

**आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**

**BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND**

**SHRI C.N. PRASAD, JUDICIAL MEMBER**

**आयकर अपील सं /I.TA No.4358/Mum/2015**

**(निर्धारण वर्ष / Assessment Year: 2015-16**

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|--|---------------------|--|
| M/s. Manish Tower Co-Operative Hsg Soc.Ltd., Jay Prakash Road, Andheri (W), Mumbai-400 053 | <b>बनाम/</b><br>Vs. | The DCIT (TDS), Centralized Processing Unit Cell TDS Ghaziabad U.P. -201 010 Through ITO tds 1(3)(4) |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.AAAAM 6288P  |                     |  |
| <b>(अपीलार्थी /Appellant)</b>  | ..                  | <b>(प्रत्यर्थी / Respondent)</b>   |
| अपीलार्थी ओर से/ <b>Appellant by:</b>  |                     | None   |
| प्रत्यर्थी की ओर से/ <b>Respondent by:</b>   |                     | Shri N. Sathya Moorthy   |
|  |                     |  |

**सुनवाई की तारीख / Date of Hearing : 20.07.2016**

**घोषणा की तारीख /Date of Pronouncement : 23.09.2016**

**आदेश / ORDER**

**PER C.N. PRASAD, JM:**

This appeal is filed by the assessee against the order of the Ld. CIT(A)-59, Mumbai dated 18.05.2015 pertaining to assessment year 2015-16.

2. The assessee has raised following grounds in its appeal:

- 1.1. *On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income-tax (Appeals) i.e. [CIT(A)] erred in confirming the action*

*of Assessing Officer in levying the fees amounting to Rs.16,000/- u/s.234E of the Income Tax Act, 1961 ('the Act') for default /delay in filing of TDS statement.*

*1.2. The CIT(A) erred in confirming the action of the AO in levying the fees u/s.234E of the Act in the following respects:*

*1.2.1 In not appreciating the fact that provisions of section 200A of the Act for processing TDS statements does not enable levying of Fees for default / delay in furnishing TDS statement u/s.234E of the Act at the time of processing of TDS statements and issuance of Intimation u/s.200A in respect thereof.*

*1.2.2. In not appreciating the fact that provisions of section 200A of the Act amended by Finance Act, 2015 to include levy of fees u/s.234E of the Act at the time of processing of TDS statements u/s. 200A of the Act is applicable from prospective date i.e. w.e.f. 01.06.2015. Accordingly, fee u/s.234E cannot be levied prior to 01.06.2015.*

*1.2.3 In not appreciating the fact that provision of section 204 of the Act defining the 'Person Responsible for Paying in reference to the provision of section 190 to 203 of the Act. Accordingly, no person has been made responsible for paying late fees under the provision of section 234E of the Act.*

*1.2.4. In not appreciating the fact that levy in the nature of fee is unreasonable and unconstitutional.*

*1.2.5. In not appreciating the fact that when the TDS is deducted and paid in time, delay in filing TDS E'return do not cause any loss to the revenue in respect of Tax Collection.*

2. None appeared on behalf of the assessee inspite of notice issued to the assessee. Therefore, we heard the Ld. Departmental Representative and disposed off this matter ex parte on merit.

2. Brief facts are that the Assessing Officer while passing intimation u/s.200A of the I.T. Act charged late filing fee in respect of quarterly statement of TDS in Form No. 26Q.

5. The assessee preferred an appeal before the Ld. CIT(A). However, the Ld. CIT(A) dismissed the appeal of the assessee holding that the issue is covered by the decision of the Hon'ble Bombay High Court in the case of Rashmikant Kundalia Vs Union of India dated 9.2.2015.

8. We have heard the Ld. Departmental Representative and we find that a similar issue has arisen in a bunch of appeals namely M/s. Kash Realtors Pvt. Ltd & Others in ITA No. 4199/M/2015 dated 27.7.2016 wherein the Co-ordinate Bench considering various decisions including the jurisdictional decision which the CIT(Appeals) relied on i.e. Rashmikant Kundalia Vs Union of India dated 9.2.2015 held as under:

*“In this bunch of 17 appeals, the sole issue involved is as to whether or not, for the period prior to 01.06.15, fees under section 234E of the Income Tax act, 1961 (hereinafter referred to as the Act) in respect of defaults in furnishing TDS statements, could be levied in intimation under section 200A of the Act.*

*2. In some of the appeals there is a representation by the Ld. Counsel/authorized representative on behalf of the assessee. However, in some of appeals, none has come present and adjournment has been sought. However, considering the short and*

*common issue involved in all the appeals which can be adjudicated on the basis of only a few material facts, we proceed to decide the appeals rejecting the adjournment applications, if any, moved in any of the above captioned appeals.*

3. *In all these cases, there was admittedly a delay in filing of the TDS returns. The period involved is after 01.07.12, but prior to 01.06.15. These dates are relevant because 1.7.2012 is the date of insertion of section 234E into the Income Tax Act, 1961 whereas 1.6.2015 is the date of amendment/substitution of clause (c) to section 200A vide which it has been provided that fees payable under section 234E can be adjusted while processing intimation under section 200A w.e.f. 1.6.2015.*

4. *Now coming to the facts of these cases, in the course of the processing of the TDS returns, the Assessing Officer (TDS) [hereinafter referred to as the AO(TDS)] raised demand in each of the above cases by way of an intimation issued under section 200A of the Act for levy of fees under section 234E for delay in filing of TDS statement beyond the period stipulated as per the provisions of section 200(3) of the Act. Aggrieved by this levy of fees, the respective assessees carried the matter in appeal before the Ld. CIT(A) but without any success. Being aggrieved by the orders of the Ld. CIT(A), the assessees in the above captioned appeals have come in appeal before us.*

5. *We have heard the rival contentions and have also perused the material on record. The contention of the Ld. respective Counsels for the assessees has been that this issue has already been considered by the Amritsar Bench of the Tribunal in the case of "Sibia Healthcare Pvt. Ltd. vs. DCIT" (2015) 171 TTJ (ASR) 0145 wherein the Amritsar Bench of the Tribunal has held that since the intimation under section 200A is an appealable order before the Ld. CIT(A) (w.e.f. 1.7.2012) under section 246A(a) and therefore the Ld. CIT(A) could have examined the validity of the adjustments made under the intimation under section 200A in the light and scope of the provisions of section 200A. The Tribunal further observed that since there was no enabling provision under section 200A before 01.06.15 providing for the adjustment in respect of levy of fees under section 234E while processing the TDS statements, hence in the absence of such an enabling provision, no such levy could be affected. The provision for making adjustments regarding fees leviable under section 234E*

*has been introduced by way of amendment made vide Finance Act, 2015 w.e.f. 01.06.15 only. The Tribunal therefore held that the action of the AO in making adjustments with regard to the fees leviable under section 234E while processing the TDS statements under section 200A for the period prior to 1.6.2015, was not legally valid.*

*It has therefore been contended on behalf of the assessee that the TDS statements filed by the assessee has to be processed in the manner as laid down in the provisions of section 200A as in force during the relevant period. That the levy of fees under section 234E of the Act, thus, cannot be a subject matter of process, while processing the statement under section 200A of the Act so far as the period prior to 01.06.15 is concerned.*

6. *The Ld. D.R., on the other hand, has relied upon the decision of the Hon'ble Bombay High Court in the case of "Rashmikant Kundalia vs. Union of India" dated 09.02.15 which decision has been relied upon by the Ld. CIT(A) in the impugned order wherein the jurisdictional Hon'ble Bombay High Court has upheld the constitutional validity of section 234E. The Ld. D.R. has further submitted that, even otherwise, the section 234E of the Act is an independent section and the AO (TDS) has otherwise jurisdiction to levy penalty for delay in filing TDS statements as provided under section 200(3) of the Act. It has therefore been contended that the AO(TDS) has rightly exercised his jurisdiction while making adjustment of the fees leviable under section 234E for non compliance/delay in filing the TDS statements as provided under section 200(3) of the Act.*

7. *We have heard the rival contentions and have also gone through the case laws cited before us. So far as the reliance of the Revenue on the decision of the Hon'ble Bombay High Court in the case of "Rashmikant Kundalia vs. Union of India" (supra) is concerned, we find that in the said case the constitutional validity of section 234E was challenged. The Hon'ble Bombay High Court has upheld the validity of the section 234E. However, the issue whether the fees leviable under section 234E can be adjusted while processing the TDS statements under section 200A of the Act in relation to the period prior to 01.06.15, has neither been raised before the Hon'ble Bombay High Court nor has been adjudicated. Hence, the reliance of the Revenue on the decision of the Hon'ble Bombay High Court in the case of "Rashmikant Kundalia vs.*

