IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.325/Coch/2018 : Asst.Year 2013-2014
ITA No.326/Coch/2018 : Asst.Year 2014-2015
ITA No.327/Coch/2018 : Asst.Year 2015-2016
ITA No.328/Coch/2018 : Asst.Year 2016-2017

M/s.Popular Printers Popular Printers Vakayar P.O., Konni Pathanamthitta. **PAN : AAHFP1673K**	Vs.	The Income Tax Officer TDS, Alappuzha.
(Appellant)		(Respondent)

ITA No.307/Coch/2018 : Asst.Year 2013-2014
ITA No.308/Coch/2018 : Asst.Year 2014-2015
ITA No.309/Coch/2018 : Asst.Year 2015-2016
ITA No.310/Coch/2018 : Asst.Year 2016-2017

The Income Tax Officer TDS, Alappuzha.	Vs.	M/s.Popular Printers Popular Printers Vakayar P.O., Konni Pathanamthitta.
(Appellant)		(Respondent)

CO No.72/Coch/2018 : Asst.Year 2013-2014
CO No.73/Coch/2018 : Asst.Year 2014-2015
CO No.74/Coch/2018 : Asst.Year 2015-2016
CO No.75/Coch/2018 : Asst.Year 2016-2017

M/s.Popular Printers Popular Printers Vakayar P.O., Konni Pathanamthitta.	Vs.	The Income Tax Officer TDS, Alappuzha.
(Cross Objector)		(Respondent)

ITA No.321/Coch/2018 : Asst.Year 2013-2014
ITA No.322/Coch/2018 : Asst.Year 2014-2015
ITA No.323/Coch/2018 : Asst.Year 2015-2016
ITA No.324/Coch/2018 : Asst.Year 2016-2017

M/s.Popular Traders Popular Printers Vakayar P.O., Konni Pathanamthitta. **PAN : AAHFP1675R**	Vs.	The Income Tax Officer TDS, Alappuzha.
(Appellant)		(Respondent)

ITA No.299/Coch/2018 : Asst.Year 2013-2014
ITA No.300/Coch/2018 : Asst.Year 2014-2015
ITA No.301/Coch/2018 : Asst.Year 2015-2016
ITA No.302/Coch/2018 : Asst.Year 2016-2017

The Income Tax Officer TDS, Alappuzha.	Vs.	M/s.Popular Traders Popular Printers Vakayar P.O., Konni Pathanamthitta.
(Appellant)		(Respondent)

CO No.68/Coch/2018 : Asst.Year 2013-2014
CO No.69/Coch/2018 : Asst.Year 2014-2015
CO No.70/Coch/2018 : Asst.Year 2015-2016
CO No.71/Coch/2018 : Asst.Year 2016-2017

M/s.Popular Traders Popular Printers Vakayar P.O., Konni Pathanamthitta.	Vs.	The Income Tax Officer TDS, Alappuzha.
(Cross Objector)		(Respondent)

ITA No.329/Coch/2018 : Asst.Year 2013-2014
ITA No.330/Coch/2018 : Asst.Year 2014-2015
ITA No.331/Coch/2018 : Asst.Year 2015-2016
ITA No.332/Coch/2018 : Asst.Year 2016-2017

M/s.Popular Dealers Popular Printers Vakayar P.O., Konni Pathanamthitta. **PAN : AAHFP1674Q**	Vs.	The Income Tax Officer TDS, Alappuzha.
(Appellant)		(Respondent)

ITA No.303/Coch/2018 : Asst.Year 2013-2014
ITA No.304/Coch/2018 : Asst.Year 2014-2015
ITA No.305/Coch/2018 : Asst.Year 2015-2016
ITA No.306/Coch/2018 : Asst.Year 2016-2017

The Income Tax Officer TDS, Alappuzha.	Vs.	M/s.Popular Dealers Popular Printers Vakayar P.O., Konni Pathanamthitta.
(Appellant)		(Respondent)

CO No.64/Coch/2018 : Asst.Year 2013-2014
CO No.65/Coch/2018 : Asst.Year 2014-2015
CO No.66/Coch/2018 : Asst.Year 2015-2016
CO No.67/Coch/2018 : Asst.Year 2016-2017

M/s.Popular Dealers Popular Printers Vakayar P.O., Konni Pathanamthitta.	Vs.	The Income Tax Officer TDS, Alappuzha.
(Cross Objector)		(Respondent)

Revenue by : Smt.A.S.Bindhu, Sr.DR
Assessees by : Sri.Sivadas Chittoor

Date of Hearing : 07.02.2019		**Date of Pronouncement : 18.02.2019**

O R D E R

Per George George K., JM

These 12 appeals at the instance of three assessees are directed against 12 orders of the CIT(A), all dated 06.04.2018. The Revenue has also filed 12 appeals. Against the Revenue's appeals, the assessees have filed cross objections. The relevant assessment years are 2013-2014 to 2016-2017. The order's of the CIT(A) arises out of the order's passed u/s 201(1) and 201(1A) of the Income-tax Act.

2. Common issues are raised in the appeals and cross objections. Hence, they were heard together and disposed off by this consolidated order.

3. There is a delay of 23 days in filing the assessees' appeals. The Managing Partner of the three assessee-firms had filed petition for condonation of delay along with affidavit stating the reasons therein for the delay in filing the appeal before the Tribunal.

3.1 We have perused the reasons stated in the affidavit for filing the appeals belatedly. We find the delay in filing the appeals is not on account of any latches on the part of the assessee-firms, and there was sufficient cause for the delay in filing these appeals belatedly. Hence, we condone the delay of 23 days in filing these appeals by the assessees and proceed to dispose off the same on merits.

4. We shall first adjudicate the Revenue's appeal.

Revenue's appeals

5. The grounds raised in the Revenue's appeals are identical except for variance in figures. Hence the grounds raised in ITA No.307/Coch/2018 are reproduced as under:-

> *1. The order of the Commissioner of Income Tax (Appeals), Kottayam in ITA No.AT06/CIT(A)/ KTM/ 2016-17 dated 06-04-2018 is opposed to law, facts and evidences of the case.*

2. The learned Commissioner of Income Tax (Appeals) has erred in deleting the demand raised u/s 201 (1) of the IT Act, 1961 amounting to Rs.24,96,038/- and u/s 201(1A) of Rs.9,48,495/- totaling to Rs.34,44,533/-.

3. The learned Commissioner of Income Tax (Appeals) erred in remitting back the issue to the AO with the direction to give a final opportunity to the assessee to produce form 15G /15H collected before the due date from the deductees and give credit to the same, applicable in this case, thereby violating the provisions of section 251 of the Income Tax Act, 1961.

4. The learned Commissioner of Income Tax (Appeals) erred in citing the order of the Ld. ITAT, Cochin Bench in the case of Shri Jacob Thomas in ITA No.200/Coch/2016 dated 10/11/2016 as the same is inapplicable in this case because it related to' a technical error in the 15G/15H forms uploaded/ filed, whereas in the instant case the issue is non-uploading of forms 15G/15H by the assessee.

5. The learned CIT(Appeals) erred in directing the AO to re-compute the tax portion of left out PAN provided by the assessee is against the provisions contained in sub section (6) of section 206M, wherein it is specifically states that, where the PAN submitted to the deductor is invalid or does not belong to the deductee, it shall be deemed that deductee has not submitted PAN and the provision of sub section (1) shall apply.

6. For these and other grounds that may be urged at the time of hearing, it is requested that the order of the Commissioner of Income Tax (Appeals) may be set aside and that of the Assessing Officer restored."

5.1 The Ground Nos. 1, 2 and 6 are general in nature and no specific adjudication is called for. The remaining grounds

relate to issue whether CIT(A) was correct in remanding the issue of curing the defects in Form No.15G and 15H and also whether CIT(A) was correct in directing the Assessing Officer to grant an opportunity to the assessee to furnish the correct PAN No's of the deductees.

5.2 Before the CIT(A) the assessee contested that the assessee should be granted an opportunity to file Form 15G/ 15H collected by the assessee, but could not be uploaded. The CIT(A) held that defects in Form 15G/15H are curable defects and remitted the issue to the Assessing Officer to examine Form 15G/15H to be produced by the assessee. The relevant findings of the CIT(A) are reproduced below:

> *"4.5.2. Considering the arguments of the learned A.R., it would be relevant to examine whether the defects in Form 15G / 15H are curable or not. A similar issue was before the Hon'ble ITAT Cochin in the case of Jacob Thomas, ITA No 200/Coch/2016, and Tribunal vide order dated 01.11.2016 held as under:*
>
> > *"6.2 As mentioned earlier, non filling up of the column in Form 15G/15H by the payees are only technical default, which could have been corrected had the assessee been given an opportunity. In the interest of justice and equity, I am of the view that the assessee should be given an opportunity to correct the technical error with regard to the defaults that is containing in Forms 15G/15H. Therefore, the matter is remitted to the Assessing Officer. The assessee shall produce the corrected Form 15G/15H for the relevant period from the payee and shall submit the same to the Assessing*

Officer. If the corrected forms in 15G / 15H are submitted, there shall be no disallowance of interest expenditure. It is ordered accordingly."

4.5.3. As per the above decision of ITAT, the defects in Form 15G/15H are curable. But it would be also relevant to examine which defects are not curable. In the case of Kerala State Financial Enterprises Ltd. 2O18 TaxPub(DT) O839, Hon'ble ITAT Cochin held as under:

> *"4.2 As regards the Form 15H considered invalid or non curable by the learned Commissioner (Appeals), we are in total agreement with him of the same being so and, resultantly, the relevant Forms 15H being non est. Surely, unsigned or unverified forms or which could not be legally submitted, as where the deductee's income interest exceeded the maximum amount not chargeable to tax or those which came into existence only subsequent to the close of the relevant year, could not possibly be cured, and have to be rejected. The charge of interest under sections 201(1A) is, again, without doubt, consequential, being compensatory, even as clarified by the hon'ble jurisdictional high court in the case of CIT v. Dhanalakshmy Weaving Works (supra). We, accordingly, uphold the impugned order."*

4.5.4. Therefore, in the light of the above decisions of the jurisdictional Tribunal, it is evident that even though the defects in Form 15G/15H are curable but if they were unsigned or unverified or those forms came into existence only subsequent to the close of the relevant financial year, defects can not be cured. Therefore, the Assessing Officer is directed to give one final opportunity to the Assessee to produce form 15G/15H collected before the due

date from the Deductees and give credit to the same as per the guidelines laid down by Hon'ble ITAT in the above cases. The ground raised on this issue is allowed for statistical purpose."

5.3 The learned Departmental Representative relied on the grounds raised by the Revenue.

5.4 The learned AR supported the orders of the CIT(A) by filing cross objections. The grounds raised in the assessee's cross objections are identical. Hence the grounds raised in CO No.72/Coch/2018 is reproduced as under:-

"1. The order of the Commissioner of Income Tax (Appeals), Kottayam in ITA no. AT06/CIT(A)/KTM/ 2016-17 dated 06-04-2018 is in law, facts and evidences of the case.

2. It is submitted that the learned Commissioner of Income Tax (Appeals) was correct in granting one more opportunity to the assessee for uploading the form 15G/15H in the facts and circumstances of the case and also in the interest of the natural justice. So no interference is called for in respect of the ground no. 2 raised by the department.

3. In respect of ground no. 3 raised by the department, it is submitted that the learned Commissioner of Income Tax (Appeals), rightly remitted back the issue to the ITO. It is further submitted that it is unfair and unjust to interfere at this distance of time since the ITO have already initiated proceedings based on the direction by CIT(A) and it is in the advanced stage of completion. It may

also be noted that the action of the CIT(A), is in accordance with law.

4. Regarding ground no. 4, it is submitted that the principle applied in the case of Jacob Thomas, ITA No. 200/Coch/2016 vide order dated 01.11.2016 applies.

5. Regarding ground no. 5, it is submitted that the CIT(A) rightly directed the AO to re-compute the tax portion of left out PAN is in accordance with section 206AA(6) of the Act.

6. For these amongst other grounds that may be permitted to be raised and additional evidences adduced at the time of hearing or before and it is prayed that justice be done to the appellant by quashing/modifying the impugned order."

