IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, JODHPUR

BEFORE SHRI N.K. SAINI, VICE PRESIDENT
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 106 To 108/Jodh/2019
Assessment Year: 2016-17

Municipal Board Phalodi Jodhpur Executive Officer	Vs.	JCIT (TDS) Jodhpur

PAN No. AAALN1437A
TAN No. JDHM06080E

ITA No. 109 To 112/Jodh/2019
Assessment Year: 2017-18

Municipal Board Phalodi Jodhpur Executive Officer	Vs.	JCIT (TDS) Jodhpur

PAN No. AAALN1437A
TAN No. JDHM06080E
(Appellant) (Respondent)

Assessee by : Shri Bhawani Singh Bhati, Advocate
Department by: Shri Girish Mehta, JCIT DR

Date of hearing : 25/11/2019
Date of Pronouncement : 25/11/2019

O R D E R

PER BENCH :

These appeals by the Assessee are directed against the separate orders each dated 28/12/2018 of the Ld. CIT(A)-1, Jodhpur.

2. Since the issues involved are common in all these appeals which were heard together, so these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. At the first instance, we shall deal with appeal in ITA No. 106/Jodh/2019 for the A.Y. 2016-17 wherein Assessee has raised the following grounds:

> *1. The CIT Appeals and assessing officer has grossly erred in passing the order u/s 200A and there by levying the late filling fee under section 234E for defaulting in furnishing the statement.*
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> *2. Section 201(2) of the act states that if the person is fails to deposit the tax after deducted, the amount of the tax together with the interest thereron shall be a charge upon all his assets. The section does not cover late fee, amount. It is clear intention of law not to cover / recover late fee if same is not deposited along with the TDS statement.*
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> *3. Levy of the late fee is illegal, wrong and not in accordance with the law.*
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> *4. That as per the provision of the section 201(1) of the I.T. Act 1961 an assessee can't be treated in default and TDS statement can't be treated as defective due to non-payment of late fee u/s 234E. Whereas non-payment of self assessment tax and interest alongwith the return u/s 139 treats an Income Tax Return defective u/s 139(9). This clearly shows that provision of section 234E is un judicial.*
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> *5. There was no nay opportunity provided to assessee of being heard before imposing the late fee.*
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> *6. There was a reasonable cause for delayed filling of statement of tax deducted.*
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> *7. The late fee can't be the way of revenue when interest (if Payable) was separately charged from the assessee, since imposing the late fee is constitutionally invalid as it is double charged hence it should be waived.*
>
> *8. The appellant craves liberty to add amend alter and modify any of the ground of appeal on or before its hearing before your honour.*

4. From the aforesaid grounds it is gathered that the appeals of the assessee relates to the confirmation of late filing fees charged by the Assessing Officer under section 234E of the Income Tax Act, 1961 (hereinafter referred to as 'Act').

5. Facts of the case in brief are that the Assessing Officer passed the orders under section 154 r.w.s 200A of the Act, and created demand for different quarters under section 234E of the Act for default in furnishing the TDS statement with in stipulated time. The Assessee moved an applications under section 154 of the Act which were also rejected by the Assessing Officer.

6. Being aggrieved the assessee carried the matter to the Ld. CIT(A) and submitted that no fee could be levied under section 234E of the Act while passing intimation under section 200A of the Act before 01/06/2015 as power to charge/collect fees under section 234E of the Act while issuing intimation under section 200A of the Act was vested with Revenue only on substitution of clause (c) to section 200A vide Finance Act, 2015 w.e. 01/06/2015 and once any provision of the Act had been applicable from a particular date then the requirement of the statute was to apply the said provision from the specific date. Hence in the TDS statement filed prior to 01/06/2015, late fees under section 234E of the Act could not be levied. Reliance was placed on the following case laws:

i. M/s Sandeep Jhanwar Advisory Services Pvt. Ltd. Vs. CPC (ITA No. 722 & 723/JP/2016 dt. 18/10/2016)

ii. Shri. Fatheraj Singhvi & Ors (Writ Appeal No. 2663-2674/2015 (T-IT) 73 Taxmann.com 252 (Kar HC)

iii. Sibia Healthcare Pvt. Ltd. Vs. DCIT (61 Taxmann.com 70) (ITAT Amritsar)

iv. Smt. G. Indhirani Vs. DCIT (60 taxmann.com 312) (ITAT Chennai)

v. Gajanan construction Vs. DCIT (ITAT) Pune.

vi. Maharashtra Cricket Association Vs. DCIT (ITAT Pune)

7. The Ld. CIT(A) however confirmed the action of the Assessing Officer by observing that the TDS statements were filed and processed after 01/06/2015, therefore the late filing fees levied under section 234E of the Act were valid.

8. Now the assessee is in appeal.

9. Ld. Counsel for the Assessee at the very outset stated that this issue is squarely covered vide order dated 10/05/2019 of this Bench of the ITAT in ITA Nos. 492 to 500/Jodh/2018 & others in cases of Station Headquarters Jodhpur & Others Vs. ACIT

CPC-TDS, Ghaziabad & Others, copy of the said order was furnished which is placed on the record.

10. The Ld. DR, in his rival submissions although strongly supported the orders of the authorities below but could not controvert the aforesaid contention of the Ld. Counsel for the Assessee.

11. We have considered the submissions of both the parties and perused the material available on the record. It is noticed that an identical issue having similar facts had already been decided by this Bench of the ITAT vide aforesaid referred to order dated. 10/05/2019 wherein the relevant findings has been given in para 5 to 6 which read as under:

> *"5. We note that the Hon'ble High Court decided the Constitutional validity of sec. 234E of the Act after taking note of the decision of the Hon'ble Bombay High Court in Rashmikant Kundalia & Ors. Vs. Union of India & Ors. (2015) 229 Taxman 596 (Bom) which was decided on 06.02.2015 wherein the Hon'ble Bombay High Court has upheld the validity of section 234E of the Act and thereafter, the Hon'ble jurisdictional High Court upheld the Constitutionality of section 234E of the Act has clearly held that "We do not in exercise of the powers under Article 226 of the Constitution of India, find any valid reasons or justification to interfere with compensatory fees imposed for late filing of the TDS returns on flat rates. The absence of any provision for condonation of delay and appeal prior to amendments also did not make imposition of late fees by Sec. 234E to be ultra vires. The Writ Petition has no merits and is accordingly dismissed." We note that thus the Hon'ble jurisdictional High Court in this case has upheld the Constitutional validity of the provision of section 234E of the Act, however, the question before us in these appeal that has been raised is whether the impugned intimation given by the AO, TDS against all the appellants u/s. 200A of the Act are so far as they are for the period prior to 01.06.2015 can be said as without any authority under the law. We note that the issue has been dealt in detail in the order of the Tribunal in Maharastra Cricket Association & Ors. Vs. DCIT (2016) 182 TTJ (Pune) "A" Bench by decision dated 21.09.2016 wherein the Tribunal has held as under:*
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> *"16. We have heard the rival contentions and perused the record. The issue arising in this bunch of appeals is against levy of fees under s. 234E of the Act. In order to adjudicate the issue, first reference is being made to the relevant provisions of the Act. Under Chapter XVI headed 'Collection and recovery of taxes' and under 'cl. B', deduction at source, the statute lays down the duty of the payer of certain amounts to deduct tax at source under ss. 192 to 194LD, 195 to 196D of the Act. Under s. 198 of the Act, it is provided that the tax deducted at source shall for the purpose of computing the income of assessee be deemed to be income received. Under s. 199 of the Act, it is further provided that any deduction made in accordance with the provisions of chapter and paid to the Central Government shall be treated as payment of tax on behalf of the person from whose income the deduction was made.*
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> *The sum referred to in sub-s. (1A) of s. 192 of the Act and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of*

whose income such payment of tax has been made."

17. Section 200 of the Act lays down the duty of the person deducting tax, which reads as under:-

"200. (1) Any person deducting any sum in accordance with the foregoing provisions of this Chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs. (2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.

(2A) In case of an office of the Government, where the sum deducted in accordance with the foregoing provisions of this Chapter or tax referred to in sub-section(1A) of section 192 has been paid to the credit of the Central Government without the production of a challan, the Pay and Accounts Officer or the Treasury Officer or the Cheque Drawing and Disbursing Officer or any other person, by whatever name called, who is responsible for crediting such sum or tax to the credit of the Central Government, shall deliver or cause to be delivered to the prescribed income-tax authority, or to the person authorised by such authority, a statement in such form, verified in such manner, setting forth such particulars and within such time as may be prescribed.

(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income-tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed:

Provided that the person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement delivered under this subsection in such form and verified in such manner as may be specified by the authority."

18. Under section 200(1) of the Act, it is provided that any person deducting any sum in accordance with the provisions of the Chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs. Under section 200(2) of the Act, any person being an employer, as referred to in subsection (1A) of section 192 of the Act shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs. Under sub-section (2A) of the Act, it is provided that where the sum has been deducted in accordance with foregoing provisions of the 19 Chapter, by the office of the Government, then duty is upon the Treasury Officer or the Drawing & Disbursing Officer or any other person, to deliver or cause to be delivered to the prescribed income tax authorities, or to the person authorized by such authority, statement in such form, verified in such manner, setting forth such particulars within such time as may be prescribed. Under section 200(3) of the Act, similar responsibility is on any person deducting any sum on or after first day of April, 2005 in accordance with foregoing provisions of the Chapter, including any person as an employer referred to in section 192(1A) of the Act. The onus is upon such person that he shall after paying the tax to the credit of Central Government within prescribed time, prepare such statement for such period as may be prescribed and deliver or cause to be delivered to the prescribed income tax authority or any person so authorized, such statement in such form and verified in such manner and setting forth such particulars and within such time as may be provided. The duty is upon a person deducting any sum in accordance with various provisions under the Chapter and also upon

an employer who is making deduction out of the payments made to the employees, then sub-section (3) requires that the deductor is to prepare a statement for such period as may be prescribed, which is to be delivered to the prescribed authority, in such form and verified and setting forth such particulars as may be prescribed. The said statement is to be delivered within such time as may be prescribed.

19. Rule 31A of the Income Tax Rules, 1962 (in short 'the Rules') provides that every person who is responsible for deduction of tax under Chapter XVIIB shall in accordance with the provisions of section 200(3) of the Act, deliver or cause to be delivered, the quarterly statements to the Director General of Income Tax (Systems) or the persons authorized by them i.e. in respect of deductions under various provisions of the Chapter XVIIB. The Rule further 20 provides that the statements referred to in sub-rule (1) are to be delivered quarterly and the stipulated period of due date of filing the said statement in respect of deductor being an office of the Government and the deductor being other than Government, are provided. The subrule (3) of Rule 31A of the Rules further provides that the statement referred to in sub-rule (1) may be furnished in any of the following manners i.e. by way of furnishing the statement in paper form or furnishing the statement electronically under digital signature or after verification. Initially, such statement had to be furnished in paper form and later by way of amendment, the procedure for furnishing the statement electronically was provided. Once the statement has been so submitted by the deductor of tax deducted at source, then processing of statement is as per the provisions of section 200A of the Act. The said section was inserted by the Finance (No.2) Act, 2009 w.e.f. 01.04.2010. The said section 200A of the Act reads as under:-

"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 sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of amount computed under clause (b) against any amount paid under section 200 and section 201, and any amount paid otherwise by way of tax or interest;
(d) 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 (c); and
(e) the amount of refund due to the deductor in pursuance of the determination under clause (c) 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." 20. Section 200A of the Act lays down the manner in which the statements of tax

deducted at source are to be processed for issuing the intimation. First of all, the sums deductible under the Chapter are to be computed and interest, if any, shall be computed on the basis of such sums deductible as computed in the statements as per clause (a) and (b) under section 200A(1) of the Act. Clauses (c) to (f) reproduced above were substituted for clauses (c) to (e) by the Finance Act, 2015 w.e.f. 01.06.2015. Prior to the substitution, clauses (c) to (e) read as under:-

"(c) the sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of amount computed under clause (b) against any amount paid under section 200 and section 201, and any amount paid otherwise by
way of tax or interest;
(d) 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 (c); and
(e) the amount of refund due to the deductor in pursuance of the determination
under clause (c) shall be granted to the deductor."
21. As per newly substituted clause (c) w.e.f. 01.06.2015, the fees, if any, is to be computed in accordance with the provisions of section 234E of the Act. However, under the earlier clause (c), there was no such provision.

22. Section 234E(1) of the Act provides that where a person fails to deliver or cause to be delivered, a statement within time prescribed in section 200(3) of the Act or the proviso to section 206C(3) of the Act, he shall be liable to pay, by way of fees, sum of Rs.200/- for every day during which the failure continues. The said provisions were inserted by the Finance Act, 2012 w.e.f. 01.07.2012. 22 Under sub-section (2), it is further provided that the amount of fees referred to in sub-section (1) shall not exceed the amount of tax deductible or collectable, as the case may be. Sub-section (3) further lays down that the amount of fees referred to in sub-section (1) shall be paid before delivering or causing to be delivered a statement in accordance with sub-section 200(3) of the Act or the proviso to section 206C(3) of the Act. The provisions of said section have been made applicable to a statement to be delivered or cause to be delivered on or after the first day of July, 2012.

23. Reading the above said provisions of the Act, it transpires that where tax has been deducted at source by a deductor out of the account of deductee, then the onus is upon the deductor under section 200 of the Act to prepare a statement in such form and verified in such manner which is prescribed under the Act in which the particulars of tax deduction at source are to be provided and the said statement is to be delivered or cause to be delivered within such time as may be prescribed. Rule 31A of the Rules provided the time limit for the furnishing of statement for tax deduction at source on quarterly basis. Section 234E of the Act levies fees for default in furnishing the statements of tax deducted at source. Such fees is to be paid before delivering or causing to be delivered a statement in accordance with section 200(3) of the Act or proviso to section 206C(3) of the Act. In other words, in case the assessee has defaulted in not delivering the statement or causing to deliver the statement within time prescribed, then he is liable to pay the fees which is so prescribed under the Act and such fees shall not exceed the amount of tax deductible or collectable at source but the same has to be paid along with statement which is to be delivered under the provisions of section 200(3) of the Act. Though the statement of tax deducted at source has to be furnished by the deductor, no doubt, under section 200 of the Act, but the same has to be processed by the 23 prescribed authority as per provisions of section 200A of the Act. In case there is any variation in the tax, sum deductible under the Chapter and / or their payment, the Assessing Officer is empowered to make adjustments in this regard and also reject incorrect claim made by the deductor which is apparent from the information in the statement filed by the deductor. Further, the Income tax authority is authorized to charge interest, if any, and the same shall be computed
on the basis of sums deductible in addition to the amount of tax deducted at source, which is to be paid to the account of Treasury by the deductor. In case of any default, interest is to be

charged against such deductor and the same is to be computed as per provisions of section 200A(1)(b) of the Act. Further, in addition to both these amounts, clause (c) to section 200A of the Act provides fees to be levied which shall be computed in accordance with the provisions of section 234E of the Act. The said provision to charge fees by the prescribed authority has been substituted for earlier provisions by the Finance Act, 2015 w.e.f. 01.06.2015. Prior to the said substitution though the provisions of section 234E of the Act for payment of fees for default in furnishing the statement were inserted by the Finance Act, 2012 w.e.f. 01.07.2012, the prescribed authority did not have the power to charge the said fees, while processing the quarterly statements / returns under section 200A of the Act.

24. Now, looking at various provisions of the Act, the issue needs to be adjudicated in the case of assessee, wherein admittedly, TDS returns which were deemed to be filed by the assessee were filed after delay and the question was whether the Assessing Officer which processing the intimation under section 200A of the Act could charge late fee under the provisions of section 234E of the Act. The assessee claims that the Assessing Officer at best could charge the difference in tax deducted and not paid in Treasury from the deductor and / or any interest payable on such deduction of tax at source. 24 However, till substitution of clause (c) to section 200A(1) of the Act by the Finance Act, 2015 w.e.f. 01.06.2015, the Assessing Officer
was not empowered to charge fees under section 234E of the Act. The case of Revenue on the other hand, was that it was the duty of deductor while furnishing the statement under section 200(3) of the Act to deposit the fees referred to in section 234E(1) of the Act. The learned CITDR stressed that fees referred to in sub-section (1) had to be paid while delivering or causing to deliver the statement in accordance with provisions of section 200(3) of the Act or the proviso to section 206C(3) of the Act. However, various regulations and the statutory provisions in this regard point out that undoubtedly, the responsibility of the deductor was to deposit the tax deducted at source in time and if not so, then with interest and consequently, where the tax was not paid in time and interest was not paid in time and then, where the statement of tax deducted at source could not be filed before the prescribed authority within stipulated time, the assessee was liable to levy of fees under section 234E of the Act.

However, in case any default occurs due to the non-payment of fees by the assessee in this regard, then the provisions which has to be considered is section 200A(1)(c) of the Act. The power to charge / collect fees as per provisions of section 234E of the Act was vested with the prescribed authority under the Act only on substitution of earlier clause (c) to section 200A of the Act by the Finance Act, 2015 w.e.f. 01.06.2015. Once any provision of the Act has been made applicable from a respective date, then the requirement of the statute is to apply the said provisions from the said date.

25. In respect of the issue raised before us, it is clear that the prescribed authority has been vested with the power to charge fees under section 234E of the Act only with regard to levy of fees by the substitution made by Finance (No.2) Act, 2015 w.e.f. 01.06.2015. Once the power has been given, under which any levy has to be imposed upon tax payer, then such power comes into 25 effect from the date of substitution and cannot be applied retrospectively. The said exercise of power has been provided by the statute to be from 01.06.2015 and hence, is to be applied prospectively. There is no merit in the claim of Revenue that even without insertion of clause (c) under section 200A(1) of the Act, it was incumbent upon the assessee to pay fees, in case there is default in furnishing the statement of tax deducted at source.

Admittedly, the onus was upon the assessee to prepare statements and deliver the same within prescribed time before the prescribed authority, but 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. Prior to said substation, 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. Before exercising the authority of charging

any sum from any deductor or the assessee, the prescribed authority should have necessary power vested in it and before vesting of such power, no order can be passed by the prescribed authority in charging of such fees under section 234E of the Act, while exercising jurisdiction under section 200A of the Act. Thus, in the absence of enabling provisions, under which the prescribed authority is empowered to charge the fees, the Assessing Officer while processing the returns filed by the deductor in respect of tax deducted at source can raise the demand on account of taxes, if any, not deposited and charge interest. However, prior to 01.06.2015, the Assessing Officer does not have the power to charge fees under section 234E of the Act while processing TDS returns. In the absence of enabling provisions, levy of fees could not be effected in the course of intimation issued under section 200A of the Act prior to 01.06.2015.

26. The Amritsar Bench of Tribunal in Sibia Healthcare (P) Ltd. Vs. DCIT (2015) 121 DTR 81 (Asr) (Trib) had held that the adjustment in respect of levy of 26 fees under section 234E of the Act was indeed beyond the scope of permissible adjustments contemplated under section 200A of the Act. Such a levy could not be effected in the course of intimation under section 200A of the Act and in the absence of any other provisions enabling the demand in respect of this levy having been pointed out, no such levy could be effected. The said proposition has been applied in various decisions of different Benches of Tribunal. Reference was made to the decisions of Chennai Bench of Tribunal in G. Indirani Vs. DCIT (supra), Ahmedabad Bench of Tribunal in M/s. Globe Ecologistics Ltd. Vs. DCIT in ITA Nos.2689-2691/Ahd/2015, ITA No.2692/Ahd/2015, relating to assessment year 2014-15, ITA No.2693/Ahd/2015, relating to assessment year 2013-14 and ITA Nos.2694- 2695/Ahd/2014, relating to assessment year 2013-14, vide consolidated order dated 26.11.2015 and Chandigarh Bench of Tribunal in M/s. Khanna Watches Ltd. Vs. DCIT in ITA Nos.731 to 735/CHD/2015, relating to assessment years 2014-15 & 2013-14, order dated 29.10.2015.

27. While deciding the present bunch of appeals, the Revenue had placed reliance on the ratio laid down by the Hon'ble Bombay High Court in Rashmikant Kundalia Vs. Union of India (supra) wherein, the constitutional validity of section 234E of the Act was challenged. The Hon'ble High Court noted the fact that where the deductor was required to furnish periodical quarterly statements containing the details of deduction of tax made during the quarter, by the prescribed due date and the delay in furnishing such TDS returns would have cascading effect. It was further observed by the Hon'ble High Court that under the Income-tax Act, where there is an obligation on the Income-tax Department to process the income-tax returns within specified period from the date of filing, the returns could not be accurately processed of such person on whose behalf tax has been deducted i.e. deductee, until information of such deductions is 27 furnished by the deductor within the prescribed time. Since the substantial number of deductors were not filing their TDS returns / statements within prescribed time frame, then it lead to an additional work burden upon the Department due to the fault of the deductor and in this light and to compensate for additional work burden forced upon the Department, fees was sought to be levied under section 234E of the Act. The Hon'ble High Court held that looking at this from this perspective, section 234E of the Act was not punitive in nature but a fee which was a fixed charge for the extra service which the Department had to provide due to the late filing of TDS statements. It was further held by the Hon'ble High Court that late filing of TDS returns / statements was regularized by payment of fees as set out in section 234E of the Act. Therefore, the findings of Hon'ble High Court were thus, that the fees sought to be levied under section 234E of the Act was not in the guise of tax sought to be levied on the deductor. The provisions of section 234E of the Act were held to be not onerous on the ground that section does not empower the Assessing Officer to condone the delay in late filing the income tax returns or that no appeal is provided from arbitrary order passed under section 234E of the Act. The Hon'ble High Court held that the right to appeal was not a matter of right but was creature of statute and if the Legislature deems fit not to provide remedy of appeal, so be it. The Hon'ble High Court further held that a person can always approach the court in extraordinary equitable jurisdiction under Article 226/227 of the

Constitution as the case may be. The Hon'ble High Court therefore, observed that simply because no remedy of appeal was provided for the provisions of section 234E of the Act, the same cannot be said to be onerous and section 234E of the Act was held to be constitutionally valid. The constitutional validity of provisions of section 234E of the Act has also been upheld by the Hon'ble Rajasthan High Court in M/s. Dundlod Shikshan Sansthan & Anr. Vs. Union of India and Ors (supra).

28. In view of the above said ratio laid down by the Hon'ble Bombay High Court, the case of the learned CIT-DR before us was that there is no merit in the present set of appeals filed by the assessee as the Hon'ble High court has laid down that no appeal is provided from an order passed under section 234E of the Act and the same merits to be dismissed at the outset. In this regard, he has raised two issues that (a) the appeal filed by the assessee is not maintainable and also (b) there is no merit in the claim of the assessee that the Assessing Officer is not empowered to charge fees under section 234E of the Act before insertion of clause (c) to section 200A(1) of the Act by the Finance Act, 2015 w.e.f. 01.06.2015. The learned Authorized Representative for the assessee on the other hand, drew our attention to the Memorandum to the Finance Bill, 2015 while introducing the said clause (c) to section 200A(1) of the Act. The Finance Bill took note of the provisions of Chapter XVIIB, under which the person deducting tax i.e. deductor was required to file quarterly tax deduction at source statement containing the details of deduction of tax made during the quarter by the prescribed due dates. Similar responsibility is on a person required to collect tax of certain specified receipts under section 206C of the Act. In order to provide effective deterrence against the delay in furnishing TDS / TCS statements, the Finance Act, 2012 inserted section 234E of the Act to provide for levy of fees on late furnishing of TDS / TCS statements. The Memo further took note of the fact that the Finance (No.2) Act, 2009 inserted section 200A in the Act, which provided for furnishing of TDS statements for determining the amount payable or refundable to the deductor. It further took note that however, as section 234E of the Act was inserted after the insertion of section 200A in the Act, the existing provisions of section 200A of the Act does not provide for determination of fees payable under section 234E of the Act at the time of processing of TDS statements. It was thus, proposed to amend the provisions 29 of section 200A of the Act so as to enable the computation of fees payable under section 234E of the Act at the time of processing of TDS statements under section 200A of the Act. The Memo explaining the Finance Bill, 2015 very categorically held that currently there does not exist any provision in the Act to enable the processing of TCS returns and hence, a proposal was made to insert a provision in this regard and also the post provision shall incorporate the mechanism for computation of fees payable under section 234E of the Act. The Finance Bill further refers to the existing provisions of the Act i.e. after processing of
TDS statement, intimation is generated specifying the amount payable or refundable. This intimation generated after processing of TDS statement is (i) subject to rectification under section 154 of the Act; (ii) appealable under section 246A of the Act; and (iii) deemed as notice of payment under section 156 of the Act. The Finance Bill further provided that intimation generated after the proposed processing of TCS statement shall be at par with the intimation generated after processing of TDS statement and also provided that failure to pay tax specified in the intimation shall attract levy of interest as per provisions of section 220(2) of the Act. Further, amendments were also made in respect of the scheme of payment of TDS
/ TCS by the Government, deductor / collector which are not relevant for deciding the issue in the present appeal and hence, the same are not being referred to. The Finance Bill further provided that the amendment would take effect from 01.06.2015.

29. The perusal of Memo explaining the provision relating to insertion of clause (c) to section 200A of the Act clarifies the intention of Legislature in inserting the said provision. The provisions of section 234E of the Act were inserted by the Finance Act, 2012, under which the provision was made for levy of fees for late furnishing TDS / TCS statements. Before insertion of section 234E of the Act, the Finance (No.2) Act, 2009 had inserted section 200A in the 30 Act, under the said section, mechanism was provided for processing of TDS statements for determining

the amount payable or refundable to the deductor, under which the provision was also made for charging of interest. However, since the provisions of section 234E of the Act were not on statute when the Finance (No.2) Act, 2009 was passed, no provision was made for determining the fees payable under section 234E of the Act at the time of processing the TDS statements. So, when section 234E of the Act was introduced, it provided that the person was responsible for furnishing the TDS returns / statements within stipulated period and in default, fees would be charged on such person. The said section itself provided that fees shall not exceed the amount of tax deducted at source or collected at source. It was further provided that the person responsible for furnishing the statements shall pay the said amount while furnishing the statements under section 200(3) of the Act. However, power enabling the Assessing Officer to charge / levy the fee under section 234E of the Act while processing the TDS returns / statements filed by a person did not exist when section 234E of the Act was inserted by the Finance Act, 2012. The power to charge fees under the provisions of section 234E of the Act while processing the TDS statements, was dwelled upon by the Legislature by way of insertion of clause (c) to section 200A(1) of the Act by the Finance Act, 2015 w.e.f. 01.06.2015. Accordingly, we hold that where the Assessing Officer has processed the TDS statements filed by the deductor, which admittedly, were filed belatedly but before insertion of clause (c) to section 200A(1) of the Act w.e.f. 01.06.2015, then in such cases, the Assessing Officer is not empowered to charge fees under section 234E of the Act while processing the TDS returns filed by the deductor.

30. The Hon'ble Bombay High Court in Rashmikant Kundalia Vs. Union of India (supra) has upheld the constitutional validity of said section introduced by 31 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 Vs. Union of India (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.

31. Another aspect of the issue is whether the amendment brought in by the Finance Act, 2015 w.e.f. 01.06.2015 by way of insertion of clause (c) to section 200A(1) of the Act is clarificatory or is prospective in nature and is not applicable to the pending assessments. Undoubtedly, the provisions of section 234E of the Act were inserted by the Finance Act, 2012, under which the liability was imposed upon the deductor in such cases where TDS statements / returns were filed belatedly to pay the fees as per said section. However, in cases, where the assessee has failed to deposit the said fees, then in order to enable the Assessing Officer to collect the said fees chargeable under section 234E of the Act, it is incumbent upon the Legislature to provide mechanism for the Assessing Officer to charge and collect such fees. In the absence of enabling provisions, the Assessing Officer while processing the TDS statements, even if the said statements are belated, is not empowered to charge the fees under section 234E of the Act. The amendment was brought in by the Finance Act, 2015 w.e.f. 01.06.2015 and such an amendment where empowerment is given to the Assessing Officer to levy or charge the fees cannot be said to be clarificatory in nature and hence, applicable for pending assessments.

32. The Hon'ble Supreme Court in CIT Vs. Vatika Township Pvt. Ltd. (supra) has explained the general principle concerning retrospectively and have held that "of the various rules guiding how a legislation has to be interpreted, one established rule is that unless contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. Idea behind the rule is that current law should govern current activities". The Memo explaining the Finance Bill, 2015 very clearly also recognizes that and refers to the current provisions of subsection (3) to section 200 of the Act, under which the deductor is to furnish TDS statements. However, as section 234E of the Act was inserted after insertion of section 200A in the Act, the existing provisions of section 200A of the Act did not provide for determination of fees payable

under section 234E of the Act at the time of processing of TDS statements. In this regard, it was thus, proposed to amend the provisions of section 200A of the Act so as to enable the computation of fees payable under section 234E of the Act at the time of processing of TDS statements under section 200A of the Act. In other words, the Assessing Officer is empowered to charge fees payable under section 234E of the Act in the intimation issued after insertion of clause (c) to section 200A(1) of the Act w.e.f. 01.06.2015. The Legislature itself recognized that under the existing provisions of section 200A of the Act i.e. prior to 01.06.2015, the Assessing Officer at the time of processing the TDS statements did not have power to charge fees under section 234E of the Act and in order to cover up that, the amendment was made by way of insertion of clause (c) to section 200A of the Act. In such scenario, it cannot be said that insertion made by section 200A(1)(c) of the Act is retrospective in nature, where the Legislature was aware that the fees could be charged under section 234E of the Act as per Finance Act, 2012 and also the provisions of section 200A of the Act were inserted by Finance (No.2) Act, 2009, under which the machinery was provided 33 for the Assessing Officer to process the TDS statements filed by the assessee. The insertion categorically being made w.e.f. 01.06.2015 lays down that the said amendment is prospective in nature and cannot be applied to processing of TDS returns / statements 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) & Ors in Sri Fatheraj Singhvi & Ors Vs. Union of India & Ors 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 Ho n'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 Vs. Union of India (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 34 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.

35. Before parting we may refer to reliance placed upon by the learned CITDR on the ratio laid down by Chennai Bench of Tribunal in G. Indirani Vs. DCIT (supra) on another aspect wherein it was held that before 01.06.2015, whether the Assessing Officer had authority to pass a separate order under section 234E of the Act levying fees for delay in filing the TDS statements under section 200(3) of the Act; the Tribunal held 'yes' that the assessing authority had such power and after 01.06.2015, the Assessing Officer was within his limit to levy fees under section 234E of the Act even while processing the TDS statements under section 200A of the Act. In view of the present set of facts, where the Assessing Officer had charged fees under section 234E of the Act while processing the statements under section 200A of the Act before 01.06.2015, there is no merit in the reliance placed upon by the learned CIT-DR on the said proposition laid down by the Chennai Bench of Tribunal and we dismiss the same.

36. Another reliance placed upon by the learned CIT-DR was in respect of amendment being retrospective or prospective and reliance was placed on the ratio laid down by Hon'ble Delhi

High Court in CIT Vs. Naresh Kumar (supra). However, in view of our decision in the paras hereinabove, where power is being enshrined upon the Assessing Officer to levy or charge while processing the TDS returns w.e.f. 01.06.2015, such provision cannot have retrospective effect as it would be detrimental to the case of tax payer. The Hon'ble Delhi High Court was considering the application of amendment to section 40(a)(ia) of the Act by the Finance Act, 2010, under which certain relaxations were given to 35 the application of said section and it was held that the same applies retrospectively to earlier years. However, in the present set of appeals, the issue is against the provision under which a new enabling power is being given to charge fees under section 234E of the Act while processing TDS returns / statements and such power is to be applied prospectively. In any case, the Parliament itself has recognized its operation to be prospective in nature while introducing clause (c) to section 200A(1) of the Act and hence, cannot be applied retrospectively. Similarly, reliance placed upon by the learned CIT-DR on the ratio laid down by the Hon'ble Supreme Court in Govinddas Vs. ITO (supra) is misplaced because of the distinguishable facts and issues.

37. Now, coming to the connected issue raised by the learned Authorized Representative for the assessee by way of ground of appeal No.1 that whether any appeal is maintainable against the intimation issued under section 200A of the Act and / or order passed under section 154 r.w.s. 200A of the Act by Assessing Officer in charging the fees under section 234E of the Act. Both the learned Authorized Representatives have raised varied arguments in respect of said issue and the learned CIT-DR has referred to the order of CIT(A), who had held that no appeal is maintainable against the order of Assessing Officer passed while processing the TDS returns / statements and charging of fees under section 234E of the Act. Without going into various aspects of the issue, we make reference to the Memorandum explaining the Finance Bill, 2015, under which the heading was rationalization of provisions relating to Tax Deduction at Source (TDS) and Tax Collection at Source (TCS). The said memorandum categorically recognized that under the existing provisions of the Act, after processing of TDS statements, an intimation is generated specifying the amount payable or refundable. It was further noted that this intimation generated after 36 processing TDS statement is (i) subject to rectification under section 154 of the Act; (ii) appealable under section 246A of the Act; and (iii) deemed as notice of payment under section 156 of the Act. Under the amendment, similar position was given to the processing of TCS statements. In other words, the Legislature recognizes that a deductor who has filed his statement of tax deducted at source, which in turn, has been processed by the Assessing Officer and intimation is generated under which, if any amount is found to be payable, then such intimation generated after processing of TDS returns is subject to rectification under section 154 of the Act and / or is also appealable under section 246A of the Act, since the demand issued by the Assessing Officer is deemed to be a notice of payment under section 156 of the Act. Since the intimation in question issued by the Assessing Officer was appealable order under section 246A(1)(a) of the Act, therefore, the CIT(A) should have examined the legality of adjustment made under intimation issued under section 200A of the Act. The CIT(A) has rejected the present set of appeals on the surmise that first of all, no appeal is provided against the intimation issued under section 200A of the Act. Further, the CIT(A) has also decided the issue on merits and the assessee is in appeal before us on both these grounds. Vis-à-vis the first issue of maintainability of appeal against the intimation issued under section 200A of the Act, we hold that such intimation issued by the Assessing Officer after processing the TDS returns is appealable. The demand raised by way of charging of fees under section 234E of the Act is under section 156 of the Act and any demand raised under section 156 of the Act is appealable under section 246A(1)(a) and (c) of the Act. Accordingly, we reverse the findings of CIT(A) in this regard. We find support from the similar proposition being laid down by Mumbai Bench of Tribunal in bunch of cases with lead order in M/s. Kash Realtors Pvt. Ltd. Vs. ITO in ITA No.4199/M/2015, relating to assessment year 2013-14, consolidated order dated 27.07.2016, which had also decided the 37 issue of charging of fees under section 234E of the Act in favour of the assessee following the decisions of other Benches of Tribunal. Once intimation issued under section 200A(1) of the Act is appealable order before the CIT(A) under section 246A(1)(a) of the Act, then such

appealable order passed by the CIT(A) under section 250 of the Act is further appealable before the Tribunal under section 253 of the Act. Hence, we admit the present appeals filed by the assessee even on this preliminary issue. We have already adjudicated the issue of charging fees under section 234E of the Act by the Assessing Officer while processing returns / statements in the paras hereinabove and in view thereof, we hold that the Assessing Officer is not empowered to charge the fees under section 234E of the Act by way of intimation issued under section 200A of the Act in respect of defaults before 01.06.2015, we allow the claim of assessee on both the aspects. The grounds of appeal raised by the assessee are thus, allowed.

38. In the result, except for the appeals in ITA Nos.560/PN/2016 & 561/PN/2016, 193/PN/2016, 189/PN/2016, 191/PN/2016, 199/PN/2016, 194/PN/2016 and 196/PN/2016, which are dismissed as withdrawn, all the other appeals filed by different assessee for different quarters relating to different years are allowed."

6. In the light of the aforesaid decision and respectfully following the same, we note that it appears that in all matters, the intimation given by the AO which are given in purported exercise of power u/s. 200A are in respect of late fees u/s. 234E of the Act for the period prior to 01.06.2015. As such, it is on account of the intimation given making demand of the late fee in purported exercise of powers u/s. 200A of the Act. We note that clause (c) of sec. 200A of the Act empowers the AO to levy late fee was w.e.f. 01.06.2015 and there is no indication [which is either express or implied] while amendment was made that it is retrospective or clarifactory in nature. Since the AO is empowered to levy the late fee for late filing of the statement of TDS/TCS statement and in the Memorandom explaining the introduction of Finance Bill, 2015 clearly took note of the provisions of Chapter XVIIB under which the persons deducting tax i.e. deductor was required to file quarterly tax deduction at source, statements containing the details of deduction of tax made during quarterly by the prescribed due dates. (Similar responsibility is on the persons required to collect tax of certain specified receipt u/s. 206C of the Act). In order to provide effective deterrence against the delay in furnishing TDS/TCS statements, the Finance Act, 2012 inserted sec. 234E of the Act to provide for levy of fees on late furnishing of TDS statements. The Memorandum of Finance Bill, 2015, further took note of the fact that the Finance (No. 2) Act 2009, inserted sec. 200A in the Act, which prescribed for furnishing of TDS statements for determining the amount payable or refundable to the deductor. It further took note that however, as sec. 234E of the Act was inserted after the insertion of sec. 200A in the Act, the existing provisions of sec. 200A of the Act do not provide for determination of late fees payable u/s. 234E of the Act at the time of processing of TDS statement. It was thus, proposed to amend the provisions of sec. 200A of the Act so as to enable the computation of taxes payable u/s. 234E of the Act at the time of processing of TDS statement u/s. 200A of the Act. Taking note of the aforesaid legal history the Memorandum explaining Finance Bill, 2015 took note of the fact that at that time there does not exist any provision in the Act to enable the processing as TCS returns and hence, a proposal was made to insert a provision in this regard and also the post provision was incorporated the mechanism for computation of late fees payable u/s. 234E of the Act. Thus, we note that a perusal of the Memorandum explaining the insertion of provision relating to insertion of clause (c) to sec. 200A of the Act clarifies the intention of the legislature in inserting the said provision. The Finance Bill further clearly provides that the amendment took effect from 01.06.2015, so there is no indication whatsoever that clause (c) of section 200A is retrospective or clarificatory in nature. Therefore, the AO is not empowered to levy late fees u/s. 234E of the Act before 01.06.2015. Therefore, in the light of the aforesaid discussion and the ratio laid by the Pune Bench in Maharastra Cricket Association & Ors. (supra), we hold that the amendment [clause (c)] was inserted u/s. 200A of the Act which has been given effect from 01.06.2015 is prospective in nature, and no computation of late fee for the demand or the intimation for the late fee u/s. 234E could be made for the TDS deducted for the respective assessment years prior to 01.06.2015. Therefore, the intimation u/s. 200A of the Act by the AO, TDS for payment of late fee u/s. 234E of the Act for the respective assessment years prior to 01.06.2015

is without any authority of law. In the light of the aforesaid view, we set aside the order of the Ld. CIT(A) and remand the matter back to the file of AO with a direction to AO that the late fee levied for the period of delay of filing return prior to 01.06.2015 need to be deleted. We further clarify that the AO is well within his jurisdiction to levy late fee u/s. 234E of the Act for the period starting only from 01.06.2015 to the date of actual filing of the TDS return. In sum and substance, the levy of late fee u/s. 234E of the Act is valid from the period from 01.06.2015 to the date of actual filing of the TDS return and the balance fees levied earlier to 01.06.2015 is directed to be deleted."

So respectfully following the aforesaid referred to order, we hold that the late fees levied under section 234E of the Act for the period prior to 01/06/2015 was not justified and needs to be deleted and that the late fees under section 234E may be levied only for the period starting from 01/06/2015 to the date of actual filing of the TDS return. Accordingly, the appeals involving the period before 01/06/2015 are set aside to the file of the Assessing Officer to be decided as per the directions given in the aforesaid referred to order dt. 10/05/2019, and others pertaining to the period after 01/06/2015 are dismissed.

12. In the result, appeal in ITA No. 106/Jodh/2019 is allowed for statistical purposes and appeals in ITA Nos. 107 to 112/Jodh/2019 are dismissed.

(Order pronounced in the open Court on 25/11/2019)

Sd/-	**Sd/-**
(SANDEEP GOSAIN)	**(N.K. SAINI)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Dated : 25/11/2019

AG

Copy to: 1.The Appellant, 2. The Respondent, 3. The CIT(A), 4. The CIT, 5. The DR