*Union of India” (supra) so far as the issue is concerned, is of no help to the Revenue. One of the contentions raised before the Hon’ble Bombay High Court was that under the provisions of the Act, no appeal is provided for or from an arbitrary order passed under section 234E of the Act. The Hon’ble Bombay High Court observed that a right of appeal is not a matter of right but is a creature of statute and if the legislature deems it fit not to provide a remedy of appeal, so be it. The Hon’ble Bombay High Court has observed that even in such a scenario, the aggrieved party is not left remediless rather such aggrieved person can always approach the Hon’ble High Court in extraordinary equitable jurisdiction under article 226/227 of the Constitution of India, as the case may be.*

8. *However, in the cases before us, the grievance of the assesseees is not against the levy of fees under section 234E of the Act independently rather, the issue is that while processing the TDS statements under section 200A of the Act, whether or not, the fees leviable under section 234E can be adjusted therein? No doubt, the order passed under section 200A is an appealable order before the Ld. CIT(A) under section 246 of the Act (w.e.f. 1.7.2012). The appellate order of the Ld. CIT(A) passed under 250 of the Act is further appealable before this Tribunal under section 253 of the Act. Hence, we do not find any illegality in the course adopted by the assesseees of invoking the appealable jurisdiction of this Tribunal for redressal of their grievance on this issue.*

9. *So far as the issue whether for the period prior to 01.06.15, such adjustment can be made while processing the statements under section 200A of the Act is concerned, we find that the Amritsar Bench of the Tribunal in the case of “Sibia Healthcare Pvt. Ltd. vs. DCIT” (supra) has held that in the absence of enabling provision under section 200A prior to 01.06.15 such a power was not vested with the AO (TDS). The said decision has been further followed by the Ahmedabad Bench of the Tribunal in a recent decision dated 05.02.16 in the case of “Varun Radiators Pvt. Ltd. vs DCIT (CPC- TDS)” 2016-TIOL-436-ITAT-AHM. However, we have come across another decision of the Chennai Bench dated 10.07.15 in the case of “Smt. G. Indhirani & Others vs. DCIT, CPC-TDS” in ITA No.109/Mas/2015 & others wherein the Chennai Bench of the Tribunal has considered the decision of the Amritsar Bench of the Tribunal in the case of “Sibia Healthcare Pvt. Ltd. vs. DCIT” (supra) and has arrived at a*

*similar finding that under section 200A, in the absence of enabling provision for the period before 01.06.15, the levy of fee under section 234E while processing the TDS statements was not permissible to the AO (TDS). However, the co-ordinate Chennai Bench of the Tribunal has also examined the other contention of the Revenue that section 234E is an independent section and the fees can be levied by the AO (TDS), independent of the provisions of section 200A, for the default/delay in filing the TDS statements as prescribed under section 200(3) of the Act. The Tribunal, considering the above submissions, held that if the assessee fails to pay the fees before filing the statement under section 200(3) of the Act, the Assessing Authority may pass a separate order levying of such a fee under section 234E of the Act, if the same is not barred by time limit or otherwise under any other provisions of law. The Assessing Authority, however, could not adjust the fees leviable under section 234E while processing the TDS statement under section 200A of the Act. However, after 01.06.15 the Assessing Authority is well within his limit to levy fee under section 234E of the Act even while processing the statement under section 200A and making adjustment. The relevant part of the decision of the Chennai Bench of the Tribunal for the sake of completeness is reproduced as under:*

- “4. The Ld. counsel invited our attention to Section 234A of the Act and submitted that when an assessee fails to deliver the statement within the prescribed time, the assessee is liable to pay by way of fee a sum of ₹200/- for every day during such a period the failure continues. Referring to the word used in the section 234E "he shall be liable to pay", the Ld. counsel pointed out that the assessee is liable to pay fee. However, it does not empower the Assessing Officer to levy the fee. Section 234E(3) of the Act provides for payment of the fee before delivery of statement under Section 200(3) of the Act. Therefore, the fee has to be paid by the assessee voluntarily before filing the statement under Section 200(3) of the Act and the assessing authority has no power to levy the fee.*
- 5. On the contrary, Sh. P. Radhakrishnan, the Ld. Departmental Representative, submitted that Section 234E of the Act provides for payment of fee, if the assessee fails to deliver the statement as prescribed in Section 200(3) of the Act. Therefore, the Assessing Officer has every authority to levy fee either by a separate order or while processing the statement under Section*

200A of the Act.

6. *We have considered the rival submissions on either side and perused the relevant material on record. Section 200A of the Act provides for processing of the statement of tax deducted at source by making adjustment as provided in that Section. For the purpose of convenience, we are reproducing the provisions of Section 200A of the Act:-*

*"200A. (1) Where a statement of tax deduction at source or a correction statement has been made by a person deducting any sum (hereafter referred to in this section as deductor) under section 200, such statement shall be processed in the following manner, namely :—*

*(a) the sums deductible under this Chapter shall be computed after making the following adjustments, namely :—*

- (i) any arithmetical error in the statement ; or*
- (ii) an incorrect claim, apparent from an information in the statement*

*(b) the interest, if any, shall be computed on the basis of the sums deductible as computed in the statement ;*

*(c) the sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of amount computed under clause (b) against any amount paid under section 200 and section 201, and any amount paid otherwise by way of tax or interest ;*

*(d) an intimation shall be prepared or generated and sent to the deductor specifying the sum determined to be payable by, or the amount of refund due to, him under clause (c); and*

*(e) the amount of refund due to the deductor in pursuance of the determination under clause (c) shall be granted to the deductor:*

*Provided that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the statement is filed.*

*Explanation -For the purposes of this sub-section, "art*

*incorrect claim apparent from any information in the statement" shall mean a claim, on the basis of an entry, in the statement-*

*(i) of an item, which is inconsistent with another entry of the same or some other item in such statement*

*(ii) in respect of rate of deduction of tax at source, where such rate is not in accordance with the provisions of this Act;*

*(2) For the purposes of processing of statements under sub-section (1), the Board may make a scheme for centralised processing of statements of tax deducted at source to expeditiously determine the tax payable by, or the refund due to, the deductor as required under the said sub-section.*

7. *The Assessing Officer cannot make any adjustment other than the one prescribed above in Section 200A of the Act. By Finance Act, 2015, with effect from 01.06.2015, the Parliament amended Section 200A by substituting sub-section (1) of clauses (c) to (e). For the purpose of convenience, we are reproducing the amendment made in Section 200A by the Finance Act, 2015 as under:-*

*"In section 200A of the Income-tax Act, in sub-section (1), for clauses (c) to (e), the following clauses shall be substituted with effect from the 1<sup>st</sup> day of June, 2015, namely:-*

*"(c) the fee, if any, shall be computed in accordance with the provisions of section 234E;*

*(d) the sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of the amount computed under clause (b) and clause (c) against any amount paid under section 200 or section 201 or section 234E and any amount paid otherwise by way of tax or interest or fee;*

*(e) an intimation shall be prepared or generated and sent to the deductor specifying the sum determined to be payable by, or the amount of refund due to, him under clause (d); and*

*(f) the amount of refund due to the deductor in pursuance of the determination under clause (d) shall be granted to*

*the deductor."*

*Therefore, it is obvious that prior to 01.06.2015, there was no enabling provision in Section 200A of the Act for making adjustment in respect of the statement filed by the assessee with regard to tax deducted at source by levying fee under Section 234E of the Act. The Parliament for the first time enabled the Assessing Officer to make adjustment by levying fee under Section 234E of the Act with effect from 01.06.2015. Therefore, as rightly submitted by the Ld. counsel for the assessee, while processing statement under Section 200A of the Act, the Assessing Officer cannot make any adjustment by levying fee under Section 234E prior to 01.06.2015. In the case before us, the Assessing Officer levied fee under Section 234E of the Act while processing the statement of tax deducted at source under Section 200A of the Act. Therefore, this Tribunal is of the considered opinion that the fee levied by the Assessing Officer under Section 234E of the Act while processing the statement of tax deducted at source is beyond the scope of adjustment provided under Section 200A of the Act. Therefore, such adjustment cannot stand in the eye of law.*

8. *The next contention of the assessee is that Section 234E of the Act says that the assessee "shall be liable to pay" by way of fee, therefore, the assessee has to voluntarily pay the fee and the Assessing Officer has no authority to levy fee. The argument of the Ld.counsel for the assessee is very attractive and fanciful. However, we do not find any substance in that argument. When Section 234E clearly says that the assessee is liable to pay fee for the delay in delivery of the statement with regard to tax deducted at source, the assessee shall pay the fee as provided under Section 234E(1) of the Act before delivery of the statement under Section 200(3) of the Act. If the assessee fails to pay the fee for the periods of delay, then the assessing authority has all the powers to levy fee while processing the statement under Section 200A of the Act by making adjustment after 01 .06.2015. However, prior to 01 .06.2015, the Assessing Officer had every authority to pass an order separately levying fee under Section 234E of the Act. What is not permissible is that levy of fee under Section 234E of the Act while processing the statement of tax deducted at source and making adjustment before 01 .06.2015. It does not mean that the Assessing Officer cannot pass a separate order under Section 234E of the Act levying fee for the delay in filing the statement as required under Section 200(3) of the Act.*

9. *The contention of the assessee can also be examined in the light of the provisions of Indian Penal Code. Section 396 of Indian Penal Code provides for punishment for dacoity with*

*murder. The punishment is imprisonment for life or rigorous imprisonment for a term which may be extended to ten years and also liable to fine. For the purpose of convenience, we are reproducing Section 396 of Indian Penal Code, hereunder:-*

***"396. Dacoity with murder - If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."***

*Similarly, Section 408 of Indian Penal Code provides for criminal breach of trust by a clerk or servant. In addition to imprisonment which may extend to seven years, the accused who is found to be guilty shall also be liable to fine. Similarly, the other provisions of Indian Penal Code also say that in addition to imprisonment, the accused shall be liable to pay fine. The language used by the Parliament in Indian Penal Code is "shall also be liable to fine". This means that the Magistrate or Sessions Judge, who tries the accused for an offence punishable under the provisions of Indian Penal Code, in addition to punishment of imprisonment, shall also levy fine. If the contention of the Ld.counsel for the assessee is accepted, then the Magistrate or Sessions Judge, as the case may be, who is trying the accused for the offence punishable under Indian Penal Code, may not have authority to levy fine.*

*10. It is well known principle that the fine prescribed under the Indian Penal Code has to be levied by the concerned Magistrate or Sessions Judge who is trying the offence punishable under the Indian Penal Code. Therefore, the contention of the Ld.counsel that merely because the Parliament has used the language "he shall be liable to pay by way of fee", the assessee has to pay the fee voluntarily and the Assessing Officer has no authority to levy fee could not be accepted. No one would come forward to pay the fee voluntarily unless there is a compulsion under the statutory provision. The Parliament welcomes the citizens to come forward and comply with the provisions of the Act by paying the prescribed fee before filing the statement under Section 200(3) of the Act. However, if the assessee fails to pay the fee before filing the statement under Section 200(3) of the Act, the assessing authority is well within his limit in passing a separate order levying such a fee in addition to processing the statement under Section 200A of the Act. In other words, before 01.06.2015, the assessing authority could pass a separate order under Section 234E levying fee for delay in*

*filing the statement under Section 200(3) of the Act. However, after 01 .06.2015, the assessing authority is well within his limit to levy fee under Section 234E of the Act even while processing the statement under Section 200A and making adjustment.*

*11. In view of the above discussion, this Tribunal is of the considered opinion that the Assessing Officer has exceeded his jurisdiction in levying fee under Section 234E while processing the statement and make adjustment under Section 200A of the Act. Therefore, the impugned intimation of the lower authorities levying fee under Section 234E of the Act cannot be sustained in law. However, it is made clear that it is open to the Assessing Officer to pass a separate order under Section 234E of the Act levying fee provided the limitation for such a levy has not expired. Accordingly, the intimation under Section 200A as confirmed by the CIT(Appeals) insofar as levy of fee under Section 234E is set aside and fee levied is deleted. However, the other adjustment made by the Assessing Officer in the impugned intimation shall stand as such.*

*12. In the result, all the appeals filed by the assesseees are allowed as indicated above.”*

9. In the case in hand also the intimation u/s. 200A has been processed prior to 1.6.2015 wherein fee u/s. 234E was levied. Taking consistent view in this matter, following the said decision, we set aside the demand raised u/s. 234E of the Act in the intimation processed u/s. 200A of the Act prior to 1.6.2015.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 23<sup>rd</sup> September, 2016.

Sd/-

Sd/-

**(RAJENDRA)**

**(C.N. PRASAD )**

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 23<sup>rd</sup> September, 2016

व.नि.स./ Rj , Sr. PS