* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on November 21, 2014
Judgment delivered on December 22, 2014

\+ **ITA No. 654/2014**

COMMISSIONER OF INCOME TAX-VIII ..... Appellant
Through: Mr.Balbir Singh, Senior Standing Counsel

versus

NARESH KUMAR JAGGI ..... Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this appeal by the revenue under Section 260A of the Income Tax Act, 1961 ('Act' in short) is to the order dated March 31, 2014 passed by the Income Tax Appellate Tribunal, Delhi Bench ('Tribunal', in short), whereby the Tribunal, in cross appeals filed by the appellant-revenue and the respondent-assessee, upheld the order of the Commissioner of Income Tax (Appeals), restricting the penalty imposed under Section 140A (3) to 25%.

2. The relevant facts of the case are, the respondent-assessee filed return of income for the Assessment Year 2009-10 on 03.11.2010

declaring an income of Rs. 6,23,36,790/-, on which tax at Rs.1,26,46,875/- was due and payable after reducing the advance tax paid of Rs. 14,60,000/-. The respondent-assessee had not paid this admitted tax liability under Section 140A of the Act. The return was processed under Section 143(1) of the Act. The intimation under Section 143(1) of the Act was served upon the assessee on 02.01.2011 and the assessee was required to make the payment by 01.02.2011. The assessee did not make the payment of outstanding demand by the said date. Accordingly, a show cause notice under Section 140A(3) of the Act was served upon the assessee by the Assessing Officer vide a letter dated November 22, 2011. In the reply to the show cause notice, it was the stand of the assessee that the admitted tax of Rs. 1,41,06875/- for the Assessment Year 2009-10 stands paid by him inasmuch as Rs.14,00,000/- was paid as advance tax and the balance amount of Rs. 1,26,46,875/- was paid in the month of April, 2011 and in support of the same, he attached necessary challans. He requested that he should not be treated as in default and the action under Section 140A(3) of the Act be not initiated. The Assessing officer was of the view that nothing has come from the reply of the assessee to overcome the default committed under Section 140A(3) of the Act. According to him, the assessee had not shown and established a reasonable cause for non payment of the

admitted tax liability. The Assessing Officer referred to six judgments of the different High Courts and the Supreme Court and was of the view that in the absence of any reasonable cause for non payment of the admitted tax liability, penalty should be imposed. He imposed penalty at 100% of the admitted tax liability i.e. Rs.12646875/- or an amount equal to the unpaid tax liability.

3. The respondent assessee filed an appeal before the Commissioner of Income Tax (Appeals), who was of the following view:

> *"I have considered the arguments of the AO and rival submissions made in this regard. The contention of appellant has no forces. A plain reading of the Sec. 140A(3) states:-*
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> *91(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.)*
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> *The intention of the legislative is clear on above provisions contained in the Act. The provisions are made to ensure strict compliance of the law. This is evident from the word "shall" used in treating the assessee in default. Any other interpretation will*

defeat the very purpose of the provision. Where the Assessing Officer initiated proceedings for levy or penalty by treating the assessee as assessee in default and the assessee challenged levy of penalty under section 221 on the ground that no notice of demand under section 156 was served by the Assessing Officer, it was held that liability to pay self assessment tax arises on the basis of the return furnished by the assessee and the failure to pay tax or interest or both on the income admitted in the return, renders the assessee to be in default. Hence, there was no need to issue notice of demand.(Safari Mercantile Pvt. Ltd. Vs. CIT(2008) 21 SOT 531 (Mum). In view of the above I am of the considered opinion that once the default is committed the appellant became the assessee is default and cannot take shelter under any reason or circumstances. It is quite a vague reason that the appellant was facing financial crisis and that too without any proof and evidence. Even though the tax and interest have been paid subsequently that will not cure the defect of the assessee in default u/S 140A(3). During the appellant proceedings the appellant stated that he had informed the assessing officer about their financial crisis and inability to pay tax vide letter dated 27/08/2010 and 13/10/2010. The appellant had also requested to grant installments for payment of tax. Since the

appellant had paid the entire amount of tax before issuance of show cause the intention to pay cannot be doubted and therefore does not deserve the maximum penalty. However, the appellant cannot escape from the liability to pay penalty as the intention of the legislature regarding payment of tax is to pay as you earn. The appellant should have arranged for payment of tax as the income was earned. It is quite a vague reason that the appellant was facing financial crisis and that too without any proof and evidence. In my opinion the appellant is definitely an assessee in default and is liable to pay penalty. Since the intention of the appellant was not to evade tax and the entire tax has been paid also, the imposition of maximum penalty is not justified. In view of the above, I restrict the quantum of the penalty to the 25% of the amount levied by the AO, i.e. 25% of the tax liability of the appellant. Thus the penalty is reduced to Rs. 31,61,720/-".

