IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI

BEFORE SHRI SHAMIM YAHYA (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA Nos.6897 & 6898/MUM/2019
(Assessment Years: 2011-12 & 2012-13)

Dy. Commissioner of Income-Tax, Central Circle – 6(3), Room No. 1905, 19th Floor, Air India Building, Nariman Point, Mumbai – 400 021	Vs.	M/s Karanja Terminal and Logistic Pvt. Ltd. 153, Makers Chambers III, Nariman Point, Mumbai – 400 021
PAN No. AADCK9709Q		
(Revenue)		**(Assessee)**

Assessee by : Shri Mihir Naniwadekar, A.R
Revenue by : Shri Ajey Malik, D.R

Date of Hearing : 06/09/2021
Date of pronouncement : 21/10/2021

ORDER

PER RAVISH SOOD, J.M:

The captioned appeals filed by the revenue are directed against the respective orders passed by the CIT(A)-54, Mumbai, for A.Y. 2011-12 and A.Y. 2012-13, dated 30.08.2019 and 29.08.2019, respectively, which in turn arises

from the respective orders passed by the A.O under Sec. 221(1) r.w.s 140A(3) of the Income Tax Act, 1961 (for short 'Act') for the aforementioned years. As a common issue is involved in the captioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal filed by the revenue for A.Y 2011-12, wherein, the impugned order has been assailed by the revenue on the following solitary ground before us:

> "1. On the facts and circumstances of the case and in law, the ld. CIT(A) erred in deleting the penalty of Rs.3,92,70,237/-, levied u/s 221 r.w.s. 140A(3) of the I.T. Act."

2. Briefly stated, the assessee company had e-filed its return of income for A.Y 2011-12 on 12.03.2012, declaring an income of Rs. 6,86,61,138/-. Thereafter, the assessee on 19.04.2012 filed a revised return of income, declaring an income of Rs. 9,64,16,230/-. The return of income filed by the assessee company was initially processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. Assessment was thereafter framed by the A.O, vide his order passed u/s 143(3), dated 28.02.2014, and the income of the assessee was determined at Rs.9,66,11,510/-.

4. On a perusal of the records, it was observed by the A.O that the assessee had failed to pay its admitted self-assessment tax liability of Rs.3,92,70,237/-. On being confronted, the assessee vide its reply dated 11.03.2015 submitted that the failure to discharge its self-assessment tax liability was due to financial constraints that were primarily triggered by delay in commencement of its project, viz. Karanja Port development project. Further, it was submitted by the assessee, that its solitary source of income i.e the interest receivable from the NBFC's was accounted for on an accrual basis and was not received by it. Also, the assessee in order to buttress its bonafides to deposit the admitted tax liability, had submitted before the A.O that it was desperately trying to negotiate with the NBFC's to release the funds and accrued interest. However, the A.O did not find favour with the aforesaid explanation of the assessee. It was observed by the A.O that since the assessee had voluntarily declared the income in its return of income, therefore, the failure on its part to pay till date its admitted tax liability on the returned income was not acceptable by any stretch of logic and imagination. Accordingly, the A.O holding the assessee as being in default of the aforesaid outstanding tax liability, vide his order passed under Sec. 221(1) r.w.s 140A(3) dated 20.03.2015 imposed a penalty of Rs.3,92,70,237/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Before the CIT(A) the assessee assailed the validity of the order passed by the

A.O imposing penalty u/s 221(1) r.w Sec. 140A(3) of the Act. It was the claim of the assessee that post amendment of Sec. 140A(3) w.e.f 01.04.1989 without there being any amendment in Sec. 221(1) of the Act no penalty could be levied for non-payment of self-assessment tax. In support of his aforesaid contention the assessee had relied upon two orders of the ITAT, Mumbai, viz. (i).Heddle Knowledge (P) Ltd. Vs. ITO (2018) 169 ITD 304 (Mum).; and (ii). Balraj Prakashchand Bansal, ITA No. 1058/Mum/2013, dated 19.03.2018. Apart from that, it was submitted by the assessee that as the failure on its part to pay the amount of self-assessment tax was due to serious financial constraints, and, it had due to unavailability of funds failed to discharge its admitted tax liability, therefore, no penalty could have validly been imposed. After deliberating at length on the contentions advanced by the assessee the CIT(A) found favour with its aforesaid explanation and vacated the penalty imposed by the A.O.

6. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. It was submitted by the ld. Departmental Representative (for short 'D.R') that as the assessee had failed to deposit its admitted tax liability, therefore, the A.O had rightly imposed penalty under Sec. 221(1) r.w Sec. 140A(3) of the Act. In order to buttress his aforesaid claim the ld. D.R took us through the relevant statutory provisions. It was submitted by the ld. D.R that as per sub-section (3) of Sec. 140A of the Act, the assessee

having failed to pay its admitted self-assessment tax liability was deemed to be an "assessee in default", and thus, rightly subjected to penalty by the A.O under sub-section (1) to Sec. 221 of the Act. Further, rebutting the observations of the CIT(A) that the assessee had failed to pay its admitted tax liability due to financial constraints, it was submitted by the ld. D.R that the said observation was factually incorrect as the assessee had sufficient funds parked as deposits with the bank. It was, thus, submitted by the ld. D.R that the CIT(A) had gravely erred in law and the facts of the case in setting-aside the penalty imposed by the A.O under Sec. 221(1) r.w Sec. 140A(3) of the Act.

7. Per contra, the ld. Authorized Representative (for short 'A.R') for the assessee relied on the order of the CIT(A). It was submitted by the ld. A.R that in the absence of any corresponding amendment to Sec. 221(1) of the Act commensurate with the amendment carried out in Sec. 140A(3) w.e.f 01.04.1989, the A.O had erred in law in imposing the impugned penalty. In support of his aforesaid contention the ld. A.R had relied on the orders of the ITAT, Mumbai, viz. (i). Heddle Knowledge Pvt. Ltd. vs. ITO (2018) 169 ITD 304 (Mum); and (ii). Balraj Prakashchand Bansal, ITA No. 1058/Mum/2013, dated 19.03.2018. Alternatively, it was submitted by the ld. A.R that as the assessee was in no financial position to discharge its admitted tax liability, therefore, the the CIT(A) considering the financial impediments of the assessee had in all

fairness vacated the impugned penalty imposed by the A.O. It was submitted by the ld. A.R that as there was no infirmity in the view taken by the CIT(A), therefore, the appeal filed by the revenue being devoid and bereft of any merit was liable to be dismissed.

8. We have heard the ld. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them. Briefly stated, the assessee company had developed a sea port at Karanja in the State of Maharashtra and does not have any other business. Income declared by the assessee in its return of income for the year under consideration i.e A.Y. 2011-12 comprised only of the interest income that had accrued on the funds that it had invested with NBFCs by placing ICD's. The source of the ICD's was the subscription of share capital of approximately Rs. 450 crores that was received by the assessee from its parent company, viz. Mercantile Ports & Logistics Ltd. [formerly known as SKIL Ports & Logistics Ltd. Guernesey (SPLL-G)] for its project, viz. development of Karanja Port, which, however, was delayed due to various regulatory issues.

9. As stated by the assessee, the interest accrued on the aforesaid ICD's with the NBFC's were erroneously taken by it to the credit of its Profit and loss account. In order to fortify his aforesaid claim, it was submitted by the ld. A.R

that adopting a similar approach the assessee had offered the interest on ICD's with the NBFC's as income in the succeeding years, i.e A.Y 2013-14, A.Y 2014-15 and A.Y 2015-16, which, on appeal, had been held by the Tribunal vide its consolidated order passed in ITA NO. 2472, 2473 & 5752/Mum/2018, dated 20.03.2019 as an incorrect declaration of income as the same was in the nature of a capital receipt. In its return of income for the year under consideration, the assessee company is stated to have offered the aforesaid interest income under a misconception of law as part of its taxable income instead of declaring it as a capital receipt. It is further stated that as the aforesaid return of income was belatedly filed, therefore, a revised return of income to rectify the aforesaid mistake could not be filed. Assessment was thereafter framed by the A.O vide his order passed u/s 143(3), dated 28.03.2014, wherein after making a miniscule addition of depreciation the income of the assessee was assessed at Rs.9,66,11,510/-. It is the claim of the assessee that not a single rupee from the interest receivable was received by it. As per the return of income filed by the assessee company the self-assessment tax had remained payable and was not paid at the time of filing the return of income. However, the assessee company had eventually made the payment of the self-assessment tax over the period i.e 31.03.2011 to 04.01.2016. As the assessee had failed to deposit the self-assessment tax at the time of filing of its return of income, therefore, the A.O had vide his order passed under Sec. 221(1) r.w.s 140A(3) of the Act, dated

20.03.2015, had held the assessee as being an "assessee in default" and imposed a penalty of Rs.3,92,70,237/-. On appeal, the CIT(A) vide his order dated 29.11.2016 invoked the provisions of Sec. 249(4) of the Act and, observing, that the assessee had not paid the self-assessment tax, dismissed the appeal in limine. On further appeal, the Tribunal vide its order passed in ITA No. 1697/Mum/2017, dated 20.12.2018 restored the matter to the file of the CIT(A), with a direction to re-adjudicate the same after affording an opportunity of being heard to the assessee.

10. In the course of the set-aside proceedings, the CIT(A) vide her order dated 30.08.2019 found favour with the contentions advanced by the assessee, that, as per the post-amended sub-section (3) of Sec. 140A of the Act no penalty for non-payment of self-assessment tax could have been imposed on it. Also, the CIT(A) was of the view that considering the serious financial constraints due to which the assessee at the time of filing of its return of income, and for some period thereafter, had failed to discharge its admitted self-assessment tax liability, no penalty u/s 140A(3) r.w.s 221(1) ought to have been imposed. Backed by her aforesaid observations the CIT(A) had vacated the penalty imposed by the A.O.

11. Before us the revenue has assailed the order of the CIT(A), on the ground, that she had erroneously concluded that as per the post-amended sub-section

(3) to Sec. 140A of the Act, i.e as have been made available on the statute vide the Direct Tax laws (amendment) Act, 1987, w.e.f 01.04.1989, no penalty could have validly been imposed for non-payment of self-assessment tax by the assessee. Also, the observation of the CIT(A) that in the backdrop of the serious financial impediments due to which the assessee had failed to deposit the self-assessment tax no penalty was called for in its hands has also been challenged before us.

12. We shall first take up the claim of the revenue that the CIT(A) had gravely erred in law and the facts of the case in concluding that no penalty under sub-section (3) to Sec. 140A could have validly been imposed on the assessee for its failure to discharge its admitted self-assessment tax liability. Admittedly, the provisions of Sec. 140A(3) had been amended vide the Direct Tax Laws (Amendment) Act, 1987 w.e.f 01.04.1989. 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."*

On the other hand, the pre-amended Sec. 140A(3) of the Act which was operative upto 31.03.1989 and was amended by the Direct Tax Laws (Amendment) Act, 1987, 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;*
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> *Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard."*
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> *(emphasis supplied by us)*

Notably, as per the pre-amended provisions of Sec. 140A(3) of the Act as were available on the statute 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. The purpose and intention leading to the amendment of sub-section (3) to Sec. 140A, as was made available on the statute vide the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 01.14.1989, has been explained by the CBDT in its Circular no. 549 of 31.10.1989, which reads 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).*
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> *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."*

Notably, on a conjoint reading of the pre-amended Sec. 140A(3) i.e upto 31.03.1989 and the post-amended Sec.140A(3) w.e.f. 1.4.1989 a/w the

explanatory notes provided in the CBDT Circular no. 549 of 31.10.1989 explaining the import of the substitution of the new section, we find that the earlier provision that prescribed for levy of penalty for default outlined in sub-section (1) of Sec. 140A(3) had yielded place to mandatory charging of interest for such default. Our aforesaid conviction is all the more fortified by the fact that the legislature had simultaneously prescribed for mandatory charging of interest u/s 234B of the Act for default in payment of self-assessment tax i.e w.e.f. 01.04.1989 onwards. However, we find that there is no amendment of Sec. 221(1) of the Act and it continues to remain the same. It is in the backdrop of the aforesaid position of law, that, we shall deal with the claim of the revenue that as the assessee had failed to pay the self-assessment tax that it was obligated to do as per sub-section (1) of Sec. 140A of the Act, therefore, it was to be "deemed to be an assessee in default" in respect of the said amount, and all the provisions of the Act shall apply accordingly. Backed by its aforesaid conviction, it is the claim of the revenue, that as the assessee was "deemed to be in default" for having failed to deposit the self-assessment tax, it, thus, satisfied the conditions for bringing it within the realm of the penal provisions contemplated in Sec. 221(1) of the Act.

13. Admittedly, the aforesaid claim of the revenue on the very face of it appeared to be very convincing, however, we are afraid that the same does not

merit acceptance. Notably, the penalty envisaged in pre-amended Sec. 140A(3) i.e upto 31.03.1989 was available on the statute a/w the penalty envisaged u/s 221(1) of the Act. Although, Sec. 140A(3) had been amended vide the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 01.14.1989, however, Sec. 221 (1) had remained the same. Now, if the aforesaid claim of the revenue is to be accepted, then, it would mean that prior to the amendment the same default i.e failure on the part of the assessee to deposit self-assessment tax invited penalty under two sections, namely Sec. 140A(3) as well as Sec. 221(1) of the Act, which in our considered view does not merit acceptance. In fact, the clear intention of the legislature to dispense with the penal provisions that were earlier contemplated in Sec. 140A(3) i.e upto 31.03.1989, for the reason, that the rate of interest for non-payment of self-assessment tax had been increased, can beyond any doubt be gathered from the 'Explanatory notes' to the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 01.14.1989 promulgated by the CBDT vide its Circular no. 549 of 31.10.1989. Also, the very purpose of retaining the term "deemed to be an assessee in default in respect of the tax", as explained by the 'Explanatory notes' in the CBDT Circular No. 549 (supra), was for the limited purpose to vest the power of recovery of tax and interest due under the section on the basis of the return of income filed by the assessee. Accordingly, the claim of the revenue that the availability of the term "deemed to be an assessee in default" under the post-amended Sec. 140A(3) sufficed to bring an assessee who had not paid its

self-assessment tax in the realm of the penal provisions envisaged in Sec. 221(1) of the Act does not merit acceptance. We, thus, in terms of our aforesaid deliberations are of the considered view that as observed by the CIT(A), and rightly so, the assessee under the post-amended Sec. 140A(3) of the Act could not have been subjected to penalty under Sec. 221(1) r.w.s 140A(3) of the Act, for its failure to have paid the self-assessment tax. Our aforesaid view is supported by the order of the coordinate benches of the Tribunal, viz. (i). Heddle Knowledge (P) Ltd. Vs. ITO (2018) 169 ITD 304 (Mum); and (ii). Balraj Prakashchand Bansal ITA No. 1058/Mum/2013, dated 19.03.2018, by relying on which the CIT(A) had held, and rightly so, that no penalty as per the post-amended sub-section (3) to Sec. 140A r.w Sec. 221(1) of the Act could have been imposed on the assessee for its failure to deposit its admitted self-assessment tax liability. For the sake of clarity the observations of the CIT(A) are culled out as under :

> 9.9. In view of the facts and circumstances of the case and the judicial precedents supra, it is held that the assessee could not pay the SA tax on time due to financial stringency and the delay was not intentional. The Id. Counsel has also submitted before me two interesting decisions of the jurisdictional Hon'ble Mumbai ITAT Decision in the cases of Meddle Knowledge Pvt. Ltd. [169 ITD 304] order dated 19.01.2018 and Balraj Prakashchand Bansal in ITA No. 1058/Mum/2013 order dated 19.03.2018.
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> The Hon'ble Mumbai ITAT in the case of Heddle Knowledge Pvt. Ltd. [169 ITD 304] held as under;
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> > "In terms of the provisions of section 140A(3) as existing till 31-3-1989, 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 per cent of such tax or part thereof. At the time of introduction of the new section by the Direct Tax Laws (Amendment] Act, 1987 with effect

from 1-4-1989, the Explanatory notes issued by CBDT vide Circular No. 549 of 31-10-1989 seeks to explain the import of the substitution of new section.

Quite clearly, if one is to read the earlier section 140A(3) of the Act and the amended section with effect from 1-4-1989 along with 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 section 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 under section 234B of the Act for default in payment of self-assessment tax with effect from 01-04-1989 onwards. [Para 5]

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 section 140A(3) of the Act and, therefore, if one is to read the same with section 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 section 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.

Section 221(1) of the Act prescribes for penalty when assessee is in default in making the payment of tax. On the face of if, 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 under section 140A(3j in the unamended provision was on the statute along with the penalty. envisaged under section 221 of the Act, Once section 140A(3) of the Act has been amended with effect from 01-04-1989, there is no amendment of section 221 of the Act and it continues to remain the same. What is being emphasised is if the plea of the revenue is to be accepted, based on the amendment to section 140A(3) of the Act, it would mean that prior to 01-04-1989 the same default invited penal provisions under two sections, namely, section 140A(3) as well as section 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 section 140A{3) makes it clear that the old provisions of section 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 section 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 section 221(1) of the Act.

The consequence of the aforesaid two expressions contained in section 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, the fact that the amended section 140A(3) with effect from 01-04-1989 does not envisage any penalty for nonpayment of self-assessment tax, the Assessing Officer was not justified in levying the penalty by making recourse to section 221(1) of the Act. Before parting, it may again be emphasised that section 221 remains unchanged, both during the pre and post amended section 140A(3)

of the Act and even in the pre-amended situation, penalty under section 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 section 140A(3).

Thus, without there being any requisite corresponding amendment to section 221 of the Act in consonance with the amendments carried out in section 140A(3) of the Act with effect from 01-04-1989, the Assessing Officer erred in levying the penalty. Thus, on this aspect, the order of Commissioner (Appeals) is set aside and the Assessing Officer is directed to delete the penalty imposed under section 140A(3) read with section 221(1) of the Act. [Para 6]

In the result, appeal of the assessee is allowed. [Para 7]"

Further, the Hon'ble ITAT, Mumbai, in the case of Balraj Prakashchand Bansal in ITA No. 1058/Mum/2013 dated 19.03.2018 held as under:

"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 vs. (TO, Ward-8(l)(4), Mumbai [2018] 90 taxmann.com 376(Mumbai Trib.) for AY 2009-1 on 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 18.0!.2010 requiring the assessee to produce the proof of payment of self-assessment fax 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 .fax 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 fo 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 deay in deposit of self-assessment tax. In order to appreciate the point sought to Sec. 140A(3) of the Act, as it stands for the year under consideration, reads as under "140A(3) 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 (I), 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. !40A(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 lax 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;
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> Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard.
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> 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 of31.10.1989 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 :-
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> > "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).
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> > 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 alngwith 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 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.ef 01.04.1989 onwards.”

The ld. Counsel has relied on the decision of the Bombay High Court in the case of Bank of Baroda vs. H. Srivastava [256 ITR 385], wherein the Hon’ble Court has held as under:

> "16. At this juncture, we cannot resist from observing that the judgment delivered by the Tribunal was very much binding on the AO. The AO was bound to follow the judgments in its true letter and spirit. It was necessary for the judicial unity and discipline that all the authorities below the Tribunal must accept as binding the judgment of the Tribunal. The AO being inferior officer vis-a-vis the Tribunal, was bound by the judgment of the Tribunal and the AO should not have tried to distinguish the same on untenable grounds. In this behalf, it will be out of place to mention that in the hierarchical system of Courts which exists in our country, it is necessary for each lower tier including the High Court to accept loyally the decisions of the higher tiers. It is inevitable in hierarchical system of Courts that there are decisions of the supreme appellate Tribunals which do not attract the unanimous approval of all members of the judiciary. But the judicial system only works if someone is allowed to have the last word, and that last word once spoken is loyally accepted'. The better wisdom of the Court below must yield to the higher wisdom of the Court above as held by the Supreme Court in the matter of CCE vs. Dunlop India Ltd. AIR 1985 SC 330."

Further Hon'ble Supreme Court in the case of Kamlakshmi Finance Corporation Ltd. 55 ELT 433 (SC) has after deciding the matter of that case has given ratio decidendi :

> "The principles judicial discipline require that the orders of the higher appellate authorities shall be followed unreservedly by the subordinate authorities"

9.10. In view of the facts and circumstances discussed in the preceding paras, the financial stringency which has been established and the judicial precedents referred to supra, the penalty levied by the Ld. A.O to the tune of Rs. 3,92,70,237/- is deleted."

We, thus, in terms of our aforesaid deliberations, and respectfully following the view taken by the coordinate benches of the Tribunal in the aforementioned orders, uphold the view taken by the CIT(A) that no penalty under the post-amended sub-section (3) to Sec. 221(1) r.w. Sec. 140A(3) could have been imposed on the assessee for non-payment of its self-assessment tax liability.

14. We shall now take up the claim of the revenue that the CIT(A) had erred, in concluding, that considering the serious financial constraints due to which the assesseee had failed to pay its self-assessment tax at the time of filing of its return of income, and for a period thereafter, no penalty under sub-section (3) to

Sec. 221(1) r.w.s 140A of the Act could even otherwise have been imposed. As observed by us hereinabove, it is a matter of fact borne from the record that the assessee's returned income comprised only of interest income that had accrued on the funds that were invested by it in NBFC's by placing ICD's. As noticed by us hereinabove, the source of the aforesaid deposits was the subscription of share capital of Rs.450 crores (approx) that was received by the assessee from its parent company, viz. Mercantile Ports and Logistics Ltd. [formerly known as SKIL Ports & Logistics ltd) Guernesey (SPLL-G)] for a specific purpose i.e development of port at Karanja, Maharashtra. However, as the aforesaid project was delayed due to various regulatory issues, therefore, the assessee had for the intermittent period invested the aforesaid idle funds in NBFC's by placing ICD's. Interest accrued on the aforesaid ICD's from NBFC's were credited by the assessee in its profit and loss account. As observed by us hereinabove, though the assessee during the year under consideration had interest accrued of Rs.9,04,92,507/- on the aforesaid ICD's from NBFC's, however, not a single rupee from the said amount was received by it. Insofar the aforesaid factual position is concerned, we find that the same had neither been controverted by the lower authorities nor rebutted before us by the ld. D.R. Notably, the CIT(A) considering the aforesaid factual position had found favour with the claim of the assessee that, it was but for the acute financial stringency which was further supplemented by absence of any other source of income that had triggered the

failure on its part to discharge its admitted self-assessment tax liability. Backed by the aforesaid factual position, the CIT(A) was of the view, that considering the serious financial constraints to which the assessee was subjected, no penalty under sub-section (3) to Sec. 221(1) r.w.s 140A(3) could have been imposed on it. On a perusal of the order of the CIT(A), we find that she had accepted the claim of the assessee that due to its serious financial constraints it had failed to pay its admitted self-assessment tax liability at the time of filing of the return of income, and some period thereafter, observing as under:

> "9.4 The appellant company has developed a sea port at Karanja in the state of Maharashtra; per se it does not have any other business. The income declared by it in the Return of income filed for AY. 2011-12, is arising out of interest accrued on the funds invested in NBFC by placing ICD. The source of the ICD were from subscription of share capital of approximately Rs.450 crores received from the parent company Mercantile Ports & Logistics Ltd (formerly known as SKIL Ports & Logistics Ltd Guernsey (SPLL-G)); which were for the Karanja Port project which were available as the same was delayed due to various regulatory issues.
>
> **9.5** In support of the contention of the appellant company of acute financial stringency, it has been pointed out that the company does not have any other source of income and although income declared is on accrual basis, till date not a single rupee from the interest so receivable has actually been received out of total interest receivable from NBFC to the tune of Rs,9,04,92,507/-. The appellant company has also relied on the following case laws:
>
> CIT vs. Bikaji Ramchandra 183 ITR 478 BOM
> CIT vs. Chembara Peak Estates Ltd 183 ITR 471
> Kerala Jaipur Electro Pvt Ltd 183 ITR 476 Rajasthan
> CIT vs. Dadu Vala & Co. (1998) 170 ITR 491 (Raj)
> CIT vs. Smt. Vijayanthimala (1977) 108 ITR 882 (Mad.)
> CIT. VS Munni lal & Co. (2006) 157 taxman 466 (Raj)
> CIT vs. Raunaq & Co Pr. LTd (1983) 140 ITR 407, 411 (Del)
> CIT V. Chembara Peak Estates Ltd.(1990) 183 ITR 471 474 (ker)
> CIT Vs. Dadu Wala & Co. (1988) 179 ITr 491 494 (Raj)
> Mahadev Ram s. RTA (1973) Tax LR 2227 (Ori)
> Brajalal Bank v. State of Tripura (1990) 79 STC 217, 226 (Gauh)
>
> 9.6 The submissions of the Id. Counsel have been carefully considered. The Ld.AO without giving any reason or commenting on the financial stringency position of the

assessee levied penalty of 100% of the tax payable. Before me, the assessee had again reiterated the financial stringency faced by the company alongwith evidences. The Form 26AS of the assessee for the relevant assessment year is a proof that the assessee has not received the interest which was receivable from the NBFCs. The audited financial statements of the assessee for the relevant assessment year show the interest receivable from NBFCs at 44,23,74,6127- which have not actually been received. The company has not incurred any revenue expenditure. The sources of funds are only share capital and loans. These factors clearly show that the company did not have any liquidity or sources to make the payment of SA tax. Therefore, the company's plea that the SA tax could not be paid due to financial stringency is accepted.

9.7 Also, to be noted, though not relevant to the issue at hand is the fact that the interest income which has been considered by the assessee as income during the AYs. 2011-12 and 2012-13 has been deleted by the Hon'ble ITAT for AYs. 2013-14 to 2015-16 considering the interest income as capital receipt."

9.8 The Hon'ble High Court of Karnataka in the case of Ramchandra Pesticides (P.) Ltd. Vs. Commissioner of Income Tax (2006) 285 ITR 45 (Karnataka) has held as under:

> "In the light of the language employed in section 140A and the various judgments, it is clear that though section 140A uses the word 'shall', the entire provision must be read harmoniously and reasonably. This being a taxing provision and a penal provision, the one has to give effect to a plausible interpretation which is in favour of the citizen, where two plausible views are permissible. Otherwise, it will lead to anomaly and hardship to the assessee. So construed, section 140A(3) provides a reasonable opportunity of being heard to the assessee which is mandatory. Once the law mandates that an opportunity is to be given to the assessee to explain the default, if the explanation offered by the assessee is found to be satisfactory, then the question of imposing penalty would not arise. In other words, an amount of discretion is vested with the authority to impose or not to impose the penalty based on explanation offered by the assessee. He is empowered in his discretion in appropriate cases to exonerate the assessee from the liability to pay any amount towards penalty if he is satisfied, on consideration of the fact and circumstances, that there was sufficient or reasonable cause for the assessee for his inability to pay the entire amount or a part thereof within the time stipulated under law. To hold it otherwise, would render the proviso to section 140A{3) redundant. Therefore, the penalty is not an automatic consequence of a default and the penalty' will follow only in the event of the assessee's failing to show a reasonable cause for nonpayment of the tax as required by section J40A. [Para 9] A reading of section 140A(3) makes it clear that if any assessee fails to pay the tax, the UO 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. Therefore, a power is conferred on the ITO to impose penalty for delayed payment of tax. However, proviso to the said sub-section makes it clear 'that before levying such penalty, there is an obligation imposed on the assessing authority to hear the assessee with regard to the imposition of penalty. It also makes it clear that a wide discretion is conferred on the assessing authority either to levy or not to levy the penalty and even if he decides to levy penalty, it could be in a portion and not the entire two per cent of the tax payable. If in a given case, the assessee shows sufficient cause for non-payment of the tax within the time stipulated, it is open to the assessing authority to waive the levy of penalty, [Para 10] In the instant case, as the Tribunal had on the basis of the cause shown held that the assessee had a sufficient reasonable cause for not paying the tax within the time prescribed, the said finding recorded by the Tribunal had already been accepted by the revenue and the same was not challenged before the Court. The Tribunal had refused to exercise its discretion in

> favour of the assessee only on the ground that it had no power to waive the penalty. The said approach of the Tribunal was contrary to section 140A(3). [Para 11]
>
> Therefore, no penalty was leviable upon the assessee."

The above observations are u/s. 140A(3) as it stood before the amendment w.e.f from 01.04,1989. However, the provision of section 221 on this aspect are identical and, therefore, the judicial pronouncement of Karnataka High Court is relevant for the case of the appellant herein.

The above contention stands fully supported by the Hyderabad ITAT decision rendered in the matter of Sheetal Refineries Ltd. [153 ITD 577], where the ITAT has held that

> "Further, in spite of financial crunch assessee has declared large amount of profits and the taxes due were also admitted. Due to severe cash crunch, assessee could not discharge tax liability immediately. However, the same was discharged as stated by the assessee bef.ore the Ld. CIT(A), Penalty under section 221(1) is not automatic and mandatory. The proviso to section 221 (1) states that where assessee proves to the satisfaction of the A.O. default for good and 'sufficient reasons, no penalty shall be levied under this section. In fact this aspect was examined by the Ld. CIT(A) and came to the conclusion that there are good and sufficient reasons for the assessee not to discharge the self-assessment tax at the particular point of time due to financial crunch. However he restricted the penalty to 10% instead of deleting the whole of the amount. We are of the opinion that assessee had made out a good case in its support and the facts do indicate that there are good and sufficient reasons for assessee's delay in payment of taxes. Relying on the various case law which are extracted by the Ld. CIT(A) in para-7 of the order, it can be concluded that penalty under section 221 f 1J is not a mode of recovery of taxes and this punitive action can be taken in case of willful default. Assessee is not a willful defaulter and it has sufficient reasons to not to discharge the tax liability at the time of filing return, but within period of 7 months discharged entire admitted tax. In fact the cheques issued in the month of March, 2011 were encashed by the A.O. in the months of March and June,2011. In-these circumstances, we are of the opinion that assessee cannot be considered as willful defaulter. Since it has bonafide reasons, we are of the opinion that penalty under section 221(1) is not attracted on the facts of the case, Therefore, we delete the penalty partly confirmed by the Ld. CIT(A). Accordingly, assessee's appeal is allowed and consequently Revenue appeal has to be dismissed as there is no merit in Revenue contentions."

9.9. In view of the facts and circumstances of the case and the judicial precedents supra, it is held that the assessee could not pay the SA tax on time due to financial stringency and the delay was not intentional."

We have given a thoughtful consideration to the aforesaid observations of the CIT(A) and concur with the view therein taken by her. Admittedly, it is a matter of fact borne from the record that the assessee company except for the aforesaid interest income on the ICD's with NBFC's had no other source of income. Insofar the availability of the aforesaid funds invested with the NBFC's are concerned,

we find that as the same were sourced from the parent company, viz. Mercantile Ports and Logistics Ltd. [formerly known as SKIL Ports & Logistics ltd) Guernesey (SPLL-G)] for a specific purpose i.e for Karanja port development project, and were invested by it with the NBFC's, therefore, the same were not freely available to the assessee for discharging its admitted tax liability. Be that as it may, we are in agreement with the view taken by the CIT(A) that as the assessee was in no financial position to pay the self-assessment tax at the time of filing of return of income, therefore, no penalty under Sec. 221(1) r.w.s 140A(3) could have been imposed on it. We, thus, in terms of our aforesaid observations concur with the view taken by the CIT(A) that considering the serious financial constraints of the assessee due to which it had failed to discharge its admitted self-assessment tax liability at the time of filing its return of income, and for a period thereafter, no penalty under Sec. 221(1) r.w.s 140A(3) could have even otherwise be imposed on it.

15. Backed by our aforesaid observations, finding no infirmity in the view taken by the CIT(A) we uphold his order. Accordingly, the appeal filed by the revenue being devoid and bereft of any merit is dismissed.

ITA No. 6898/Mum/2019
A.Y. 2012-13

16. As the facts and the issue involved in the present appeal remains the same as were there before us in the appeal of the revenue for the immediately

preceding year i.e ITA 6897/Mum/2019 for A.Y. 2011-12, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposing off the present appeal. Accordingly, the appeal filed by the revenue for A.Y. 2012-13 in ITA No. 6898/Mum/2019 is dismissed on the same terms.

17. Resultantly, both the appeals of the revenue are dismissed.

Order pronounced in the open court on 21.10.2021

Sd/-	Sd/-
(Shamim Yahya)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai;
Dated: 21.10.2021
PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai