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IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

Before Shri C.M.GARG, Judicial Member, and
Shri O.P. MEENA, Accountant Member

ITA No.2075 & 2076/AHD/2015
Assessment Year: 2013-14

M/s Kaushal Enterprenuer Pvt. Ltd, 3, Kathak Row House, Honey Park Road, Opp. Jyotindra Dave Garden, Adajan – Surat 395009	**बनाम**/ Vs.	DCIT, TDS Range, Surat
(Appellant)		(Respondent)
P.A. No. AACCK8159M		

ITA No.2575/AHD/2015
Assessment Year: 2014-15

Jigisha Corporation, 101 to 106, Super Yarn Market, Zampa Bazaar, Surat 395003	**बनाम**/ Vs.	DCIT, TDS Range, Surat
(Appellant)		(Respondent)
P.A. No. AABFJ9650Q		

Assessee by	Shri Rashesh Shah, CA
Revenue by	Shri B. P. K. Panda – Sr. DR
Final Date of Hearing:	**11/01/2018**
Date of Order:	**/01/2018**

ITA No.1930, 1931/AHD/2015
Assessment Year: 2013-14

M/s Comet Car Sales and Services, Chikuwadi Complex, GHB Road, Pandesara, Post Office Fateh Nagar, Surat - 395220	**बनाम**/ Vs.	DCIT, TDS Range, Surat
(Appellant)		(Respondent)
P.A. No. AAECC4818M		

Assessee by	Written Submission
Revenue by	Shri B. P. K. Panda – Sr. DR
Final Date of Hearing:	**11/01/2018**
Date of Order:	**23/01/2018**

आदेश / O R D E R

Per C. M. Garg - JM:

These appeals have been filed by the respective assessee against the orders of the learned CIT (Appeals) 3, Surat whereby addition made by the Assessing Officer has been confirmed u/s 234E of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. In the beginning of the hearing both the parties agreed to the fact that facts and circumstances of all five cases are similar and identical. Admittedly, facts and circumstance of the case of ITA No. 2075/AHD/2015/SRT are quite similar

and identical to the other four cases therefore, we are taking this case as lead case for adjudication. In this appeal the assessee has raised the following grounds:-

> *"(i) On the facts and circumstance of the case as well as law on the subject, that the Ld. Assessing Officer (TDS CPC) has erred in confirming the action of the Assessing Officer in levying late filing fees of Rs. 76,840/- as per Section 234E for Quarter 2 of A.Y. 2013 -14 & Passing order U/s 154 r.w.s. 200A of the I.T. Act, 1961.*
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> *(ii) On the facts and circumstances of the case as well as law on the subject, section 200A of the act does not permit processing of TDS statement of default in payment of late fees u/s 234E, except any arithmetical error, or incorrect claim, or default in payment of interest and TDS payable or refundable etc for A.Y. 2013-14. Hence, late fees for TDS quarterly statement cannot be recovered by way of processing under section 200A. Therefore, demand notice cannot be issued under this section, and even if issued, then it is illegal and liable to be quashed.*

3. Brief facts giving rise to these cases are that the assessee filed its Quarterly TDS statement in form No. 26Q of 2nd Quarter of F.Y. 2012-13 on 20th September, 2013 which was due to be filed on 15th October, 2012 and therefore there was a delay of 340 days in filing quarterly statement. The Ld. Assessing Officer (TDS CPC) imposed late filing fees of Rs. 68,000/- u/s 234E for delay in filing of Quarterly TDS statement. The aggrieved assessee carried the matter before CIT (A) who confirmed the penalty now, the empty handed

assessee is before this Tribunal with the grounds as reproduced above.

4. We have arguments of both the sides and carefully perused the relevant record placed before us. The Ld. Assessee's Representative (AR) submitted that the cause of delay in furnishing the return is delay in depositing TDS and the assessee has already compensated the revenue by depositing interest on late payment of TDS and it is a well settled principle that person cannot be compensated twice for the same mistake. He also submitted that as per Sec. 201(2) of the Act states that if a person has failed to deposit tax and interest then it shall be a charge upon all the assets of that person and as it does not cover late fee amount, so it is clear that the intention of law is not to cover/recover any late fee if not deposited along with TDS statement. Therefore, the Ld. AR submitted that addition made by the Assessing Officer and confirmed by the CIT (A) may kindly be deleted. The Ld. AR also placed reliance on the decision of Hon'ble Karnataka High Court in the case of Fatheraj Singhvi & Ors. Vs. Union of India reported as (2016) 289 CTR 0602 (Kar). We have also carefully gone through the written submissions dated 21/11/2017 filed by the appellants in ITA No. 1930, 1931/AHD/2015/SRT for A.Y. 2013-14. No other arguments have been placed on behalf of the appellants.

5. Replying to the above, the Ld. Departmental Representative (DR) strongly supported the action of the Assessing Officer and submitted that the first appellate authority was right in upholding the addition, which is in confirmatory and as per ratio of the decision of Hon'ble Jurisdictional High Court of Gujarat in the case of Rajesh Kourani Vs Union of India (2017) 83 Taxmann.com 137(Gujarat).

6. On careful consideration of above rival submissions at the very outset, from the relevant part of the decision of Hon'ble High Court of Gujarat in the case of Rajesh Kourani (Supra) we observed that their Lordship speaking for Jurisdictional High Court on the issue and after considering the all available decisions of Hon'ble Supreme Court & High Courts and distinguishing the decision of Hon'ble Karnataka High Court in the case of Fathera Singhvi (Supra), held thus: -

> ***16.*** *We now come to the petitioner's central challenge viz. of non permissibility to levy fee under section 234E of the Act till section 200A of the Act was amended with effect from 01.06.2015. We have noticed the relevant statutory provisions. The picture that emerges is that prior to 01.07.2012, the Act contained a single provision in section 272A providing for penalty in case of default in filing the statements in terms of section 200 or proviso to section 206C. Such penalty was prescribed at the rate of Rs.100 for every day during which the failure continued. With effect from 01.06.2012, three major changes were introduced in the Act. Section 234E as introduced for the first time to provide for charging of fee for late filing of the statements. Such fee would be levied at the rate of Rs.200/- for every day of failure subject to the maximum amount of tax deductible or collectible as the case may be. Section 271H was also introduced for the first time for levying penalty for failure to furnish the statements. Such penalty would be in the range of Rs.10,000/- and Rs.1 lakh. No penalty would be imposed if the tax is deposited with fee and interest and the statement is filed within one year of*

the due date. With addition to these two provisions prescribing fee and penalty respectively, clause (k) of sub-section (2) of section 272A became redundant and by adding a proviso to the said section, this effect was therefore limited upto 01.07.2012.

17. *In essence, section 234E thus prescribed for the first time charging of a fee for every day of default in filing of statement under sub-section (3) of section 200 or any proviso to sub-section (3) of section 206C. This provision was apparently added for making the compliance of deduction and collection of tax at source, depositing it with Government revenue and filing of the statements more stringent.*

18. *In this context, we may notice that section 200A which pertains to processing of statements of tax deducted at source provides for the procedure once a statement of deduction of tax at source is filed by the person responsible to do so and authorizes the Assessing Officer to make certain adjustments which are prima-facie or arithmetical in nature. The officer would then send an intimation of a statement to the assessee. Prior to 01.06.2015, this provision did not include any reference to the fee payable under section 234E of the Act. By recasting sub-section (1), the new clause-c permits the authority to compute the fee, if any, payable by the assessee under section 234E of the Act and by virtue of clause-d, adjust the said sum against the amount paid under the various provisions of the Act.*

19. *In plain terms, section 200A of the Act is a machinery provision providing mechanism for processing a statement of deduction of tax at source and for making adjustments, which are, as noted earlier, arithmetical or prima-facie in nature. With effect from 01.06.2015, this provision specifically provides for computing the fee payable under section 234E of the Act. On the other hand, section 234E is a charging provision creating a charge for levying fee for certain defaults in filing the statements. Under no circumstances a machinery provision can override or overrule a charging provision. We are unable to see that section 200A of the Act creates any charge in any manner. It only provides a mechanism for processing a statement for tax deduction and the method in which the same would be done. When section 234E has already created a charge for levying fee that would thereafter not been necessary to have yet another provision creating the same charge. Viewing section 200A as creating a new charge would bring about a dichotomy. In plain terms, the provision in our understanding is a machinery provision and at best provides for a mechanism for processing and computing besides other, fee payable under section 234E for late filing of the statements.*

20. *Even in absence of section 200A of the Act with introduction of section 234E, it was always open for the Revenue to demand and collect the fee for late filing of the statements. Section 200A would merely regulate the manner in which the computation of such fee would be made and demand raised. In other words, we cannot subscribe to the view that without a regulatory provision being found for section 200A for computation of fee, the fee prescribed under section 234E cannot be levied. Any such view would amount to a charging section yielding to*

the machinery provision. If at all, the recasted clause (c) of sub-section (1) of section 200A would be in nature of clarificatory amendment. Even in absence of such provision, as noted, it was always open for the Revenue to charge the fee in terms of section 234E of the Act. By amendment, this adjustment was brought within the fold of section 200A of the Act. This would have one direct effect. An order passed under section 200A of the Act is rectifiable under section 154 of the Act and is also appealable under section 246A. In absence of the power of authority to make such adjustment under section 200A of the Act, any calculation of the fee would not partake the character of the intimation under said provision and it could be argued that such an order would not be open to any rectification or appeal. Upon introduction of the recasted clause (c), this situation also would be obviated. Even prior to 01.06.2015, it was always open for the Revenue to calculate fee in terms of section 234E of the Act. The Karnataka High Court in case of Fatheraj Singhvi (supra) held that section 200A was not merely a regulatory provision, but was conferring substantive power on the authority. The Court was also of the opinion that section 234E of the Act was in the nature of privilege to the defaulter if he fails to pay fees then he would be rid of rigor of the penal provision of section 271H of the Act. With both these propositions, with respect, we are unable to concur. Section 200A is not a source of substantive power. Substantive power to levy fee can be traced to section 234E of the Act. Further the fee under section 234E of the Act is not in lieu of the penalty of section 271H of the Act. Both are independent levies. Section 271H only provides that such penalty would not be levy if certain conditions are fulfilled. One of the conditions is that the tax with fee and interest is paid. The additional condition being that the statement is filed latest within one year from the due date.

***21.** Counsel for the petitioner however, referred to the decision of Supreme Court in case of CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294/5 Taxman 1 (SC), to contend that when a machinery provision is not provided, the levy itself would fail. The decision of Supreme Court in case of B C Srinivasa Setty (supra) was rendered in entirely different background. Issue involved was of charging capital gain on transfer of a capital asset. In case on hand, the asset was in the nature of goodwill. The Supreme Court referring to various provisions concerning charging and computing capital gain observed that none of these provisions suggest that they include an asset in the acquisition of which no cost can be conceived. In such a case, the asset is sold and the consideration is brought to tax, what is charged is a capital value of the asset and not any profit or gain. This decision therefore would not apply in the present case.*

***22.** In the result, petition fails and is dismissed.*

7. In view of above decision we observe that the Hon'ble High Court after considering the facts and circumstances of the case, which are akin to the present cases, held that section

234E is a charging provision creating a charge for levying fee for certain defaults in filing statements, and fee prescribed under section 234E could be levied even without a regulatory provision being found in section 200A for computation of fee and it was also held that taking into account complex transactions involved, slightly longer period granted to Government agencies to file return of deduction of tax was perfectly valid.

8. In the backdrop of above ratio when we analyze the facts of the present case then we find that undisputedly the assessee filed its Quarterly TDS statement in form No. 26Q of 2nd Quarter of F.Y. 2012-13 on 20th September, 2013 which was due to be filed on 15th October, 2012 and therefore there was a delay of 340 days in filing quarterly statement. The Ld. Assessing Officer (TDS CPC) imposed late filing fees of Rs. 68,000/- u/s 234E for delay in filing of Quarterly TDS statement. The Assessing Officer imposed late fees @ 200 per day for 340 days of Rs. 68,000/- which is less than the amount of TDS deductable of Rs. 1,16,601/-. Therefore, respectfully following the ratio of the decision of Hon'ble Jurisdictional High Court we find that the contentions of the Ld. AR are devoid of merits and cannot be accepted. Thus, addition made by the Assessing Officer and confirmed by the CIT (A) is sustainable and valid and we uphold the same. Accordingly, ground no. 1 and 2 of the assessee are dismissed.

9. Since, undisputedly facts and circumstance of all five cases are similar and identical therefore our conclusion drawn in ITA No. 2075/AHD/2015/SRT would apply *mutatis mutandis* to four appeals also and hence, other four appeals are also dismissed.

10. In the result, all five appeals of the assessee are dismissed.

Order pronounced in the open court on 23/01/2018

Sd/-	Sd/-
(O.P. Meena)	(C.M. Garg)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

दिनांक /**Dated : 23rd January, 2018**

Nhanu/LDC

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Sr. Private Secretary, Surat
वरिष्ठ निजी सचिव
आयकर अपीलीय अधिकरण
सूरत न्यायपीठ, सूरत.