IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

BEFORE SHRI SANJAY ARORA, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No. 887 & 888/Coch/2022
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

M/s. St. Alphonsa Timbers & Traders (Pvt.) Ltd. Kundannoor, Maradu (PO), Ernakulam-682304.	**बनाम**/ Vs.	ITO (TDS) Kochi.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAMCS9963M		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri S. Rajeev, (Adv)
Revenue by:	Smt J. M Jamuna Devi, (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 15/05/2023
घोषणा की तारीख /Date of Pronouncement: 05/06/2023

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These are appeal preferred by the assessee company against the order of the Ld. CIT(A)/NFAC dated 23.08.2022 for Q2 & Q4 of AY. 2013-14 respectively confirming the order u/s 234E of the Income Tax Act, 1961 (hereinafter "the Act").

2. The grounds of appeal preferred by the assessee are as under: -

> "(1) The order of the authorities below are against Law, facts and circumstance of the case
>
> (2) The order U/s 234 E is void *ab intio* since there is no charging provision giving power to the department to charge and collect late fee U/s 234 E for the assessment year |2013-14. The Sec.200 A was amended only with effect from 01-06-2015 to give the assessing authority the power to impose late fee u/s 234E for the period under appeal. Hence there had been no jurisdiction to impose fee by the concerned authority Assistant Commissioner of Income Tax, C.P.C - TDS, Ghaziabad.

(3) The charging of fee levied U/s 234 E(Quarter-4) is therefore illegal and liable to be cancelled.

(4) The authority below ought have considered the judgment of the Hon' Income Tax Appellate Tribunal, Cochin Bench in ITA 145/Coch/2017 dated 17-09-2018 in similar issue. Appellant could not file the copy of the Tribunal's judgments before the first appellate authority. The said judgment is applicable and binding on appellant.

(5) Appellant would be put to much hardship and damages if the fee charged is not cancelled."

3. Brief facts as noted by the Ld. CIT(A) for both ITA Nos. 887/Coch/2022 & 888/Coch/2022 which reads as under: -

ITA. No.887/Coch/2022

"The assessee is a private limited company engaged in the business of wholesale import and sale of timbers. The assessee failed to file the TDS/TCS return of Quarter-4 for FY 2012-13 on or before the due date prescribed in this regard. The AO, TDS CPC, Ghaziabad passed an order u/s 143(1) on 10.09.2013. Subsequently, the AO, TDS CPC, Ghaziabad passed an order u/s 154 r.w.s. 200A of the Act on 27.01.2016, raising a total demand of Rs.7500/- (Rs.6200/- on account of late filing fee u/s 234E & Rs.1300/- as Interest u/s 220(2) of the Act thereon)."

ITA. No.888/Coch/2022

"The assessee is a private limited company engaged in the business of wholesale import and sale of timbers. The assessee failed to file the TDS/TCS return of Quarter-2 for FY 2012-13 on or before the due date prescribed in this regard. The AO, TDS CPC, Ghaziabad passed an order u/s 143(1) on 10.09.2013. Subsequently, CPC TDS passed an order u/s 154 r.w.s. 200A of the Act on 28.01.2016, raising a total demand of Rs.11,160/-

(Rs.9,153/- on account of late filing fee u/s 234E & Rs.2,002/- as Interest u/s 220(2) of the Act thereon)."

4. Aggrieved by the aforesaid action of the CPC, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the action of the CPC. Aggrieved, assessee is before us.

5. At the outset, the Ld. AR of the assessee, drew our attention to the fact that the issue of levy of late 'fee' before 01.06.2015 u/s 234E of the Income Tax Act, 1961 (hereinafter "the Act") is no longer res-integra, since it has been held by the Hon'ble Jurisdictional High Court in the case M/s. Sarala Memorial Hospital Vs. Union of India that the amendment brought in by insertion of clause 'C' in section 200A(1) of the Act [Processing of statements of tax deducted at source] is prospective and that only post 01.06.2015, processing of return entails levy of late fee as envisaged u/s 234E of the Act. It would be gainful to refer to the relevant portion of the order of the Hon'ble High Court which reads as under: -

6. Indeed, the facts are not in dispute. The petitioner submitted quarterly returns for the assessment years 2012-2013 and 2013-2014. After processing them, the assessing officer issued the Exts.P1 to P4 intimations, requiring the petitioner to pay the late fee. The petitioner has assailed that. To put the issue in perspective, we need to examine the statutory provisions. To begin with, Section 200A before 1.6.2015 stood as follows:

Processing of statements of tax deducted at source.

200A. (1) Where a statement of tax deduction at source [8a][or a correction statement] has been made by a person deducting any sum (hereafter referred to in this section as deductor) under section 200, such statement shall be processed in the following manner, namely:—

(a) the sums deductible under this Chapter shall be computed after making the following adjustments, namely:—

(*i*) any arithmetical error in the statement; or

(*ii*) an incorrect claim, apparent from any information in the statement;

(b) the interest, if any, shall be computed on the basis of the sums deductible as computed in the statement;

(c) the sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of amount computed under clause (b) against any amount paid under section 200 and section 201, and any amount paid otherwise by way of tax or interest;

(d) an intimation shall be prepared or generated and sent to the deductor specifying the sum determined to be payable by, or the amount of refund due to him under clause (c); and

(e) amount of refund due to the deductor in pursuance of the determination under clause (c) shall be granted to the deductor;

(f) the amount of refund due to the deductor in pursuance of the determination under clause (d) shall be granted to the deductor;

Provided that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the statement is filed.

Explanation.—For the purposes of this sub-section, "an incorrect claim apparent from any information in the statement" shall mean a claim, on the basis of an entry, in the statement-

(i) of an item, which is inconsistent with another entry of the same other item in such statement;

(ii) in respect of rate of deduction of tax at source, where such rate in accordance with the provisions of this Act.

(2) For the purposes of processing of statements under sub-section (1), the Board may make a scheme for centralised processing of statements of tax deducted at source to expeditiously determine the tax payable by, or the refund due to, the deductor as required under the said sub-section.]

7. Later through Finance Act, 2015 with effect from 01.06.2015, among other things, clause (c) was added, with other consequential changes. Now, with the amendment, the provision has this addition:

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

8. In fact, Section 234E affects the proceedings. Therefore, it prays to examine that provision as well. And it reads:

"234E-Fee for default in furnishing statements:-

(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 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."

9. Interpreting Section 200A and Section 234E, the Karnataka High Court has held in Fatheraj that when the statute confers no express power under section 200A before 01.06.2015 on the authority either to compute and collect any fee under section 234E, the demand for the period before 01.06.2015 could not be sustained. Fatheraj in fact observes:

"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.

10. But the Gujarat High Court has taken a contrary stand in Rajesh Kourani. It has held: -

"In plain terms, Section 200A 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 1.6.2015, this provision specifically provides for computing the fee payable under Section 234E. On the other hand, Section 234E is the 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. Section 200A does not create any charge in any manner. It only provides a mechanism for processing q 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 have been necessary to have another provision creating the same charge. Viewing Section 200A as creating a new charge would bring about, dichotomy. In plain terms, the provision 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"

11. There is cleavage in judicial opinion. But I am afraid, elaborate s the judgment may be in Rjesh Kourani, it does not seem to have considered the Circular No. 19 of 2015, which in para no. 47.3 clarifies:

> "47.3 Finance (No.2) Act, 2009 inserted section 200A in the Income-tax 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 Income-tax Act, the existing provisions of section 200A of the Income-tax Act did not provide for determination of fee payable under section 234E of the Income-tax Act at the time of processing of TDS statements. Therefore, the provisions of section 200A of the Income-tax Act has been amended so as to enable computation of fee payable under section 234E of the Income-tax Act at the time of processing of TDS statement under section 200A of the Income-tax Act."

12. Further, in para 47.20, the Circular has clearly emphasized that these amendments would take effect only from 1st June, 2015. Under those circumstances, I hold that the amendment is prospective and the demand under exts. P1 to P6 demand notices cannot be sustained.

I, accordingly, set aside the Exts. P1 to P6 demand notices. NO order on costs."

6. The Division Bench of the Hon'ble Kerala High Court affirmed the aforesaid ratio of the single bench in the case of M/s Olari Little Flower Kuries (P.) Ltd. v. UoI [2022] 440 ITR 26 (Ker), after reproducing paras 20 to 23 of the decision in Fatheraj Singhvi (supra), and concluding it's findings, at para 6.1 of the Judgment, it expresses it's agreement therewith at para 6.2:

> "23. In view of the aforesaid observation and discussion, since the impugned intimation given by the respondent-Department against all the appellants under section 200A are so far as they are for the period prior to 1.6.2015 can be said as without any authority under law. Hence, the same can be said as illegal and invalid."

At Paras 21 & 22 of the decision in Fatheraj Singhvi (supra) Hon'ble High Court (Kar) specifically hold that the amendment vide Finance Act, 2015, w.e.f. 01/6/2015 would not have a retroactive effect as it confers a substantive power on the AO, and is not merely a regulatory

mechanism, as held by the Hon'ble Gujarat High Court in Rajesh Kourani (supra). We also extract the afore-referred para 6.2, as follows, for ready reference:

> "6.2 Firstly, we are convinced with the reasoning and basis for the view taken by the learned single judge in the judgment under appeal, and secondly, the view taken by the Karnataka High Court in the judgment referred to above is to the same effect. Keeping in view the grounds of challenge and the view taken by this court as well as the Karnataka High Court in the judgment referred to above, we are of the view that the appeal at the instance of second respondent is without merit and is liable to be dismissed. Accordingly dismissed."

7. Further, the Hon'ble Division Bench of the High Court (Ker) held as under: -

> "**9.1** Stated briefly, the writ petitioner challenges the intimation received under section 200A from the respondent/Revenue calling upon the writ petitioner to pay late fee for delayed filing of quarterly statements of TDS. The periods for which the notices are issued are stated as prior to 1-6-2015. By following the judgment in W.P.(C) No. 37775/2018, as confirmed in W.A. No. 722/2019, the writ petition stands allowed and the intimations dealing with filing of belated statements prior to 1-6-2015 are set aside. A return filed subsequent to 1-6-2015 is present, the respondents are given liberty to issue notice, hear the writ petitioner, and pass orders in accordance with law.
>
> The writ petition is allowed as indicated above."

