

**IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD**

(THROUGH VIRTUAL COURT),

BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER

**ITA Nos. 178 to 182/ALLD/2018
Assessment Year: 2008-09 to 2012-13**

District Mining Officer, District Magistrate Office, Mines Division, Allahabad, Uttar Pradesh.	v.	Joint Commissioner of Income Tax (TDS) Allahabad, Uttar Pradesh
TAN: ALDDO 0931 A		
(Appellant)		(Respondent)

Appellant by:	Shri Pawan Jaiswal, CA
Respondent by:	Shri A.K. Singh, Sr. DR
Date of hearing:	25.11. 2020
Date of pronouncement:	02.12. 2020

ORDER

PER SHRI VIJAY PAL RAO, JUDICIAL MEMBER:

These five appeals by the assessee are directed against five separate orders of CIT(A) all dated 17.10.2017 arising from penalty order passed u/s 272A(2)(k) of the Income Tax Act for the Assessment Year 2008-09 to 2011-12. The assessee has raised common grounds in these appeals. The grounds raised for Assessment Year 2008-09 are as under:

"1. Because, the learned Commissioner of Income Tax (Appeals) erred in law as well as on facts while confirming the order of the learned JCIT(TDS).

2. Because, the learned Commissioner of Income Tax (Appeals) in the order are perverse, arbitrary, baseless and misleading.

3. *Because, the learned JCIT (TDS), wrongly and illegally proceeded to impose penalty for non-filing of TDS statements.*
4. *Because, the appellant has totally denied the liability illegally fastened upon it by submitting appropriate reply together with a declaration on 31.03.2014 specifically stating therein that the appellant is not required to file TDS Statement Form 26Q and as such it has been requested that the present proceedings may kindly be dropped after making appropriate rectification of mistake in the penalty order in exercise of powers conferred under Section 154 of the Income Tax Act, 1961*
5. *Because, another affidavit dated 15.09.2014 has again been submitted by District Mining Officer, Allahabad before the Commissioner of Income Tax Appeal) reiterating the earlier submissions made before the concerned authorities.*
6. *Because, on the facts and in the circumstances of the case, intimation under Section 154/272A(2)(k)/274 of the Income Tax Act, 1961 is ab initio erroneous and bad in law.*
7. *Because, there is no justification for raising of the demand of Rs. 2,03,578/- for non-filing of Form No. 26Q therefore it is incorrect and unlawful, the Same deserves to be vacated in toto.*
8. *Because, the assessing officer has without going into the fact that if someone from Somewhere had deposited the TDS amount quoting wrongly the TAN of the appellant, it does not make any meaning to file Form 26Q by the appellant forcefully.*
9. *Because no material evidence has been brought on record to establish that the amount in question pertains and relates to the appellant.*
10. *Because, the Learned A.O. has failed to appreciate that in this computerized regime if somebody has wrongly deposited the TDS amount on the assessee's TAN, how can the said assessee be held liable to file the 26Q statement. Till date there no mechanism has been evolved by the Income Tax Department to restrict any person to deposit TDS amount on wrong TAN or for making any correction or rectification in case any such mistake.*

11. Because, the impugned judgment and order dated 17.10.2017 has been passed by the Commissioner of Income Tax (Appeals) without recording any independent finding or observation and without considering the submissions made by the appellant. The exorbitant liability and demand fastened upon the appellant even without perusing the entire material available on record.

12. Because, the ratio laid down in the case of Anil Goel Vs. CIT (Appeals-I), Ludhiana reported in (2008) 306 ITR 212 (P & H) relied upon by the court below is not applicable under the facts and circumstances of the present case particularly in view of the fact that the appellant has specifically denied the amount deposited in the name of the appellant.

13. Because, the ratio decidendi laid down by Income Tax Appellate Tribunal, New Delhi in the case of Jitendra Singh Bajwa Vs. Income Tax Officer, Meerut after considering the aforesaid judgment reported in (2008) 306 ITR 212 (P & H) is fully applicable and binding upon the department.

14. Because, the judgment passed by Punjab and Haryana High Court in the case of Sh. Yash Pal Goel vs The Commissioner of Income Tax on 20 January, 2009 together with such other judicial pronouncements made by various High Courts as well as by the Apex Court with regard to recording of adequate reasons by the Courts, Tribunal and Authorities while passing any judicial decision or making any decision are fully applicable under the facts and circumstances of the present case.

15. Because justice must not only be done but it should appear to have been done and in the present case the appellant has been held responsible and liable for illegitimate demand of tax which is not legally tenable against the appellant but the learned courts below failed to consider this aspect of the matter in the correct prospective and illegally and arbitrarily passed the impugned orders.

16. Because, the letter and spirit of the law are often at loggerheads. When one obeys the letter of the law but not the spirit, one is following the literal interpretation of the words as is written, but not the actual intent. Which is why it's said that justice should not only be done, but must also be seen to be done. The reason is, rules are amoral constructs that are meant to serve a

social function whereas the objective behind them serves a higher purpose or values.

17. Because, the authenticity and credibility of any Judicial interpretation is based upon the genesis and reasons assigned by the judicial authority while adjudicating the controversy between the parties Id not otherwise. The learned court below failed to consider this aspect of the matter in the correct prospective and illegally jumped to the conclusion without assigning any reason. Hence, the same is bad and liable to be set aside by this Hon'ble Tribunal.

18. Because, the appellant became aware of the disputed demand of liability only on receiving recovery notice on 06.03.2018 being numbered as notice no. F.No.Arr. Demand/ITO(TDS)/Alld./2017-18 dated 06.03.2018 with regard to outstanding arrears of demand.

19. Because, thereafter, the appellant gathered information by making inspection and enquiries after seeking appropriate permission from the competent authorities with regard to the subject matter of controversy and deposited requisite fee on 06.04.2018 alongwith an affidavit on 07.04.2018 and it transpired that the arrears of demand does not pertain or relate to the appellant and as such an appropriate application has been filed to obtain the certified copies of all the relevant documents together with the copy of impugned order which has been issued on 14.04.2018 to the appellant whereupon the appellant is filing the present appeal.

20. Because, there is no deliberate delay in filing the present appeal and the delay, if any, has occurred only on account of the facts and circumstances of the matter beyond the control of the appellant which may kindly be condoned and the present appeal may kindly be heard and decided on merits so that justice be done.

21 Because, the order is bad in the eyes of law and against the facts and submissions of the case.

22. The appellant craves leave to add/alter any of the ground of appeal before or at the time of hearing.

2. The ld. AR of the assessee has submitted that the AO has initiated the penalty proceedings u/s 272A(2)(k) by issuing the show cause notice for delay in submitting the quarterly TDS Statement in Form 26Q. In reply, the assessee has categorically stated that the assessee has not entered into any such alleged transaction of payment subjected to TDS and thereby casting any obligation of the assessee to deduct TDS and submit the statement / TDS return in Form 26Q. The ld. AR has referred to an affidavit filed by the assessee on a stamp paper and submitted that the assessee has clearly pointed that no such TDS was either deducted or deductible in any of the transaction of the assessee during the year. Rather the assessee is receiving the payment for the leasing of mines to the successful bidders. The ld. AR has referred to an affidavit filed by the assessee. He has also referred to the order passed by the AO u/s 154 after the penalty order passed u/s 272A(2)(k) of the Income Tax Act. The ld. AR has submitted that the initiation of penalty proceedings by the AO are not valid when the assessee has not carried out the alleged transactions of payment which are subjected to TDS and, therefore, the initiation and the consequential penalty order passed by the AO are invalid and liable to be quashed. Once the Assessing Officer has passed an illegal order, the same cannot be rectified to valid by passing an order u/s 154 that has changed the nature of transactions. Thus, the ld. AR has contended that the penalty levied by the AO and confirmed by the ld. CIT(A) are liable to be deleted as the same are invalid.

3. On the other hand, the ld. DR has submitted that there is no dispute that the assessee has received various payments which are subjected to TCS and not TDS however, despite the Tax Collected at Source and depositing to the account of the Government, the assessee has failed to deliver the statement / returns in Form 27EQ. Therefore, the assessee has failed to comply with the proviso to section 206 of the Income Tax Act and liable for the penalty levied u/s 272A(2)(k) of the Income Tax Act. He has relied upon the order of the authorities below.

4. Having considered the rival submissions as well as relevant material on record, it is noted that the Assessing Officer has initiated the penalty proceedings u/s 272A(2)(k) of the Income Tax Act for the alleged default of delivering the statement of TDS in Form 26Q within the time specified in section 200(3) read with proviso to section 206(3). In the penalty proceedings, the assessee has raised an objection against levy of penalty and contended that the alleged transactions / amount deductible as TDS as mentioned by the AO do not pertain to the assessee as the assessee has not made any payment or credit any payment which is subjected to TDS. Despite this fact pointed out by the assessee, the AO proceeded to pass the penalty order u/s 272A(2)(k) of the Income Tax Act and levied the penalty for default in / delay in delivering the TDS statement in Form 26Q of the Act. The AO has passed separate order for each Financial Year / Assessment Year. The assessee challenged the action of the AO before the CIT(A) and contended that the order passed by the AO is illegal and invalid ab-initio, erroneous and bad in law. The assessee in the grounds of appeal has also pointed out that there is no justification for levy of penalty and raising demand for not filing of Form 26Q when there was no such obligation on the assessee to deduct TDS or submit Form 26Q. The CIT(A) has decided the appeal of the assessee summarily as under:

*"I have gone through the grounds of appeal as well as the assessment order passed by the Assessing Officer. No worthwhile facts are found mentioned therein which could lead me to understand the grievances arising from the grounds of appeal. Even though, I am not required to give separate reasons for confirming the order of the Assessing Officer as per the ratio of the judgment in the case of **Anil Goel vs. CIT (Appeals-I) (2008) 306 ITR (P & H)**.*

3. *Grounds of appeal and decision thereof:*

1. Because on the facts and in the circumstances of the case, intimation u/s 154/272A(2)(k)/274 of the income Tax Act, 1961, is ab initio, erroneous and bad in law.

2. Because there is no justification for raising of the demand of Rs. 2,03,578/- for non-filing of Form No. 26Q, therefore, it is incorrect and unlawful, the same deserves to be vacated in toto.

3. Because the Assessing Officer has without going into the fact that if someone from somewhere had deposited the TDS amounting quoting wrongly the TAN of the appellant, it doesn't make any meaning to file form 26Q by the appellant forcefully.

4. Because the Learned AO has failed to appreciate that in this computerized regime if somebody is wrongly deposited the TDS amount on the assessee's TAN, how for assessee is liable to file the 26Q statement, and till date there is no mechanism has been evolved by the Income Tax Department to restrict any person to deposit TDS amount on wrong TAN.

5. The appellant craves leave to add, alter and modify any grounds of appeal at the time of hearing.

The AO in the order has elaborately discussed, this issues and no infirmity is found in the order. No material has been produced by the appellant to show that the order of the AO is incorrect. The Assessing Officer's order is confirmed."

5. It is clear that the CIT(A) has not even considered the fact that the penalty proceedings were initiated by the AO for default on the part of the assessee on account of non - filing of Form 26Q within the period specified u/s 200(3) read with proviso to section 206(3) of the Income Tax Act. It is pertinent to note that once the assessee has stated on the affidavit and given an undertaking that the assessee has not paid any amount or deducted any TDS on any sum during these assessment years which requires to submit in Form 26Q, the levy of penalty for default of delivering the From 26Q is invalid and consequently the penalty order passed by the AO is bad in law, ab initio. Once the initiation of the penalty is based on some wrong facts and wrong ground which is not an error or mistake due to any incorrect

mentioning of provision of law but the very basis of initiation of the proceedings was misconceived by the AO being the TDS statement in Form 26Q was not delivered by the assessee within the specified time. This fact is accepted by the AO while passing an order u/s 154 on 05.06.2014 wherein the AO has accepted that the assessee was not under any obligation to deduct TDS in respect of the alleged transaction but the assessee was under the obligation to collect the tax in respect of various amounts received by the assessee and consequently the assessee was required to submit the statements in Form No. 27EQ. Once the AO has accepted this fact that the assessee was not required to deduct TDS or submit Form 26Q then the initiation of the penalty by the AO for such a non - existing default renders the penalty order invalid. The invalid initiation of the penalty vitiates the entire proceedings and consequently the penalty orders passed u/s 272A(2)(k) based on absolutely non - existing grounds is not sustainable in law. The CIT(A) has summarily dismissed all the appeals of the assessee without even discussing the correct fact brought on record and accepted by the AO while passing 154 order. Hence the impugned penalty orders are not sustainable in law and liable to be quashed. Consequently, the penalty levied by the AO u/s 272A(2)(k) for these assessment years are deleted.

6. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open Court on 02/12/2020 through video conferencing.

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

DATED: 02/12/2020
Biswajit, Sr. P.S.

Copy forwarded to:

1. Appellant – District Mining Officer.
2. Respondent – JCIT (TDS), Allahabad.
3. CIT(A) -
4. CIT
5. DR -

By order
Assistant Registrar