<u>आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम</u>

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं**./I.T.A.Nos.2&3/Vizag/2018**

(निर्धारण वर्ष / Assessment Years: 2013-14 & 2014-15)

Sri Sai Durga Housing Estates Vijayawada [PAN No.ABQFS0830H] (**अपीलार्थी** / Appellant)	ACIT, Central Processing Cell-TDS Ghaziabad (**प्रत्यार्थी** / Respondent)

अपीलार्थी की ओर से / Appellant by : Shri C. Subrahmanyam, AR

प्रत्यार्थी की ओर से / Respondent by : Shri V. Appala Raju, DR

सुनवाई की तारीख / Date of hearing : 24.04.2018

घोषणा की तारीख / Date of Pronouncement : 26.04.2018

<u>आदेश / O R D E R</u>

PER D.S. SUNDER SINGH, Accountant Member:

These appeals filed by the assessee are directed against common order of the Commissioner of Income Tax (Appeals) {CIT(A)}, Vijayawada vide ITA No.201 & 202/CIT(A)/VJA/2015-16 dated 4.10.2017 for the assessment years 2013-14 & 2014-15.

2. All the grounds of appeal are related to the levy of late fee u/s 234E of the Income Tax Act, 1961 (hereinafter called as 'the Act'). The assessee required to submit E-statements of TDS u/s 200(3) of the Act for the quarter ending 2, 3 & 4 of the financial year 2012-13 relevant for the assessment year 2013-14. Since the assessee filed E-statements with a delay of 212 days for the quarter ending September, 120 days for the quarter ending December and 196 days for the quarter ending March-2013, the A.O. levied the late fee of ₹ 42,400/-, ₹ 24,000/- & ₹ 39,200/- respectively for the quarters ending Sept, Dec and March 2012-13. The due dates for filing E-statements, date of filing the statement, the delay and the late fee charged u/s 234E of the Act is as under:

S.No	Q.No	Form Type	Type of statement	Due date of filing	Date of filing	Days of delay in filing	Total TDS	Interest chargeable u/s 234E
1	Q2	26Q	Correction	15.10.2012	15.05.2013	212	154539	42400
2	Q3	26Q	Correction	15.01.2013	15.05.2013	120	115468	24000
3	Q4	26Q	Original	15.05.2013	27.11.2013	196	183876	39200

3. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A). The Ld. CIT(A) confirmed the late fee levied by the

A.O. following the decision of Hon'ble Gujarat High court in Rajesh Kourani Vs. UOI reported in 83 Taxmann.com 137.

4. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal. During the appeal hearing, the Ld. Authorized Representative of the assessee(AR) argued that though section 234E of the Act is introduced in the Income Tax Act, w.e.f. 1.7.2012 by Finance Act, 2012, there is no enabling provision in the Act to levy the late fee. The enabling provision was inserted in section 200A by Finance Act, 2015 w.e.f. 1.6.2015 and hence, prior to insertion of sub clause (c) of Sub-section (1) of section 200A there is no provision for levy of late fee. Therefore, argued that power to charge or collect the late fee u/s 234E of the Act was vested with the revenue only on insertion of clause (c) of Sub-section (1) of section 200A vide Finance Act, 2015 w.e.f. 1.6.2015. Hence, prior to 1.6.2015, no fee could have been levied u/s 234E of the Act while issuing intimation u/s 200A. The Ld. A.R. also relied on the decision of Hon'ble Karnataka High court in the case of Fatheraj Singhvi (2016) 73 Taxmann.com 252.The Ld. A.R. further submitted that the Ld. CIT(A) has considered the decision of Karnataka High Court and relied on Gujarat High Court in the case of Rajesh Kourani Vs. UOI 83 Taxmann.com 137, wherein Hon'ble High Court held that Section 234E is a charging provision creating a charge for

levying fee for certain defaults in filing statements, and fee prescribed under section 234E could be levied even without a regulatory provision being found in section 200A for computation of late fee. The Ld. A.R. submitted that the coordinate bench of this Tribunal considered the decision of Hon'ble Karnataka High court and decided the issue in favour of the assessee in Challapalli Exports Limited and others Vs. ITO (TDS) Ward-1, Guntur in ITA Nos.179 to 182/Vizag/2016 dated 16.2.2017 and held that the late fee u/s 234E of the Act cannot be levied while processing the TDS statements u/s 200A of the Act before 1.6.2015. The Ld. A.R. further submitted that there are two judgements of hon'ble High courts with contradicting views, the decision of Hon'ble Karnataka High Court is in favour of the assessee while the decision of Hon'ble Gujarat High Court cited (supra) is in favour revenue for levy of late fee, in the circumstances Hon'ble High Court of Andhra Pradesh jurisdictional High court in the case of State of Andhra Pradesh Vs. Commercial Tax Officer in 169 ITR 0564 held that the decision which is most favourable to the assessee required to be considered. Similarly, Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Limited in 88 ITR 192 (SC), also expressed the similar view. Therefore requested to adopt the decision in favour of the assessee and allow the relief.

