowledge Pvt. Ltd. (supra). The relevant finding of the Co-ordinate Bench of the Tribunal in the case of Heddle Knowledge Pvt. Ltd. (supra) is reproduced as under:

"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.u.s. 221(1) of the Act."

5.1 Thus the Co-ordinate Bench of the Tribunal referred to the Circular of the Central Board of Direct Taxes dated 31.10.1989 wherein it is pointed out that in view of the mandatory interest for failure to pay the self-assessment tax has now been increased, therefore levy of the penalty for non-payment of the self-assessment tax under old provisions of sub-section (3) of section 140 was not necessary. The Co-ordinate Bench has held that levy of penalty u/s 140A(3) of the Act has been retained only to vest power of recovery of interest due under the section and not for levy of the penalty where payment has already been done. The Co-ordinate Bench of the Tribunal (supra) has held that therefore without any requisite corresponding amendment to section 221 of the Act, the Assessing



Officer is not having any authority to levy penalty invoking section 140A(3) of the Act r.w.s. 221 of the Act. In the instant case also the penalty has been levied for delay in payment of the self-assessment tax and therefore, respectfully following the finding of the Coordinate Bench of the Tribunal in the case of Heddle Knowledge Pvt. Ltd. (supra), we set aside the order of the Ld. CIT(A) on the issue in dispute and delete the penalty levied by the AO invoking section 221 of the Act.

5.2 Since, we have already deleted the penalty in view of lack of authority, the issue of sufficient cause is rendered merely academic and therefore, we are not adjudicating upon the same. The issue in dispute involved in the remaining two appeals is identical to the issue decided in assessment year 2013-14 in ITA No. 1786/Mum/2024 and therefore, following our finding the grounds raised in other two appeals are also allowed.

6. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the open Court on 22/08/2024.

**Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 22/08/2024
Rahul Sharma, Sr. P.S.



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai