

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पॉल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 14/JP/2017
निर्धारण वर्ष/Assessment Years : 2013-14

Geeta Star Hotels & Resorts P Ltd., Geeta Enclave, Vinobha Marg, C Scheme, Jaipur Rajasthan	बनाम Vs.	The Deputy Commissioner of Income Tax- CPC, TDS Ghaziabad UP
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: JPRS06903B		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rohan Sogani (CA)
राजस्व की ओर से/ Revenue by: Shri P. P. Meena (JCIT)

सुनवाई की तारीख/ Date of Hearing : 22/10/2018
उदघोषणा की तारीख/Date of Pronouncement : 29/10/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT (A)-3, Jaipur dated 24.05.2016 for Assessment Year 2013-14 wherein the assessee has taken the following grounds of appeal:-

"1. *The Commissioner of Income Tax, (Appeals)-3, Jaipur ("the CIT(A)") erred in fact and in law in confirming the levy of fees for delay in filing the TDS return u/s 234E of the Income Tax Act, 1961 (the Act) without appreciating the facts and circumstances*

of the case. The CIT(A) ought to have directed to waive the said fees.

2. The learned CIT(A) erred in fact and in law in adjudicating an issue of validity of the impugned levy of fees u/s 234E in the order passed u/s 200A of the Act. The CIT(A) ought to have appreciated that 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 (1) of the Act by the Finance Act, 2015 w.e.f. 01.06.2015. Since, prior to said substitution the Assessing Officer had no authority to charge the fees under section 234E of the Act while issuing intimation under section 200A of the Act and henceforth levy of fees u/s 234E in the case is without authority."

2. The Coordinate Bench has earlier passed an order dated 17.4.2017 and thereafter, pursuant to misc. application filed by the assessee, the Bench has recalled the earlier order vide its order dated 21.8.2018 and hence, the present appeal has come up for adjudication.

3. At the outset, it is noted that there has been a delay in filing these appeals. In its condonation petition, the assessee has submitted that the concern employee who was responsible for TDS return and filing appeals against the orders related to TDS matter was unavailable for 4 months starting 1st August, 2016 and he came back on 1st December, 2016 and thereafter, the assessee has filed the subject appeal. It was submitted that even though the order of the Id. CIT(A) was received by the company on 15.06.2016. However, due to non-availability of the concern employee who was handling the TDS matter, the present appeal could not be filed in time and it was accordingly

submitted that there was a reasonable cause for delay in filing the present appeal and in support reliance was placed on the decision of Hon'ble Supreme Court in case of Collector Land Acquisition vs. Mst. Katji 167 ITR 471. Similar submissions have been made in respect of other two assesseees who are part of the same group of companies.

4. The Id. DR is heard who has opposed the petition seeking condonation of delay in filing the present appeals.

5. We have heard the rival contentions and perused the material available on record. The assessee has taken the plea that due to absence of the concern employee who was handling the TDS and related tax matters, the present appeal could not be filed in time. In support of its contention, the assessee has filed the necessary affidavit as well as the affidavit of the concern employee which is not disputed by the Revenue. We thus find the reasons explained by the assessee to be true and the explanation bonafide and not mala fide. It is settled proposition of law that the Court should take a lenient view on the matter of condonation of delay provided the explanation and reasons for delay is bonafide and not merely a device to cover an ulterior purpose or an attempt to save limitation in an underhand way. While construing the sufficient cause, a liberal view should be taken and the Court should lean in favour of the party provided the reasons for delay are bonafide. Whenever substantial justice and technical considerations are opposed to each other, cause of substantial justice has to be preferred. On the facts and reasons explained by the assessee, we are satisfied that the assessee was prevented from filing the appeal within the period of limitation. Then in the facts and circumstances of the case and in the interest of justice, we condone the delay of 143 days in filing the present appeals.

6. Now coming on merits of the case, briefly, the facts of the case are that the AO has imposed late filing fees of Rs. 14,400/- u/s 234E while processing the TDS return (26Q) u/s 200A of the Act for the second quarter of the F.Y 2012-13 relevant to impugned assessment year and the intimation u/s 200A of the Act was passed on 15th December, 2013. Before the Id. CIT(A), the assessee has contended that prior to 01.06.2015, there was no enabling provisions in section 200A of the Act for making adjustment in respect of statement filed by the assessee with regard to TDS by levying fee u/s 234E of the Act. The Id. CIT(A) however, referring to the decision of the Hon'ble Rajasthan High Court in case of M/s Dundlod Shikshan Sansthan v. Union of India [2015] 63 taxmann.com 243 and others vide order dated 28.07.2015 has held that there is no valid reason or justification to interfere with the compensatory fee imposed in late filing of the TDS return. Accordingly, the demand raised by the AO for late filing fee u/s 234E was confirmed. Now, the assessee is in appeal before us.

7. During the course of hearing, the Id. AR submitted that provisions of Section 200A of the IT Act, 1961, inserted w.e.f. 1.4.2010 are special provisions for processing of the TDS statements. The section sets out some exhaustive adjustments, which can be made while processing the statement.

7.1 Section 234E has been inserted by Finance Act, 2012 w.e.f. 1st July, 2012 which provides for levy of Fee for delay in furnishing TDS Statement. Hence, from 1st July, 2012 onwards, a fee can be levied for the delay in submission of TDS Return.

7.2 Section 200A was amended by Finance Act 2015 and w.e.f 1st June, 2015 clause (c) to subsection (1) has been substituted. The updated clause is as under:

*"Section 200A - Processing of statements of tax deducted at source.
(1) Where a statement of tax deduction at source [or a correction statement] has been made by a person deducting any sum (hereafter referred to in this section as deductor) under section 200, such statement shall be processed in the following manner, namely:—
(c) the fee, if any, shall be computed in accordance with the provisions of section 234E;"*

7.3 Hence, for the above it is clear that although prior to 1.6.2015, fees u/s 234E can be levied, yet the same cannot be levied while processing TDS statement u/s 200A.

7.4 In the present case, the assessee filed its TDS return for Q2 on 26.12.2012. The same was processed u/s 200A vide order dated 15.12.2013. However, Ld. AO erred in levying fees u/s 234E while processing the TDS statement for a period prior to 1.6.2015.

7.5 It was submitted 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) of subsection (1) of Section 200A can be read as having prospective effect and not having retroactive character or effect.

7.6 Thus the action of Ld. AO is bad in law since the impugned intimation u/s 200A was processed in the period prior to 1.6.2015. Hence, the action of Ld. AO is outside the scope and purview of the section 200A.

7.7 Further, it is submitted that Id. CIT(A) has misplaced his reliance on the decision of Hon'ble Jurisdictional High Court in the case of Dundlod Shikshan Sansthan v. Union of India [2015] 63 taxmann.com 243. The Hon'ble Court has placed reliance on the decision of Hon'ble Bombay High Court in the case of Rashmikant Kundalia v. Union of India 373 ITR 268 and has adjudicated the issue relating to whether the fees charged is legal or illegal and has upheld the constitutional validity of levy of fess u/s 234E. The Court has not touched upon the mechanism to levy the fees u/s 234E in the TDS Statement processed u/s 200A. Thus, CIT(A) has erred in interpreting the decision of Hon'ble Rajasthan High Court.

7.8 It was further submitted that the assessee's case is squarely covered by the undernoted judgments of Hon'ble ITAT Jaipur, which have also considered the decision of Hon'ble Rajasthan High Court in the case of Dundlod Shikshan Sansthan (*supra*) and have decided in the favour of the assessee. Relevant extracts has been set out here for your convenience.

- M/s Mentor India Limited vs. DCIT - ITA No.738/JP/2016

"..We find that the Hon'ble Jurisdictional High Court in the case of Dundlod Shikshan Sansthan Vs. Union of India (supra) has ITA 738/JP/2016 & Ors. ITAs_ M/s Mentor India Ltd. Vs DCIT with other 10

cases 7 also considered the decision of the Hon'ble Bombay High Court in the case of Rashmikant Kundalia Vs. Union of India (2015) 229 Taxman 596 wherein the Hon'ble High Court has decided the nature of demand. The Hon'ble High Court has held that Section 234E of the Act is not punitive in nature but a fee which is a fixed charge for the extra service which the department has to provide due to the late filing of the TDS statements. Hence from both the decisions relied upon by the Id. DR, the issue of power of imposing late fee is not decided but the Hon'ble Karnataka High Court in the case of Fatheraj Singhvi & ors. Vs. Union of India & Ors. (supra) has decided the issue in favour of the assessee and held that the late fee U/s 234E of the Act has raised vide impugned demand notice U/s 200A of the Act. We find force in the contention of the Id. AR of the assessee. If there is conflicting views taken by the two Hon'ble Courts, then the view, which favours the assessee should be adopted. In this regard, the Id AR of the assessee has relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Vatika Township P. Ltd. (2014) 367 ITR 466 (SC). In view of the decision of the Hon'ble Supreme Court in the case of CIT Vs. Vatika Township (supra), the demand so raised are directed to be deleted.."

- M/s. Sandeep Jhanwar Advisory Services Pvt. Ltd. Vs. The TDS CPC (ITA No. 722 & 723/JP/2016)

*"..We find merit into the contention of Id. Counsel that **the jurisdictional High Court has decided the validity of section 234E, but has not decide the issue of power of AO for levy of tax under section 234E in the judgment rendered in the case of M/s. Dundlod Shikshan Sansthan and Others (supra) as relied by Id. CIT (A). We have considered the recent decision of Hon'ble Karnataka High Court in the case of Shri Fatheraj***

Singhvi & Ors (supra) wherein the issue of levy of fees u/s 234E on statements processed u/s 200A before 01.06.2015 has been categorically discussed by the Hon'ble High Court and in para 24 of the said order it was held that "no demand for fee u/s 234E can be made in intimation issued for TDS deducted u/s 200A before 01.06.2015". We have also gone through the judgment of Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd. (supra) wherein the Hon'ble Apex Court has discussed in detail the general principle of concerning retrospectively and held that unless contrary intention appears, a legislation is presumed not to have a retrospective operation. Respectfully following the above judgments of Hon'ble Supreme Court and Hon'ble Karnataka High Court, we set aside the order of Id. CIT (A) and direct the AO to drop the demand raised of Rs. 4,200/- u/s 234E on statements processed u/s 200A before 01.06.2015. Thus grounds raised by the assessee are allowed..."

7.9 Further, our attention was drawn to the decision of Coordinate Bench in the case of Maharashtra Cricket Association vs. DCIT [2016] 74 taxmann.com 6 (Pune - Trib.) who on placing reliance on the decision of Hon'ble 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 held that prior to 1-6-2015, AO did not have power to charge fees under section 234E while processing TDS returns. Further the Hon'ble Court has held that Hon'ble Bombay High Court in the case of Rashmikant Kundalia (*supra*), has not upheld the applicability of section 234E of the Act by the Assessing Officer while processing TDS statement filed by the deductor prior to 01.06.2015. Relevant extract has been set out here for the sake of your convenience:

"..30. The Hon'ble Bombay High Court in *Rashmikant Kundalia's case (supra)* has upheld the constitutional validity of said section introduced by the Finance Act, 2015 w.e.f. 01.06.2015 but was not abreast of the applicability of the said section 234E of the Act by the Assessing Officer while processing TDS statement filed by the deductor prior to 01.06.2015. In such scenario, we find no merit in the plea of learned CIT-DR that the Hon'ble Bombay High Court in *Rashmikant Kundalia's case (supra)* has laid down the proposition that fees under section 234E of the Act is chargeable in the case of present set of appeals, where the Assessing Officer had issued the intimation under section 200A of the Act prior to 01.06.2015. .."

33. We further find that in recent judgment dated 26.08.2016, the **Hon'ble 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 of the Act levying the fees for delayed filing the TDS statements under section 234E of the Act. The Hon'ble High Court notes that the Finance Act, 2015 had made amendments to section 200A of the Act enabling the Assessing Officer to make adjustments while levying fees under section 234E of the Act was applicable w.e.f. 01.06.2015 and has held that it has prospective effect. Accordingly, the Hon'ble High Court held that "intimation raising demand prior to 01.06.2015 under section 200A of the Act levying section 234E of the Act late fees is not valid".** However, the Hon'ble High Court kept open the issue on constitutional validity of section 234E of the Act. We have already referred to the decision of Hon'ble Bombay High Court in *Rashmikant Kundalia's case (supra)* in this regard, wherein the constitutional validity of section 234E of the Act has been upheld.

34. Accordingly, we hold that the amendment to section 200A(1) of the Act 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 01.06.2015, was not empowered to charge fees under section 234E of the Act. Hence, the intimation issued by the Assessing Officer under section 200A of the Act in all these appeals does not stand and the demand raised by way of charging the fees under section 234E of the Act 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 of the Act and such adjustment could not stand in the eye of law..."

8. We have heard the rival contentions and perused the material available on record. In the present case, the undisputed facts are that the assessee filed its TDS return (Form 26Q) for the fourth quarter of financial year 2012-13 on 26.12.2012 and the same was processed and intimation under section 200A was issued vide order dated 15.12.2013 much prior to the amendment to section 200A of the Act w.e.f. 1.6.2015 empowering the Assessing officer levying the fees under section 234E of the Act. It is therefore not a case of continuing default where the assessee has defaulted in furnishing the TDS statement even after 1.6.2015 and thereafter, the demand for payment of fees under section 234E has been raised by the Assessing officer. In case of Fatheraj Singhvi (supra), the Hon'ble Karnataka High Court has held that the provisions of amended section 200A are prospective in nature. Further, the decision of the Hon'ble Rajasthan High Court in case of M/s. Dundlod Shikshan Sansthan and Others (supra) as relied by Id. CIT (A) is in the context of validity of section 234E, but not in the context of

power of AO for levy of fee under section 234E prior to 1.6.2015. In view of the above, the Assessing Officer while processing the TDS statements for the period prior to 01.06.2015, was not empowered to charge fees under section 234E of the Act. Hence, the demand raised by way of charging the fees under section 234E of the Act is not valid and the same is deleted.

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

Order pronounced in the open Court on 29/10/2018.

Sd/-

(विजय पॉल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 29/10/2018

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Geeta Star Hotels & Resorts P. Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- DCIT- CPC, TDS, Ghaziabad, UP
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 14/JP/2017 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar