

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

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA Nos. 984 to 994/Coch/2022
(Assessment Years: 2016-17 to 2019-20)

Commissioner for Govt. Examinations Pareeksha Bhavan, Poojappura Thiruvananthapuram 695012 [PAN:AAAGO0931P]	Vs.	Dy. CIT, Circle - 1(2) Thiruvananthapuram
(Appellant)		(Respondent)

Appellant by:	----- None -----
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	24.01.2024
Date of Pronouncement:	15.04.2024

ORDER

Per: Sanjay Arora, AM

This is a set of 11 Appeals by the Assessee directed against the dismissal of it's appeals contesting the levy of fee under section 234E of Income Tax Act, 1961 (the Act) for the delayed filing of the quarterly TDS returns/statements (in Form 24Q & 26Q) for FY 2015-16 to FY 2018-19, by the Commissioner of Income Tax (Appeals) Income Tax Department [CIT(A)] vide his separate orders dated 30.08.2022.

2. The appeals raising a common issue, were taken up together for hearing, and are being accordingly disposed of per a common, consolidated order.

3. The appeals, filed on 06.12.2022, are with a delay of 38 days. The Affidavit dated 19.11.2022 by Shri Santosh Kumar S., Secretary to the assessee, a government institution, who has also verified the appeal memo, filed along with, explains the delay in terms of the Tax Consultants – without naming them, being pre-occupied

due to tax audit work as indeed the medical emergency of the concerned Officer – again without naming him. In view of the assessee being a government department, which has its inherent limitations, we consider the five-week delay as liable to be condoned, no serious objection to which was raised by Smt. Devi, the ld. Sr. DR.

4. None appeared for the appellant when the appeals were called out for hearing, and neither is there any adjournment motion despite service of notice of hearing. Hearing in the matter was accordingly proceeded *ex parte* qua the assessee.

5. We have heard the party before us, and perused the material on record.

5.1 We begin by reproducing the relevant provisions of the Act:

Fee for default in furnishing statements.

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.

Duty of person deducting tax.

200. (1) Any person deducting any sum in accordance with the foregoing provisions of this Chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.

(2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.

(2A) In case of an office of the Government, where the sum deducted in accordance with the foregoing provisions of this Chapter or tax referred to in sub-section (1A) of section 192 has been paid to the credit of the Central Government without the production of a challan, the Pay and Accounts Officer or the Treasury Officer or the Cheque Drawing and Disbursing

Officer or any other person, by whatever name called, who is responsible for crediting such sum or tax to the credit of the Central Government, shall deliver or cause to be delivered to the prescribed income-tax authority, or to the person authorised by such authority, a statement in such form, verified in such manner, setting forth such particulars and within such time as may be prescribed.

(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income-tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed:

Provided that the person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement delivered under this sub-section in such form and verified in such manner as may be specified by the authority.

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) 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 fee, if any, shall be computed in accordance with the provisions of section 234E;
- (d) 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;
- (e) 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 (d); and
- (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 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 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.

6. We may next tabulate, for ready comprehension, default/s for which the impugned fee u/s. 234E stands levied:

S. No.	ITA No.	Quarter/A.Y	Date of Filing	Date of Processing	Return Form No.	Late Fee U/s 234E	Short Deduction & Interest	Total (R/off) Rs.
1	985/C/2022	Q2/2016-17	03.06.2021	07.06.2021	26Q	4,08,400	-	4,08,400
2	986/C/2022	Q3/2016-17	03.06.2021	07.06.2021	26Q	43,028	-	43,030
3	984/C/2022	Q4/2016-17	02.07.2016	08.07.2016	24Q	9,200	255	9,460
4	987/C/2022	Q4/2016-17	03.06.2021	07.06.2021	26Q	16,874	-	16,870
5	988/C/2022	Q1/2017-18	07.08.2017	10.08.2017	24 Q	60,750	-	60,750
6	989/C/2022	Q1/2017-18	24.02.2021	02.03.2021	26Q	46,193	-	46,190
7	990/C/2022	Q2/2017-18	24.02.2021	02.03.2021	26Q	3,15,400	-	3,15,400
8	991/C/2022	Q4/2017-18	24.02.2021	02.03.2021	26Q	10,120	-	10,120
9	992/C/2022	Q2/2018-19	23.11.2017	02.12.2017	24Q	4,600	-	4,600
10	993/C/2022	Q2/2019-20	16.07.2019	20.07.2019	26Q	51,600	-	51,600
11	994/C/2022	Q3/2019-20	16.07.2019	20.07.2019	26Q	33,200	-	33,200

5.2 The default of the delayed filing of the TDS returns/statements for the relevant quarters is admitted. As also stated more than once by the Id. CIT(A) per the impugned order, no mistake in the computation of the impugned fee stands pointed out by the assessee, and neither is there any reference thereto in the assessee's written note dated 19.11.2022 filed with the Tribunal. That apart, in each case, the statement

has been filed and, accordingly, processed u/s. 200A of the Act only after 01.06.2015, i.e., the date w.e.f. which s. 200A stands amended enabling computing fee u/s. 234E – brought on statue w.e.f. 01.07.2012, while processing the statement filed u/s. 200(3), and toward which the ld. CIT(A) cites the decision by the Tribunal in *Lampmaster Wolters India P. Ltd. v. ITO* [2022] 141 taxmann.com 149 (Chny) dated 29.07.2022, also quoting there-from.

5.3 The assessee's principal grievance, however, as we gather from the impugned order, as indeed the grounds raised before us, is that the fee is in the nature of penalty. This is as:

- (a) it draws no distinction between small and large deductors;
- (b) no daily, incremental administrative expenditure to compensate for the delay incremental fee is incurred;
- (c) no daily additional service is rendered to demand a daily incremental fee reckoned per day of the delay for the continuing default; and
- (d) no nexus with the quantum of service rendered is established.

5.4 Save for the plea at (a) above, we find, for the reasons stated hereinafter, considerable merit in the assessee's argument, not met by the ld. CIT(A), before whom we find the assessee's objections to be principally the same, even as he, to be fair to him, adverts to several decisions sustaining the constitutional validity of the levy u/s. 234E of the Act. The same stands upheld by the Hon'ble Courts on the basis of being toward processing of TDS returns/statements and avoiding unwanted consequences of the delayed processing; finalizing the tax return of the tax deductees, including grant of refund, where applicable, thereto.

5.5 The question that, however, is raised before us, is if the levy is, as stated, in the nature of fee, or penal in nature, i.e., providing a deterrent. Fee to the extent it is toward cost of processing, as explained by the Union of India (UoI) in its reply/s in the challenges to the *vires* of the provision, since upheld per the several decisions

referred to by the Id. CIT(A) in his order, the same would apply equally to the statements filed in time. The levy is, however, limited to the cases of late filing, i.e., the default, for which the fee is levied. Why, one may ask, to no answer, i.e., in the Revenue's said replies, or the explanation introducing the levy in the statute. Inasmuch as the service, i.e., the processing of the returns/statements, is the same, one would have expected a uniform levy irrespective of the date of processing and, thus, independent of the date of filing the statement which is to be subject to processing, which would only be in a chronological order, i.e., the returns being processed in the sequence of their filing. No charge however being levied unless there is a delayed filing, is it not, one may ask, then, an admission that the fee seeks to, or penalizes, the delayed filing? This is as a nexus with cost, a pre-requisite for a fee, would obtain either way. The Apex Court in *Om Prakash Agarwal v. Giri Raj Kishori & Ors.* [1987] 164 ITR 376 (SC) clarified that, as an imperative, a fee, to qualify as one, the relevant provision must *ex facie* reflect the correlation with the expense incurred by the Government in rendering the service for which the fee is being levied. *Then, again, what, one may ask, is the basis of a daily increase therein?* And which, nowhere explained, again breaks down on the anvil of the nexus with the cost incurred for the same service being provided, i.e., processing of the return, which is to be established. That is, a constant, daily, increase in the cost incurred on processing – a service itself found independent of the date of its performance, is hard to justify. One would have rather expected it to be slated for increase, hinging it with the inflation index, over time, or after every few years, taking into account the increase in cost. On the contrary, inasmuch as a person may file several incorrect statements in time, to no levy, which becomes leviable only on the filing of the delayed return and, further, as we understand, only where the same is correct, does not agree with the stated purpose of the levy which, without doubt, is to be satisfied for the same to be regarded as a fee.

5.6 The Revenue choosing to recover the processing cost only in case of delayed filing of the relevant return/statement/s, is by itself a clear indicator of the levy being a deterrent measure geared toward filing the same in time, and its daily increase, imposing an increasing burden, further endorses and corroborates the said inference. Characterizing, thus, the default, as a continuing one, provides for an inbuilt disincentive. The inference of penal nature becomes irresistible in the wake of levy increasing in a linear proportion to time, while administrative cost would remain constant or nearly so. The delay in filing the statements sure leads to the unwanted result in delaying the deductor's tax return, but then that is precisely what the measure is being ascribed as, i.e., toward providing a deterrent by providing for a proportional levy, which cannot be justified in terms of a fee, a term explained, *inter alia*, in *Om Prakash Agarwal v. Giri Raj Kishori & Ors.* (supra). Why, the said levy was, prior to its incorporation in the statute-book as s. 234E, on the statute in the form of s. 272A(2)(k), a penal provision, of which section 234E is a verbatim reproduction. Could therefore one may ask there be any doubt that the provision, particularly considering an incremental levy with reference to the delay, is principally penal, i.e., insofar as defining the default, and the quantification of the 'fee' thereagainst is concerned. The same, thus, is, a penalty in the guise of a fee. And which, if it was necessary, proves what is being stated herein. The charge of it being, even if to that extent, penal in nature, is, thus, unmistakable.

5.7 We may next discuss the consequence of levy being, even if in part, penal in nature. The same, firstly, would have to be segregated into its compensatory and penal parts; the former being based on the criterion suggested by the Apex Court for it being regarded as a fee. This, we may add, would only be on first meeting the objection of the processing cost – which the fee is ostensibly toward, being not recovered where a statement, correct or even incorrect, is filed in time. And, further, only on the basis of some empirical data on cost being furnished by the Revenue.

Two, to the extent it is penal in nature, i.e., as a deterrent measure to disincentivise non-compliant, and promote compliant, behavior, the same would be subject to being saved on a reasonable cause/s being shown, which of course must extend to the entire period of default for a full relief there-from.

5.8 We have carried the matter thus far, only in discharging our duty in expressing our honest and independent view on the subject matter under appeal. This Tribunal, itself a creation of the statute, has no power to decide on the *vires* of any provision of the Act. That apart, the same stands, on challenge, upheld by the constitutional Courts, including the Hon'ble jurisdictional High Court (*Olari Little Flower Kuries P. Ltd. v. UoI* (134 taxmann.com 111 (Ker)). A decision on merits by us, would thus have to be necessarily governed by the provision as it stands, i.e., without travelling to its constitutionality. As afore-stated, no infirmity in the computation of the levy stands pointed out by the assessee at any stage, with the processing being after the date of amendment in s.200A, authorizing it w.e.f. 01/6/2015.

6. In the result, the assessee's appeals are dismissed.

Order pronounced on April 15, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: April 15, 2024

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order
Assistant Registrar
ITAT, Cochin