IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos.236-242/Coch/2017
Assessment Years : 2012-13, 2013-14 and 2014-15.

The Headmistress, A.V. High School, Ponnani, Malappuram-679 577. [TAN:CHNA 02320D]	**Vs.**	The Assistant Commissioner of Income-tax, CPC-II, TDS, Ghaziabad.
(Assessee-Appellant)		**(Revenue-Respondent)**

Assessee by	Shri Harisankar V. Menon, Adv.
Revenue by	Shri A. Dhanaraj, Sr. DR

Date of hearing	04/07/2018
Date of pronouncement	05/07/2018

O R D E R

Per BENCH:

These appeals filed by the assessee are directed against the common order of the CIT(A), Kozhikode dated 23/01/2017 and pertains to the assessment years 2012-13, 2013-14 and 2014-15.

2. The assessee raised the following grounds:

A The orders of the authorities below in so appellant are opposed to law, facts and circumstances of the case.

B The averments made before the first appellate authority, by way of written submissions have not been taken into account by the said authority.

C The provisions of Section 234E is conferring arbitrary powers for imposition of late filing fee without providing the assesse an opportunity to explain the reasons for the delayed filing of the TDS statements. The constitutional validity of Section 234E is being considered by the various High Courts. The fee levied under Section 234E is akin to a penalty. So much so, the provisions under Section 234E to the extent it provides for automatic levy of late fee without taking into account the circumstances that led to the delayed filing of the TDS statements is arbitrary and illegal.

D: The delayed filing in the present case is not intentional. The appellant as stated earlier is the Headmistress of a High School. Salary is being disbursed from the treasury on the basis of the bill submitted by the appellant herein. Tax is being deducted by the treasury while making such payments. But there was mismatch in the TDS statements submitted by the treasury on account of which the filing of TDS statements by the appellant got delayed. But this aspect is not taken into account by the authorities below while passing the impugned order. It ought to have been noticed that the delay in filing TDS statements was on account of reasons beyond the control of the appellant. So much so, the delay ought not to have been penalized by imposition of late filing fee under Section 234E.

E: Without prejudice to the above, the appellant may point out that though Section 234E was introduced from 2012 onwards, the demand of such late filing fee is provided by the mechanism under Section 200A. But Section 200A is amended enabling the imposition and demand of late filing fee under Section 234E only with effect from 01-06-2015. So much so, the demand of late filing fee from the appellant for the periods prior to 01-06-2015 is without any justification and arbitrary.

> *"21. However, if Section 234E providing for fee was brought on the statute book, keeping in view the aforesaid purpose and the intention then, the other mechanism provided for computation of fee and failure for payment of fee under Section 200A which has been brought about with effect from 1-6-2015 cannot be said as only by way of a regular mode or a regulatory*

mechanism but it can rather be termed as conferring substantive power upon the authority. It is true that, a regulatory mechanism by insertion of any provision made in the statute book, may have a retroactive character but, whether such provision provides for a mere regulatory mechanism or confers substantive power upon the authority would also be a aspect which may be required to be considered before such provisions is held to be retroactive in nature. Further, when any provision is inserted for liability to pay any tax or the fee by way of compensatory in nature or fee independently simultaneously mode and the manner of its enforceability is also required to be considered and examined. Not only that, but, if the mode and the manner is not expressly prescribed, the provisions may also be vulnerable. All such aspects will be required to be considered before one considers regulatory mechanism or provision for regulating the mode and the manner of recovery and its enforceability as retroactive. If at the time when the fee was provided under Section 234E, the Parliament also provided for its utility for giving privilege under Section 271H (3) that too by expressly put bar for penalty under Section 272A by insertion of proviso to Section 272A(2), it can be said that a particular set up for imposition and the payment of fee under Section 234E was provided but, it did not provide for making of demand of such fee under Section 200A payable under Section 234E. Hence, considering the aforesaid peculiar facts and circumstances, we are unable to accept the contention of the learned counsel for respondent - revenue that insertion of clause (c) to (f) under Section 200A (1) should be treated as retroactive in character and not prospective.

22. It is hardly required to be stated that, as per the well established principles of interpretation of statute, unless it is expressly provided or impliedly demonstrated, any provision of statute is to be read as having prospective effect and not retrospective effect. Under the circumstances, we find that substitution made by clause (c) to (f) of sub-section (1) of Section 200A can be read as having prospective effect and not having retroactive character or effect. Resultantly, the demand under Section 200A for computation and intimation for the payment of fee under Section 234E could not be made in purported exercise of power under Section 200A by the respondent for the period of the respective assessment year prior to 01-06-2015. However, we make it clear that, if any deductor has already paid the fee after intimation received under Section 200A, the aforesaid view will not permit the deductor to reopen the said question unless he has made payment under protest.

23. In view of the aforesaid observation and discussion, since the impugned intimation given by the respondent. Department against all the appellants under Section 200A are so far as they are for the period prior to 01-06-2015 can be said as without any authority under law. Hence, the same can be said as illegal and invalid."

The above judgment applies to the present case also and the demand of late filing fee is to be cancelled.

The appellant has submitted written agreement notes before the first appellate authority pointing out the above judgment. But the first appellate order does not make any reference to the said judgment in the impugned order.

H The other grounds will be raised at the time of hearing.

2.1 The assessee has not pressed Ground Nos. A, B C & D and has accordingly made an endorsement to that effect. Hence, these grounds are dismissed as not pressed.

3. Regarding Ground Nos. E and F, the facts of the case are that the assessee filed TDS regular statements in Form No. 24Q in respect of various quarters of financial years 2012-13, 2013-14 and 2014-15, as detailed under:

Financial Year	Quarter No.	Date of filing TDS statement
2012-13	Q2	16.11.2015
2012-13	Q3	16.11.2015
2012-13	Q4	16.11.2015
2013-14	Q1	09.11.2015
2013-14	Q2	09.11.2015
2013-14	Q3	09.11.2015
2013-14	Q4	09.11.2015
2014-15	Q1	04.11.2015
2015-16	Q2	04.11.2015
2015-16	Q3	04.11.2015
2016-17	Q4	04.11.2015

3.1 As there were delays in filing these statements, the TDS Central Processing Zone, Ghaziabad imposed fees under section 234E of the Income Tax Act, 1961 as per intimations u/s 200A of the Income Tax Act, 1961, as under:-

Financial Year	Quarter No.	Amount levied u/s. 234E	Date of intimation
2012-13	Q2	Rs. 11,250/-	20.11.2015
2012-13	Q3	Rs. 15,000/-	20.11.2015
2012-13	Q4	Rs.2,00,010/-	28.11.2015
2013-14	Q1	Rs. 86,150/-	12.11.2015
2013-14	Q2	Rs. 84,150/-	12.11.2015
2013-14	Q3	Rs. 4,150/-	12.11.2015
2013-14	Q4	Rs.1,08,600/-	12.11.2015
2014-15	Q1	Rs. 92,200/-	07.11.2015
2015-16	Q2	Rs. 73,800/-	07.11.2015
2015-16	Q3	Rs. 55,400/-	07.11.2015
2016-17	Q4	Rs. 34,600/-	07.11.2015

4. On appeal, the CIT(A) observed that in view of the provisions of section 200A and 234E of the I.T. Act, the assessee is liable for levy of late fee u/s. 234E for delay in furnishing the TDS statement to the Department. Accordingly, he held that the levy of late fee u/s. 234E was justified.

5. Against this, the assessee is in appeal before us.

6. We have heard the rival submissions and perused the record. We find that a similar issue came up before this Tribunal in the case of Little Servants of Divine Providence Charitable Trust vs. ITO(TDS) reported in 2016 (9) TMI 960 –

ITAT, Cochin (ITA No.258/Coch/2016 dated 09/09/2016) wherein it was held as under:

> *"8 We have heard the rival submissions and perused the material on record. The Finance Act, 2015 has amended section 200A of the Act with effect from 1.6.2015. The amendment is as follows:*
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> *In section 200A(1) of the Act, for clause (c) to (e), the following clauses were substituted with effect from the 1st day of June 2015, namely:-*
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> *(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."*
>
> *8.1 Thus, post 1st June 2015, in the course of processing of a TDS statement and issuance of intimation u/s 200A in respect thereof, an adjustment could also be made in respect of the 'fee', if any, shall be computed in accordance with the provisions of section 234E". Prior to 1st June 2015, there was no enabling provision therein for raising a demand in respect of levy of fees u/s 234E of the Act.*
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> *8.2 This issue has been elaborately considered by the Amritsar Bench of the Tribunal in the case of Sibia Healthcare (P) Limited Vs. Deputy Commissioner of Income Tax (2015) 61 Taxmann.com 70 and held that levy of fee u/s. 234E is beyond the scope of permissible adjustments contemplated u/s.200A. The relevant portion of the order of the Amritsar Bench of the Tribunal reads as follows:*
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> > *"In view of the above discussions, in our considered view, the adjustment in respect of levy of fees under section 234E was indeed beyond the scope of permissible adjustments, contemplated under section 200A. This intimation is an appealable order under section 246A(1)(a), and, therefore, the CIT(A) ought to have examined legality of the adjustment made under this intimation in the light of the scope of the section 200A. Learned CIT(A) has not done so. He has justified the levy of fees on the basis of*

the provisions of Section 234E. That is not the issue here. The issue is whether such a levy could be effected in the course of intimation under section 200A. The answer is clearly in negative. No other provision enabling a demand in respect of this levy has been pointed out to us and it is thus an admitted position that in the absence of the enabling provision under section 200A, no such levy could be effected. As intimation under section 200A, raising a demand or directing a refund to the tax deductor, can only be passed within one year from the end of the financial year within which the related TDS statement is filed, and as the related TDS statement was filed on 19th February 2014, such a levy could only have been made at best within 31st March 2015. That time has already elapsed and the defect is thus not curable even at this stage. In view of these discussions, as also bearing in mind entirety of the case, the impugned levy of fees under section 234E is unsustainable in law. We, therefore, uphold the grievance of the assessee and delete the impugned levy of fee under section 234E of the Act....."

8.3. The Ahmedabad Bench of the Tribunal, in the case of Lions Club of North Surat Charitable Trust Vs. Income Tax Officer, (TDS)-II 2015 (9) TMI 1231 and the Chennai Bench of the Tribunal in the case of Smt. G. Indhrani Vs. Deputy Commissioner of Income Tax, Centralized Processing Cell(TDS) (2015) 60 Taxmann.com 312 have followed the views taken by the Amritsar Bench of the Tribunal and decided the issue in favour of the assessee.

8.4 In view of the aforesaid reasoning and respectfully following the orders of the coordinate benches of the Tribunal, we delete the levy of late filing fee u/s 234E of the Act. It is ordered accordingly.

9. In the result, the appeal filed by the assessee is allowed."

6.1 Further, the Karnataka High Court in the case of Fatheraj Singhvi & Ors. Vs. Union of India reported in 289 CTR 602 has held as under:

"When the intimation of the demand notices under Section 200A is held to be without authority of law so far as it relates to computation and demand of fee under Section 234E, the question of further scrutiny for testing the constitutional validity of Section 234E would be rendered as an academic exercise because there would not be any cause on the part of the petitioners to continue to maintain the challenge to constitutional validity under Section 234E of the Act. At this stage, the learned counsels appearing for the appellant had also declared that if the impugned notices under Section 200A are set aside, so far as it relates to computation and intimation for payment of fee under Section 234E, the appellant-petitioners would not press the challenge to the constitutional validity of Section 234E of the Act. But, they submitted that the question of constitutional validity of Section 234E may be kept open to be considered by the Division Bench and the Judgment of the learned Single Judge may not conclude the constitutional validity of Section 234E of the Act. (Para 25)

Under these circumstances, no further discussion would be required for examining the constitutional validity of Section 234E of the Act. Save and except to observe that the question of constitutional validity of Section 234E of the Act before the Division Bench of 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 of the Act for computation and intimation for payment of fee under Section 234E as they relate to for the period of the tax deducted prior to 1.6.2015 are set aside. It is clarified that the present judgment would not be interpreted to mean that even if the payment of the fees under Section 234E already made as per demand/intimation under Section 200A of the Act for the TDS for the period prior to 01.04.2015 is permitted to be reopened for claiming refund. The judgment will have prospective effect accordingly. It is further observed that the question of constitutional validity of Section 234E shall remain open to be considered by the Division Bench and shall not get concluded by the order of the learned Single Judge. (Para 27)

The appeals are partly allowed to the aforesaid extents"

6.2 Since the facts of the present case are similar to the facts considered by this Tribunal (supra) and the Karnataka High Court (supra) wherein it was held that there cannot be levy of late fee u/s. 234E for the period prior to 01/06/2015, we are inclined to delete the levy of late fee u/s. 234E of the Act in all the cases.

7. In the result, the appeals filed by the assessee are partly allowed.

Order pronounced in the open Court on this 5th July, 2018.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 5th July, 2018
GJ
Copy to:
1. The Headmistress, A.V. High School, Ponnani, Malappuram-679 577.
2. The Assistant Commissioner of Income-tax, CPC-II, TDS, Ghaziabad.
3. The Commissioner of Income-tax(Appeals), Kozhikode.

4. The Commissioner of Income-tax (TDS), Kochi
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin