आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.6943/Mum/2014

(**निर्धारण वर्ष /** Assessment Year: 2010-11)

Bakhtawar Construction Co. P. Ltd, Meher House, 1st floor, Casasji Patel Street Fort, Bombay 400001	**बनाम**/ v.	Addl. CIT (TDS) RG 1 10th floor, K.G. Mittal Ayurvedic Hosptial Bldg, Charni Road(W) Mumbai 400002
स्थायी लेखा सं./PAN : AAACB4942P		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri. Amogh M. Ghaisas
Revenue by :	Shri. Suman Kumar (DR)

सुनवाई की तारीख **/Date of Hearing : 21-02-2018**

घोषणा की तारीख **/Date of Pronouncement : 21 -03-2018**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 6943/Mum/2014 for assessment year 2010-11 is directed against the appellate order dated 07.10.2014 passed by learned Commissioner of Income-tax (Appeals)-14, Mumbai (hereinafter called "the CIT(A)") for assessment year 2010-11, appellate proceedings had arisen before learned CIT(A) from the order dated 04.04.2012 passed by learned Assessing Officer (hereinafter called "the AO") u/s 272A(2)(k) of the Income-tax Act, 1961 (hereinafter called "the Act") levying penalty of Rs.99,200/- against the assessee.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

" a) The Learned CIT(Appeals) has erred in ignoring the submissions of the Appellant and confirming the penalty of Rs. 99,200/- under section 272A(2)(k) of the Income Tax Act. The appellant submits that on the facts and in the circumstances of the case, the levy of penalty is not justified and the entire penalty of Rs. 99,200/- ought to have been cancelled.

b) The Appellants crave leave to add, alter or amend the above ground either before or at the time of hearing of the appeal. "

3. The assessee had filed statement of tax deducted at source in form no. 26Q for financial year 2009-10 which was filed late beyond the time prescribed in Rule 31A of Income-tax Rules, 1962 , as detailed here under:

Qtr.	TDS Amt.	Due date of filing TDS statements	Date of filing TDS statement	Delay of days
Q-l	74485	15.07.2009	18.08.2010	399
Q-2	168595	15.10.2009	18.08.2010	307
Q-3	168547	15.01.2010	18.08.2010	215
Q-4	145218	15.06.2010	25.08.2010	71

4. The AO observed that the assessee has not filed quarterly statements of tax-deducted at source in form no. 26Q for financial year 2009-10 in time. The AO invoked penal provisions under section 272A(2)(k) of the Act, as there was a delay in filing of the statement of tax-deducted at source within the prescribed time limit. The assessee contended before the AO as under:-

"We are in receipt of your above referred show-cause Notice in respect of the delay in filing the quarterly returns of TDS for Financial 2009-10.

In this connection, we wish to place on record that the total TDS payments during the year amount to Rs.5,56,845/- as per the enclosed tabulation representing the TDS under Section 194C and 194J of the Income Tax Act. Barring an exception of a solitary payment of Rs.9,542/- representing the TDS on provision made in the accounts as on 31st March 2010, all other payments of Rs.5.47,303/- represented by 25 different challans are all made within the prescribed time limit. In other words, there is no failure to deduct Tax at source and there is no failure to pay the same into the government treasury within the prescribed the limit.

That leaves us with the only default in respect of the filing of TDS returns. In this connection, we are at great pains to place on record that the software created by NSDL for E-filing of TDS

returns is very clumsy and beyond comprehension of an average assessee. The things could have been better if the Call Centre NSDL, which is set up to help the assessee to clarify the queries, was equipped with efficient and qualified personnel who can guide the assessee. However, it has been the experience of one and all that the call centre has inadequate staff of inefficient personnel that getting any help from NSDL call centre is next to impossible. Therefore, some delay has taken place in filing the quarterly returns. However, an assessee, who is diligent to deduct Tax at Source and diligent enough to pay the tax within the time limit, must be supposed to be diligent in filing the quarterly returns, which is a mere procedural requirement. There can be hardly any reason for an assessee not to file the quarterly TDS returns after the payment of tax. Hence, it should be appreciated that it is the E-difficulties faced by the assessee, who are not fully conversant with E-filing of TDS returns. The difficulties have to be held to be genuine in the case like this. It can also be seen that a number of days delay in filing 4 quarterly returns has gradually decreased as stated in the Show-cause Notice itself There have been no delays in filing the TDS returns for the next Financial Year as you may verify from your system. You are, therefore, requested to drop the penalty proceedings and oblige.

We are enclosing herewith the Xerox copies of all the TDS challans so as to enable you to verify the fact that there is not a single instance of delayed payment of tax after the same was deducted at source at the time of payment to the respective parties.

You are requested to dispose of the matter during the hearing fixed on 15th December 2011 on the basis of these written submission."

5. The AO rejected the contentions of the assessee and observed that assessee has not shown reasonable cause as stipulated u/s. 273B and levied penalty of Rs. 99,200/- u/s 272A(2)(k) of the 1961 Act for delay filing of the statement of tax deducted at source, as under:-

Quarter	TDS statement Form no.	No. of days delay	TDS Amount (Rs.)	Penalty Rs. 100/ - per day of delays (days xlOOl	Penalty amount restricted to (Rs.)
Q-l	26Q	399	74485	39900	39900
Q-2	260	307	168595	30700	30700
Q-3	26Q	215	168547	21500	21500
Q-4	26Q	71	145218	7100	7100
TOTAL					**99200**

6. The assessee filed first appeal before the learned CIT-A which was rejected by learned CIT-A by holding as under:-

> *" I have considered the facts of the case, the submission of the appellant and the penalty order u/s.272A(2)(k). It is admitted that clause (k), which requires a person to deliver or cause to be delivered copy of the statement within time specified under section 200(3), was applicable in the case of the assessee. Under the provisions of section 200(3) read with Rule 31A, a person deducting tax at sources is required to prepare a statement in the prescribed form and deliver the same to the prescribed Income Tax authority after paying the tax deducted to the credit of the Central Government.*
>
> *5.1 The liability of assessee is a statutory and absolute liability. Fiscal statute has to be strictly construed so that nobody can avoid the responsibility of deposit of tax so deducted and to file return on time.*
>
> *5.2 Section 199 provides that any deduction made in accordance with provision of section 194 and paid to Central Government shall be treated as payment of tax on behalf of the person from whose income deduction is made. U/s.205 of the I.T. Act, 1961 there is a bar for the revenue to demand tax from the assessee to the extent the amount has been deducted from his income. Thus, the tax deducted and paid is treated as tax paid by the person.*
>
> *5.3 Section 272(A)(2k) contemplates that an offence is committed on the non-filing of TDS return on time, and is totally unrelated to deduction and thereafter deposit of tax in the Government Treasury. The language of 272(A)(2k) is clear so also the legislative intention. If it was the intention of the legislature, not to levy of penalty on deposit of tax is then the same would have been provided in, section 272(A)(2k) itself. Therefore, the contention that' the taxes are paid so no penalty should be levied cannot be accepted.*
>
> *5.4 Section 200(3) places a statutory mandate on every person to file TDS return/statement in prescribed form and in the prescribed manner by the due date. On breach of provision of section 200(3) penalty is leviable u/s.272(A)(2k) of the I.T. Act. The appellant stated that software was not user friendly which led to delay in filing of return. The assessee has to manage his affairs in such manner that statutory compliances are met on time. Therefore, in absence of reasonable cause being demonstrated by the appellant, the action of the A.O. in levying penalty is upheld.*
>
> *Ground is dismissed"*

7. The assessee has now filed an appeal before the tribunal and Ld. Counsel for the assessee at the outset submitted that during the relevant period E-filing and paper filing of TDS returns was going on simultaneously and the system of the Revenue was not working properly which led to delay in filing of quarterly statement of tax deducted at source while it is also submitted that all the due taxes which were deducted at source by the assessee had been paid in time as detailed here under:-

BAKHTAWAR CONSTRUCTION CO. PVT. LTD

STATEMENT OF TDS Deduced AND PAID DURING FINANCIAL YEAR 1.4.2009 TO 31.3.2

	Financial Year 2009-10	**Section Code**	**Tax deducted & paid**	**Date on which tax deposited**
Q1				
	Apr-09	94J	36492	5.5.09
	May-09	94C	800	3.6.09
		94J	11875	3.6.09
	Jun-09	94C	1907	30.6.09
		94J	23411	30.6.09
Q2				
	Jul-09	94J	15790	31.7.09
		94C	1006	31.7.09
	Aug-09	94J	26346	1.9.09
		94C	800	1.9.09
	Sep-11	94C	764	1.10.09
		94J	123889	1.10.09
Q3				
	Oct-09	94J	13980	5.11.09
		94C	388	5.11.09
	Nov-09	94J	22980	1.12.09
		94C	388	1.12.09
	Dec-09	94C	1192	28.12.09
		94J	129619	28.12.09
Q4				
	Jan-10	94J	58324	29.1.10
		94C	979	29.1.10
	Feb-10	94J	26346	15.2.10
		94C	388	3.3.10
		94J	15356	3.3.10
	Mar-10	94J	30356	30.3.10

	94C	1427	30.3.10
	94J	2500	7.4.10
	94J	9542	16.8.10
TOTAL		556845	

It is also submitted that return for subsequent financial years have been filed in time as under:-

BAKHTAWAR CONSTRUCTION COMPANY PRIVATE LIMITED

STATEMENT SHOWING DELAY IN FILING ETDS RETURNS

FOR THE PERIOD FROM 1-4-2010 TO 30-6-2014

Sr	Fin Year	Period	Form No	Due Date of Filing	FILING	Token no.	No. of days delays	Tax Deducted	Tax Paid
1	2010-11	Q1	24Q	15-7-2010	26-11-2010	07033 OB OOG36250	134	0	0
2	2Q10-11	Q1	26Q	15-7-2010	•18-11-2010	070330SOOGS4555	126	68,867	68,867
3	2010-11	Q2	24Q	15-10-2010	26-11-2010	070 33 OBQ 0536246	42	0	0
4	2010-11	Q2	26Q	15-10-2010	18-11-2010	07Q330300634566	34	1,18,486	1,18,486
5	2010-11	Q3	24Q	15-1-2011	13-1-2011	0703311000-17261	0	0	0
6	2010-11	Q3	26Q	15-1-2011	13-1-2011	070331100047272	0	1,64,527	1,64,527
7	2010-11	Q4	240	15-5-2011	11-5-2011	07033080 06S4233	0	0	0
8	2Q1G-11	Q4	26Q	15-5-2011	11-5-2011	070330800634244	0	1,62,234	1,62,234
9	2011 -12	Q1	240	15-7-2011	13-7-2011	070330800711824	0	0	0
10	2011 -12	Q1	26Q	15-7 -201 1	13-7-2011	07033Q300711835	0	1,67,007	1,67,007
11	2011-12	Q2	24O	15-10-2011	14-10-2011	070331100060062	0	0	0
12	2011 -12	Q2	26Q	15-10-2011	14-10-2011	070331100060093	0	85,310	85,310
13	2011-12	Q3	24O	15-1-2012	13-1-2012	070330900146301	0	0	0
H	2011-12	Q3	26Q	15-1-2012	13-1-2012	070330900146312	0	1,69,639	1,69,639
15	2011 -12	Q4	24Q	15-5-	U-5-2012	07033Q8QO&19B12	0	0	0
16	2011 -12	Q4	26Q	15-5-2012	14-5-2012	0703 30S DOS 19801	0	1,71,595	1,71,595
17	2012-13	Q1	24Q	15-7-2012	13-7-2012	070330900154082	0	0	0
18	2012-13	Q1	26Q	15-7-2012	13-7-2012	0703309001 54093	0	90,238	90,238
19	2012-13	Q2	24Q	15-10-2012	10-10-2012	070331100073905	0	0	0
20	2012-13	Q2	26Q	15-10-2012	10-10-2012	070331 100Q73916	0	1,34,098	1,34,098
21	2012-13	Q3	24Q	15-1-2013	14-1-2013	070331100084873	0	0	0
22	2012-13	Q3	26Q	15-1-2013	14-1-2013	070331100084862	0	1,04,139	1,04,139
a 'i	2012-13	Q4	24Q	15-5-2013	14-5-2013	070330800937165	0	2,434	2,434
24	2012-13	Q4	26Q	15-5-2013	14-5-2013	070330800937176	0	1,32,875	1,32,875

