BEFORE COMMISSIONER OF INCOME TAX, GURGAON

TEAM CODE-

IN THE MATTER OF

RITIKA VERMA & ORS **…APPELLANT**

V.

ASSESSING OFFICER **…RESPONDENT**

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

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LIST OF ABBREVIATIONS

&	And
¶	Paragraph
AIR	All India Reporter
Anr.	Another
AO.	Assessing Officer
CIT	Commissioner of Income Tax
Ed.	Edition
Govt.	Government
Hon'ble	Honourable
i.e.	That is
ITO	Income Tax Officer
Ltd.	Limited
No.	Number
Ors.	Others
PAN	Permanent Account Number
Pvt.	Private
SC	Supreme Court
SCC	Supreme Court Cases
TDS	Tax Deducted at Source
u/s	Under Section
v.	Versus
Vol.	Volume

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12.	Dr. Vinod K Singhania & Dr Kapil Singhania, Diract Taxes Law and Practice,(Taxman) Edn 52nd 2015

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1.	All India Reporter
2.	High Court on Income Tax
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4.	Oxford Advanced Learners Dictionary, (7th ed., 2008)

E. Statute, Rules Referred

1.	Income Tax Act, 1961
2.	Income Tax Rules, 1962

STATEMENT OF JURISDICTION

THE APPELLANT HAS APPROACHED THE COMMISSIONER OF INCOME TAX INVOKING SECTION 246A (r)[1] OF THE INCOME TAX ACT, 1961.

Appealable orders before Commissioner (Appeals).
246A. (1) Any assesse aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against—
a) an order against the assessee, where the assessee denies his liability to be assessed66 under this Act 67, or an intimation under sub-section (1) or sub-section (1B) of section 143, where the assessee objects to the making of adjustments,] or any order of assessment under subsection (3) of section 143 or section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed.

STATEMENT OF FACTS

For the sake of brevity and convenience of this Hon'ble Commissioner (Appeals) the facts of the present case are summarise as follows:

1. The NDLR Airline, wholly owned by Tanda group started in the middle of a major growth period but at such a time when the oil prices were climbing. The Airline tried the full service model promising handsome salary packages for its employees. Ritika Verma, an Air hostess in rival airlines is now hired by Tanda group.
2. The service agreement consists of clause, as to the employer agreed not to deduct the Tax at source (TDS) on salary payable to her and in lieu of the fact that she would be promoting the business of the NDLR Airlines. The previous year, her basic salary was Rs. 50,000 pm and DA of Rs. 60,000 pm. She was even given a 3BHK bungalow by the Employer alongwith HRA of Rs. 15000 pm. While working as an Air Hostess in the airlines, the assesse had also received a sum of Rs. 60,000 as incentive bonus.
3. Ritika due to occupational hazard hardly got the time to fulfil her obligation under the Income Tax Laws as she could not file the ITR on time due to similar reasons. Thereby, the Assessing officer issued a notice to her under Section 142(1) of the Act. After getting the notice, she requested her employer Gopal Tanda to file the ITR for her. On 30th November, 2015 he filed the same and signed on her behalf. Since the ITR could not be filed without PAN card details, he mentioned his own details.
4. The Assessing officer on the basis of ITR of Ritika file under Section 142(1) again served a notice under Section 142(2) to Ritika asking her to report at his office and clarify her position on the various claims and discrepancies in ITR. Though she missed the meeting with AO, but mailed her reply claiming a Tax exemption for HRA and that the incentive bonus is not taxable under the head of Income from salary and further claimed deduction of Rs. 29,045 as expenditure incurred for earning the incentive bonus. She remained silent about her employer filing the ITR on her behalf and quoting his PAN card.
5. The angry AO went for Best Judgement under Sec. 144, rejected all claims and imposed heavy penalty of Rs. 20,000 along with 3 months imprisonment and six months to Gopal Tanda with fine of Rs. 10000. The matter is now before Commissioner of Appeals, Gurgaon for hearing.

STATEMENT OF ISSUES

I. **THE BEST JUDGEMENT GIVEN BY THE ASSESSING OFFICER WAS IN ACCORDANCE WITH THE LAW.**

II. **THE ASSESSING OFFICER WAS JUSTIFIED IN IMPOSING PENALTY AND IMPRISONMENT.**

SUMMARY OF ARGUMENTS

I. THE BEST JUDGEMENT GIVEN BY THE ASSESSING OFFICER WAS IN ACCORDANCE WITH THE LAW.

The Assessing officer has followed all the procedure which was in accordance with law, Section 139 (1) creates an obligation on a person whose income is above a prescribed limit to file the income tax return within the prescribe date. The word "shall" maintained in the section is used, which emphasize and creates an obligation on the person to file his return. Sec-144 envisages full compliance with the terms of the notice. In the instant case the return has not been filed properly and this cannot be said to be the full compliance with the terms of notice u/s 142 (1) and thus best judgment assessment is justified. It is submitted that AO made all the efforts to seek the return but because of the evasive nature and dilatory attitude of the assessee the return became an invalid return. Thus, following his statutory obligation u/s 144 AO was justified in making best judgment assessment.

II. THE ASSESSING OFFICER WAS JUSTIFIED IN IMPOSING PENALTY AND IMPRISONMENT.

Section 276CC of the Act provides that if a person wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (*i*) of sub-section (1) of section 142, he shall be punishable. The invalid return does not have any legal consequences (discussed above) and thus it can be said that the Assessee failed to furnish return consequently attracting the prosecution u/s 276CC of the Act. The Best Judgment was passed on the presumption that the ITR has been filed after the requisite deduction by the employer. The order passed for levying of fine and imprisonment u/s 276B on Gopal Tanda was for the reason that he failed to pay the tax to the credit of Central Government, as the Assessing Officer was not aware that the TDS has not been deducted by the employer in the first place, thereby justifying his order of imprisonment.

ARGUMENTS ADVANCED

I. THE BEST JUDGEMENT GIVEN BY THE ASSESSING OFFICER WAS IN ACCORDANCE WITH THE LAW.

1. The term 'assessment' in field of taxation law has a definite meaning. This term is comprehensive and may include varied ranges of activities and procedures.[2] Essentially the assessment would evidently mean determination of the quantum of taxable turnover and also the quantum of taxable amount payable by the tax payer.[3] Assessment is made on the basis of returns and accounts furnished by an Assessee in support thereof but on an estimate made by the assessing authority which may, of course, be based inter alia on the accounts and documents furnished by the Assessee.[4]

A. ASSESSEE DID NOT COMPLY WITH THE NOTICE ISSUED U/S 142(1)

2. Section-144 of Income Tax Act, 1961 (hereinafter referred to as 'Act') provides for the best judgment assessment. According to Section 144 the Assessing Officer (hereinafter referred to as 'AO') has an obligation to give his best judgement if any person-
   - *(i)* Fails to make the return required under sub-section (1) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or
   - *(ii)* fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or
   - *(iii)* Having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,
3. It is submitted that, it is a statutory obligation on the AO to make judgment best to his judgment upon non-fulfilment of any of the above mentioned condition. The provisions are mandatory in the nature.[5] The use of word 'shall' by the legislature clearly shows the intent to put an obligation on the AO. The clear import of section-

[2] Kalavati Devi Harlalka v. CIT, (1967)3 SCR 833.
[3] MRV. Rao, Concepts in Taxation, The Law Publishers, Madras.
[4] Bharat Wood Products Co v. CST, (1987) 64 STC 107 (Del).
[5] Gangadhar Baijnath v. CIT, (1976) 102 ITR 662 (All).; see also, CIT v. Laxminaraain Badridas, (1937) 5 ITR 170 (PC).

144 is that on the assessee's committing any one of the defaults mentioned therein the Assessing Officer is bound to make the assessment to the best of his judgment.[6]

4. The four circumstances specified in the section are alternative and not cumulative. Any one of the four defaults referred to in section 144 would entail a best judgment assessment.[7] Even in the case of *CIT v. Segu Buchiah Setty*[8], Supreme Court held that these conditions are alternative and not cumulative.
5. In the instant case the Assessing officer has followed all the procedure which was in accordance with law, Section 139 (1) creates an obligation on a person whose income is above a prescribed limit to file the income tax return within the prescribe date. The word "shall" maintained in the section is used, which emphasize and creates an obligation on the person to file his return. Appellant has delayed around four month in filling the income tax return without any justified reason for delayed.
6. The AO have given notice to the assesse in Section 142 (1) seeking her return to be filed under section 139 (1) on which the assesse has acted very carelessly and she asked her employer to filed her income tax return on behalf of her without any authorization or proper delegation. Non-compliance with the notice u/s-1422(1) by not furnishing the return as required entails a best judgment assessment.[9] Where the assessee failed to file return within due date nor sought extention of time and it also failed to respond to notices u/s 142(1), it was held that assessee is not entitled to any relief in writ petition against the best judgment assessment.[10]
7. Sec-144 envisages full compliance with the terms of the notice. In the instant case the return has not been filed properly and this cannot be said to be the full compliance with the terms of notice u/s 142(1) and thus best judgment assessment is justified. Failure to comply with all the terms of notice includes where compliance is only partial and not full.[11]

B. ASSESSEE FILED AN INVALID RETURN

8. It is pertinent to note that the employer while filing the return deliberately maintained his own PAN number and also he signed the return file himself. To cure these

[6] *Supra* Note-4.
[7] D.R. Puttanna v. CIT, (1974) 96 ITR 333 (Mys); Behari Lal Chatterji v. CIT, (1934) 2 ITR 377 (All).
[8] (1970) 77 ITR 539 (SC).
[9] Raghunatha Das v. CIT, AIR 1932 Cal 411, see also Muhammad Hayat v. CIT, (1931) 5 ITC 159 (Lah); Ramaswami Chettiar v. CIT, (1929) 3 ITC 290 (Mad).
[10] Hotel Shah & Co. v. Asst. CIT, (1999) 238 ITR 799 (Ker).
[11] Tejmal Bhojraj v. CIT, (1952) 22 ITR 208 (Nag); see also, Bhimraj Panna Lal v. CIT, (1957) 32 ITR 289 (Pat); Tulsi Das Nagin Chand v. CIT, (1938) 6 ITR 385 (Lah).

discrepancies the AO have again issued a notice under section 142 (2) asked the appellant to appear before the AO and clarify her position on certain claims and discrepancies. The appellant have wilfully and maliciously concealed the fact that the return was signed by the employer and he quoted his own PAN number. This makes the return invalid.

9. A return which is not signed by the assessee and is not in accordance with the terms of mandate of Sec-140 is an invalid return.[12] A return which is unverified is invalid one and, in the eyes of law, is no return.[13] A return which is unsigned or not properly signed is not merely an inaccurate or incomplete return but it is not a return at all.[14] A return signed and verified by an agent without having specific authority is *non est*.[15]
10. In above maintained section it is necessary on the part of the AO to give an opportunity to be heard to the assessee, however under section 144 Proviso it is maintain that if the assessment has been filed under section 142 (1) the it is not necessary for the AO to give any opportunity to be heard to the assessee as the notice itself creates an opportunity to being heard to the assessee which is compiled in the instance case. It is not the duty of the assessing officer to adduce proof in support of its estimate.[16]
11. It is pertinent to note that Assessee did not make any effort to rectify the defect after the notice u/s 142(2) thus rendering the return invalid and an invalid return is ought to be ignored.[17] It is submitted that AO made all the efforts to seek the return but because of the evasive nature and dilatory attitude of the assessee the return became an invalid return. Thus, following his statutory obligation u/s 144 AO was justified in making best judgment assessment.
12. Therefore, the best judgment assessment done by AO is indeed in accordance with law and justified in the instant case.

[12] CIT v. Harjinder Kaur (2009) 180 Taxman 23 (P&H).
[13] CIT v. Dr. Krishan Lal Goyal (1984) 148 ITR 283 (P&H).
[14] Behari Lal Chatteri v. CIT, (1934) 2 ITR 377 (All).
[15] Raja Sayyid Mahomed Mehdi v. CIT, (1935) 3 ITR 202 (Oudh); see also, Special Manager, Court of Wards v. CIT, (1950) 18 ITR 204 (All).
[16] *Supra* Note-4.
[17] Eapen Joseph v. CIT, (1987) 64 CTR (Ker) 324.

II. THE ASSESSING OFFICER WAS JUSTIFIED IN IMPOSING PENALTY AND IMPRISONMENT.

A. THE PENALTY AND IMPRISONMENT IMPOSED ON THE ASSESSEE IS JUSTIFIED.

13. In the instant case, the assessee failed to furnish returns in due time and thus AO went for best judgment u/s 144 and also imposed penalty for failure to furnish returns and comply with the notices u/s 271 and initiated prosecution for failure to furnish returns u/s 276CC.
14. From the perusal of section 271 Explanation 1[18] it is evident that when AO has issued the notice to assessee under section 142 (2) asking her to clearly the various discrepancy in the return, the assessee fails to offer the explanation the AO is justified in his reason that there is a concealment of income and he can levy penalty three times of the amount which sought to be evaded.[19]
15. Section 276CC of the Act provides,
16. If a person wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (*i*) of sub-section (1) of section 142, he shall be punishable,
    (i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
    (ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.
17. In the instant case, AO issued notice u/s 142(1) seeking her return to which she filed her return through her employer without proper authorisation and false PAN card details.

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[18] Section 271. Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—
(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

[19] Rajnikant Gamanlal Gilitwala v. The ITO, Ahmedabad, ITA No. 2320/Ahd/2015; Brooke Bond India Limited v. Commissioner of Income Tax, West Bengal-III, Calcutta, AIR 1997 SC 1336, (1997) 140 CTR (SC) 598.