8. It thus stands clarified by the binding decision of jurisdictional High Court that no late filing fee could be levied for processing u/s. 200A(1) for any period prior to 01.6.2015. In the light of the aforesaid

decision of the Hon'ble Jurisdictional High Court, we find in the instant appeals that the late filing 'fee' u/s 234E of the Act has been levied for Quarter-4 ending for FY. 2012-13 Rs.6,200/- (ITA. No.887/Coch/2022) and late filing 'fee' u/s 234E of the Act for Quarter-2 for FY. 2012-13 at Rs.9,153/- (ITA. No.888/Coch/2022) has been levied. We note that only after 1st June, 2015 while processing of a TDS/TCS statement and issuance of intimation u/s 200A/206CB of the Act in respect thereof, an adjustment could also be made in respect of 'fee', if any shall be computed in accordance with the provisions of section 234E of the Act. Prior to 1st June, 2015, there was no enabling provision therein for raising a demand in respect of levy of fees u/s 234E of the Act. Therefore, no such levy could have been effected, [*Refer the decisions of the Hon'ble High Court in the case of (i) M/s. Olari Little Flower Kuries Pvt. Ltd. Vs. Union of India, (ii) M/s. Sarala Memorial Hospital Vs. Union of India, (iii) M/s. Mayi Industries Vs. Union of India, (iv) M/s. Anadiyil Hospital Vs. Union of India*,] Ergo, we hold that the order levying late 'fee' u/s 234E of the Act is bad in law and therefore, cancelled.

9. Before we part, we note that that appeals in the instant case arise not out of intimation u/s 200A(1) r.w.s. 234E of the Act, but u/s 154 of the Act r.w.s. 200A of the Act, *suo moto* made by the AO/TDS, CPC, Ghaziabad raising the demand *inter alia* the late 'fee' u/s 234E of the Act. The AO while passing the order u/s 154 of the Act has not given any reasons as to the mistake apparent on the face of the record. Anyway, since the late 'fee' for non-filing the statement of TDS/TCS [under section 200A(1)/206CB of the Act respectively] are no-longer

res-integra as noted (supra), the action of AO/CPC u/s 154 of the Act cannot be sustained. In this context, it would be gainful to refer to the observation of this Tribunal in the case of Kerala Gramin Bank ITA. No. 797/Coch/2022 and others order dated 03.03.2023 wherein in the Tribunal observed as under: -

> "So, however, the Hon'ble Apex Court in Asst. CIT v. Saurashtra Kutch Stock Exchange Ltd. [2008] 305 ITR 277 (SC) clarified that a decision by the Hon'ble jurisdictional High Court shall be binding and lead to rectification where an order inconsistent therewith has been passed; rather, even where the same is prior to the binding decision by the Hon'ble High Court inasmuch as it would relate back to the period to which it pertains to. Though rendered in the context of rectification of a mistake u/s.254(2), i.e., in relation to orders u/s. 254(1) of the Act by the Appellate Tribunal, the same being a statement of law, would apply equally to rectification of a mistake u/s. 154, which is well-settled could be of fact or law or both. Reference in this context may also be made to the decision in CIT v. Aruna Luthra [2001] 252 ITR 76 (P&H)(FB). We are, therefore, not in agreement with the ld. CIT(A), who has distinguished the former decision as well as in Laxmndas Bhatia Hingwala Pvt. Ltd. v. Asst. CIT [2011] 330 ITR 243 (Del)(FB), cited before him by the assessee, as being in respect of the power u/s. 254(2) of the Act. His reliance for the purpose on the decision in the case of CIT v. South Indian Bank Ltd. [2001] 249 ITR 304 (SC) and CIT v. Hero Cycles Ltd. [1997] 228 ITR 463 (SC), is misplaced. The same stand pursued to find as ousting debatable issues from the purview of s. 154. The decision by the Hon'ble jurisdictional High Court is binding within it's territorial jurisdiction, settling the issue for that jurisdiction. Any order inconsistent therewith is thus to be necessarily regarded as

mistaken. It would have been a different matter if only the decisions by the Hon'ble Karnataka and Gujarat High Courts were available. Rather, in such a case, the latter having considered the former, it is the latter that would prevail."

10. In the light of the discussion (supra), the levy of late 'fee' u/s 234E of the Act being of Q2 and Q4 of AY. 2013-14 being prior to 01.06.2015, are directed to be deleted.

11. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on this 05/06/2023.

Sd/-	Sd/-
(SANJAY ARORA)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin; Dated : 05/06/2023.
Vijay Pal Singh, (Sr. PS)

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-Trichur.
4. The CIT, Cochin.
5. The DR, ITAT, Cochin.
6. Guard File.

Asst. Registrar/ITAT, Cochin