25	2013-14	Q1	24Q	15-7-2013	12-7-2013	070330900171464	0	0	0
26	2013-14	Q1	26Q	15-7-2013	12-7-2013	070330900171475	0	1,71,558	1,71,558
27	2013-14	Q2	26Q	15-10*2013	14-10-2013	070330801004052	0	1,25,592	1,25,592
28	2013-14	Q3	26O	15-1-2014	14-1-2014	07033960 001	0	1,40,378	1,40,378
29	2013-14	Q4	26Q	15-5-2014	13-5-2014	0703B960027S756	0	2,70,258	2,70,258
30	2014-15	Q1	26Q	15-6-2014	14-6-2014	070389600483963	0	2,27,289	2,27,289
						Total		24,55,524	24,55,524

Thus the assessee submitted it is only due to faulty software and the faulty system being installed by the revenue for E-filing of the TDS return and initial technological glitches, there was a delay in filing quarterly statement of tax deducted at source and hence the penalty should not be levied on the assessee . The Ld. DR on the other hand has relied upon the provisions of Section 200(3) and it was submitted that there was no evidence on record so far as technical glitches are concerned thus it was prayed that penalty levied by the AO and as confirmed by learned CIT(A) be also confirmed by tribunal. However, learned DR could not controvert the statements filed by the assessee in paper book regarding payment of taxes in time as well filing of subsequent returns in time.

8. We have considered rival contentions and have perused the material on record . We have observed that the assessee has E-Filled quarterly statement of tax deducted at source late as detailed here under:

Qtr.	TDS Amt.	Due date of filing TDS statements	Date of filing TDS statement	Delay of days
Q-l	74485	15.07.2009	18.08.2010	399
Q-2	168595	15.10.2009	18.08.2010	307
Q-3	168547	15.01.2010	18.08.2010	215
Q-4	145218	15.06.2010	25.08.2010	71

The revenue was initially accepting the TDS return in paper forms which was later on converted into filing in an electronic mode. In this switch over face there were technological glitches as well difficulties which were faced by the taxpayers in filing returns with Revenue . The assessee also claimed to have faced problem in E-filing of TDS returns although it is claimed that taxes were paid in time. The Revenue cannot

rebut the same that it got the payment of taxes deducted at source in time. The assessee has also claimed that in subsequent years most of the TDS returns have been E-filed in time. The conduct of the assessee appears to be bona-fide as the assessee was paying taxes in time for the impugned year under consideration while statement of tax deducted at source were filed late as well it has been explained that the taxes have been paid for subsequent years also in time as well TDS returns were also filed in time in majority of the quarters. Thus keeping in view totality of the circumstances and also considering that taxes have been paid in time and the technological system was new in those years i.e. FY 2009-10 , we are inclined to hold that the assessee has shown bona-fide cause and in the circumstances we are of the considered view that penalty is not exigible on the assessee and we hereby order for the deletion of the penalty of Rs.99,200/- levied by the AO for all the four quarters of financial year 2009-10. The Pune tribunal in the case of Nav Maharashtra Vidyalaya v. Addl. CIT reported in (2016) 161 ITD 732(Pune-trib) has held as under:

> ***"17.*** *We have heard the rival contentions and perused the record. In this bunch of appeals, the issue which arises for adjudication is against the levy of penalty under section 272A(2)(k) of the Act for late filing of TDS statements / returns. In this regard, reference is being made to the relevant provisions of the Act. Under Chapter XVII of the Act, duty is upon the person making certain payments to deduct tax at source under the respective sections. The said tax deducted at source is due to be the income received by the deductee as per section 198 of the Act. Section 199 of the Act further provides that where any deduction is made under the Chapter and paid to the Central Government, then the same is to be treated as payment of tax on behalf of the person from whose income such deduction is made.*
>
> ***18.*** *Section 200 of the Act lays down the duty of the person deducting tax, which reads as under:-*
>
> > *"200. (1) Any person deducting any sum in accordance with the foregoing provisions of this Chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.*
> >
> > *(2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.*
> >
> > *(2A) In case of an office of the Government, where the sum deducted in accordance with the foregoing provisions of this*

Chapter or tax referred to in sub-section (1A) of section 192 has been paid to the credit of the Central Government without the production of a challan, the Pay and Accounts Officer or the Treasury Officer or the Cheque Drawing and Disbursing Officer or any other person, by whatever name called, who is responsible for crediting such sum or tax to the credit of the Central Government, shall deliver or cause to be delivered to the prescribed income-tax authority, or to the person authorised by such authority, a statement in such form, verified in such manner, setting forth such particulars and within such time as may be prescribed.

(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income-tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed:

***Provided** that the person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement delivered under this sub-section in such form and verified in such manner as may be specified by the authority. "*

***19.** Under section 200(1) of the Act, it is provided that any person deducting any sum in accordance with the provisions of the Chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs. Under section 200(2) of the Act, any person being an employer, as referred to in sub-section (1A) of section 192 of the Act shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs. Under sub-section (2A) of the Act, it is provided that where the sum has been deducted in accordance with foregoing provisions of the Chapter, by the office of the Government, then duty is upon the Treasury Officer or the Drawing & Disbursing Officer or any other person, to deliver or cause to be delivered to the prescribed income tax authorities, or to the person authorized by such authority, statement in such form, verified in such manner, setting forth such particulars within such time as may be prescribed. Under section 200(3) of the Act, similar responsibility is on any person deducting any sum on or after first day of April, 2005 in accordance with foregoing provisions of the Chapter, including any person as an employer referred to in section 192(1A) of the Act. The onus is upon such person that he shall after paying the tax to the credit of Central Government within prescribed time, prepare such statement for such period as may be prescribed and deliver or cause to be delivered to the prescribed income tax authority or any person so authorized, such*

statement in such form and verified in such manner and setting forth such particulars and within such time as may be provided. The duty is upon a person deducting any sum in accordance with various provisions under the Chapter and also upon an employer who is making deduction out of the payments made to the employees, then sub-section (3) requires that the deductor is to prepare a statement for such period as may be prescribed, which is to be delivered to the prescribed authority, in such form and verified and setting forth such particulars as may be prescribed. The said statement is to be delivered within such time as may be prescribed.

20. *In other words, any deductor deducting any sum on or after first day of April, 2005 in accordance with the provisions of Chapter has the following duties i.e. after paying the tax deducted at source credit to the Central Government, the TDS statements within prescribed time shall be prepared and filed. Rules 31A of the Rules provide the time limit for deposit of the tax deducted statement as per section 200(3) of the Act. The TDS statements are to be deposited quarterly i.e. quarter ending 30th June, 30th September, 31st December and 31st March of each financial year and the due date for furnishing the TDS statements is 15th July for the first quarter, 15th October for the second quarter, 15th January for the third quarter and 15th May of the immediately following financial year for the fourth quarter i.e. 31st March. The said statements could be furnished either in paper form or electronically. However, subsequent to the amendment by IT (Sixth) Amendment Rules, 2010 with retrospective effect from 01.04.2010, it was provided that furnishing of statements electronically in accordance with the format and standards prescribed became mandatory. The deductor in the said statement of tax deducted at source was compulsorily required to quote its tax deduction and Collection Account Number i.e. TAN number. Further, quote its Permanent Accountant Number except in the case where the deductor was office of Government and also quote PAN number of all the deductees. Further, the deductor was required to furnish the particulars of tax paid to the Central Government including Book Identification Number or challan indication number as the case may be. He was also required to furnish the particulars of amount paid or credited on which tax was not deducted.*

21. *In view of various provisions of the Act, as pointed out above, the substitution was made by Income Tax (Sixth) Amendment Rules, 2010 and was applicable for the financial year 2010-11. Since e-compliance of TDS returns was introduced in the said financial year, there was time and again amendments/corrections in order to make system of filing TDS returns user-friendly. The learned Authorized Representative for the assessee has pointed out that there were about 18 amendments / corrections in this regard. In the present set of appeals before us admittedly, there was default in furnishing e-TDS statements late for the respective quarters by different assessee, but all relating to assessment year 2011-12. The question which arises for adjudication before us is*

whether in such cases where e-TDS was made compulsory for the instant assessment year and where the software was not user-friendly and required amendments at the end of the Government itself from time to time and the compliance being a complex procedure introduced for the first time and where originally the deductors were not in default in depositing the paper TDS returns, does the assessee deductor have reasonable cause for not furnishing the said e-TDS returns in time. In this regard, reference is to be made to the provisions of section 273B of the Act, where it has been provided that in case a person establishes or proves that he had reasonable cause for the failure to comply with the provisions of various sections provided in section 273B of the Act, then no penalty shall be imposable on such person for the said failure. Reading of section 273B of the Act shows that under it, the Section refers to along with many other sections clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A of the Act. What is relevant for adjudication before us is section 272A(2) of the Act, since penalty has been levied for default in furnishing e-TDS returns under section 272A(2)(k) of the Act. Since section 273B of the Act covers the cases of levy of penalty under section 272A(2) of the Act, then in line with the provisions of said section in case a person establishes its case of reasonable cause for not complying with the provisions of said section, then the section provides that such a person shall not be liable to the penalty imposable for the said failure i.e. under section 272A(2) of the Act. The CIT(A) in the case of several assessee before us has wrongly come to the conclusion that the provisions of section 273B of the Act do not cover the defaults under section 272A(2)(k) of the Act. We reverse the finding of CIT(A) in this regard.

22. *Now, coming to the case of reasonableness put up before us by different assessee. The first plea raised by all the assessee is that where the compliance to the provisions of the Act was complicated and difficult and in the absence of any technical support in this regard, default if any, in furnishing the TDS returns late should be condoned. Another plea raised by some of the assessee was that where the tax deducted at source was not paid in time, e-TDS returns as such could not be filed and hence, the assessee was prevented by reasonable cause in not filing e-TDS returns in time and as such, no merit in levy of penalty. Another plea raised before us is that charging of fees for each day of default and then, restricting the same to the tax deducted at source was not correct. One another aspect of reasonableness was that in case the returns for quarter 1 was filed belatedly, then the returns for consequent quarters also got delayed for no default and as such, no penalty was leviable for such quarters. Different learned Authorized Representatives appearing before us has made reference to the decisions of various Benches of Tribunal. On the other hand, the learned Departmental Representative for the Revenue has placed reliance on the ratio laid down by the Hon'ble Allahabad High Court in Raja Harpal Singh Inter College's case (supra) and Chandigarh Bench of Tribunal in Central Scientific Instruments Organization's case (supra). One last aspect pointed out by the learned Authorized Representative for the assessee*

was that the CIT(A) has acknowledged that there was reasonable cause in not furnishing e-TDS returns in time. However, no benefit of the same was given to the assessee because the CIT(A) was of the view that the provisions of section 273B of the Act do not cover penalty leviable under section 272A(2)(k) of the Act.

23. *First of all, we shall deal with the last submission of the assessee that under the provisions of section 273B of the Act, the provisions of section 272A(2)(k) of the Act are referred and in case the person establishes its case of reasonable cause, then no penalty is to be leviable for such defaults. The case put up by the assessee was that where tax was deducted at source and merely because e-TDS statements / returns were not filed in time does not result in any loss of revenue and hence, no merit in levy of penalty under section 272A(2)(k) of the Act. The claim of deduction of tax deducted at source, its payment to the Treasury to the Government and thereafter, the credit to be allowed to the deductee of tax deducted from his account, all work on the principle that the tax is collected and deposited in the account of the Government as income is earned. In other words, the said provisions of tax deducted are advance payments of tax as you earn the income. Taxes are deducted by the deductor out of payments due to the deductee and such tax deducted is the income of deductee. The credit for tax deduction at source would be allowed to the deductee only after the tax deducted at source is deposited in the credit of the Government and the deductor files the compliance report in this regard by way of e-TDS returns. Thus, it is obligatory upon the person deducting tax to deposit the tax deducted at source and also to furnish statement declaring tax deduction made from the account of various deductees. Earlier provisions were to be complied with manually by filing the TDS returns in paper form. However, as per IT (Sixth) Amendment Rules, 2010 with retrospective effect from 01.04.2010, the deductor was asked to file e-TDS statements for which infrastructure was provided and it was required that the assessee complies to the said filing of e-TDS returns. However, since assessment year 2011-12 was the first year of introduction of such facilities of e-TDS returns, there were certain hindrances which were taken care of by the authorities by way of various amendments introduced in this behalf. The case of the assessee on the other hand, is that they were small taxpayers and in the absence of technical guidance provided and because of technical hitches, the TDS returns could not be filed in time. Most of the assessee before us have paid the tax deducted at source to the Treasury within time frame but have defaulted in filing e-TDS statements. In some of the cases, there is default in payment of tax deducted at source and consequently, delay in filing the e-TDS returns. The question which arises is whether in the abovesaid scenario, can the provisions of section 273B of the Act can be applied in order to decide the issue of levy of penalty under section 272A(2)(k) of the Act.*

24. *The Hon'ble Punjab & Haryana High Court in HMT Ltd. v. CIT [2005] 274 ITR 544/[2004] 140 Taxman 606 had held that where*

the tax deducted at source had been paid in time and the necessary returns in respect thereto were filed in time with the Income Tax Department, on mere late issue of tax deduction certificate, there was no loss to the Revenue and the delay in furnishing the tax deduction certificate was held to be merely technical or venial in nature and penalty levied under section 272A(2)(k) of the Act was deleted. It may be clarified herein that earlier under section 272A(2)(k) of the Act, penalty was leviable where the tax deduction certificate was not issued in time. However, by Finance (No.2) Act, 2004 w.e.f. 01.04.2005, it has been provided that where a person fails to deliver or cause to be delivered copy of statement within time specified in section 200(3) of the Act or the proviso to section 206C(3) of the Act, then he shall pay by way of penalty sum of Rs.100/- for every day of default. It is further provided under the said sub-section that the amount of penalty for failure shall not exceed the amount of tax deductible or collectable, as the case may be. It is further provided that no penalty shall be levied under clause (a) for failure to furnish the statement under section 200(3) of the Act or proviso to section 206C(3) of the Act, on or after first day of July, 2012.

25. *The learned Departmental Representative for the Revenue has placed strong reliance on the ratio laid down by the Hon'ble Allahabad High Court in Raja Harpal Singh Inter College's case (supra) for the proposition that where the e–TDS statement was not filed in time, then penalty under section 272A(2)(k) of the Act has been held to be leviable. In the facts of the said case before the Hon'ble High Court, the assessee was deducting the tax at source but had not filed the e-TDS returns for five successive assessment years starting from 2008-09 to 2012-13. The assessee failed to furnish any explanation before the Assessing Officer for the said default and only on the last date, it was pointed out that since the Principal of college had joined recently, it would take some time to collect the records for filing the e-TDS statements. The assessee however, failed to comply with notice and the Assessing Officer held the assessee to be liable for levy of penalty under section 272A(2)(k) of the Act. Before the CIT(A), the assessee for the first time offered an explanation that prior to joining regular Principal in the college on 25.01.2010, only officiating Principal had been working, who did not have idea of e-TDS statements and requirement of filing the same. The Tribunal noted that the appellate authority had accepted the explanation offered by the assessee and imposed penalty only from 01.04.2010 though regular Principal had joined the college on 25.01.2010. The Tribunal dismissed the appeal of assessee as no explanation was furnished for non-furnishing TDS statements in time. The Hon'ble High Court thus, in this regard observed that the requirement of filing e-TDS statements in time could not be overlooked. In such circumstances, the Hon'ble High court held that it cannot be urged by the Counsel for the assessee that no penalty could have been imposed for non-filing e-TDS returns in time since it had not resulted in any loss to the Revenue. The Hon'ble High Court further took note of the fact that before the Assessing Officer, no explanation was offered. However, an*

explanation was offered before the appellate authority, which was taken into consideration and the penalty amount was suitably reduced as the case of appellant that regular Principal assumed charge on 25.01.2010, was accepted and the penalty was imposed after that date. The appeal of the assessee in this regard was thus, dismissed.

26. *Applying the said ratio laid down by the Hon'ble Allahabad High Court in Raja Harpal Singh Inter College's case (supra), there is no merit in the plea of the learned Departmental Representative for the Revenue that the Hon'ble High Court has laid down the proposition that in every case of default in filing the e-TDS statements in time, penalty under section 272A(2)(k) of the Act is leviable. The Hon'ble High Court in an appeal filed by the assessee dismissed the plea of assessee that no penalty is leviable but has upheld the orders of authorities below, wherein the CIT(A) had restricted the levy of penalty from the date of 1st April, 2010 in respect of e-TDS statements to be filed for assessment years 2008-09 to 2012-13, since the assessee had explained that regular Principal had assumed charge on 25.01.2010. In other words, the Hon'ble High Court has accepted the explanation offered by the assessee regarding reasonableness of cause of delay in furnishing e-TDS returns late partially. Admittedly, the default in filing the said e-TDS returns have not been accepted in full but taking into consideration the reasonableness of explanation, the penalty chargeable under section 272A(2)(k) of the Act has been restricted i.e. suitably reduced in the case of appellant as held by the Hon'ble High Court.*

27. *Another reliance placed upon by the learned Departmental Representative for the Revenue is on the ratio laid down by the Chandigarh Bench of Tribunal in Central Scientific Instruments Organization's case (supra). In the facts of the said case, the assessee had filed TDS returns in Form No.26Q belatedly after expiry of 10 years from prescribed time limit and the assessee had submitted that he was unaware of provisions of section 200(3) of the Act. The assessee had deposited the tax to the Central Government at relevant time, however, the assessee failed to furnish TDS returns. The delay in filing the returns in prescribed form for all four quarters was 6463 days in assessment year 2009-10 and in assessment year 2010-11 for all four quarter was 4966 days and in assessment year 2011-12, the delay was 3474 days. In view of the factual aspects of the case, where the delay is so huge and in the absence of any explanation of the assessee, we find no merit in the reliance placed upon on such decision by the learned Departmental Representative for the Revenue.*

28. *On the other hand, various Benches of Tribunal have time and again held that where there was case of reasonableness, there was no merit in levying the penalty under section 272A(2)(k) of the Act. Thus, in order to adjudicate the issue before us, we accept the case of reasonable cause as relevant to section 273B of the Act put up by the assessee in the respective cases in the appeals before us, which admittedly relate to different quarters of*

assessment year 2011-12. Where for the first time, there was requirement of e-TDS furnishing of TDS statement and since there were certain complications in e-filing of TDS returns because of system failure, which admittedly, was amended 18 times by the Department, the delay in furnishing the said returns late could not be attributed to the assessee. The onus was upon the authorities to provide platform for easy compliance to newly introduced provisions of the Act. Where such facilities could not be provided by the authorities and the technical support not being available to small assessees, who are in appeal before us, then the delay in furnishing the e-TDS returns late should be liberally construed. Hence, there was practical difficulty on the part of assessee to comply with newly introduced requirement of e-TDS filing of TDS statements, being technical delay and not venial in nature, merits to be considered as reasonable cause for non-levy of penalty as per the requirements of section 273B of the Act. We hold so. In this bunch of appeals, there are cases where the assessee has defaulted in not depositing tax deducted at source in time, in such cases, the returns were delayed because of default on behalf of the deductor. In such cases, penalty under section 272A(2)(k) of the Act is leviable. However, the same is to be restricted from the date of payment of TDS to the date of filing e-TDS statements since e-TDS statements cannot be filed without payment of TDS to the credit of Central Government. Similar ratio has been laid down by the Chandigarh Bench of Tribunal in Ashirwad Complex case (supra). Accordingly, we hold so.

29. *Another issue raised in some of the appeals is that where all quarterly returns relating to assessment year 2011-12 were filed on one date i.e. there was default in furnishing the returns for each of the quarters late, the case of the assessee was that because of overlapping default, penalty at best should be restricted to quarter No.1 and no penalty should be levied for the subsequent quarters. We find merit in the above plea of the assessee and accordingly, we direct the Assessing Officer to restrict the penalty leviable to first quarter which is in default and for the overlapping default, no penalty is to be levied under section 272A(2)(k) of the Act. We direct the Assessing Officer to verify the claim of assessee in this regard and work out the penalty accordingly.*

30. *The issue arising in other appeals before us is identical and following our directions in the paras hereinabove, the Assessing Officer in the case of individual assessee has to verify the claim of assessee and work out penalty, if any, leviable accordingly after affording reasonable opportunity of hearing to the assessee.*

31. *In the result, all the appeals of assessee are allowed as indicated above."*

Thus, under the aforesaid facts situations , we hold that the assessee has shown bonafide cause as is contemplated u/s 273B of the 1961 Act

and under the factual matrix of the case the penalty of Rs. 99,200/- levied u/s 272A(2)(k) is hereby ordered to be deleted. The assessee succeeds in this appeal. We order accordingly.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 21.03.2018

आदेश की घोषणा खुले न्यायालय में दिनांकः 21.03.2018 को की गई ।

Sd./- Sd/-

(JOGINDER SINGH) (RAMIT KOCHAR)
JUDICIAL MEMBER ACCOUNTANTMEMBER

Mumbai, dated: 21 .03.2018

Nishant Verma

Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench
6. Master File

// Tue copy//

BY ORDER
DY/ASSTT. REGISTRAR
ITAT, MUMBAI