IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA NOs.	A.Y.	APPELLANT(S)	VS.	RESPONDENT
2658/Bang/2018	2013-14	Manoj Kumar Jaiswal, No.4, 1st Floor, 5th Cross, Above Paramount, H Siddaiah Road, Bengaluru – 560 027. **PAN: ABPPJ 6922J**		The Assistant Commissioner of Income Tax, CPC-TDS, Ghaziabad.
2660/Bang/2018	2013-14	Lalit Kumar Dosi, No.31, 1st Floor, RPG Complex, Hospital Road, Bengaluru – 560 053. **PAN: ACMPK 0499B**		
2675/Bang/2018	2014-15			
2676/Bang/2018	2014-15			
2666/Bang/2018	2013-14	Pachisia Plastics Pvt. Ltd., Plot No.6-C, KIADB Industrial Area, 1st Stage, Harohalli, Kanakapura Taluk-562112. **PAN: AAFCP 0392L**		
2667/Bang/2018	2013-14			
2668/Bang/2018	2014-15			
2669/Bang/2018	2014-15			
2670/Bang/2018	2014-15			

Appellants by	:	Shri H.N. Khincha, CA
Respondent by	:	Dr. P.V. Pradeep Kumar, Addl.CIT(DR)(ITAT)

Date of hearing	:	19.03.2019
Date of Pronouncement	:	22.03.2019

O R D E R

Per Bench

These are appeals filed by three different assessees against the orders of the CIT(Appeals)-9, Bangalore dated 19.07.2018, 23.07.2018 and 25.07.2018 relating to assessment years 2013-14 & 2014-15 respectively. Since common issue is involved in all these appeals, they were heard together and we deem it convenient to pass a consolidated order.

2. We take up and refer to facts of the case in appeal in ITA No.2658/Bang/2018 for adjudication. The assessee filed statement of tax deducted at source (TDS) in Form 26Q for quarter II of financial year 2012-13 on 09.03.2017. The statement was processed by CPC TDS, Ghaziabad. There was a delay in filing the above TDS statement and therefore the AO by intimation u/s. 154 r.w.s. 200A of the Act dated 10.3.2017 levied late fee of Rs.6,900 u/s. 234E of the Income-Tax Act, 1961 ["the Act"]. Under Sec.234E of the Act, if there is a delay in filing statement of TDS within the prescribed time then the person responsible for making payment and filing return of TDS is liable to pay by way of fee a sum of Rs.200/- per day during which the failure continues. Section 234E of the Act inserted by the Finance Act, 2012 w.e.f. 1.7.2012. reads as follows:-

> "**Fee for default in furnishing statements.**
>
> **234E.** (1) Without prejudice to the provisions of the Act, where a person fails to deliver or cause to be delivered a statement within the time prescribed in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C, he shall be liable to pay, by way of fee, a sum of two hundred rupees for every day during which the failure continues.

(2) The amount of fee referred to in sub-section (1) shall not exceed the amount of tax deductible or collectible, as the case may be.

(3) The amount of fee referred to in sub-section (1) shall be paid before delivering or causing to be delivered a statement in accordance with sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C.

(4) The provisions of this section shall apply to a statement referred to in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C which is to be delivered or caused to be delivered for tax deducted at source or tax collected at source, as the case may be, on or after the 1st day of July, 2012."

3. Aggrieved by the aforesaid order of the AO, the assessee filed an appeal before the CIT(A). The assessee's contention before CIT(A) was that the provisions of section 234E of the Act was inserted by the Finance Act, 2012 w.e.f. 1.7.2012. Section 200A of the Act is a provision which deals with how a return of TDS filed u/s.200(3) of the Act has to be processed and it reads as follows:-

Processing of statements of tax deducted at source.

200A. (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:—

(*a*) the sums deductible under this Chapter shall be computed after making the following adjustments, namely:—

(*i*) any arithmetical error in the statement; or

(*ii*) an incorrect claim, apparent from any information in the statement;

(*b*) the interest, if any, shall be computed on the basis of the sums deductible as computed in the statement;

(*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:

Provided that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the statement is filed.

Explanation.— For the purposes of this sub-section, "an incorrect claim apparent from any information in the statement" shall mean a claim, on the basis of an entry, in the statement—

(*i*) of an item, which is inconsistent with another entry of the same or some other item in such statement;

(*ii*) in respect of rate of deduction of tax at source, where such rate is not in accordance with the provisions of this Act.

(2) For the purposes of processing of statements under sub-section (1), the Board may make a scheme for centralised processing of statements of tax deducted at source to expeditiously determine the tax payable by, or the refund due to, the deductor as required under the said sub-section."

4. Clause (c) to (f) of section 200A(1) was substituted by the Finance Act, 2015 w.e.f. 1.6.2015. The assessee contended that AO could levy fee u/s.234E of the Act while processing a return of TDS filed u/s.200(3) of the Act only by virtue of the provisions of Sec.200A(1)(c), (d) & (f) of the Act and those provisions came into force only from 1.6.2015 and therefore the authority issuing intimation u/s. 200A of the Act while processing return of

TDS filed u/s.200(3) of the Act, could not levy fee u/s. 234E of the Act in respect of statement of TDS filed prior to 1.6.2015. The assessee, thus, challenged the validity of charging of fee u/s. 234E of the Act. The assessee relied on the decision of the Hon'ble High Court of Karnataka in the case of *Fatehraj Singhvi v. UOI [2016] 73 taxmann.com 252* wherein the Hon'ble Karnataka High Court held that amendment made u/s. 200A providing that fee u/s. 234E of the Act could be computed at the time of processing of return and issue of intimation has come into effect only from 1.6.2015 and had only prospective effect and therefore, no computation of fee u/s.234E of the Act for delayed filing of return of TDS while processing a return of TDS u/s.234E of the Act could have been made for tax deducted at source for the assessment years prior to 1.6.2015.

5. The CIT(Appeals) accepted the claim of the assessee and he held that in view of the judgment of the Hon'ble High Court of Karnataka cited by the ld. Counsel for the assessee, fee u/s. 234E cannot be charged and cancelled the intimation u/s. 200A r.w.s. 154 of the Act in so far as it relates to levy of fee u/s.234E of the Act.

6. The CIT(Appeals), however, in purported exercise of his powers of enhancement, proposed to hold that the statement of TDS filed by the assessee was *non est* in law because it was filed beyond the time prescribed u/s. 200(3) of the Act. To this proposal of enhancement by the CIT(A), the assessee filed a reply in which he took a stand that TDS statement filed without payment of fee is a valid statement. The CIT(A), however, referred to the provisions of section 234E of the Act which lays down the amount of fee referred to sub-section (1) of section 234E shall be paid before delivering or causing to be delivered a statement in accordance with the provisions of sub-section (3) of section 200. The CIT(A) also took a stand that TDS statement filed without payment of fee u/s. 234E of the Act is not a valid statement.

7. Another argument of assessee before the CIT(A) was that if a return of income is invalid or defective, the AO u/s. 139(9) of the Act has to call upon the assessee to rectify the defect and only if the defect so pointed out is not rectified, can a return of income filed u/s. 139(1) of the Act be treated as invalid. Since there is no such provision for return of TDS u/s. 200(3) of the Act, the AO cannot treat the statement of TDS filed as invalid. To this argument, the CIT(Appeals) held that the provisions of section 139 and section 200(3) cannot be compared. He also took the following view:-

> "20. However, since the AO had also not intimated the defect to the appellant; the appellant was issued a show cause by me following the principle of natural justice. It was informed to the appellant that in absence of payment of fee the return shall be treated as non-est. However, even now no fee is paid by the appellant.
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> 21. The only provision which provides for filing of belated TDS return is section 234E. Considering this the Hon. Bombay High Court had held (already discussed supra) that this is nothing but a privilege and a special service to the deductor allowing him to file the TDS return/statements beyond the time prescribed by the Act and/or the Rules. Thus, this argument no. 3 is also rejected."

8. The next argument of the ld. Counsel for the assessee was that u/s. 251(1)(c) of the Act which is applicable in the present case, the CIT(A) has no power to enhance and therefore in an appeal challenging the validity of levy of fee u/s. 234E of the Act by the assessee, he cannot go into the question, whether TDS return filed by the assessee has to be treated as *non est*. The CIT(Appeals), however, held that the CIT(A) has plenary powers in disposing of an appeal and that the CIT(A) was duty bound to correct errors in the orders of lower authorities. The CIT(A), therefore, rejected this contention of the assessee also.

9. Aggrieved by the order of CIT(Appeals), in declaring the return filed by the assessee as *non est*, the assessee has preferred the present appeal before the Tribunal because if the return of TDS filed by the assessee is treated as *non est*, the other consequences under the Act for non-deduction of tax at source might follow and hence these appeals by the Assessees.

10. We have heard the rival submissions. The ld. DR relied on the order of CIT(Appeals) and further placed reliance on the decision of the Hon'ble Gujarat High Court in the case of *Rajesh Kourani v. UOI [2017] 83 taxmann.com 137 (Guj)* wherein the Hon'ble High Court took a view that levy of fee u/s. 234E of the Act is possible even without a regulatory provision u/s. 200A of the Act and therefore the levy of fee u/s. 234E of the Act w.e.f.1.7.2012, when those provisions were introduced, was valid. We are of the view that this Tribunal is bound to follow the decision of the Hon'ble High Court of Karnataka which is the jurisdictional High Court and therefore this argument advanced by the ld. DR cannot be accepted. Even otherwise, the issue before the Tribunal is with regard to action of the CIT(A) in treating the return of TDS filed by the assessee as *non est* and therefore the decision of the Hon'ble Gujarat High Court, with respect, is not relevant for adjudicating on the issue involved in the present appeal. In all other respects, the ld. DR relied on the order of CIT(Appeals).

11. The ld. Counsel for the assessee reiterated the stand as was put forth before the CIT(Appeals) and further placed reliance on the following decisions for the proposition that exercise of powers of enhancement by the CIT(Appeals) is restricted only to matters which are subject matter which arose for consideration before the AO and he cannot introduce a new source in an appeal:-

1. The Commissioner of Income Tax v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC).

2. Commissioner of Income Tax v. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC)

3. Commissioner of Income Tax v. National Co. Ltd. [1993] 199 ITR 445 (Calcutta).

12. On the parity of ratio laid down in the aforesaid decision, it was submitted that the action of the CIT(Appeals) in declaring return of TDS filed by the assessee as *non est* was not the subject matter of appeal and the subject matter of appeal was only with regard to correctness of levy of fee u/s. 234E of the Act. In that view of the matter, it was submitted that the CIT(Appeals) erred in going into an issue which was not subject matter of appeal before him. This submission was made without prejudice to the argument that u/s. 251(1)(c), the CIT(A) does not have powers of enhancement. U/s. 251(1)(c) which is applicable in the present case, the CIT(A) may pass such orders in the appeal as he thinks fit. It was submitted that the words "in the appeal" in section 251(1)(c) makes it clear that the CIT(Appeals) cannot travel beyond the subject matter of the appeal which in the case of assessee was validity of levy of fee u/s. 234E of the Act. It was, therefore, submitted that the order of CIT(Appeals) to the extent that it declares the return of income as *non est*, should be held to be bad in law and quashed.

13. We have given a very careful consideration to the rival submissions. The first aspect is as to, whether the TDS return filed u/s. 200(3) of the Act can be declared as *non est*. We have already extracted the provisions of section 200(3) of the Act. There is no such power conferred, either under those provisions or under any other provisions of the Act, to declare the return of TDS filed u/s. 200(3) as *non est*. As rightly contended by the

learned counsel for the Assessee, the Act contains provision for declaring a return of income filed as invalid u/Sec.139(9) of the Act. There is no such provision for declaring a return of TDS as invalid. This is a clear indication in the Act that return of TDS cannot be declared as non est. A return of TDS only evidences payment of taxes which are withheld by a payee who, under the provisions of the Act, is bound to deduct tax at source. Declaring a return of TDS as non est, cannot have the effect of treating the payee as an Assessee in default and expose him to other consequences under the Act as an Assessee in default. Section 234E(3) lays down that the fee to be paid u/s. 234E of the Act shall be paid before the return of TDS is filed u/s. 200(3) of the Act. This provision, in our view, does not confer power on the CIT(A) to declare the return of TDS as *non est* in law in a case where the return of TDS is filed without payment of fee u/s.234E of the Act. Besides the above, in the present case, the levy of fee u/s. 234E of the Act has already been deleted by the CIT(A) and therefore these provisions cannot be of any help to the conclusions of the CIT(Appeals) that the return filed without payment of fee u/s. 234E of the Act is invalid and can be declared as *non est* in law.

14. As far as the power of enhancement under Explanation to section 251(1) which was relied on by the ld. DR is concerned, the Explanation is only with regard to clauses (a), (aa) and (b) of section 251(1) of the Act and is not applicable to clause (c). The provisions of Sec.251 of the Act reads thus:-

> **Powers of the Commissioner (Appeals)**.
>
> **251.** (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."

15. It is not in dispute before us that clause (c) of section 251 is the clause applicable in the present case. A reading of this clause shows that the CIT(Appeals) in the cases to which the said clause applies can pass such orders as he thinks fit, but that power is circumscribed by the words "in the appeal". Therefore, the CIT(Appeals) cannot travel beyond the subject matter of the appeal, which in the present case is as to, whether fee u/s. 234E of the Act can be levied or not; and not the question, whether the return of TDS filed by the assessee is *non est* in law? We are, therefore, of the view that the CIT(Appeals) had no power in the appeal in the present case to declare the return of TDS filed by the assessee as *non est* in law. In that view of the matter, we are of the view that the conclusion of the CIT(Appeals) holding that return of TDS filed by the assessee is *non est* in law is not valid in the eyes of law and the said direction is directed to be

deleted and the order of the CIT(A) to this extent is held to be bad in law. Consequently, the appeal by the assessee in ITA No.2658/Bang/2018 is allowed.

16. Since the facts and circumstances of the case in others appeals viz., ITA No.2660/Bang/2018 and ITA Nos.2675 &o 2676/Bang/2018 and ITA Nos.2666 to 2670/Bang/2018 is identical to ITA No.2658/Bang/2018, following the decision in that appeal, all other appeals by the assessees are also allowed.

17. In the result, all the appeals by the assessees are allowed.

Pronounced in the open court on this 22nd day of March, 2019.

Sd/-	Sd/-
(JASON P. BOAZ)	(N V VASUDEVAN)
ACCOUNTANT MEMBER	VICE PRESIDENT

Bangalore,
Dated, the 22nd March, 2019.
/ Desai Smurthy /

Copy to:
1. Appellants (3)
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.