4. The appellant-revenue as well as the respondent-assessee filed cross appeals challenging the order of the Commissioner of Income Tax (Appeals) dated 31.08.2012 before the Tribunal. The Tribunal held as under:

"9. We have heard both the sides, considered the material on record as well as submissions made before

the lower authorities and reiterated before this Bench in the light of the precedents relied upon by Ld. Counsel for the assessee. It is not in dispute that the assessee has earned substantial income in the year under consideration but he did not pay the due tax within the stipulated time after service of demand notice. Neither any reasonable cause has been shown nor substantiated and Ld. CIT(A) appears to have given relief of 75% of the amount of penalty imposed by the A.O. while taking a very lenient view. Considering the entirety of facts, circumstances of the case and material on record in the light of the precedents relied upon, we are of the view that relief already granted by Ld. CIT(A) is sufficient. As such, the action of Ld. CIT(A) is confirmed and resultantly, appeal of the assessee as well as of the Department are dismissed".

5. Mr.Balbir Singh, Senior Standing Counsel for the appellant-revenue would submit that there has been a clear default on the part of the assessee as he had not paid the amount due within the specified period and the penalty was rightly imposed by the Assessing Officer. He would state that no reasonable cause was shown by the assessee in not depositing the admitted amount due as tax. He would justify the order of the Assessing Officer in imposing penalty @ 100% of the tax due.

6. Having heard the learned Senior Standing Counsel for the revenue, we note, the respondent-assessee had stated, in his reply before the Commissioner of Income Tax (Appeals), that he had paid the admitted tax by 28.04.2011 before the issuance of the show cause notice by the Assessing Officer on 22.11.2011. In addition the assessee was liable to pay interest for the delayed payment. The delay in payment of tax as stated and argued by the assessee was due to the financial hardship or constraint due to huge losses suffered in share investments. In support, the assessee had filed the details of the bank statements and other relevant details before the Assessing Officer to explain his financial hardship, which it was stated was beyond his control. For the said reasons, the assessee was not in a position to pay the admitted tax within time. Though, the CIT (Appeals) and the Tribunal have not accepted the plea of financial hardship, the said authorities primarily were of the opinion that there was no intention on the part of the assessee to avoid or intentionally delay payment of taxes. The assessee had paid the entire tax but belatedly. He had also paid interest. This belated payment was made voluntarily and without resort to any coercive steps. Payment was made in April 2011, whereas the Assessing Officer waited and issued notice only in November 2011. The CIT (Appeals) and the Tribunal reduced the penalty to 25% of the amount levied by the Assessing Officer. We

have not examined the question of financial hardship, as the assessee is not in appeal. The only aspect which falls for our consideration is whether the CIT (Appeals), so also the Tribunal were justified in restricting the penalty imposed under Section 140A(3) of the Act to 25%.

7. Suffice to state, it is a case of 'proportionality'. The Supreme Court in the case of ***Coimbatore District Central Cooperative Bank vs. Coimbatore District Central Cooperative Bank Employees's Association & Anr.*** [2007] 4 SSC 669 on the aspect of 'proportionality' in paras No.18 and 34 has held as under:-

> *"18. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise - the elaboration of a rule of permissible priorities.*
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> *xxx*
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> *34. As observed by this Court in M.P. Gangadharan and Anr. v. State of Kerala, the constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix in each case. It cannot be put in a straitjacket*

formula. It must be considered keeping in view the doctrine of flexibility. Before an action is struck down, the Court must be satisfied that a case has been made out for exercise of power of judicial review. The Court observed that we are not unmindful of the development of the law that from the doctrine of "Wednesbury unreasonableness", the Court is leaning towards the doctrine of "proportionality". But in a case of this nature, the doctrine of proportionality must also be applied having regard to the purport and object for which the Act was enacted.

8. In the case in hand, it is to be seen whether penalty of 25% restricted by the CIT (Appeals) and the Tribunal is justified or the penalty must be the one imposed by the Assessing Officer. We note, the CIT (Appeals) while restricting the penalty to 25% was of the view that there was no intention to evade tax. The conclusion of the CIT (Appeals) which is upheld by the Tribunal reducing the quantum of penalty is justified. Such a finding is keeping in view the fact that the assessee paid advance tax of Rs.14,00,000/-. After the return was processed under Section 143(1) of the Act, the intimation was sent to the assessee on 01.02.2011 calling upon him to make payment by 01.02.2011. The assessee deposited the tax due by April 28, 2011, which is much before the date of issuance of notice under Section 140A(3) of the Act by the Assessing Officer i.e. November 22, 2011. Further, we are of the view,

when the authorities were justified in restricting the penalty to 25% based on cogent material and finding, more so when it is discretionary, as is clear from the reading of Section 221 of the Act which is reproduced below:-

> ***"Penalty payable when tax in default.***
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> ***221.*** *(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :*
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> ***Provided*** *that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :*
>
> ***Provided further*** *that where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.*
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> *Explanation.—For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the*

fact that before the levy of such penalty he has paid the tax.

(2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded."

9. The discretion so exercised is within the mandate of law and based on good, valid and cogent ground. If at all, the Assessing Officer was rather harsh, and did not give due credence to several mitigating factors, including the payment made. Contumacious and maladroit conduct, though not relevant while deciding the question of reasonable cause, are relevant consideration when we examine the question of penalty. Revenue perhaps harbours the belief that maximum penalty must be imposed in all cases, which is not the legislative mandate. No substantial question of law arises for our consideration.

The appeal is thus dismissed.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

DECEMBER 22, 2014
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