5. On the other hand, the Ld. D.R. relied on the order of the Ld. CIT(A) and argued that Hon'ble Gujarat High court has considered the decision of Hon'ble Karnataka High Court while rendering the judgement, hence, submitted that the Ld.CIT(A) rightly confirmed the addition thus requested to uphold the order of the Ld.CIT(A).

6. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case, the assessee has filed the TDS statements belatedly and the department has levied late fee of ₹ 42,400/- for the quarter ending September, 2012, ₹ 24,000/- for the quarter ending December, 2012 and ₹ 39,200/- for the quarter ending March, 2013. The Ld. A.R. argued that enabling provision i.e. sub clause © of sub-section (1) of section 200A is inserted in the Income Tax w.e.f. 1.6.2015, hence, the A.O. is not empowered to charge the late fee prior to 1.6.2015 in the absence of enabling provision. This view is also supported by the decision of coordinate bench of ITAT, Pune reported in Gajanan Constructions.*v.* Deputy Commissioner of Income-tax, CPC(TDS), Ghaziabad, [2016] 73 taxmann.com 380.Hon'ble Karnataka High Court rendered the decision in favour of the assessee in Fateraj Singhvi Vs. UOI 73 Taxmann.com 252 and

held that section 200A of the Act enables the A.O. to determine late fee u/s 234E of the Act, brought about w.e.f. 1.6.2015 held to be prospective, hence no computation of fee for demand or institution of late fee u/s 234E of the Act could be made for TDS deducted for respective assessment years prior to 1.6.2015. Hon'ble Gujarat High court in the case of Rajesh Kourani Vs. UOI (2017) 83 Taxmann.com 137 rendered the judgement in favour of revenue and held that even in the absence of section 200A(1)© of the Act, the A.O. is empowered to levy late fee u/s 234E of the Act. Since there are two conflicting and contradicting judgements of Hon'ble High courts as held by Hon'ble A.P. High court, the decision, which is most favourable to the assessee has to be adopted. For ready reference, we reproduce hereunder para -13 of the jurisdictional High court judgement in the case of State of Andhra Pradesh Vs. Commercial Tax Officer 169 ITR 0564 cited (supra) which reads as under:

> *"13. Reference may also be invited to the decision of the Bombay High Court in Subramanian, ITO vs. Siemens India Ltd. (1985) 36 CTR (Born) 197 (1985) 156 ITR 11 (Born), The question that arose for consideration in this case is whether the ITO is bound by the decision of a single Judge or a Division Bench of the Court within whose jurisdiction he is operating even if an appeal has been preferred against such decision and is pending. The following observations of the Bombay High Court may be extracted:*

So far as the legal position is concerned, the ITO would be bound by a decision of the Supreme Court as also by a decision of the High Court of the State within whose jurisdiction he is (functioning), irrespective of the pendency of any appeal or special leave application against that judgment. He would equally be bound by a decision of another High Court on the point, because not to follow that decision would be to cause grave prejudice to the assessee. Where there is a conflict between different High Courts, he must follow the decision of the High Court within whose jurisdiction he is (functioning), but if the conflict is between decisions of other High courts, he must take the view which is in favour of the assessee and not against him. Similarly, if the Tribunal has decided a point in favour of the assessee, he cannot be ignore that decision and take a contrary view, because that would equally prejudice the assessee."

7. Similar view was expressed by the Hon'ble Apex Court in the case of CIT Vs. Vegetable Products Limited cited (supra), therefore following the decision of Hon'ble jurisdictional High court, we hold that the decision of Hon'ble Karnataka High court, which is most favourable to the assessee required to be adopted in this case. As discussed earlier, this tribunal in the case of Challapalli Exports Pvt. Ltd. Vs. ITO (TDS) Ward-1 cited (supra) held that the late fee payable u/s 234E of the Act cannot be levied while processing the statements u/s 200A of the Act prior to 01/06/2015. The coordinate bench has considered the decision of Hon'ble Karnataka High Court also while giving the ruling. For ready reference, we extract relevant part of the order of the coordinate bench, which reads as under:

"7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The only limited issue came up for our consideration is whether on facts and circumstances of the case, the A.O. can levy late filing fee u/s 234E of the Act, for belated filing of TDS statements u/s 200(3), prior to insertion of sub-clause (c) into section 200A of the Act. Admittedly, in these cases, the assessee has filed TDS statements after the due date specified under the respective provisions of the Act and rule 31A of Income Tax Rules, 1962. It is the claim of the assessee that there is no enabling provision in section 200A of the Act, for computation of fee prescribed u/s 234E of the Act, therefore, the A.O. cannot compute late fee prescribed u/s 234E of the Act, prior to insertion of sub-clause (c) into section 200A of the Act, by the Finance Act, 2015 w.e.f. 1.6.2015.

