

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member
Sh. Anubhav Sharma, Judicial Member**

**ITA No. 1027/Del/2020 : Asstt. Year. 2015-16
ITA No. 1028/Del/2020 : Asstt. Year. 2015-16
ITA No. 1029/Del/2020 : Asstt. Year. 2015-16
ITA No. 1030/Del/2020 : Asstt. Year. 2015-16
ITA No. 1031/Del/2020 : Asstt. Year. 2015-16
ITA No. 1032/Del/2020 : Asstt. Year. 2015-16
ITA No. 1034/Del/2020 : Asstt. Year. 2014-15
ITA No. 1035/Del/2020 : Asstt. Year. 2014-15
ITA No. 1036/Del/2020 : Asstt. Year. 2014-15
ITA No. 1037/Del/2020 : Asstt. Year. 2014-15
ITA No. 1038/Del/2020 : Asstt. Year. 2014-15
ITA No. 1040/Del/2020 : Asstt. Year. 2013-14**

W Serve Technologies Pvt. Ltd., Plot No. 43, Pace City-I, Sector-37, Gurgaon, Haryana-122001 (APPELLANT)	Vs	ACIT, CPC-TDS, Ghaziabad-201010 (RESPONDENT)
PAN No. AAACW6483E		

**Assessee by : None
Revenue by : Sh. M. Baranwal, Sr. DR**

Date of Hearing: 19.07.2022	Date of Pronouncement: 31.08.2022
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ORDER

Per Bench:

The present appeals have been filed by the assessee against the orders of Id. CIT(A)-41, New Delhi dated 31.05.2019.

2. All these appeals have been filed against levy of fee u/s 234E of the Income Tax Act, 1961 after rectifying the orders passed in 04/2014, 03/2015 and 04/2015 on 03.04.2018.

Before the Id. CIT(A), the assessee has not applied for condonation of delay, however, the Id. CIT(A) has judiciously adjudicated the issue on merits and held that since the AO has levied late fee u/s 234E only after 01.06.2015 vide intimation dated 03.04.2018, the claim of the assessee for the exemption from levy of late fee was liable to be dismissed.

3. Aggrieved the assessee filed appeal before the Tribunal.

4. None attended on behalf of the assessee nor any adjournment application has been filed.

5. The written submission of the Id. DR is as under:

"The above mentioned appeals are listed for hearing on 19.07.2022. The common issue which is under consideration in all the above mentioned appeals, is levy of fees u/s 234E of I.T. Act. The order levying penalty has been passed by respective TDS authorities and upheld by Ld. CIT(A). Accordingly, the appellants are in appeal before Hon'ble Tribunal. On this issue Hon'ble ITAT has passed a combined order dt. 29.11.2019 read with corrigendum dt. 11.12.2019 in 3 ITAs [ITA No. 5380/Del/2017, AY 2016-17; No. 5989/Del/2017, AY 2013-14 & 5990/Del/2017, AY 2013-14] with lead case being ITA No. 5380/Del/2017 in the case of Sh. Udit Jain. In its order dt. 29.11.2019, Hon'ble ITAT has allowed appeals of the assessee holding that fees u/s 234E is not leviable before 01.06.2015 i.e. the date when clause (c) was inserted in section 200A(I) for the computation of said fees at the time of processing. In its order Hon'ble ITAT has relied upon the decision of Hon'ble Karnataka High Court in the case of Fatehraj Singhvi & Others reported in [2016] 289 CTR 602. The appellant in this case has also relied upon the case-law of

Fatehraj Singhvi, as seen from the ground of appeals taken before Ld. CIT(A).

2. At the outset it is impressed upon that the facts are largely distinguished in as much as Hon'ble ITAT has not appreciated the rationale of the amendments brought in form of insertion of Sec.234E by the Finance Act 2012 and insertion of clause (c) to Sec. 200A(1) of the I.T. Act by Finance Act 2015 as well as the decisions of various High Courts including jurisdictional High Court. The rationale behind such amendments & explanatory notes are available in the respective Memorandum to the corresponding Finance Bill which have not been considered by Hon'ble ITAT in its order dt.29.11.2019. Relevant provisions of I.T. Act viz. Sec.234E, - Sec.200A(1), 271H, Memorandum to Finance Bill, 2012, Memorandum to Finance Bill'2015 have been elaborately discussed in the succeeding paras alongwith host of case-laws decided in favour of Revenue & being relied upon. The premise /foundation of the decision of Hon'ble Karnataka High Court has also been analyzed and distinguished in view of the case-laws referred to. Accordingly it is urged before the Hon'ble Bench that the above decision dt. 29.11.2019 may kindly not be followed in the name of rule of consistency in the case of above mentioned appeals as also res-judicata is not applicable in income-tax proceedings.

3. Non-applicability of Rule of consistency

3.1 As regards 'Rule of consistency,' reliance in this regard is placed on the decision of jurisdictional High Court in the case of Krishak Bharati Cooperative Ltd vs. DCIT [2012] 23 taxmann.com 265 (Delhi) wherein Hon'ble Delhi HC considered the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT [1992] 60 taxman 248(SC) and

has held that the rule of consistency should not create anomaly. Relevant extracts of the decision, para-15 of the order (copy attached) are reproduced as under:

"It is now necessary to take up the submission that the Tribunal erred in departing from the "consistency " rule. This is based on the fact that for a period of about 15 years, the income-tax authorities had accepted the assessee's submissions and permitted the annual amortization of the initial lease consideration as advance rent. The assessee here relied on the "consistency" rule enunciated in Radhasoami Satsang (supra). The Supreme Court observed, in that case that:

"Where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter and if there was no change it was in support of the assessee - we don't think the question should have been reopened and contrary to what have been decided by the Commissioner of income tax in the earlier proceedings, a different and contradictory stand should have been taken."

This court notices that there cannot be a wide application of rule of consistency. In Radhasoami Satsang itself, the Supreme Court acknowledged that there is no res-judicata as regards assessment orders, and assessments for one year may not bind

the officer for the next year. This is consistent with the view of the Supreme Court that 'there is no such thing as res-judicata in income-tax matter' (Visheshwara Singh vs Commissioner of Income tax AIR 1961 SC 1062). Similarly, erroneous or mistaken views cannot felter the authorities into repeating them, by application of rule such as estoppel, for the reason that being an equitable principle, it has to yield to the mandate of law. A deeper reflection would show that blind adherence to the ride of consistency would lead to anomalous results, for the reason that it would endanger the unequal application of laws, and direct the tax authorities to adopt varied interpretations to suit individual assesseees, subjective to their convenience - a result at once debilitating and destructive of the rule of law. A previous Division Bench of this Court in Rohitasava Chand [2008] 306ITR 242 (Delhi) has held that the rule of consistency cannot be of inflexible application."

3.2 On this issue of non-applicability of rule of consistency, reliance is also placed on following case-laws:

- i) Rohitasava Chand [2008] 306 ITR 242 (Delhi)*
- ii) Anup Sharma vs Addl. CIT, ITA No.161/CHD/2012, order dt.26.08.2014 of ITAT, Chandigarh*
- iii) Meeraj Estate & Developers vs DCIT [2014] 44 taxmann.com 431 (ITAT, Agra)*
- iv) K K Khullar vs DCIT [2009] 116 ITD 301(Delhi)*
- v) Dwarkadas Kesardeo Morarka vs CIT [1962] 44 ITR 529 (SC)*
- vi) C.K. Gangadharan vs CIT [2008] 304 ITR 61 (SC)*
- vii) CIT vs Swapnaroy [2011] 331 ITR 367 (Allahabad)*

4. Before we request Hon'ble Tribunal to take to elaborate discussions on the issue, it would be beneficial if we kindly

have a look through the provisions contained in Section 234E which was introduced w.e.f. 01.07.2012 by the Finance Bill, 2012. The same is reproduced as under:

"234E (1) Without prejudice to the provisions of the Act, where a person fails to deliver or cause to be delivered a statement within the time prescribed in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C, he shall be liable to pay, by way of fee, a sum of two hundred rupees for every day during which the failure continues.

(2) The amount of fee referred to in sub-section (1) shall not exceed the amount of tax deductible or collectible, as the case may be.

(3) The amount of fee referred to in sub-section (1) shall be paid before delivering or causing to be delivered a statement in accordance with sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C.

(4) The provisions of this section shall apply to a statement referred to in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C which is to be delivered or caused to be delivered for tax deducted at source or tax collected at source, as the case may be, on or after the 1st day of July, 2012.]"

5. Kind attention of the Tribunal is also drawn to the Memorandum to the Finance Bill, 2012 which elaborates the rationale / explanatory notes with respect to amendments being brought in the provisions of the 1. T. Act. The rationale for such amendments in TDS/TCS related provisions have been provided under the heading "E. Rationalization of Tax Deduction at Source (TDS) and Tax Collection at Source (TCS) Provisions"

which comprise of 6 paras. Para (111) relates to insertion of section 234E in the statute & relevant to the issue under consideration. The same are reproduced as under:

"E. Rationalization of Tax Deduction at Source (TDS) and Tax Collection at Source (TCS) Provisions

I. Deemed date of payment of tax by the resident payee

.....(Not reproduced as not relevant)

II. Disallowance of business expenditure on account of non-deduction of tax on payment to resident payee

..... (Not reproduced as not relevant)

III. Fee and penalty for delay in furnishing of TDS/TCS Statement and penalty for incorrect information in TDS/TCS Statement

As per the existing provisions of the Income-tax Act, a deductor is required to furnish a periodical TDS statement (quarterly) containing the details of deduction of tax made during the quarter by the prescribed due date. A substantial number of the deductors are not furnishing their TDS statement within the prescribed due date. Delay in furnishing of TDS statement results in delay in granting of credit of TDS to the deductee and consequently results into delay in issue of refunds to the deductee tax payers or raising of infructuous demand against the deductee tax payers. Further, in large number of cases, the deductors are not furnishing correct information like PAN of the deductee, amount of tax deducted, etc. in the TDS statement. Furnishing of correct information in respect of tax deduction is critical for processing of return of income furnished by the deductee because credit for TDS is

granted to the deductee on the basis of information furnished by the deductor.

Under the existing provisions of section 272A, penalty of Rs. 100 per day is levied for delay in furnishing of TDS statement, however, no specific penalty is specified for furnishing of incorrect information in the TDS statement. The said provisions of penalty are not proved to be effective in reducing or eliminating defaults relating to late furnishing of TDS statement.

In order to provide effective deterrence against delay in furnishing of TDS statement, it is proposed -

(i) to provide for levy of fee of Rs. 200 per day for late furnishing of TDS statement from the due date of furnishing of TDS statement to the date of furnishing of TDS statement. However, the total amount of fee shall not exceed the total amount of tax deductible during the period for which the TDS statement is delayed, and

(ii) to provide that in addition to said fee, a penalty ranging from Rs. 10,000 to Rs. 1,00,000 shall also be levied for not furnishing TDS statement within the prescribed time.

In view of the levy of fee for late furnishing of TDS statement, it is also proposed to provide that no penalty shall be levied for delay in furnishing of TDS statement if the TDS statement is furnished within one year of the prescribed due date after payment of tax deducted along with applicable interest and fee. In order to discourage the deductors to furnish incorrect information in TDS statement, it is proposed to provide that a penalty ranging from Rs. 10,000 to Rs. 1,00,000 shall be levied for furnishing incorrect information in the TDS statement.

Consequential amendment is proposed in section 273B so that no penalty shall be levied if the deductor proves that there was a reasonable cause for the failure.

Consequential amendment is also proposed in section 272A to provide that no penalty under this section shall be levied for late filing of TDS statement in respect of tax deducted on or after 1st July, 2012.

Amendments on the similar lines for levy of fee and penalty for delay in furnishing of TCS statement and furnishing of incorrect information in the TCS statement are also proposed to be made.

These amendments will take effect from 1st July, 2012 and will, accordingly, apply to the TDS or TCS statement to be furnished in respect of tax deducted or collected on or after 1st July, 2012.

IV. Intimation after processing of TDS statements

.....(Not reproduced as not relevant)

V. "Person responsible for paying" in case of payment by Central Government or Government of a State

.....(Not reproduced as not relevant)

Vi. Extension of time for passing an order under section 201 in certain cases

.....(Not reproduced as not relevant)

6. Further, a clause(c) was subsequently inserted in section 200A(1) of I.T. Act w.e.f. 01.06.2015 by the Finance Act, 2015. After the said insertion the provisions contained in 200A(1) and 200A(2) read as under:

Processing of statements of tax deducted at source.

"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)	<i>the sums deductible under this Chapter shall be computed after making the following adjustments, namely:—</i>
(i)	<i>any arithmetical error in the statement; or</i>
(ii)	<i>an incorrect claim, apparent from any information in the</i>
(b)	<i>the interest, if any, shall be computed on the basis of the sums deductible as computed in the statement;</i>
(c)	<i>the fee, if any, shall be computed in accordance with the provisions of section 234E;</i>
(d)	<i>the sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of the amount computed under clause (b) and clause (c) against any amount paid under section 200 or section 201 or section 234E and any amount paid otherwise by way of tax or interest or fee;</i>
(e)	<i>an intimation shall be prepared or generated and sent to the deductor specifying the</i>
	<i>sum determined to be payable by, or the amount of refund due to, him under clause (d); and</i>
(f)	<i>the amount of refund due to the deductor in pursuance of the determination under clause (d) shall be granted to the deductor:]</i>

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—

d)	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 centralized 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.] ”

7. Kind attention of the Tribunal is also drawn to the Memorandum to the Finance Bill, 2015 which elaborates the rationale for insertion of clause (c) in section 200A(I) in the statute. Para (I) & para (III) under the heading “I. Rationalization of Measures” are relevant to the issue and the same are reproduced as under:

Rationalization of provisions relating to Tax Deduction at Source (TDS) and Tax Collection at Source (TCS)

Under Chapter XVII-B of the Act, a person is required to deduct tax on certain specified payment at the specified rate if the payment exceeds the specified threshold. The person deducting tax (‘the deductor) is required to file a quarterly Tax Deduction at Source (TDS) statement containing the details of deduction of tax made during the quarter by the prescribed due date. Similarly, under Chapter XVII-BB of the Act, a person is required to collect tax on certain specified receipts at the specified rates. The person collecting tax (‘the collector) also is required to file a quarterly Tax Collection at Source (TCS) statement containing the details of collection of tax made during the quarter by the prescribed due date.

In order to provide effective deterrence against delay in furnishing of TDS/TCS statement, the Finance Act, 2012 inserted section 234E in the Act to provide for levy of fee for late furnishing of TDS/TCS statement. The levy of fee under section 234E of the Act has proved to be an effective tool in improving the compliance in respect of timely submission of TDS/TCS statement by the deductor or collector.

Finance (No. 2) Act, 2009 inserted section 200A in the Act which provides for processing of TDS statements for determining the amount payable or refundable to the deductor. However, as section 243E 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 fee payable under section 234E of the Act at the time of processing of TDS statements. It is, therefore, proposed to amend the provisions of section 200A of the Act so as to enable computation of fee payable under section 234E of the Act at the time of processing of TDS statement under section 200A of the Act.

Currently, the provisions of sub-section (3) of section 200 of the Act enable the deductor to furnish TDS correction statement and consequently, section 200A of the Act allows processing of the TDS correction statement. However, currently, there does not exist any provision for allowing a collector to file correction statement in respect of TCS statement which has been furnished. It is, therefore, proposed to amend the provisions of section 206C of the Act so as to allow the collector to furnish TCS correction statement.

Currently, there does not exist any provision in the Act to enable processing of the TCS statement filed by the collector as available for processing of TDS statement. As the mechanism of

TCS statement is similar to TDS statement, it is proposed to insert a provision in the Act for processing of TCS statements on the line of existing provisions for processing of TDS statement contained in section 200A of the Act. The proposed provision shall also incorporate the mechanism for computation of fee payable under section 234E of the Act.

Under the existing provisions of the Act, after processing of TDS statement, an 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 demand under section 156 of the Act. As the intimation generated after the proposed processing of TCS statement shall be at par with the intimation generated after processing of TDS statement, it is, further, proposed to provide that intimation generated after processing of TCS statement shall also be—

- (i) subject to rectification under section 154 of the Act;*
- (ii) appealable under section 246A of the Act; and*
- (iii) deemed as notice of demand under section 156 of the Act.*

Further, as the intimation generated after proposed processing of TCS statement shall be deemed as a notice of demand under section 156 of the Act, the failure to pay the tax specified in the intimation shall attract levy of interest as per the provisions of section 220(2) of the Act. However, section 206C (7) of the Act also contains provisions for levy of interest for non-payment of tax specified in the intimation to be issued. To remove the possibility of charging interest on the same amount for the same period of default both under section 206C (7) and section 220(2) of the Act, it is proposed to provide that where

interest is charged for any period under section 206C (7) of the Act on the tax amount specified in the intimation issued under proposed provision, then, no interest shall be charged under section 220(2) of the Act on the same amount for the same period.

Under the existing scheme of payment of TDS and TCS, Government deductors/collectors are allowed to make payment of tax deducted/collected by them without production of challan i.e. through book entry..... [This para has been truncated as not relevant]

Under section 192 of the Act, the person responsible for paying (DDO) income chargeable under the head "salaries" under the Act is authorized to allow certain deductions, exemptions or allowances or set-off of certain loss as per the provisions of the Act for the purposes of estimating income of the assessee or computing the amount of the tax deductible under the said section. [This para has been truncated as not relevant]

The existing provisions of sub-section (6) of section 195 of the Act provide that the person referred to in section 195(1) of the Act shall furnish prescribed information. Section 195(1) of the Act provides that any person responsible for paying any interest (other than interest referred to in sections 194LB or 194LC or 194LD of the Act) or any sum chargeable to tax (not being salary income) to a non-resident, not being a company, or to a foreign company, shall deduct tax at the rates in force.....[This para has been truncated as not relevant]

These amendments will take effect from 1st June, 2015."

8. Kind attention of Tribunal is also drawn to the provisions of Section 271H of the Act which was simultaneously inserted with the provisions of section 234E w.e.f. 01.07.2012 by the Finance Act, 2012. The applicability & interpretation of the provisions of sec. 271H have been discussed by various High Courts in its order while examining the validity of provisions of Sec.271H. The Section reads as under:

"Penalty for failure to furnish statements, etc.

271H. (1) Without prejudice to the provisions of the Act, the Assessing Officer may direct that a person shall pay by way of penalty, if, he—

(a) fails to deliver or cause to be delivered a statement within the time prescribed in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C; or

(b) furnishes incorrect information in the statement which is required to be delivered or caused to be delivered under sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C.

(2) The penalty referred to in sub-section (1) shall be a sum which shall not be less than ten thousand rupees but which may extend to one lakh rupees.

(3) Notwithstanding anything contained in the foregoing provisions of this section, no penalty shall be levied for the failure referred to in clause (a) of sub-section (1), if the person proves that after paying tax deducted or collected along with the fee and interest, if any, to the credit of the Central Government, he had delivered or cause to be delivered the statement referred to in sub-section (3) of section 200 or the

proviso to sub-section (3) of section 206C before the expiry of a period of one year from the time prescribed for delivering or causing to be delivered such statement.

(4) The provisions of this section shall apply to a statement referred to in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C which is to be delivered or caused to be delivered for tax deducted at source or tax collected at source, as the case may be, on or after the 1st day of July, 2012 ”.

9. *In number of cases, various High Courts have upheld the validity of provisions of section 234E which provides for imposition of fee for delayed filing of statement of TDS. Hon’ble High Courts have categorically held that the provisions are not ultra vires and not violative of constitution. The issue of chargeability of fee u/s 234E for the period of delay in filing of TDS return/statement before 01.06.2015 i.e. insertion of clause (c) to section 200A have also been examined by various High Courts and have upheld the chargeability of fee u/s 234E and the assessee’s appeal have been dismissed. In particular, the decisions of Hon’ble Gujarat High Court, Madras High Court & Rajasthan High Court may kindly be referred to as cited hereunder. In several cases the period under consideration before Hon’ble High Courts included the period prior to 01.06.2015. On the issue involved, reference is made to following case laws (copies attached) and reliance is placed on them :-*

- i) Rajesh Kourani vs. UOI [2017] 83 taxmann.com 137 (Gujarat)*
- ii) Biswajit Das vs. UOI, [2019] 103 taxmann.com 290 (Delhi)]*

- iii) *Qatalys Software Technologies (P) Ltd. vs. UOI, [2020] 115 taxmann.com 345 (Madras)]*
- iv) *Dunlod Shikshan Sansthan vs. UOI [2015] 63 taxmann.com 243 (Raj)]*
- v) *Rashmikant Kundalia vs. UOI [2015] 54 taxmann.com 200 (Bombay)*
- vi) *Lakshminirman Bangalore Pvt. Ltd. vs. DCIT [2015] 60 taxmann.com 144 (Karnataka)*
- vii) *Sree Narayana Guru Smaraka Sangam Upper Primary School vs. UOI [2017] 77 taxmann.com 244 (Kerala)*
- viii) *Dr. Amrit Lai Mangal vs. UOI [2015] 62 taxmann.com 310 (P&H)*

10. A harmonious and conjoint reading of provisions of section 234E & Memorandum to Finance Bill, 2012, Section 271H, section 200 A(1)(c), Memorandum to Finance Bill, 2015 and the case-laws on this issue makes following points unambiguously clear that:

10.1 The fee payable u/s 234E is a charging provision and the AO has no discretion at all whereas section 200A is a machinery provision enabling for processing of TDS statements, computation of adjustments, fees and generation of intimation etc. Hon'ble ITAT has not appreciated this obvious difference in its order dt. 29.11.2019, referred supra.