18. It is submitted that a return which is not signed by the assessee and is not in accordance with the terms of mandate of Sec-140 is an invalid return[20], also it has been discussed above. The invalid return does not have any legal consequences (discussed above) and thus it can be said that the Assessee failed to furnish return consequently attracting the prosecution u/s 276CC of the Act. In the case of *Haji Ghulam Hussain v. CIT*[21] the assessee filed an invalid return and The Deputy Commissioner (Appeals) held it as a failure to furnish returns and imposed penalty. This view was upheld by the Hon'ble High Court of Kerala.
19. Following the above dictum, it can be said that Assessee failed to furnish return as she filed an invalid return and failed to correct it subsequently. Thus, the imprisonment awarded is justified in the eyes of law.

B. THE ASSESSING OFFICER WAS JUSTIFIED IN IMPOSING PENALTY AND IMPRISONMENT ON GOPAL TANDA.

20. The Service Agreement as entered between the Employer on behalf of Tanda Group and Ritika Verma (hereinafter referred to as 'Assessee'), includes such clause wherein the employer agreed not to deduct Tax at source (TDS) on the salary payable to the assessee. This agreement in itself is in contravention to the statutory obligation on the employer to deduct tax at source on payment of salary as provided under Section 192 of the Act, which reads as- 'Any person responsible for paying any income chargeable under the head of salaries 'shall' at the time of payment, deduct income tax.' This agreement itself is unlawful under Section 23 read with Section 24 of the Indian Contract Act, 1872.
21. Further, the employer while filing the ITR on behalf of the assessee with the prior knowledge and intention furnished wrong information including the false PAN details. The Assessing Officer served notice in regard to the filing of the ITR u/s 142(1) and for clarifying the position on various claims and discrepancies u/s 142(2), but on the non-compliance of such notices, the Assessing Officer went for Best Judgment as provided u/s 144 with the available documents under his possession at the time of assessment.
22. It is pertinent to note, that the Assessing Officer during such procedure for assessment, takes into account the relevant material available in the due course for

[20] CIT v. Harjinder Kaur (2009) 180 Taxman 23 (P&H).
[21] (1953) 23 ITR 309 (All).

which it could not be attributed that the Officer have the knowledge of such agreement of the non-deduction of TDS. The Best Judgment was passed on the presumption that the ITR has been filed after the requisite deduction by the employer. The order passed for levying of fine and imprisonment u/s 276B on Gopal Tanda was for the reason that he failed to pay the tax to the credit of Central Government, as the Assessing Officer was not aware that the TDS has not been deducted by the employer in the first place, thereby justifying his order of imprisonment.

23. Further, the intent of the Legislature to use 'shall' in Section- 192, ponder upon the mandate for deducting such tax, thereby leaving no room for discretion. In the case of *Chhogmal Chiranji Lal v. CIT*[22] Tribunal held that the payer is under obligation to deduct the tax until a declaration in form no 15G/15H is received and in the event that such form is not received till the end of financial year, the failure to deduct tax would amount to violation of section 192.
24. Whereupon, the failure to deduct tax under the said section would render a person liable to penalty under section 201 read with section 221 and would also constitute an offence under section 276B of the Act.[23] If a person fails to deduct tax, then under Section 201 of the Act, he can be treated as an Assessee in default. Therefore, failure to deduct tax at source under Section 195 may attract various penal provisions.[24] *Mens Rea* is not requisite ingredient of offence u/s 276B.[25]
25. The appellant as an employer statutorily bound to deduct an amount from his salary as per the above provisions.[26] Furthermore, in the instant case appellant while filing return on behalf of the appellant with knowledge and intentionally quoted false PAN number. Section- 272B provides that a person quoting false PAN number wherever required is liable for the penalty of Rs 10,000.
26. Thus, it can be said that the AO in the given facts is justified in imposing penalty and imprisonment.

[22] (2002) 257 ITR 51 (Raj).
[23] A. N. Aiyars, Indian Tax Laws,2009, Pg- 879.
[24] Vodafone International Holdings v. Union of India, 2009 (4) Bom CR 258.
[25] DCIT v. Modern Motor Works (1996) 220 ITR 415 (P&H).
[26] Rajesh Tiwari and Ors. v. Nanda Kishore Roy, 2011 (1) ACR 582 (SC).

PRAYER

Wherefore in the light of facts presented, issues raised, arguments advanced and authorities cited, the Counsels on behalf of the Respondent humbly pray before this Hon'ble Commissioner (Appeals) that it may be pleased to adjudge and declare that:

1. The Appeal is dismissed.

Or pass any other order that the court may deem fit in the light of equity, justice and good conscience and for this Act of kindness of Your Lordships the Respondent shall as duty bound ever pray.

Sd/- ________________________

Counsels for the Respondent.