IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI – VIRTUAL COURT

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.31 & 52 to 60/PAN/2022
निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

Kwality Animal Feeds Pvt. Ltd., Plot No.12, Kwality House, Jamboti Road, Machhe Industrial Area, Belgaum- 590014. PAN : AABCK0589J	Vs.	DCIT, TDS, Ghaziabad.
Appellant		Respondent

Assessee by	:	Shri Omkar Godbole
Revenue by	:	Shri Ashwini D. Hosmani
Date of hearing	:	06.09.2023
Date of pronouncement	:	07.09.2023

आदेश / ORDER

PER BENCH :

These are the appeals filed by assessee against the separate orders of the National Faceless Appeal Centre, Delhi [‘NFAC’] dated 08.04.2022 for the assessment years 2013-14 and 2014-15 respectively.

2. Since the identical facts and common issues are involved in all the above captioned ten appeals, we proceed to dispose of the same by this common order.

3. For the sake of convenience and clarity, the facts relevant to the appeal in ITA No.31/PAN/2022 for the assessment year 2013-14 are stated herein.

ITA No.31/PAN/2022, A.Y. 2013-14 :

4. Briefly, the facts of the case are that the Dy. Commissioner of Income Tax, CPC (TDS), Ghaziabad issued an intimation u/s 200A of the Income Tax Act, 1961 ('the Act') for the assessment year 2013-14 levying a late fee under the provisions of section 234E of Rs.34,816/- by stating that the appellant had failed to file the quarterly statement of TDS of fourth quarter for financial year 2012-13 in Form No.26Q. Accordingly, the DCIT, CPC (TDS), Ghaziabad had levied penalty of late fee of Rs.34,816/- for Q4 u/s 234E by intimation dated 11.11.2013 passed u/s 200A of the Act.

5. Being aggrieved by the said intimation, an appeal was filed with delay of 2495 days before the NFAC, who vide impugned order had not condoned the delay on the ground that the assessee

had failed to demonstrate sufficient and reasonable cause for delay in filing the appeal.

6. Being aggrieved by the above decision of the NFAC, the appellant is in appeal before us in the present appeal.

7. During the course of hearing before us, it is submitted that the provisions of section 200A were inserted by only w.e.f. 1.6.2015 by the Finance Act, 2015 and no late fee u/s 234E can be levied prior to insertion of provisions of section 200A of the Act. It is argued that the NFAC ought to have condoned the delay, inasmuch as, the appellant had shown the sufficient cause for delay in filing the appeal. In support of this proposition, the ld. AR relied upon the decision of the Co-ordinate Bench of Tribunal in the case of Alpha Electronics Pvt. Ltd. vs. ACIT in ITA No.1450/PUN/2019 and others, order dated 13.12.2019.

8. On the other hand, ld. Sr. DR had no serious objection for condonation of delay.

9. We heard the rival submissions and perused the material on record. The issue in the present appeal relates to the condonation of delay in filing the appeal before the NFAC. At the outset, the issue

in the appeal relates to the levy of late fees u/s 234E of the Act. The provisions of section 234E were inserted w.e.f. 1.6.2012. However, it is only w.e.f. 1.6.2015 an amendment was made u/s 200A providing the changing mechanism for levy of late fees u/s 234E of the Act. Resultantly, the late fee u/s 234E can be levied only prospectively i.e. w.e.f. 1.6.2015 as held by the Hon'ble Karnataka High Court in the case of Fatheraj Singhvi vs. Union of India, 73 taxmann.com 252 and this ratio was followed by the Co-ordinate Bench of Pune Tribunal in the case of (i) Gajanan Constructions vs. DCIT, 73 taxmann.com 380 and (ii) Maharashtra Cricket Association, Pune vs. DCIT, 74 taxmann.com 6. Admittedly, in the present case the late fees u/s 234E was levied for the period prior 1.6.2015 and applying ratio of the decisions referred supra, the late fee cannot be levied. In view of the fact that the appellant is not liable for payment of late fee u/s 234E, there is a strong prima facie case in favour of assessee on merits of issue in appeal. The Hon'ble Supreme Court in the case of Collector of Land Acquisition vs. Mst. Katiji, 167 ITR 471 (SC) had laid as follows :-

> *"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is con- doned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

10. Similarly, the Hon'ble Jurisdictional High Court in the case of Vijay Vishin Meghani vs. DCIT, 389 ITR 250 (Bom.) held that in the matter of condonation of delay an overall view in the larger interest of justice has to be taken. None should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate Authority finds that the litigant has deliberately and intentionally delayed filing of the appeal, that he is careless, negligent and his conduct is lacking in bona fides. The Hon'ble Telangana High Court in the case of Thunuguntla Jagan Mohan Rao vs. DCIT, 427 ITR 204 (Telangana) after referring to the decision of

the Hon'ble Supreme Court in the case of N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123 (SC) held as follows :-

> *"26. The Supreme Court in N. Balakrishnan v. M. Krishnamurthy [1998] 7 SCC 123 has held that the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice; and that rules of limitation are not meant to destroy the right of parties, but they are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly.*
> *It held that there is no presumption that delay in approaching the Court is always deliberate, and the words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.*
> *It held that in every case of delay there can be some lapse on the part of the litigant concerned, but that alone is not enough to turn down his plea and to shut the door against him; and if the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. It also observed that if the delay is deliberate, then the Court should not accept the explanation. It held that while condoning the delay, the Court should compensate the opposite party with costs."*

11. Applying the principles enunciated in the decisions referred to hereinabove, the facts of the present case, it is clear that the appellant has strong case on merits of case. Therefore, the NFAC ought to have condoned the delay and adjudicate the appeal on merits. However, since the issue involved is purely legal, we decide the issue on merits as follows.

12. We heard the rival submissions and perused the material on record. The only issue in the present appeal relates to the levy of late fees u/s 234E of the Act. The DCIT, CPC (TDS), Ghaziabad

had levied penalty u/s 234E of the Act for belated submission of tax deducted at source statement during the financial year 2012-13. It is only w.e.f. 01.06.2015 an amendment was made u/s 200A of the Act providing that fee u/s 234E could be computed at the time of processing of the return of income and intimation could be issued specifying the same payable by the dedutor as fee u/s 234E of the Act. The Hon'ble Karnataka High Court in the case of Fatheraj Singhvi vs. Union of India, 73 taxmann.com 252 held that the provisions of section 234E of the Act are substantive in nature and the mechanism for computing the late fee was provided by the Parliament only w.e.f. 01.06.2015. Therefore, late fees u/s 234E of the Act can be levied only prospectively w.e.f. 01.06.2015. The relevant observation of the Hon'ble Karnataka High Court in the case of Fatheraj Singhvi (supra) are extracted hereunder :-

> *"19. Hence, it can be said that, the mechanism provided for enforceability of Section 200(3) or 206C (3) for filing of the statement by making it penal under Section 272A (2) (k) is done away in view of the insertion of Section 271H providing for penal provision for such failure to submit return. When the Parliament has simultaneously brought about Section 234E, Section 271H and the aforesaid proviso to Section 272A(2), it can be said that, the fee provided under Section 234E is contemplated to give a privilege to the defaulter to come out from the rigors of penalty provision under Section 271H (1) (a) if he pays the fee within one year and complies with the requirement of sub-section (3) of Section 271H.*

20. In view of the aforesaid observations and discussion, two aspects may transpire one, for Section 234E providing for fee and given privilege to the defaulter if he pays the fee and hence, when a privilege is given for a particular purpose which in the present case is to come out from rigors of penal provision of Section 271H(1)(a), it cannot be said that the provisions of fee since creates a counter benefit or reciprocal benefit in favour of the defaulter in the rigors of the penal provision, the provisions of Section 234E would meet with the test of quid pro quo.

21. However, if Section 234E providing for fee was brought on the state book, keeping in view the aforesaid purpose and the intention then, the other mechanism provided for computation of fee and failure for payment of fee under Section 200A which has been brought about with effect from 1.6.2015 cannot be said as only by way of a regulatory mode or a regulatory mechanism but it can rather be termed as conferring substantive power upon the authority. It is true that, a regulatory mechanism by insertion of any provision made in the statute book, may have a retroactive character but, whether such provision provides for a mere regulatory mechanism or confers substantive power upon the authority would also be a aspect which may be required to be considered before such provisions is held to be retroactive in nature. Further, when any provision is inserted for liability to pay any tax or the fee by way of compensatory in nature or fee independently simultaneously mode and the manner of its enforceability is also required to be considered and examined. Not only that, but, if the mode and the manner is not expressly prescribed, the provisions may also be vulnerable. All such aspects will be required to be considered before one considers regulatory mechanism or provision for regulating the mode and the manner of recovery and its enforceability as retroactive. If at the time when the fee was provided under Section 234E, the Parliament also provided for its utility for giving privilege under Section 271H(3) that too by expressly put bar for penalty under Section 272A by insertion of proviso to Section 272A(2), it can be said that a particular set up for imposition and the payment of fee under Section 234E was provided but, it did not provide for making of demand of such fee under Section 200A payable under Section 234E. Hence, considering the aforesaid peculiar facts and circumstances, we are unable to accept the contention of the learned counsel for respondent-Revenue that insertion of clause (c) to (f) under Section 200A(1) should be treated as retroactive in character and not prospective.

22. 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 of statute 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 Section 200A can be read as having prospective effect and not having retroactive character or effect. Resultantly, the demand under Section 200A for computation and intimation for the payment of fee under Section 234E could not be made in purported exercise of power under Section 200A by the respondent for the period of the respective assessment year prior to 1.6.2015. However, we make it clear that, if any deductor has already paid the fee after intimation received under Section 200A, the aforesaid view will not permit the deductor to reopen the said question unless he has made payment under protest.

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.

24. If the facts of the present cases are examined in light of the aforesaid observation and discussion, it appears that in all matters, the intimation given in purported exercise of power under Section 200A are in respect of fees under Section 234E for the period prior to 1.6.2015. As such, it is on account of the intimation given making demand of the fees in purported exercise of power under Section 200A, the same has necessitated the appellant-original petitioner to challenge the validity of Section 234E of the Act. In view of the reasons recorded by us hereinabove, when the amendment made under Section 200A of the Act which has come into effect on 1.6.2015 is held to be having prospective effect, no computation of fee for the demand or the intimation for the fee under Section 234E could be made for the TDS deducted for the respective assessment year prior to 1.6.2015. Hence, the demand notices under Section 200A by the respondent-authority for intimation for payment of fee under Section 234E can be said as without any authority of law and the same are quashed and set aside to that extent.

25. 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. When the intimation of the demand notices under Section 200A is held to be without authority of law so far as it relates to computation and demand of fee under Section 234E, we find that the question of further scrutiny for testing the constitutional validity of Section 234E would be

rendered as an academic exercise because there would not be any cause on the part of the petitioners to continue to maintain the challenge to constitutional validity under Section 234E of the Act. At this stage, we may also record that the learned counsels appearing for the appellant had also declared that if the impugned notices under Section 200A are set aside, so far as it relates to computation and intimation for payment of fee under Section 234E, the appellant-petitioners would not press the challenge to the constitutional validity of Section 234E of the Act. But, they submitted that the question of constitutional validity of Section 234E may be kept open to be considered by the Division Bench and the Judgment of the learned Single Judge may not conclude the constitutional validity of Section 234E of the Act.

26. Under these circumstances, we find that no further discussion would be required for examining the constitutional validity of Section 234E of the Act. Save and except to observe that the question of constitutional validity of Section 234E of the Act before the Division Bench of this Court shall remain open and shall not be treated as concluded.

27. In view of the aforesaid observations and discussion, the impugned notices under Section 200A of the Act for computation and intimation for payment of fee under Section 234E as they relate to for the period of the tax deducted prior to 1.6.2015 are set aside. It is clarified that the present judgment would not be interpreted to mean that even if the payment of the fees under Section 234E already made as per demand/intimation under Section 200A of the Act for the TDS for the period prior to 01.04.2015 is permitted to be reopened for claiming refund. The judgment will have prospective effect accordingly. It is further observed that the question of constitutional validity of Section 234E shall remain open to be considered by the Division Bench and shall not get concluded by the order of the learned Single Judge."

13. The ratio of the above decision was followed by the Co-ordinate Bench of Pune Tribunal in the case of (i) Gajanan Constructions vs. DCIT, 73 taxmann.com 380, (ii) Maharashtra Cricket Association, Pune vs. DCIT, 74 taxmann.com 6 and (iii) Webtrust Co. In (India) Pvt. Ltd. ACIT, CPC (TDS) in ITA

Nos.1818 & 1819/PUN/2018 for Assessment Years 2013-14 & 2014-15, order dated 02.11.2021. The decision rendered by the Hon'ble Bombay High Court in the case of Rashmikant Kundalia and Others (supra) does not come to the rescue of the Revenue, inasmuch as, the Hon'ble High Court had only upheld the constitutional validity of the provisions of section 234E of the Act. The Hon'ble High Court had not gone into the issue of retrospective operation of provisions of section 234E of the Act. In the circumstances, we direct the DCIT, CPC (TDS), Ghaziabad to delete the late fee being levied u/s 234E of the Act.

14. In the result, the appeal filed by the assessee in ITA No.31/PAN/2022 for A.Y. 2013-14 stands allowed.

ITA Nos.52 to 60/PAN/2022, A.Ys. 2013-14 & 2014-15 :

15. Since the facts and issues involved in remaining nine appeals of the assessee are identical, therefore, our decision in ITA No.31/PAN/2022 for A.Y. 2013-14 shall apply *mutatis mutandis* to the remaining nine appeals of the assessee in ITA Nos.52 to 60/PAN/2022 for A.Ys. 2013-14 & 2014-15 respectively. Accordingly, the remaining nine appeals of the assessee in ITA

Nos.52 to 60/PAN/2022 for A.Ys. 2013-14 & 2014-15 stands allowed.

16. To sum up, all the above captioned ten appeals of the assessee stands allowed.

Order pronounced on this 07th day of September, 2023.

Sd/-	**Sd/-**
(PARTHA SARATHI CHAUDHURY)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 07th September, 2023.
Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT concerned.
4. DR, ITAT, Panaji.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.