10.2 As apparent from the heading of the section 200A as well as the Memorandum to the- Finance Bill, 2015 which elaborates the rationale for insertion of clause (c) in section 200A(1) in the statute (Para 7 of the written submission) it is absolutely clear that this is merely an enabling section to compute/process the TDS statement. Section 234 E is the charging section requiring automatic payment of fee by the

defaulting deductors as per its sub-section (3) as even in the absence of section 200A of the Act with introduction of section 234E, it was always open for the revenue to charge the fees in terms of section 234E of the Act from the date of its introduction in the statute i.e. 01.07.2012. It may be noted that section 234E creates an automatic charge on the deductors who have defaulted on this count & who are required to pay the fee u/s 234E suo moto before delivering such belated TDS/TCS returns /statements in accordance with sub-section (3) of sec. 234E. By amendment [introduction of clause 200A(1)(c)] this adjustment was brought within the fold of section 200A of the IT Act so that the fee u/s 234E can be computed at the time of processing & issue of intimation in the event of non-payment of fee before delivering such belated TDS/TCS statements by the defaulting deductors. Any view that inhibits the levy of fees under section 234 E due to the absence of regulatory provision will tantamount to charging section yielding to machinery provision which should not be allowed. This has not been considered by Hon'ble ITAT.

10.3 Section 200A entails the procedure for procedure for processing of TDS returns. Amended section of 200A(1)(c), with effect from 01/06/2015, enables computation of fees chargeable u/s 234E under the purview of 200A. Therefore, if any TDS return is processed after 01/06/2015, then fees chargeable u/s 234E is required to be computed as per section 200A(1)(c) by virtue of the fact that the charging section was already effective since 01/07/2012. Similar will be the scenario if TDS return with default of being delayed is submitted after 01/06/2015 and processing is done thereafter. Since the charging section was already effective on the date of occurrence of default (i.e. the due date filing of TDS return on

which TDS return was not filed), any TDS return processed after introduction of clause 200A(1)(c) (i.e. giving effect to computation of fees u/s 234E of the Act) should include computation of fees under section 234E. This also needs consideration by Hon'ble ITAT.

10.4 Section 200A speaks about the processing of TDS return/statements and thus the provisions starts only after the filing of such TDS returns/statements, whether in time or delayed, whereas section 234E seeks to levy the fees for the period of delay in filing such TDS returns and statements. Therefore, it may be seen that the charging provisions of section 234E precedes the operation of the machinery provisions of section 200A. Hon'ble ITAT has not appreciated this obvious difference in its order dt. 29.11.2019, referred supra.

10.5 The fee payable u/s 243E is compensatory in nature to the department for the services provided for regularization of the delay in tiling of a TDS return/statement & is not penal in nature since the Income Tax Department has to expend extra effort & resources for processing delayed TDS returns or statements and also the additional burden of interest to be paid on refunds payable to the assessee on whose account tax deduction has been made. [As held in para 27 by Hon'ble Delhi High Court in the case of Biswajit Das vs. UOI, [2019] 103 taxmann.com 290 (Delhi)] Hon'ble Delhi High Court that the fee imposed u/s 234E of the Act is for all intents & purposes a 'late fee' payable for excepting TDS statement/return at belated point of time. This fact has not been considered by Hon'ble ITAT in its order dt.29.11.2019.

10.6 Section 271H of the Act does not provide for any penalty for delayed filing of TDS return/statement if a person proves that he has paid the TDS amount and also filed TDS statements along with fee and interest before expiry of a period of 1 year from the prescribed time. However, the delay in filing of TDS return/statement upto a period of 1 year from the prescribed time is subject to levy of fee u/s 234E. The penalty leviable u/s 271H of the Act is not automatic whereas the fees leviable u/s 234E is mandatory and the AO has no discretion. These are two independent provisions and the findings of Hon'ble High Courts in this regard may kindly be referred to. The same have not been considered by Hon'ble ITAT.

10.7 Before the insertion of Clause (c) to section 200A(1), section 200A did not provide for computation of fee payable u/s 234E of the Act at the time of processing of TDS statements though the same was mandatorily leviable for the delay in filing of TDS statements. In this sense, insertion of Clause (c) to section 200A(1), is only an addendum to the section to provide for the machinery provision to compute the fee payable u/s 234E at the time of processing of TDS statement and the same is enabling for processes in nature. This is very much evident on perusal of the Memorandum to the Finance Bill 2015. The same have not been considered by Hon'ble ITAT.

10.8 As per various judicial decision the ratio is that the legislations which modified accrued rights or imposed disabilities were to be treated as prospective in nature unless they were accounting for an obvious omission, or explaining a former legislation. In the present case, section 200(3) provides for statutory liability for depositing the TDS and furnishing the requisite statement with in due time (the said provision

inserted by Finance Act 2004 w.e.f. 01/04/2005). Section 234 E which provides for levy of fees if assessee is in violation of 200(3) or 206C(3) of the Act, is inserted by F.A.2012 w.e.f. 01/07/2012 .Therefore, since both the substantive legislation (section imposing statutory liability as well as the charging section for levy of fees in case of violation of statutory liability) were in effect much earlier from the date of insertion of 200A(3) which is merely a mechanical provision providing for computation, such amendment in procedural section should be considered as clarificatory in nature.

10.9 In the case of Rashmikant Kundalia, Hon'ble Bombay High Court has held in para 14 as under:

"We find that the Legislature took note of the fact that a substantial number of deductors were not furnishing their TDS return/statements within the prescribed time frame which was absolutely essential. This led to an additional work burden upon the Department due to the fault of the deductor by not furnishing the information in time and which he was statutorily bound to furnish. It is in this light, and to compensate for the additional work burden forced upon the Department, that a fee was sought to be levied under section 234E of the Act. Looking at this from this perspective, we are clearly of the view that section 234E of the Act is not punitive in nature but a fee which is a fixed charge for the extra service which the Department has to provide due to the late filing of the TDS statements."

10.9 In the case of Qatalys Software Technologies (P) Ltd., it was stated by the appellant before Hon'ble Madras High Court that section 200A of the Act was amended by insertion of clause (c) to enable collection of fee u/s 234E and a question

was also raised before Hon'ble High Court that the fee u/s 243E of the Act can be collected only from 01.06.2015. Hon'ble High Court has considered the same and thereafter upheld the validity of the fee chargeable u/s 234E and the appeal was dismissed. Hon'ble High Court has concurred with the findings of various High Courts, including Delhi High Court, on this issue and has held in para 29 as under:

"29. It is well settled that if it is a charge for service rendered by the commercial agency and the amount of fee levied is based on the expenses incurred by the Government rendering the fee. Unlike the tax which is compulsory extraction of money, enforceable by law and not in return of any services rendered. The distinction between the tax and the fee is that tax is levied as a part of common burden while fee is payment for a special benefit of privilege. Fee confers some advantage and is a return of consideration for services rendered."

The same have not been considered by Hon'ble ITAT.

10.10 In the case of Rajesh Kourani, Hon'ble Gujarat High Court has considered the chargeability of fee u/s 234E before 01.06.2015 when clause (c) was inserted to section 200A(1) by the Finance Act, 2015. Hon'ble High Court also considered the decision of Hon'ble Karnataka High Court in the case of Fatehraj Singhvi & Others. The issue has been discussed in great detail in para 16 to 21 and Hon'ble High Court has upheld the levy of fee u/s 234E since the day the provisions of section 234E was brought to statute and even prior to 01.06.2015 when section 200A(1) was amended to include clause (c). Hon'ble High Court has held that section 200A of the Act is a machinery provision providing mechanism for processing a statement of TDS and for making adjustments whereas section

234E is a charging provision creating a charge for levying fee for certain defaults in filing the statements. W.e.f 01.06.2015 the provision of section 200A specifically provides for computing the fee payable u/s 234E. On this issue, specific reference may kindly be made to para 18, 19 & 20 of the order where specific findings of Hon'ble High Court are recorded. The categorical findings of Hon'ble Gujarat High Court, though considered by Hon'ble ITAT in its order dt. 29.11.2019, has not been appreciated by Hon'ble Tribunal in right perspective when read in conjunction with the provisions, explanatory notes and orders of various other High Courts wherein the validity of provisions of sec.234E has been upheld.

10.11 The issue of legality of intimations / orders passed u/s 200A levying fee u/s 234E for late filing of TDS/TCS returns / statements, prior to the amendments made by Finance Act'2015 w.e.f. 01.06.2015, was considered by Hon'ble Rajasthan High Court also in the case of Dunlod Shikshan Sansthan vs. UOI reported in [2015] 63 taxmann.com 243 (Raj)]. Para-8 of the order is relevant & the same is reproduced as under:-

"8. In the present case, the fee was levied under section 200 for late filing of the returns, prior to the amendments made by the Finance Act, 2015 with effect from 1.6.2015 in Sections 200A, 246A and 272A providing for computation and appeal. We do not find that even prior to these amendments the imposition of fee was illegal. We do not in exercise of the power under Article 226 of the Constitution of India find any valid reasons or justification to interfere with the compensatory fees imposed for late filing of the TDS returns on flat rates. The absence of any provision for condonation of delay and the appeal prior to

amendments also did not make the imposition of late fees by Section 234E to be ultra vires.”

The findings of Hon’ble Rajasthan High Court has also escaped the consideration by Hon’ble ITAT and accordingly, it is requested that the same may kindly be considered to avoid any miscarriage of justice.

10.12 ITAT Jaipur in the case of Block Development Officer Vs ACIT , date of order 19/06/2010 (ITA Nos. 891, 892, 893, 894, 895 & 896/JP/201 has held that the levy of late fee as prescribed u/s 234E of the Act is mandatory and consequential, therefore, the same cannot be deleted on the ground of reasonable cause as explained by the assessee. It is pertinent to mention that though the intimation issued U/s 200A of the Act is an appealable order, however, the said order can be challenged only on the ground that the adjustment made by the A.O. or intimation issued U/s 200A of the Act is not in accordance with the provisions of Section 234E or Section 200A of the Act. Only if the A.O. has failed to comply with the mandatory provisions of these Sections while making the adjustment and issuing the intimation, the same can be challenged in the appeal. In absence of any such allegation that the A.O. has violated any of the provisions of Section 234E or Section 200A of the Act, the adjustment made by the A.O. on account of late filing fee U/s 234E of the Act cannot be deleted. Accordingly, all the appeals of the assessee are dismissed.

10.13 Similar ratio was pronounced in the case of Government Secondary School Principal Officer Vs ACIT, CPC-TDS (ITAT Jaipur) ITA No. 964/JP/2019, Date of order 24/06/2020.

In view of these decisions it is submitted that even if notice u/s 200A is issued before 01/06/2015, the same shall not

invalidate the proceedings of processing of TDS return or levy of fees under section 234E of the IT Act for the reason of 234E being mandatory levy occurring on the point of default and on the date of default charging section was very much in existence and was effective.

10.14.1 Hon'ble ITAT in its order dt.29.11.2019, has relied upon the decision of Hon'ble Karnataka High Court in the case Fateh Raj Singhji & Others vs UOI [2016] 289 CTR 602 (Kar). In the case of Fateh Raj Singhji vs UOI Hon'ble Karnataka High Court has held in para-22 of its order that "It is hardly required to be stated that, as per the well established principles of interpretation of statute, unless it is expressly provided or impliedly demonstrated, any provision is to be read as having prospective effect and not retrospective effect. Under the circumstances we find that substitution made by clause (c) to (f) of sub-section (1) of sec. 200A can be read as having prospective effect and not having retroactive character or effect. Resultantly the demand u/s 200A for computation and intimation for the payment of fee u/s 234E could not be made in purported exercise of powers under section 200A by the respondent for the respective assessment year prior to 01.06.2015....."

10.14.2 Further in para 25 of its order Hon'ble High Court has observed that "As such, as recorded earlier, it is on account of the intimation received under section 200A for making computation and demand of fees under section 234E, the same has necessitated the appellant to challenge the constitutional validity of section 234E....."

10.14.3 On perusal of the order it may be noted that Hon'ble Karnataka High Court set-aside the order levying the fee u/s

234E holding that the amendments in sec 200A, wherein the clause (c) was inserted, can't have any retrospective application. However, two important points can be noted in the order. First Hon'ble Court didn't give any such findings which can be said to have negated the mandatory charging of fees u/s 234E for late filing of TDS/TCS returns / statements which creates an automatic charge on the deductors who have defaulted on this count & who are required to voluntarily pay the fee u/s 234E before delivering such belated TDS/TCS returns /statements in accordance with sub-section (3) of sec. 234E. Second, Hon'ble Karnataka High Court left the question of constitutional validity of sec.234E open for consideration by the Division Bench [Para-26 of the order] which was earlier decided by Single Member Bench of the High Court upholding the validity of sec. 234E in the case of Lakshminirman Bangalore Pvt. Ltd. vs. DCIT [cited supra]. It is reiterated at the cost of repetition that the issue of constitutional validity of sec. 234E has been upheld by various High Courts including the jurisdictional High Court of Delhi and Punjab & Haryana High Court. Relevant case-laws have been mentioned above. The decision of Hon'ble Delhi High Court Biswajit Das vs. UOI, [cited supra] is subsequent to the date of order of Hon'ble Karnataka High Court in the case Fatehraj Singhvi and accordingly, the decision of in the case Fatehraj Singhvi which has been relied upon by Hon'ble ITAT in its order dt.29.11.2019, does not hold ground for consideration.

10.15 On perusal of the decisions of various High courts wherein the constitutional validity of provisions of sec. 234E have been upheld, it may be seen that in several cases the period under consideration before Hon'ble High Courts were even the periods prior to 01.06.2015 i.e. the date when clause

(c) was inserted to section 200A(1) by the Finance Act, 2015. Having considered the periods prior to 01.06.2015 & having upheld the validity of sec. 234E by Hon'ble High Courts, it can't be said that the controversy, being raised now, has escaped the eyes of Hon'ble High Courts and therefore there can't be any doubt that there is any iota of ambiguity with respect to the period of default for which the fee u/s 234E is chargeable. In view of the same and categorical findings of Hon'ble High Courts, the fee u/s 234E is undoubtedly leviable for the defaults of period in filing TDS/TCS statements/returns, even for the period prior to 01.06.2015 independent to the provisions of Sec. 200A(1) of the Act. The same have not been considered by Hon'ble ITAT.

11. Without prejudice to the submissions above, following submissions are also made:-

Since the fee u/s 234E was levied in rectification order, passed after insertion of clause (c) to sec.200A(1), the same is valid. If the assessee takes a reference to the regular order passed before the amendment in sec. 200A(1) then the appeal is belated before the Ld. CIT(A). Condonation of delay was not sought by the assessee, so on this count, the appeal before CIT(A) was not maintainable in all cases & Ld. CIT(A) has observed that the appeals deserve to be dismissed. In cases at S. No.7, 13, 15, 7 16. even the regular orders were passed after insertion of clause (c) in sec.200A(1)."

6. We have gone through the submission of the Id. DR. The efforts of the Id. DR, Sh. M. Barnwal are duly appreciated for his detailed analysis and reference to different orders/judgments of various Courts.

