

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

ITA No.	Assessment Year	Appellant	Respondent
ITA No.3542 to 3558/M/2018 ITA No.3725 to 3737/M/2018 ITA No.3823 & 3824/M/2018 ITA No.3738/M/2018	Assessment Year: 2016-17	M/s. Cornerview Construction & Developments Pvt. Ltd., Bldg. No.10, 5 th Floor, ACME Group, Solitaire Park, Guru Hargovindji Road, Andheri (E), Mumbai - 400 093 PAN: AAFCC9548R	ACIT (TDS) -CPS Ghaziabad

Present for:

Assessee by : Shri Ravikant Pathak, A.R.
Revenue by : Shri Arvind Kumar, D.R.

Date of Hearing : 20.06.2019

Date of Pronouncement : 28.06.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals have been preferred by the assessee against the order dated 31.03.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2016-17.

2. The common issue raised in all the appeals of the assessee is against the confirmation of the order of AO(TDS) thereby upholding the levying of fee u/s 234E of the Act on delay in filing the form 26Q on purchase of each flat.

3. Brief facts are that the assessee company is engaged in the business of real estate construction and development. During the previous year relevant to the assessment year under dispute, the assessee entered into an agreement with M/s. Accent Construction Pvt. Ltd. for purchase of ninety six flats in three buildings. Vide allotment letter dated 29th October 2015, the developer company allotted the flats to the assessee for a total consideration of Rs.100,51,65,650/-. On the date of allotment letter itself i.e. 29th October 2015, out of the total sale consideration, the assessee paid an amount of Rs.55/- crores to the assessee through cheque and while making such payment the assessee simultaneously deducted tax @ 1% under section 194IA of the Income Tax Act, 1961 (for short "the Act") amounting to Rs.55 lakh. The TDS amount was deposited in Government account on 29th September 2016 and upon such payment challan-cum- statements as required under section 200(3) of the Act was generated on the very same day in Form no.26QB. While processing the TDS statement under section 200A of the Act, the Assessing Officer finding that TDS statements were not filed within the time prescribed under the statute levied fee under section 234E of the Act in respect of each TDS statement filed by the assessee. Challenging the levy of fee under section 234E of the Act, assessee filed appeals before the first appellate authority.

4. Before learned Commissioner (Appeals), assessee pleaded that since the transactions relating to purchase of flats was by virtue of a single allotment letter, it should be treated as a single transaction and the levy of fee under section 234E of the Act

should be restricted to one challan-cum- statement of TDS which was dismissed by the appellate authority.

5. The Ld. A.R. at the time of hearing submitted before the Bench that the appeals involving identical issue in assessee's own case have been heard in C-Bench on 15.05.2019 and order is awaited which is likely to be pronounced at any time. The Ld. A.R. therefore prayed that the same may kindly be followed in these appeals as well.

6. The Ld. D.R. also appeared to be fairly agreed to the proposition of the Ld. A.R.

7. Now the co-ordinate bench of the Tribunal has pronounced the order on 28.06.2019 in ITA No.3285/M/2018 assessment year 2016-17 & others in assessee's own case dismissing all the appeals filed by the assessee. The operative part of the order is reproduced as under:

"8. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon by the learned Authorised Representative. There is no dispute between the parties with regard to the primary facts. Vide allotment letter dated 29th October 2015, ninety six flats along with car parking space was allotted to the assessee for a total consideration of Rs.100,51,64,650, and on the date of allotment itself i.e., on 29th October 2015, the assessee paid a part of the sale consideration amounting to Rs.55 crore to the developer / builder and while making such payment, the assessee in compliance to the provisions contained under section 194IA of the Act has deducted tax at source @ 1%. Since there was a delay in filing the IDS statements as provided under section 200(3) of the Act, the Assessing Officer while processing the TDS statements under section 200A of the Act has levied fee under section 234E of the Act. Challenging the levy of fee under section 234E of the Act, the learned Authorised Representative has made submissions before us, which can be summarized as under:-

- i) Due to paucity of space in Form no.26QB, assessee was compelled to deposit TDS in separate challans-cum-statements instead of a single challan-cum-statement. Therefore, late fee should be levied in respect of a single challan-cum-statement;

- ii) Provision of section 194IA of the Act is not applicable as there is no transfer of immovable property;
- iii) Since Form no.26QB is a challan-cum-statement which is generated on the very date of payment of TDS, it does not come within the purview of section 200(3) of the Act; and
- iv) There is no additional work load on the Department as the assessee has filed the TDS statements before the due date of filing of return of income by the deductees for the assessment year 2016-17.

9. Insofar as assessee's contention regarding applicability of section 194IA of the Act is concerned, we are unable to accept the same due to following reasons. Undisputedly, at the time of making payment of Rs.55 crore to the seller of the flats, the assessee itself has deducted tax at source in compliance to the provisions contained under section 194IA of the Act. Thus, it is patent and obvious that the assessee and the seller of the flats have treated the transaction of sale of flats as a transaction coming within the purview of section 194IA of the Act. In any case of the matter, the deductee has not expressed any reservation with regard to the applicability of section 194IA of the Act to the subject transaction. Therefore, the assessee being a deductor cannot plead inapplicability of the aforesaid provision. In fact, in our view, the contention of inapplicability of section 194IA of the Act is redundant and is not available to be taken by the assessee. Once the assessee has proceeded to deduct tax at source under section 194IA of the Act, all legal consequences arising in pursuance thereto would automatically follow. As per rule 30A the tax deducted at source under section 194IA has to be deposited within the time and in the manner prescribed therein and in terms of rule 31A assessee has to submit the statements of TDS as provided under section 200(3) of the Act. In fact, a cursory look at Form no. 26QB would reveal that it refers to Rule 30A and 31A of the Rules. The assessee having deducted tax at source not only has to deposit the TDS amount to the Government account, but it has to file a statement under section 200(3) of the Act within the prescribed time limit. It is evident, the assessee has also followed the aforesaid procedure. The only default on the part of the assessee is, it has neither paid the TDS amount nor filed the statement under section 200(3) read with rule 30A and 31A within the time prescribed therein. Therefore, in case of any default in filing the statement in terms of section 200(3) of the Act, the provisions contained under section 234E would automatically get triggered and fee prescribed therein has to be paid. While processing the TDS statement under section 200A of the Act, the Assessing Officer is empowered to levy fee under section 234E of the Act, which the Assessing Officer has done in the present case.

10. The validity of the provision contained under section 234A of the Act came up for scrutiny before the Hon'ble Jurisdictional High Court in case of Rashmikant Kundalia & Anr. v/s Union of India, [2015] 373 ITR 268 (Bom). While deciding the issue, the Hon'ble Jurisdictional High Court not only upheld the validity of section 234E of the Act, but also observed that the delay in furnishing of TDS returns/statements has a cascading effect and leads to an additional work burden upon the Department. The Hon'ble High Court held, to compensate for the additional work burden forced upon the Department, the fee under section 234E of

the Act is contemplated which is not punitive in nature. The fee is a fixed charge for the extra service which the Department has to provide due to the late filing of the TDS statement. The Court held, the fee charged under section 234E of the Act is nothing but a privilege and a special service to the deductor allowing him to file TDS returns / statements beyond the time prescribed by the Act and the Rules. The Court has held that on payment of the fee under section 234E of the Act, the deductor is allowed to file the TDS returns/statements beyond the prescribed time so that it can be regularized. Thus, from the aforesaid decision of the Hon'ble Jurisdictional High Court, it is evident that the fee under section 234E of the Act is nothing but a privilege or special service allowed to a deductor for late filing of the TDS statements. In fact, as could be seen from the submissions made by the assessee before the learned Commissioner (Appeals) and even before us, it does not dispute the applicability of section 234E of the Act. The only issue raised by the assessee is, whether it should be made applicable to all TDS statements or to a single TDS statement. Thus, viewed in the aforesaid perspective, the contention of the learned Authorised Representative that the provision of section 194IA of the Act is not applicable deserves to be rejected. The decision of the Hon'ble Supreme Court in case of *Balwant Vitthal Kadam v/s Sunil Baburao I. Kadam*, (supra), therefore, would not apply.

11. As regards the second contention of the learned Authorised Representative that section 200(3) of the Act, would not apply to a statement in Form no.26QB, as it is a challan-cum-statement generated on the date of payment itself, we are unable to accept the same. No doubt, the provision contained under section 234E of the Act makes it clear that it will be applicable if the deductor fails to deliver the TDS statement within the time prescribed in sub-section (3) of section 200 of the Act. Whereas, sub-section (3) of section 200 of the Act makes it clear that furnishing of TDS statement in the prescribed form, manner and time applies to all TDS provisions including section 194IA of the Act contained under Chapter-XVII. Therefore, assessee's claim that since the challan-cum-statement is generated on a single date, therefore, it will not come within the purview of section 200(3) of the Act, is unacceptable. Thus, we are of the view that the TDS statements in Form no.26QB also comes within the ambit of section 200(3) of the Act.

12. The next contention of the learned Authorised Representative that no additional burden is cast on the Departmental Authorities is also equally unacceptable considering the fact that there is a delay in filing the TDS statement in Form no. 26QB. As held by the Hon'ble Jurisdictional High Court in case of *Rashmikant Kundalia & Anr.* (supra) for the purpose of allowing the assessee to file TDS statement beyond the prescribed time and for regularizing the same, fee under section 234E of the Act has to be charged as it is in the nature of a privilege and special service provided to the assesses. Therefore, this contention of the learned Authorised Representative also fails.

13. Now, coming to the primary contention of the learned Authorised Representative that all the transactions relating to purchase of flats should be taken as a single transaction for the purpose of filing the IDS statement and computing fee under section 234E of the Act, we do not find any merit in such contention. On a perusal of the allotment letter dated 29th October 2015, a copy of which is placed in paper book and, more particularly, Annexure-B to the said letter

reveals that the details and description of each of the flat along with cost thereof has been specifically mentioned. It is also a fact that the assessee has computed and deposited the TDS amount on the basis of the cost of each flat. In that view of the matter, the claim of the assessee that purchases of all the flats is to be taken as a single transaction, therefore, the levy of fee prescribed under section 234E of the Act is to be restricted to one challan-cum-statement filed in Form no.26QB, is unacceptable. When the assessee itself has filed separate TDS statements in respect of the tax deducted at source relating to the respective flats, while processing such statements under section 200A of the Act, the Assessing Officer has to levy fee under section 234E of the Act taking into account the delay in filing each of the statements. That being the case, assessee's contention that fee under section 234E of the Act is to be restricted to one transaction is not acceptable. At this stage, it will be relevant to observe, clause (c) of sub-section (1) of section 200A of the Act contemplates that while processing the TDS return, fee under section 234E of the Act shall be computed. Thus, use of word "shall" in the aforesaid provision makes it mandatory on the part of the Assessing Officer to levy fee under section 234E of the Act. Since, the assessee has filed separate TDS statements under section 200(3) of the Act read with rule 26QB, there is no error on the part of the Assessing Officer in computing fee under section 234E of the Act while processing such statements.

14. As regards the contention of the learned Authorised Representative that appeal against levy of fee under section 234E of the Act is maintainable before the learned Commissioner (Appeals), we find merit in the same. Therefore, to that extent, the assessee's contention is accepted. However, it will not make much difference as learned Commissioner (Appeals) has decided the issue on merit. In view of the aforesaid, we do not find any reason to interfere with the decision of learned Commissioner (Appeals) on the issue. Grounds are dismissed.

15. In the result, all the appeals of the assessee are dismissed."

8. The facts of the appeals before us are identical to ones as decided by the co-ordinate bench of the Tribunal as stated hereinabove. We, therefore, respectfully following the decision of the coordinate dismiss all the appeals of the assessee by upholding the orders of the Ld. CIT(A).

Order pronounced in the open court on 28.06.2019.

Sd/-
(Mahavir Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 28.06.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.