5.5 We have heard the rival submissions and perused the material on record. Section 251(1) defines the power of the CIT(A), which reads as follow:-

"251. Powers of the Commissioner (Appeals).- (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

> (c) in any other case, he may pass such orders in the appeal as he thinks fit.
>
> (2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.
>
> Explanation.—In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant."

5.6 The assessee went in appeal before CIT(A) with regard to the orders passed u/s 201(1) and 201(1A) of the I.T.Act, which falls under the purview of section 251(1)(c) of the I.T. Act. As per section 251(1)(c) of the Act, the CIT(A) may pass such order as he thinks fit. In other words, he can confirm, reduce, enhance, annul or remit the issue back to the file of A.O. for fresh consideration. Since the impugned order under which the assessee is in appeal is not an assessment order or penalty order, the provisions empowers the CIT(A) to pass an order as he thinks fit. Therefore, the CIT(A) did not travel beyond the scope of section 251(1)(c) of the I.T. Act. Hence, we do not find any infirmity in the orders of the CIT(A) with regard to remitting the issue to the file of A.O. to give an opportunity to the assessee to produce Form No.15G / 15H collected before the due date from the deductees and grant due credit for the same as per the guidelines laid down by the earlier order of the Tribunal mentioned in the impugned orders of the CIT(A).

5.7 As regards Ground No. 5, we are of the view, the CIT(A) correctly directed the Assessing Officer to re-compute the tax u/s. 201 of I.T. Act at the rate of 10% for those deductees, where the assessee furnished the PAN Nos. This direction of the CIT(A) is in the interest of justice and equity. Further, we make it clear that the assessee has to produce correct Permanent Account Number (PAN) of the deductee, so as to get corresponding credit. With these observations, the appeals of the Revenue are dismissed.

5.8 The cross objections filed by the assessees are in support of the orders of the CIT(A) and hence same are dismissed as infructuous. It is ordered accordingly.

Assessee's appeals

6. The grounds raised in these appeals are identical. However, in the course of hearing the learned AR confined his submissions to ground No.2 and ground No.4.

Ground No.2

6.1 Ground No.2 raised by the assessee is with regard to the jurisdiction of the Assessing Officer to pass an order u/s 201 and 201(1A) of the I.T. Act. It was contended that before an assessee is treated as an 'assessee in default', there should be action taken against the payee/deductee to pay the taxes directly as per the provisions of section 191 of the I.T. Act. It was submitted that the recording of the above fact is an foundational and jurisdictional requirement. It was contended

that failure of which would render the impugned order void and illegal. The written submission filed by the assessee in this regard before the Income-tax authorities is reproduced below:-

> *"The impugned order suffers from lack of foundation and jurisdiction. The foundation for the order or action under section 201 arises only when the deductee or payee fails to pay the tax on the payment made by the deductor or fails to show the same in the tax return filed. No action is required when the deductee does not have any taxable income even after including the said payment. Therefore the ITO as a first step ought to have made sure that the revenue was lost because the same could not be assessed or recovered from the deductee or payee. Having established this foundation then only ITO gets jurisdiction u/s 201 to proceed to declare the failed party as an "assessee in default".*
>
> *In the present case there is none. The ITO did not establish that there is a revenue loss to department. Thus there is no foundation and hence no jurisdiction.*
>
> *There is also another aspect which requires to be considered. Suppose tax with interest is recovered from the deductor. Further suppose that the deductee has included the same in his return and paid tax thereon with interest, if any. Then is it not a case of recovering or imposing the same tax on the very same income? The scheme of double taxation is not generally envisaged under the Act in the absence of a clear statutory provision. The same would be the result even if the deductee has not filed his return but subsequently the department imposes or recovers the tax from him using the machinery provisions like sections 142, 143, 144, 148 etc. are available to the department.*

There is also another important aspect. The ITO is vested with all the powers of the civil court regarding issue of summons, enforcing attendance etc. and hence he can make use of the said powers to see that the deductee has paid tax or shown the same in his income or take steps to make an assessment on him. The ITO also can refer the case to the ITO having jurisdiction over the deductee to conduct enquiries regarding his assessment etc. It may be noted that the assessee do not have those vast powers and at best he can only request the deductee to furnish details and nothing more. Therefore any attempt by the ITO to pass on the said burden to assessee should be rejected as unreasonable and unpractical. This should be the conclusion after making a harmonious reading of the provisions of sections 190, 191 and section 201 of the Act and the scheme of the Act.

In the circumstances it is clear that section 201 can be resorted to only after carrying out the above exercise by the ITO and hence order is illegal.

In support of the above contentions the appellant wishes to place reliance on the binding decision of the Hon. Allahabad High Court in Jagaran Prakashan Ltd. v. DCIT reported in (2012) 21 Taxmann.com 489 (All) or 2012 345 ITR 288 (All) wherein the Hon Court clearly approved all the contentions raised above and came to the conclusion that the ITO lacks foundational and jurisdictional powers to pass order u/s 201 without an attempt to tax the deductee. It may be noted that there is no decision of the Kerala High Court on this issue and there appears to be no other conflicting decisions from any other high courts in India. It also appears that the department accepted the judgment as no SLP or appeal appears to have been filed, before the Hon Supreme Court according to the best of information available with the appellant.

The appellant also wish to place reliance on the following decisions also.

1. ICICI Bank Ltd. v. DC of Income-tax (2013) 36 taxmann.com 433 (Lucknow Trib.)

2. Aligarh Muslim University v. ITO (TDS) (2017) 83 taxmann.com 364 (Agra Trib.)

3. Thomas Muthoot v. DCIT (TDS) (2012) 28 taxmann.com 25 (Coch)

4. Allahabad Bank v. ITO in ITA No.5992 to 5994/Del/2012 of Delhi Bench of ITAT.

The above supports the following ground No.2 raised in the appeal memorandum."

6.2 The above contention of the assessee in short is that there should be proceedings against the deductee/payee and the finding to be rendered by the revenue that the taxes are not recoverable from the deductees and only in such an eventuality, the assessee can be declared as an 'assessee in default'. According to the learned AR such finding by the Revenue is a foundational aspect for initiating proceedings u/s. 201 of the I.T. Act. The learned AR relied on the judgment of the Hon'ble Allahabad High Court in the case of *Jagran Prakashan Limited v. The DCIT (234 ITR 288).* Section 201 has been amended with effect from 01.07.2012 whereby the burden of proving that the payee / deductee had paid the taxes is on the assessee / deductor. In other words, the assessee is to provide proof that payee / deductee has filed the return declaring the income on which the TDS ought to have been deducted and duly paid the taxes on the same. The

relevant amendment in section 201 introduced by the Finance Act, 2012 with effect from 01.07.2012 reads as follow:-

> "**Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—
>
> (*i*) has furnished his return of income under section 139;
>
> (*ii*) has taken into account such sum for computing income in such return of income; and
>
> (*iii*) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:";

6.3 In view of the above amendment, the burden is cast on the assessee to prove that the deductee / payee had duly paid the taxes on the income which ought to have been subjected to TDS by the assessee-deductor. In the instant cases, the relevant assessment years are 2013-2014 to 2016-2017, and the amended provision has application. Therefore, this ground raised by the assessee is rejected.

Ground No.4

7. Ground No. 4 reads as follows:

> " It is submitted that the learned Assessing Officer failed to fix the liability on the correct person who is responsible for the deduction of tax at source as the firm has so many managers who is actually responsible for the actual payment u/s. 194A of the Act."

7.1 The above issue was never raised before the authorities below. In the instant case, the liability to pay taxes as per section 201 of the Act has been fastened on the assessee's firm and the managing partner, as its representative. For proceedings u/s. 201 of the Act, the liability to pay taxes is on the assessee who had failed to deduct tax at source. It has been correctly done so in the instant case. Therefore, this ground raised by the assessee is also rejected. It is ordered accordingly.

8. In the result:

i) The appeals filed by the assessees are dismissed.
ii) The appeals filed by the revenue are dismissed.
iii) The Cross Objections filed by the assessees are dismissed.

Order pronounced on this 18th day of February, 2019.

sd/-	sd/-
(Chandra Poojari)	**(George George K.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 18th February, 2019.
Devdas*

Copy of the Order forwarded to :
1. The Appellant
2. The Respondent.

3. The CIT (A) Kottayam.
4. The CIT (TDS) Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin