IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI R.C. SHARMA, AM AND SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./I.T. A. No. 3850/Mum/2015
(**निर्धारण वर्ष /** Assessment Year: 2013-14)

Committee of Resource Organization Near Container Yard, Suman Nagar, Sion Trombay Road, (V.N. Purav Marg) Chembur Mumbai-400 071.	**बनाम**/ Vs.	Deputy Commissioner of Income Tax Centralized Processing Cell-TDS
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAATC 4949C		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Vinayak S. Gokhale
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Neil Philip

सुनवाई की तारीख / **Date of Hearing**	:	21/07/2016
घोषणा की तारीख / **Date of Pronouncement**	:	09/09/2016

आदेश / O R D E R

Per Sandeep Gosain, Judicial Member:

This appeal by the revenue is directed against the order dated 06.04.2015 of Commissioner of Income Tax (Appeals)-59, Mumbai (hereinafter called as the CIT(A)) for assessment year 2013-14on the grounds mentioned below:-

"1) The LD. CIT(A) erred in holding that the Appellant/Assessee defaulted in submitting the TDS statements in time for Quarter 3 of Financial Year 2012-13, thereby Liable to Pay Late Filing Fee U/S 234E.

2) The Ld. CIT(A) erred by holding the view that Fee that is sought to be collected U/S 234 E of the Act, is really nothing but a collection, for the special service being given to the detector, by allowing him to file the TDS Statements beyond the time prescribed under the act, read with the respective rules for the same act.

3)

(a) The Ld. CIT(A) erred by following the Judgement of Bombay High Court's dismissing, the Writ Petition Filed challenging the Jurisdiction or Competence for levy of Late Filing Fee U/S 234E. However for the assessee in this case is altogether different, as per ground No.2 in the grounds of appeal before his authority, is with regards to Time of the TDS Statement to be filed by the deductor which was dealt in the speaking order passed by his judicial authority.

(b) Under the provisions of sub-section (3) of Section 234 E, Fee shall have to be paid at the time of delivering the TDS Statement before the concerned authority. This point was never considered by the Ld.CIT(A) while deciding the issue of Late Fee U/S 234E.

(c) Once the said TDS Statements are filed without Payment of Fees U/S 234E, no subsequent recover can be made by the authority, by issuing the Notice of Demand U/S 156.

(d) The said provision of Section 200A. that prevailed prior to changes in Finance Act, 2015, does not permit processing of TDS statement for 'default in payment of Late Fees' except

i) Any arithmetical error, or incorrect claim, or
ii) default in payment of Interest and
iii) TDS Payable or refundable.
iv) No notice of demand can be issued to recover Late Fee U/S 234E, as mentioned in item 5 of the intimation issued to the assessee dated 04/03/2014.

Thus Late Fee for delay in submission of Quarterly Statements cannot be recovered by way of processing U/S 200 A of the Act.

4) The provisions of Section 204 of the Act, has made the person responsible for Sec. 190 to Sec. 203AA, and Sec. 285, and however this wording and or phrase does not cover Sec. 234E and hence collection of Late Fee U/S 234 E is void ab initio.

5) There is no dispute that what is impugned in appeal before us is the intimation under section 200A of the Act, as stated in so many words in the impugned intimation itself, and, as the law stood, prior to 1st June 2015, there was no enabling provision therein for raising a demand in respect of levy of fees under section 234E.

6) As per the limited Mandate of

Section 200A, which, at the relevant point of time, permitted computation of amount recoverable from, or payable to, the tax deductor after making adjustments as already stated in paragraph 3(d), i),ii),iii) only and no other adjustments were permissible in the amount refundable to, or recoverable from, the tax deductor, were permissible in accordance with the law as it existed at that point of time.

7) The Ld. CIT(A) has not given the reasonable opportunity to the Assessee for explaining the above grounds attached to the Form No. 35, as the Late Fee U/S 234 is confirmed without proper hearing right to the Assessee/Appellant arbitrarily."

2. Since all the grounds raised by the assessee are inter-connected and inter-related therefore, we thought it fit to dispose off the same through the present common order. The only effective ground of appeal raised is against levying of fee of Rs.53,200/- u/s 234E of the Act. In the present case ITO-TDS has passed order u/s 200A of I.T. Act thereby determining sum of Rs.53,200/- to be paid by assessee vide order dated 04.03.2014.

3. Aggrieved by the order of the ITO-TDS-1(1)(4), assessee filed the appeal before CIT(A) and the CIT(A) after considering the case of the assessee had dismissed the appeal filed by the assessee vide order dated 06.04.2015.

4. Aggrieved by the order of CIT(A), the assessee filed the present appeal before us on the grounds mentioned herein above.

5. At the very outset, ld. AR representing the assessee relied upon the judgments passed by judicial authorities wherein the issue with regard to the levy of fee u/s 234 E of the Act was decided. Following judgments have been referred by ld. AR in ITA Nos.1019,1020 &1021/Mds/2015 in the case of Smt. G. Indhirani vs. The Deputy Commissioner of Income Tax for A.Y. 2013-14, ITA No.90/Asr/2015 in the case of Sibia Healthcare Private Limited vs. Dy. CIT in the A.Y. 2013-14 and Writ Petition No.771 of 2014 in the case of Mr Rashmikant Kundalia and another vs. Union of India and others.

6. First of all we refer to the order passed by Hon'ble ITAT Chennai Bench in ITA Nos.1019 to 1021/Mds/2015 and 1089 to 1092/Mds/2015 wherein identical question was in dispute and the Hon'ble ITAT in the afore mentioned ITA had

decided the said issue. The operative para is reproduced below for the sake of reference:

> *"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:-*
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> *"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 any 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, "an 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-see ion (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 pt 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 assessees, 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 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 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.

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 anyone of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone 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 each 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) in sofar 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 assessees are allowed as indicated above."

4. Since the facts of the present case and the point in issue involved in the present case are identical to the point in issue decided by Hon'ble ITAT Chennai Bench therefore we respectfully following the afore mentioned decision of the co-ordinate bench and in order to maintain judicial consistency allow the appeal of the assessee and set aside the impugned order passed by CIT(A), thereby upholding the order of AO in levying fee u/s 234A of the IT Act is not sustainable in law. Therefore this ground of appeal raised by assessee are allowed.

In the result, the **appeal of the Assessee is allowed.**

Order pronounced in the open court on 9th September, 2016

Sd/-	Sd/-
(R.C. Sharma)	(Sandeep Gosain)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 09.09.2016

Ps. Ashwini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai.**