8. In support of his arguments, the A.R. relied upon plethora of judgements including the decision of Hon'ble High Court of Karnataka, in the case of Fatheraj Singhvi Vs. UOI (2016) 289 CTR 602 (Karn.) and submitted that the Hon'ble High Court, held that section 200A of the Act enabling assessing officer to determine fee u/s 234E of the Act, brought about w.e.f. 1.6.2015 held to be prospective, hence no computation of fee for demand or intimation for fee u/s 234E of the Act could be made for TDS deducted for respective assessment year prior to 1.6.2015. We find that the Hon'ble High Court of Karnataka, in the said case held that u/s 200A of the Act, the A.O. cannot levy fee u/s 234E of the Act, before insertion of sub-clause (c) into section 200A of the Act, by the Finance Act, 2015 w.e.f. 1.6.2015. The relevant portion of the order is extracted below.

"As per section 200(3) read with rule 31A of the Income Tax Rules, 1962 a tax deductor is required to file quarterly statement of such taxes deducted at source by him as TDS and for the period in question, the relevant dates for filing of such statement is as follows: (i) 30th June – 15th July of the financial year, (ii) 30th September - 15th October of the financial year; (iii) 31St December - 15th January of the financial year; and (iv) 31st Mar 15th May of the following financial year. [Para 8]

- *It may be recorded that section 200(3) requiring to file formal TDS statement within the aforesaid each quarter inserted on 14-2005 and at the relevant point of time, section 272A(2)(k) provided for the penalty of Rs. 100 per for each day of default in filing TDS statement and such provision also came to be inserted with effect from 14-2 On 14-2010, section 200A was inserted providing for the processing of the TDS statement and the conseq issuance of the intimation to the deductor, the same determined as payable by it or refundable by it. But, the rele aspect is that, in initial provisions of section 200A, there was no reference for fee payable under section 234E.*
- *On 1-7-2012, section 234E providing for levying of fee of Rs.200 per day for each day of default in filing statement was inserted. [Para 10]*
- *Similarly, section 271H was inserted with effect from 1-7-2012 providing for imposition of penalty for default filing TDS statement and also for furnishing of incorrect information in such TDS statement. The proviso was inse in section 272A providing for no penalty under the said section will be imposed after 1-7-2012 for failure to file statement on time possibly because a separate section 271 H was inserted in the Act.[Para 11]*

- *On 1-6-2015, clauses (c) to (f) came to be substituted under section 200A providing that the fee under section 2 can be computed at the time of processing of the return and the intimation could be issued specifying the s payable by the deductor as fee under section 234E.[Para 12]*
- *When the returns for TDS filed by the respective appellant-petitioners were processed in purported exercise of power under section 200A, the amount of fee under section 234E is computed and determined. The demand is n and the intimation given under section 200A includes the computation and the determination of the fee payable b) appellant-petitioners. [Para 13]*
- *Section 234E has come into force on 1-7-2012. Therefore, one may at the first blush say that, since section 234E charging section for fee, the liability was generated or had accrued, if there was failure to deliver or cause t delivered the statement/s of TDS within the prescribed time. But, section 234E cannot be read in isolation an required to be read with the mechanism and the mode provided for its enforcement. As observed hereinabove, M section 234E was inserted in the Act simultaneously, section 271H was also inserted in the Act providing for penalty for failure of furnishing of statements etc. Therefore, if there was failure to submit the statement for TD per section 234E, the fee payable is provided but the mechanism provided was that if there was failure to fur statements within the prescribed date, the penalty under section 271H (1) and (2) could be imposed. However, ut sub-section (3) of section 271H, the exception is provided that no penalty shall be levied for the failure referred under clause (a) of sub-section (1) if the person proves that after paying TDS with the fee and interest the amount credited and he had delivered or caused to deliver the statement within one year from the time prescribed submission of the said statement. To put it in other words, for failure to submit the statements, the penalty provided under section 271(1)(a) cannot be imposed if the deductor complies with the requirement of sub-section (3) of sec 271H. Hence, it can be said that the fee provided under section 234E would take out from the rigors of penalty u section 271H but of course subject to the outer limit of one year as prescribed under sub-section (3) of section 2 It can also be said that when the Parliament intended to insert the provisions of section 234E providing for simultaneously the utility of such fee was for conferring the privilege to the defaulter deductor to come out from rigors of penal provision of section 271H. Be it recorded that, prior to section 271H inserted in the statute book. enforceability of requirement to file return under section 200(3) and section 206C(3) was by virtue of section 2721 (k) which provided for the penalty of Rs. 100 per day for each day of default in filing TDS statements. But, M section 234E was inserted with effect from 1-7-2012 simultaneously, a second proviso was added under section 2 (2) with effect from 1-7-2012.[Para 17]*

- *The aforesaid shows that in the clause (k) if the said failure relates to a statement referred to in sub-section (3 section 200 or the sub-section (3) of section 206C, no penalty shall be imposed for TDS after 1-7-201 2.[Para 18]*

- *Hence, it can be said that, the mechanism provided for enforceability of section 200(3) or section 206C (3) for filing of the statement by making it penal under section 272A(2)(k) is done away in view of the insertion of section 2 providing for penal provision for such failure to submit return. When the Parliament has simultaneously brought al section 234E, section 271H and the aforesaid proviso to*

section 272A(2), it can be said that, the fee provided ui section 234E is contemplated to give a privilege to the defaulter to come out from the rigors of penalty provided under section 271H (1) (a) if he pays the fee within one year and complies with the requirement of sub-section (section 271H.[Para 19]

- *In view of the aforesaid observations and discussion, two aspects may transpire one, for section 234E providing fee and given privilege to the defaulter if he pays the fee and hence, when a privilege is given for a particular purl which in the present case is to come out from rigors of penal provision of section 271H(1)(a), it cannot be said that provisions of fee since creates a counter benefit or reciprocal benefit in favour of the defaulter in the rigors of provision, the provisions of section 234E would meet with the test of quid pro quo. [Para 20]*

- *However, if section 234E providing for fee was brought on the state book, keeping in view the aforesaid purpose intention then, the other mechanism provided for computation of fee and failure for payment of fee under sec which has been brought about with effect from 1-6-2015 cannot be said as only by way of a regulatory mode or a mechanism but it can rather be termed as conferring substantive power upon the authority. It is true that, a mechanism by insertion of any provision made in the statute book, may have a retroactive character but, what provision provides for a mere regulatory mechanism or confers substantive power upon the authority would also 1 which may be required to be considered before such provisions is held to be retroactive in nature. Further, provision is inserted for liability to pay any tax or the fee by way of compensatory in nature or fee simultaneously mode and the manner of its enforceability is also required to be considered and examined. Not only if the mode and the manner is not expressly prescribed, the provisions may also be vulnerable. All such aspects required to be considered before one considers regulatory mechanism or provision for regulating the mode and of recovery and its enforceability as retroactive. If at the time when the fee was provided under section 234E, the I also provided for its utility for giving privilege under section 271H(3) that too by expressly putting bar for pen section 272A by insertion of proviso to section 272A(2), it can be said that a particular set up for imposition payment of fee under section 234E was provided but, it did not provide for making of demand of such fee u/s 200A payable under section 234E. Hence, considering the aforesaid peculiar facts and circumstances, the contented respondent-revenue that insertion of clauses (c) to (f) under section 200A(1) should be treated as retroactive in not prospective is unacceptable. [Para 21]*

It is hardly required to be stated that, as per the well established principles of interpretation of statute, unless it is provided or impliedly demonstrated, any provision of statute is to be read as having prospective effect and not ret effect. Under the circumstances, it is found that substitution made by clauses (c) to (0 of sub-section (1) of section be read as having prospective effect and not having retroactive character or effect. Resultantly, the demand u/s 200A for computation and intimation for the payment of fee under section 234E could not be made in purported power under section 200A by the respondent for the period of the respective assessment year prior to 1-6-2015. 1-1 is made clear that, if any deductor has already paid the fee after intimation received under section 200A, the afori will

not permit the deductor to reopen the said question unless he has made payment under protest.[Para 22]

- *In view of the aforesaid observation and discussion, since the impugned intimation given by the respondent- c against all the appellants under section 200A are so far as they are for the period prior to 1-6-2015 can be said any authority under law. Hence, the same can be said as illegal and invalid.[Para 23]*

- *If the facts of the present cases are examined in light of the aforesaid observation and discussion, it appears matters, the intimation given in purported exercise of power under section 200A are in respect of fees under section the period prior to 1-6-2015. As such, it is on account of the intimation given making demand of the fees in exercise of power under section 200A, the same has necessitated the appellant-original petitioner to challenge the section 234E. In view of the reasons recorded, when the amendment made under section 200A which has come on 1-6-2015 is held to be having prospective effect, no computation of fee for the demand or the intimation for the section 234E could be made for the TDS deducted for the respective assessment year prior to 1-6-2015. Hence, ti notices under section 200A by the respondent authority for intimation for payment of fee under section 234E can without any authority of law and the same are quashed and set aside to that extent. [Para 24]*

- *As such, as recorded earlier, it is on account of the intimation received under section 200A for making computation demand of fees under section 234E, the same has necessitated the appellant to challenge the constitutional validity 234E. When the intimation of the demand notices under section 200A is held to be without authority of law s relates to computation and demand of fee under section 234E, it is found that the question of further scrutiny for constitutional validity of section 234E would be rendered as an academic exercise because there would not be an: the part of the petitioners to continue to maintain the challenge to constitutional validity under section 234E. At th may also be recorded that the appellant had also declared that if the impugned notices under section 200A are so far as it relates to computation and intimation for payment of fee under section 234E, the appellant-petitioners press the challenge to the constitutional validity of section 234E. But, they submitted that the question of cor validity of section 234E may be kept open to be considered by the Division Bench and the Judgment of the Sir may not conclude the constitutional validity of section 234E .[Para 25]*

- *Under these circumstances, no further discussion would be required for examining the constitutional validity 234E. Save and except to observe that the question of constitutional validity of section 234E before the Division this Court shall remain open and shall not be treated as concluded.[Para 26]*

- *In view of the aforesaid observations and discussion, the impugned notices under section 200A for computation intimation for payment of fee under section 234E as they relate to for the period of the tax deducted prior to 1-6-2(aside. It is clarified that the present judgment would not be interpreted to mean that even if the payment of the section 234E already made as per demand/intimation under section 200A for the TDS for the period prior to 1.4. to be reopened for claiming*

refund. The judgement will have prospective effect accordingly. It is further observed of constitutional validity of section 234E shall remain open to be considered by the Division Bench and shall not the order of the Single Judge [Para 27]."

9. The assessee relied upon the decision of ITAT, Pune in the case of Gajanana Constructions Vs. DCIT, CPC (TDS), Ghaziabad (2016) 161 ITD 313 (Pune Tribunal). The coordinate bench of this Tribunal, under similar circumstances held that power to charge/collect fees u/s 234E of the Act, was vested with revenue only on substitution of clause (c) to section 200A of the Act, vide Finance Act, 2015 w.e.f. 1.6.2015. Hence, prior to 1.6.2015, no fee could have been levied u/s 234E of the Act, while issuing intimation u/s 200A of the Act. The relevant portion of the order is extracted below:

***"Whether Assessing Officer which processing intimation under section 20" could charge late fee under provisions** of **section** 234E?*

- *The issue arising in this bunch of appeals is against levy of fees under section 234E. In order to adjudicate the issue, first reference is being made to the relevant provisions of the Act. [Para 15]*
- *Looking at various provisions of the Act, the issue needs to be adjudicated in the case of assessee, wherein admittedly, TDS returns which were deemed to be filed by the assessee were filed after delay and the question was whether the Assessing Officer while processing the intimation under section 200A could charge late fee under the provisions of section 234E. The assessee claims that the Assessing Officer at best could charge the difference in tax deducted and not paid in Treasury from the deductor and/or any interest payable on such deduction of tax at source. However, till substitution of clause (c) to section 200A(l) by the Finance Act, 2015 with effect from 1-6-2015, the Assessing Officer was not empowered to charge fees under section 234E . The case of revenue on the other hand, was that it was the duty of deductor while furnishing the statement under section 200(3) to deposit the fees referred to in section 234E(I). The revenue stressed that fees referred to in sub-section (1) had to be paid while delivering or causing to deliver the statement in accordance with provisions of section 200(3) or the proviso to section 206C(3). However, various regulations and the statutory provisions in this regard point out that undoubtedly, the responsibility of the deductor was to deposit the tax deducted at source in time and if not so, then with interest and consequently, where the tax was not paid in time and interest was not paid in time and then, where the statement of tax deducted at source could not be filed before the prescribed authority within stipulated time, the assessee was liable to levy of fees under section 234E. However, in case any default occurs due to the non-payment of fees by the assessee in this regard, then the provision which has to be considered is section 200A(I)(c). The power to charge/collect fees as per provisions of section 234E was vested with the prescribed authority under the Act only on substitution of earlier clause (c) to section 200A by the Finance Act, 2015 with effect from 1-6-2015. Once any provision of the Act has been made applicable from a respective date, then the requirement of the statute is to apply the said provisions from the said date.[Para 23]*

- *In respect of the issue raised before us, it is clear that the prescribed authority has been vested with the power to charge fees under section 234E only with regard to levy of fees by the substitution made by Finance (No.2) Act, 2015 with effect from 1-6-2015. Once the power has been given, under which any levy has to be imposed upon taxpayer, then such power comes into effect from the date of substitution and cannot be applied retrospectively. The said exercise of power has been provided by the statute to be from 1-6-2015 and hence, is to be applied prospectively. There is no merit in the claim of revenue that even without insertion of clause (c) under section 200A(1), it was incumbent upon the assessee to pay fees, in case there is default in furnishing the statement of tax deducted at source. Admittedly, the onus was upon the assessee to prepare statements and deliver the same within prescribed time before the prescribed authority, but the power to collect the fees by the prescribed authority vested in such authority only by way of substitution of clause (c) to section 200A(l) by the Finance Act, 2015 with effect from 1¬6-2015. Prior to said substitution the Assessing Officer had no authority to charge the fees under section 234E while issuing intimation under section 200A. Before exercising the authority of charging any sum from any deductor or the assessee, the prescribed authority should have necessary power vested in it and before vesting of such power, no order can be passed by the prescribed authority in charging of such fees under section 234E, while exercising jurisdiction under section 200A . Thus, in the absence of enabling provisions, under which the prescribed authority is empowered to charge the fees, the Assessing Officer while processing the returns filed by the deductor in respect of tax deducted at source can raise the demand on account of taxes, if any, not deposited and charge interest. However, prior to 1-6-2015, the Assessing Officer does not have the power to charge fees under section 234E while processing TDS returns. In the absence of enabling provisions, levy of fees could not be effected in the course of intimation issued under section 200A prior to 1-6-2015.[Para 24]*

- *The perusal of Memorandum to the Finance Bill, 2015 explaining the provision relating to insertion of clause (c) to section 200A clarifies the intention of Legislature in inserting the said provision. The provisions of section 234E were inserted by the Finance Act, 2012, under which the provision was made for levy of fees for late furnishing TDS/TCS statements. Before insertion of section 234E, the Finance (No.2) Act, 2009 had inserted section 200A, under the said section, mechanism was provided for processing of TDS statements for determining the amount payable or refundable to the deductor, under which the provision was also made for charging of interest. However, since the provisions of section 234E were not on statute when the Finance (No.2) Act, 2009 was passed, no provision was made for determining the fees payable under section 234E at the time of processing the TDS statements. So, when section 234E was introduced, it provided that the person was responsible for furnishing the TDS returns/statements within stipulated period and in default, fees would be charged on such person. The said section itself provided that fees shall not exceed the amount of tax deducted at source or collected at source. It was further provided that the person responsible for furnishing the statements shall pay the said amount while furnishing the statements under section 200(3). However, power enabling the Assessing Officer to charge/levy the fee under section 234E while processing the TDS returns/statements filed*

by a person did not exist when section 234E was inserted by the Finance Act, 2012. The power to charge fees under the provisions of section 234E while processing the TDS statements, was dwelled upon by the Legislature by way of insertion of clause (c) to section 200A(1) by the Finance Act, 2015 with effect from 1-6-2015. Accordingly, it is held that where the Assessing Officer has processed the TDS statements filed by the deductor, which admittedly, were filed belatedly but before insertion of clause (c) to section 200A(1) with effect from 1-6-2015, then in such cases, the Assessing Officer is not empowered to charge fees under section 234E while processing the TDS returns filed by the deductor. [Para 28]

- *The Bombay High Court in Rashmikant Kundalia v. Union Of India 20 15] 54 taxmann.com 200/229 Taxman 596/373 ITR 268 has upheld the constitutional validity of said section introduced by the Finance Act, 2015 with effect from 1-6-2015 but was not abreast of the applicability of the said section 234E by the Assessing Officer while processing TDS statement filed by the deductor prior to 1-6-2015, In such scenario, there is no merit in the plea of the revenue that the Bombay High Court in Rashinikant KundaIia case (supra) has laid down the proposition that fees under section 234E is chargeable in the case of present set of appeals, where the Assessing Officer had issued the intimation under section 200A prior to 1-6-201 5[Para 29]*

- *Another aspect of the issue is whether the amendment brought in by the Finance Act, 2015 with effect from 1-6-2015 by way of insertion of clause (c) to section 200A(l) is clarificatory or is prospective in nature and is not applicable to the pending assessments. Undoubtedly, the provisions of section 234E were inserted by the Finance Act, 2012, under which the liability was imposed upon the deductor in such cases where TDS statements/returns were filed belatedly to pay the fees as per said section. However, in cases, where the assessee has failed to deposit the said fees, then in order to enable the Assessing Officer to collect the said fees chargeable under section 234E, it is incumbent upon the Legislature to provide mechanism for the Assessing Officer to charge and collect such fees. In the absence of enabling provisions, the Assessing Officer while processing the TDS statements, even if the said statements are belated, is not empowered to charge the fees under section 234E. The amendment was brought in by the Finance Act, 2015 with effect from 1-6-2015 and such an amendment where empowerment is given to the Assessing Officer to levy or charge the fees cannot be said to be clarificatory in nature and hence, applicable for pending assessments. [Para 30]*

- *The Supreme Court in CIT v. Vatika Township Pvt. Ltd. [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 has explained the general principle concerning retrospectivity and held that of the various rules guiding how a legislation has to be interpreted, one established rule is that unless contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. Idea behind the rule is that current law should govern current activities. The Memo explaining the Finance Bill, 2015 very clearly also recognizes that and refers to the current provisions of sub-section (3) to section 200, under which the deductor is to furnish TDS statements. However, as section 234E was inserted after insertion of section 200A, the existing provisions of section 200A did not*

provide for determination of fees payable under section 234E at the time of processing of TDS statements. In this regard, it was thus, proposed to amend the provisions of section 200A so as to enable the computation of fees payable under section 234E at the time of processing of TDS statements under section 200A. In other words, the Assessing Officer is empowered to charge fees payable under section 234E in the intimation issued after insertion of clause (c) to section 200A(1) with effect from 1-6-2015. The Legislature itself recognized that under the existing provisions of section 200A i.e. prior to 1-6-2015, the Assessing Officer at the time of processing the TDS statements did not have power to charge fees under section 234E and in order to cover up that, the amendment was made by way of insertion of clause (c) to section 200A. In such scenario, it cannot be said that insertion made by section 200A(l)(c) is retrospective in nature, where the Legislature was aware that the fees could be charged under section 234E as per Finance Act, 2012 and also the provisions of section 200A were inserted by Finance (No.2) Act, 2009, under which the machinery was provided for the Assessing Officer to process the TDS statements filed by the assessee. The insertion categorically being made with effect from 1-6-2015 lays down that the said amendment is prospective in nature and cannot be applied to processing of TDS returns/statements prior to 1-6-2015. [Para 3 1]

- *In recent judgment dated 26-8-2016. the Karnataka High Court in Writ Appeal Nos.2663-2674/2015(T¬IT) in Fatheraj Singhvi v. Union of India [2016] 73 taxmann.com 252 has quashed the intimation issued under section 200A levying the fees for delayed filing the TDS statements under section 234E. The High Court notes that the Finance Act, 2015 had made amendments to section 200A enabling the Assessing Officer to make adjustments while levying fees under section 234E was applicable with effect from 1-6¬2015 and has held that it has prospective effect. Accordingly, the High Court held that intimation raising demand prior to 1-6-2015 under section 200A levying section 234E late fees is not valid.However, the High Court kept open the issue on constitutional validity of section 234E . The decision of Bombay High Court in Rashmikant Kundalia's case (supra) has already been referred in this regard, wherein the constitutional validity of section 234E has been upheld.[Para 32]*

- *Accordingly, the amendment to section 200A(1) is procedural in nature and in view thereof, the Assessing Officer while processing the TDS statements/returns in the present set of appeals for the period prior to 1-6-2015, was not empowered to charge fees under section 234E. Hence, the intimation issued by the Assessing Officer under section 200A in all these appeals does not stand and the demand raised by way of charging the fees under section 234E is not valid and the same is deleted. The intimation issued by the Assessing Officer was beyond the scope of adjustment provided under section 200A and such adjustment could not stand in the eye of law.[Para 33]*

- *Whether any appeal is maintainable against intimation issued under section 20" and/or order passed under section 154 read with section 20" by Assessing Officer in charging fees under section 234E?*

- *In Memorandum explaining the Finance Bill, 2015, the heading was rationalization of provisions relating to Tax Deduction at Source (TDS) and*

Tax Collection at Source (TCS). The said memorandum

- *categorically recognized that under the existing provisions of the Act, after processing of TDS statements, an intimation is generated specifying the amount payable or refundable. It was further noted that this intimation generated after processing TDS statement is (i) subject to rectification under section 154; (ii) appealable under section 246A; and (iii) deemed as notice of payment under section 156. Under the amendment, similar position was given to the processing of TCS statements. In other words, the Legislature recognizes that a deductor who has filed his statement of tax deducted at source, which in turn, has been processed by the Assessing Officer and intimation is generated under which, if any amount is found to be payable, then such intimation generated after processing of TDS returns is subject to rectification under section 154 of the Act and/or is also appealable under section 246A, since the demand issued by the Assessing Officer is deemed to be a notice of payment under section 156. Since the intimation in question issued by the Assessing Officer was appealable order under section 246A(1)(a), therefore, the Commissioner(Appeals) should have examined the legality of adjustment made under intimation issued under section 200A . The Commissioner (Appeals) has rejected the present set of appeals on the surmise that first of all, no appeal is provided against the intimation issued under section 200A. Further, the Commissioner (Appeals) has also decided the issue on merits and the assessee is in appeal on both these grounds. Vis-à-vis the first issue of maintainability of appeal against the intimation issued under section 200A, it is held that such intimation issued by the Assessing Officer after processing the TDS returns is appealable. The demand raised by way of charging of fees under section 234E is under section 156 and any demand raised under section 156 is appealable under section 246A(1)(a) and (c). Accordingly, the findings of Commissioner (Appeals) in this regard are reversed. Similar proposition has been down by Mumbai Bench of Tribunal in bunch of cases with lead order in Kash Realtors (P.) Ltd. v.]TO [IT Appeal No.4199 (Mum.) of 2015, relating to assessment year 2013-14, consolidated order dated 27-7-2016, which had also decided the issue of charging of fees under section 234E in favour of the assessee following the decisions of other Benches of Tribunal. Once intimation issued under section 200A(l) is appealable order before the Commissioner (Appeals) under section 246A(l)(a), then such appealable order passed by the Commissioner (Appeals) under section 250 is further appealable before the Tribunal under section 253. Hence, the present appeals filed by the assessee even on this preliminary issue are admitted. The issue of charging fees under section 234E has already been adjudicated by the Assessing Officer while processing returns/statements in the paras hereinabove and in view thereof, it is held that the Assessing Officer is not empowered to charge the fees under section 234E by way of intimation issued under section 200A in respect of defaults before 1-6-2015, thus, claim of assessee on both the aspects is allowed. [Para 36]*

- *In the result, all the appeals filed by different assessees for different quarters relating to different years are allowed.[Para 37]"*

10. In this view of the matter and also respectfully following the ratios of the judgements discussed above, we are of the view that there is no enabling provision

in section 200A of the Act, before insertion of sub-clause (c) into section 200A of the Act, by the Finance Act, 2015 w.e.f. 1.6.2015 and hence, no adjustments can be made towards late fee payable u/s 234E of the Act, for belated filing of TDS statements u/s 200(3) of the Act, while issuing intimation u/s 200A of the Act, for processing TDS statements filed and processed for the assessment years prior to 1.6.2015. In these cases, admittedly all the TDS returns has been filed and processed by the TDS, CPC before 1.6.2015. Therefore, we are of the view that fee payable u/s 234E of the Act, cannot be levied while processing TDS statements u/s 200A of the Act. The CIT(A), without appreciating the facts simply upheld the action of the A.O. in levying late fee u/s 234E of the Act. Hence, we reverse the CIT(A) order and direct the A.O. to delete additions made towards late fee u/s 234E of the Act."

8. In the instant case, the TDS returns were filed before 1.6.2015 and processed before 1.6.2015. The late fee was related to the assessment year 2013-14, therefore, the case of the assessee is squarely covered by the decision cited (supra). Since the facts are identical, respectfully following the decision of coordinate bench and following the decision of Hon'ble Karnataka High Court, we hold that the A.O. is not empowered to levy late fee prior to 1.6.2015 and accordingly, the late fee levied by the A.O. is cancelled. The orders of the A.O. levying the late fee for both the A.Y 2013-14 and 2014-15 are cancelled and the appeals of the assessees are allowed.

9. In the result, the appeals filed by the assessee are allowed.

The above order was pronounced in the open court on 26th Apr'18.

Sd/-	Sd/-
(वी. दुर्गाराव)	**(डि.एस. सुन्दर सिंह)**
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 26.04.2018

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – Sri Sai Durga Housing Estates, 40-3/1-52, Kaminenivari Street, Near Fortune Murali Park, Vijayawada
2. प्रत्यार्थी / The Respondent – The ACIT, Central Processing Cell-TDS, Ghaziabad
3. आयकर आयुक्त / The CIT, Vijayawada
4. आयकर आयुक्त (अपील) / The CIT (A), Vijayawada
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम **/** DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
ITAT, VISAKHAPATNAM