Before the Hon'ble Commissioner (Appeals) the facts of the present case are summarise as follows:

STATEMENT OF FACTS

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 IT (Appeals) for hearing.

STATEMENT OF ISSUES

I. THE BEST JUDGMENT DONE BY ASSESSING OFFICER IS NOT IN ACCORDANCE WITH LAW.

II. THE PENALTY AND IMPRISONMENT IMPOSED BY ASSESSMENT OFFICER IS NOT LAWFUL.

II. THE BEST JUDGMENT DONE BY ASSESSING OFFICER IS NOT IN ACCORDANCE WITH LAW.

The provision relating to the best judgment as laid down under Section-144, provides that Assessment Officer shall make the assessment to the best of his judgment where the assesse has failed to make the return required. Though there is compliance with the notice issued u/s 142(1) which is evident from the fact that when AO issued notice u/s 142(1), appellant no.1 complied thereupon and filed the return through her employer. When the AO does not accept the return as correct and complete, he is bound to serve a notice on

the assesse u/s 143(2) giving the assesse chance to justify his return and if AO does not issue notice under the said provision and proceeds to make the best judgment assessment in non-compliance with the notice u/s 142(1), such assessment cannot stand.

III. THE PENALTY AND IMPRISONMENT IMPOSED BY ASSESSMENT OFFICER IS NOT LAWFUL.

The role of AO is restricted only to determine the tax liability under section 144 and not to impose the penalty, hence the best judgement for assessment in which AO impose penalty was invalid, beyond his statutory power and contrary to the provision of the act. Under Section 273B it is a mandate by legislature that there cannot be any penalty if the person proves that there was reasonable cause for the said failure. Section- 273B provides that notwithstanding, anything containing in Section- 271C, no penalty shall be imposed

on the person if he justifies his reasonable cause. Mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assesse. AO went beyond the capacity entrusted upon under the provisions of the Act and thus the action taken by him is illegal and liable to be set aside.

I. THE BEST JUDGMENT DONE BY ASSESSING OFFICER IS NOT IN ACCORDANCE WITH LAW.

1. The provision relating to the best judgment as laid down under Section-144, Income Tax Act, 1961 (hereinafter referred to as 'Act') provides that Assessment Officer shall make the assessment to the best of his judgment where the assesse has failed to make the return required under Sec-139 (1) and has not made a return u/s 139 (4) or a revised return u/s 139 (5) and also where there has been a failure to comply with the terms of notice u/s 142 (1).

A. THE BEST JUDGEMENT ASSESSMENT WAS PASSED WITHOUT FOLLOWING PROCEDURES.

2. In the instant case, there is compliance of the notice issued u/s 142 (1) which is evident from the fact that when Assessing Officer (herein after referred as AO) issued notice u/s 142 (1), appellant no.1 complied thereupon and filed the return through her employer. Thus, in the given facts the assessment upon best of his knowledge was not warranted.2

3. Further, after the compliance of notice issue u/s 142 (1), another notice u/s 142 (2) was issued to the appellant. The Officer under Sec-142 (2) has been vested with the power to make the required enquiry to obtain information about income and loss of the assessee. In the instant case appellant was served with the notice under the said section and the appellant communicated her reply to the AO and clarified all the claims and deductions with respect to her income.

Thus, under no circumstances AO was required to pass the judgment based on best of his judgment.

4. Also, if it is assumed that there AO was of the opinion that there were defects in the return filed by the appellant then he was required to intimate the assessee of any such defect and would have given an opportunity to rectify the defect by a notice u/s- 139(9).

Section- 139(9) provides that where AO considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify such defect in return.

5. A perusal of Sub-section (9) of Section 139 of the 1961 Act leaves no room for doubt that in case of a defective return, the AO is required to afford an opportunity to

assessee to rectify the defect.
As held by this Court in *State of U.P. v. Jogendra Singh*

it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context and that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command.

6. Also, this principle was reiterated in the case of *Shri Rangaswami, The Textile Commissioner and Ors. Vs. The Sagar Textile Mills (P) Ltd held as*

"If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves

in that behalf and circumstances for exercise of authority are shown to exist."

7. In the case of *Seeyan Plywoods v. ITO8*, the assessment order passed by the AO without giving an opportunity to rectify the defect in the return within the statutory period prescribed in that behalf cannot be sustained and that is liable to be set aside. In the instant case AO did not follow this statutory obligation, instead the Assessment Officer went straight to assess upon best of his judgment.

8. In the case of *Avon Sales Corporation v. ITO9*, ITAT Delhi while setting aside the best judgment said that, Assessee was never informed of any defects in return of income nor was any opportunity given for rectifying defects. Hence return filed by assessee would be defective return but not an invalid return. In the case at hand, the assessee was also not given opportunity to rectify the defect and thus best judgment assessment is not justified.

9. It is pertinent to note that u/s 148 a notice is to be issued before making assessment, reassessment or re-computation if the AO has reason to believe that income has escaped assessment but in the instant case AO did not issue any such notice before making assessment u/s 144.10

10. Also, when the AO does not accept the return as correct and complete, he is bound to serve a notice on the assessee u/s 143(2) giving the assessee chance to justify his return and if AO does not issue notice under the said provision and proceeds to make the best judgment assessment in non-compliance with the notice u/s 142(1), such assessment cannot stand.

11. The best judgment assessment made u/s 144(1)(b) was held not justified without issuance of a notice u/s 143(2) as the failure to comply with the terms of the notice u/s 142(1) was stated to be due to the reasons beyond the assessee's control. In such circumstances, the principle of *audi altrem*

partem **was held to operate and, therefore, order passed without hearing the assessee was not justified.**

12. Thus, without following any of the procedures discussed above the AO is not justified in passing an *ex parte* assessment order u/s 144.

At this point, it should be noted that power vested to AO u/s 144 is not an arbitrary or discretional power. It must be based on relevant materials and such power cannot be exercised at the sweet will and pleasure of the concerned authorities.

13. While making best judgment assessment the authority has to be fair and honest14 and must be restricted to the circumstances of the case and not any other factor. The AO should not be influenced by a desire to punish the assessee for the default which attracts the operation of this section, however culpable such default might be.

14. In the case of *CIT v. Laxminarain Badridas16*, Privy Council held that,

“*The Officer to make as assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly or vindictively, because he must exercise judgment in the matter.*”

15. The above discussed principle has been reiterated by Supreme Court in the case of *State of Kerala v. Velukutty*.17 IN exercising the quasi-judicial function in making the best judgment assessment the assessing authority has to proceed to decide the matter before him in a fair and reasonable manner upon properly ascertained facts and circumstances after conforming to the principle of natural justice.18 In the instant case it is evident from the fact that best judgment assessment passed by the AO is

vindictive in nature and he was influenced by his anger. Thereby, it is clear that AO had the opportunity to seek clarification for the appellant on various instances but instead of doing so he proceeded with the best judgment and he went beyond best judgment and awarded penalty and imprisonment also. It shows that the assessment was not based on the best of his judgment but was influenced by his anguish.

16. Upon the perusal of Sec-144 it can be said that it is only meant for assessment based on the best of his judgment and it is not to use as a penal power to impose penalty and imprisonment. In the instant case AO has gone beyond the assessment and imposed penalty and going further even awarded imprisonment. Thus the best judgment done by AO in the instant case is not in accordance with the law.

17. In the instant case, AO while making assessment upon best of his judgment has

not recorded reasons. However, as an appeal lies against the best judgment assessment, the order should disclose the basis because the higher authorities must know the ground on which assessment rests.19 Thus it can be concluded that the best judgment assessment passed by the AO was not warranted in the instant case and it is not in accordance with law.

II. THE PENALTY AND IMPRISONMENT IMPOSED BY ASSESSMENT OFFICER IS NOT LAWFUL.

A. SECTION- 144 DOES NOT VEST POWER OF IMPOSING PENALTY ON ASSESSING OFFICER

1. In the instant case, the AO reasoned his best judgment assessment by imposing penalty on the Assesse, (Appellant- 1) and fine on Gopal Tanda (Appellant- 2) along with imprisonment of 3 months and 6 months respectively.

It is submitted that Section-144 of Income Tax Act, 1961 provides for best judgment assessment. On the perusal of the provision it can be said that Section-144 only entitles the AO to make assessment with the documents and details he possess.

2. However, in the instant case AO went for best judgment under section-144 and imposed penalty and fine along with imprisonment. This is abuse of power by AO as he is not authorised to impose any penalty and fine under section- 144 as the said section limits the power to make assessment only.

3. Penalty proceeding are different from assessment proceeding and independent there form. The fact that certain additions made in the assessment proceedings would not

automatically justify the revenue to impose penalty.20

The Supreme Court in the case of *Jain Bros v. UOI*21construed that although penalty has been regarded as an additional tax, but penalty proceedings are not essentially a continuation of the proceedings relating to the assessment where a return has been filed.22 Assessment proceedings and penalty proceedings are two separate and distinct proceedings.

4. The Supreme Court in the case of *Commissioner of Income Tax, West Bengal I, and Anr. V Anwar Ali*24, reiterated that the penalty proceedings are altogether different from the assessment proceeding. The court stated that assessment is required for the imposition of tax on the assesse, whereas

"the penalty is to provide a deterrent against reoccurrence of default on the part of the assessee. Section 28 (1) (c) is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest."

5. Thereby the role of AO is restricted only to determine the tax liability under section 144 and not to impose the penalty, hence the best judgement for assessment in which AO impose penalty was invalid, beyond his statutory power and contrary to the provisions of the Act.

B. PENALTY IMPOSED BY AO IS UNLAWFUL

1. That the AO erred by imposing imprisonment on Appellant- 2, as there is no such provision rendering imprisonment, under the Act, for not deducting the TDS. U/s- 271C of the Act, it is provided that a person who fails to deduct the tax at source

will be liable for penalty which is equal to the amount of tax which such person failed to deduct or pay.25 Under no provision of the Act a person failing to deduct the TDS can be awarded imprisonment.

2. It was held that conviction for failure to deduct tax at source pending in appeal would render such conviction invalid.26 Also, it was held that there is no provision for

prosecuting non-deduction of TDS and 271C is certainly applicable to a complaint for failure to deduct tax at source, prosecution is not valid.27

3. Further, Section- 271 (2) of the Act provides that the said penalty will be imposed by the Joint Commissioner. In the instant case, AO himself has imposed fine and imprisonment which is illegal and is liable to be set aside as by virtue of Section-271C power of imposing penalty vests with the Joint Commissioner and there is no imprisonment for non-deduction of TDS.

4. That if the penalty imposed on the Appellant- 2, is for quoting false PAN Number under section-272B (2) then also it is pertinent to note that no opportunity to be heard was given to the appellant as provided under Section-272B (3) thus order stand to be vitiated and non-observance of principle of natural justice would certainly vitiate the order.

5. Importantly, the return filed by the appellant without proper particulars including the signature and PAN details does not become an invalid return. Where a return has not been signed by a person who is competent to sign the return, the defect in such return can be cured u/s 292B.

6. Furthermore, Under Section 273B it is a mandate by legislature that there cannot be any penalty if the person proves that there was reasonable cause for the said failure. Section- 273B provides that notwithstanding, anything containing in Section- 271C, no penalty shall be imposed on the person if he justifies his reasonable cause. This section incorporates the principle of natural justice as well as mens rea in the Act. In the instant case the AO has not given opportunity to the appellant to prove the reasonable cause and thus violated the mandate of Section- 273B thus the order would be liable to be vitiated.29

7. While dealing with the aspect of Mens rea in relation to Sec.276C of the I.T. Act, the Supreme Court in the case of *Gujarat Travancore Agency v. CIT30*, held that: "There can be no dispute that having regard to the provisions of Sec. 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of

the penalty, which is punitive, no sentence can be imposed under that provision unless the element of *mens rea* is established."

8. Thereupon, in the light of cases and relevant provisions discussed, it can be said that the AO went beyond the capacity entrusted upon under the provisions of the Act and thus the action taken by him is illegal and liable to be set aside.

PRAYER

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

1. The appeal is allowed.

2. **The decision of the AO to be set aside and order of a fresh assessment be granted.**

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 Appellants shall as duty bound ever pray.

***S*d/-**

Counsels for the Appellants