7. This issue of levy of late fee U/s 234E has been adjudicated by this tribunal in N number of appeals and has allowed appeals of the assessee holding that fees u/s 234E is not leviable before 01.06.2015 i.e. the date when clause (c) was inserted in section 200A(I) for the computation of said fees at the time of processing. The tribunal relied upon the decision of Hon'ble Karnataka High Court in the case of Fatehraj Singhvi & Others reported in [2016] 289 CTR 602.

8. Similar view has been taken by the Co-ordinate Bench of the ITAT Delhi Bench 'G' in the case of Vkare Bio Sciences Pvt. Ltd. Vs. DCIT(CPC-TDS) in ITA Nos. 2308, 2309 & 2310/Del/2017 vide order dated 30.08.2019. The operative part of the order is reproduced as under:

"The facts in brief are that in the order passed u/s 200A of the Act, late filing fee of Rs. 3,000/- u/s 234E of the Act has been levied. It was submitted that levy of fee u/s 234E of the Act can be levied only when there is an enabling provision prescribed u/s 200A of the Act, which has come w.e.f. 1st June, 2015. However Ld. CIT(A) after referring to the judgment of Hon'ble Bombay High Court in the case of Rashmikant Kundalia vs. Union of India and decided the issue against the assessee.

4. Before us Ld. DR has relied upon the judgment of Hon'ble Delhi High Court in the case of Biswajit Das vs Union of India 413 ITR 92 and also judgment of Hon'ble Bombay High Court in the case of Mr. Rashmikant Kundalia vs Union of India and Writ petition No. 771 of 2014 and submitted that the levy of fee u/s 234E of the Act is automatic wherever there is a delay in view of statement of tax at source.

5. After considering the impugned orders we find delay in filing of statement in regard third quarter for the financial year 2014-15. The demand has been raised by the department u/s 200 of the Act in terms of failure to comply with section 200A of the Act which deals with the processing of statement of tax deducted at source u/s 200 of the Act. First of all, sub section 3 of section 200 of the Act provides that the person deducting any sum in accordance with provision of chapter XVII

shall after paying the tax deducted to the credit of the Central Government within the prescribed time and prepare such statement for such period as may be prescribed. Provision of section 200A of the Act provides that where the statement of tax deduction at source has been made by the person deducting any sum u/s 200 of the Act, then such statement shall be processed in the manner given therein. Clause (c) of section 200A of the Act has been substituted by the Finance Act 2015 w.e.f. 1.6.2015 which reads as under:-

"(c)the fee, if any, shall be computed in accordance with the provisions of section 234E;"

6. Fee for default u/ s 234E of the Act provides that, when a person fails to deliver or cause to be delivered a statement within the time prescribed u/s 200(3) of the Act, then that person shall be liable to pay fee in the manner provided therein. Thus, fee u/s 234E of the Act is leviable if the statement is not filed as prescribed u/s 200(3) of the Act which in turn provides that the statement to be filed after the payment of tax to the prescribed authority. The relevant rule 31A (4A) provides that for filing of the 'challan cum statement' within seven days from the date of deduction. Now here in this case the demand has been raised purely on the ground that statement has not been furnished for the tax deduction at source. The relevant provision of section 200(3) read with rule 31A (4A) only refers to filing of 'challan cum statement' after the tax has been paid. The word "challan" in the said rule indicates that the tax must stand paid and that is how form 26QB is generated. Thus, here in this case, it cannot be held that there is any violation of section 200(3). In any case, the levy of fee u/s 200A of the Act in accordance with the provision of section 234E has come into the statute w.e.f. 1.6.2015. Since the challan and statement has been filed much prior to this date, therefore, no such tax can be levied u/s 200A. This has been clarified and held by Hon'ble Karnataka High Court in the case of Fatheraj Singhvi & Ors vs. Union of India reported in (2016) 289 CTR 0602, wherein the Court made following observations :-

"14. We may now deal with the contentions raised by the learned counsel for the appellants. The first contention for assailing the legality and validity of the intimation under Section 200A was that, the provision of Section 200A(1)(c), (d) and (f) have come into force only with effect from

1.6.2015 and hence, there was no authority or competence or jurisdiction on the part of the concerned Officer or the Department to compute and determine the fee under Section 234E in respect of the assessment year of the earlier period and the return filed for the said respective assessment years namely all assessment years and the returns prior to 1.6.2015. It was submitted that, when no express authority was conferred by the statute under Section 200A prior to 1.6.2015 for computation of any fee under Section 234E nor the determination thereof, the demand or the intimation for the previous period or previous year prior to 1.6.2015 could not have been made."

7. The judgment relied upon by the Ld. DR relate to constitutional validity and vires of the provision of section 234E. Nowhere in the judgments Hon'ble Courts have held that the fees u/s 200A read with section 234E shall be levied prior to 1.06.2015, because prior to this date has not prescribed levy of fees u/s 200A. Thus, we hold that no fee was leviable to the assessee u/ s 234E in violation of section 200(3), because assessee had furnished the statement immediately after depositing all the tax without any delay. Accordingly, the demand on account of 234E is cancelled. Accordingly, the appeal of the assessee is allowed."

9. Keeping in view the factual and legal aspects of the cases before us, we don't find reasons adequate to deviate from the ratio laid down by this Tribunal earlier.

10. In the result, the appeals of the assessee are allowed.
Order Pronounced in the Open Court on 31/08/2022.

Sd/-
(Anubhav Sharma)
Judicial Member
Dated: 31/08/2022

Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR