

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 1675/MUM/2019 (A.Y: 2014-15)

Vithal Appanna Shetty Bungalow No.1, Plot No. 162 Arihant Villa, 15 th Road Chembur, Mumbai PAN: AACPS7362K	v.	DCIT-CPC-TDS Ghaziabad
(Appellant)		(Respondent)

Assessee by : None
Department by : Mrs Samatha MullaMuddi

Date of Hearing : 24.02.2020
Date of Pronouncement : 13.03.2020

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of Learned Commissioner of Income Tax (Appeals)-60, Mumbai dated 13.06.2018 for the Assessment Year 2014-15 in sustaining the levy of fee u/s. 234E of the Act while processing quarterly TDS statement and while passing the intimation u/s. 200A of the Act.

2. In spite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought by the assessee. Since as it is a covered matter, we proceed to dispose off this appeal on hearing the Ld. DR on merits.

3. Briefly stated the facts are that, Centralized Processing Cell issued intimation u/s 200A of the Act on Form No.26Q filed by the Assesseees for the 3rd quarter of the financial year 2013-14 and while processing Form No.26Q, in the intimation u/s 200A, late fee u/s 234E was levied for the delay in filing Form No.26Q.

4. We find that an identical issue came up in batch of appeals before the Pune Bench of the Tribunal and by order dated 23.09.2016 after analyzing various case laws on the issue it was held that, prior to 1.06.2015 late fee u/s 234E cannot be charged while processing quarterly return u/s 200A of the Act observing as under: -

“28. 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 Act, under the said section, mechanism was provided for processing of TOS 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 i 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.

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

30. *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.

31. The Hon'ble Supreme Court in *CIT Vs. Vatika Township Pvt. Ltd.* (supra) has explained the general principle concerning retrospectivity 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 sub-section (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 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.

32. 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 Hon'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.

33. 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 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.”

5. Following this order of the Pune Bench, the Coordinate Bench of the Mumbai Bench in the case of Asian Pipes & Profiles Pvt. Ltd. Vs. Assessing Officer, TDS Ward in ITA Nos. 4740 and 4741/Mum/2016 dated 1.3.2017 held as under: -

“6.2. Following the above referred decision of the Hon'ble ITAT Pune Bench in the case of Gajanan Constructions and others in ITA Nos. 1292 & 1293/PN/2015 and others dated 23.09.2016, we hold that the amendment to section 200A(1) of the Act is prospective in nature and therefore the AO while processing the TDS statements/ returns in the present three appeals for the period prior to 01.06.20 15 was not empowered to charge fees under section 234E of the Act. Therefore, the intimations issued by the AO under section 200A of the Act in these appeals are unsustainable and the demand raised by way of charging of the fees under section 234E of the Act not being valid is deleted. In this view of the matter, we hold that the AO is not empowered to charge fees under section 234E of the Act by way of intimations issued under section 200A of the Act in respect of defaults before 01.06.2015 and consequently allow the ground of all appeals raised by the assesseees.”

6. Similar view has been taken by the Tribunal in the cases of M/s. P.L. Oswal & Co., & Shri Tirathraj J Singh in ITA.No. 4714 & 4715/MUM/2016 by order dated 17.05.2017 and in the case of Anil J.

Gorasia v. ITO in ITA.Nos. 3320, 3321 & 3322/MUM/2015 by order dated 30.06.2017.

7. Therefore, respectfully following the said orders, we delete the late fee levied u/s 234E of the Act while passing intimation u/s 200A of the Act for the 3rd quarter of the financial year 2013-14 where admittedly the intimation was passed on 11.10.2014 which is prior to 1.06.2015 in this case.

8. In the result, the appeal of the Assessee is allowed.

Order pronounced in the open court on the 13th March, 2020.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER
Mumbai / Dated 13/03/2020
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum