आयकर अपीलीय अधिकरण, मुंबई "ई" खंडपीठ

Income-tax Appellate Tribunal -"E"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and C.N. Prasad,Judicial Member

आयकर अपील सं./ITA/7495, 4599 & 4600/Mum/2014

निर्धारण वर्ष /Assessment Years: 2009-10, 2010-11 & 2011-12

Shreerang Mercantile (I) Pvt. Ltd. 501, Shreerang House, 5th Floor New Marine Lines Mumbai-400 020. PAN:AADCS 0954 M	Vs.	Addl.CIT, (TDS)-3, Room No.1001 Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road Mumbai-400 020.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent)**

Revenue by: Shri N. Sathya Moorthy-DR

Assessee by: Shri Dharmendra M. Shah

सुनवाई की तारीख **/ Date of Hearing: 19.07.2016**

घोषणा की तारीख / **Date of Pronouncement: 27.07.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the orders dated 8.10.2014 and 19.5.2014, of the CIT(A)-14 the assessee has filed the appeals for the above mentioned three years.Issue involved in all the appeals is about levy of penalty u/s.272A(2)(K)of the Act,for filing quarterly returns in form number 24Q/ 26Q belatedly.So,we are adjudica - ting all the appeals by single order.

ITA/7495/Mum/2014-09-10

2.On examination of records the AO noted that the assessee did not file the TDS returns on due dates.The delays in submission of TDS return for the quarters of FY 2008-09 were compiled by the AO as under :

F.Y. 2008-09		
Quarter	*No. of days delay*	*TDS Amount*
24Q-1st	*406*	*2,07,000*
24Q-2nd	*490*	*99,000*
24-Q-3rd	*368*	*99,000*
24-Q-4th	*421*	*1,67,800*
24Q-1st	*399*	*2,61,014*
24Q-2nd	*307*	*5,63,132*
24-Q-3rd	*215*	*4,30,907*
24-Q-4th	*71*	*12,67,097*

The AO issued a show cause notice to the assessee asking it to explain as to why penalty u/s.272A(2)(k) of the Act should not be levied. In its reply the assessee submitted that its accountant was not well versed with the computerization, and operation of TDS software as well as uploading of various quarterly TDS (Systems)/NSDL,that it was dependent on outside agencies for the work,that the assessee could not cope up with the fast advancement of computer technology.The AO after considering the submission of the assessee, held that assessee had not satisfied the requirement of establishing the reasonable cause as per the provisions of section 272A(2)(k) of the Act,that assessee was expected to be in full knowledge of its statutory obligation under the Act, that the failure of the knowledge or lack of advancement with computer technology was not a sufficient ground for not filing TDS returns.Finally,he imposed a penalty of Rs.1,68,500/- and Rs.99,200/- for filing the return late in Form No.24Q and Form No.26Q respectively.

3.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA).Before her,the assessee made the same arguments that were advanced before the AO.The FAA,referring to section 200(3) and 272(2)(k)of the Act,held that assessee's were required to file TDS return/statements in prescribed Form and in prescribed manner by the due date, that timely filing of TDS statement was an absolute necessity.With regard to the cases relied upon by the assessee the FAA observed that the same were distin - guishable on facts.Finally,he held that the lack of competency of accountant could not constitute a reasonable cause for filing TDS returns belatedly and upheld the order of the AO.

4.During the course of hearing before us, the Authorised Representative (AR) stated that TDS deducted was paid in time by the assessee that there was delay in filing the return, that it was a technical offence,that in subsequent years there

was no delay in filing the return/ statements.He referred to cases of H.M.T. Ltd. -Tractors Division(274 ITR 544);State Bank of Patiala (277 ITR 315); Harsiddh Constrctions Pvt.Ltd.(244ITR417);Schell Intl(278 ITR630)and Mahavir Agency (58ITD 396).The Departmental Representative (DR) supported the order of the AO and the FAA.

5.We have heard the rival submissions and perused the material before us. First of all we would like to take notice of the amendment dealing with various penal provisions.By the Taxation Laws(Amendment and Miscellaneous Provisions) Act,1986,section 273B was introduced in the Act.This section provides that no penalty shall be imposed under certain section if the assessee is able to prove that there was reasonable cause for the said failure.It is said that by reason of the rule of evidence provided in section 273B of the Act,imposition of penalty is dependent on the proof that there was no reasonable cause for the failure.In the matter of Capital Electronics(261 ITR 4),the Hon'ble Calcutta High Court has elaborated the concept further.From the said judgment it becomes clear that the omission of the particular phrase from the substantive law(sections 271/272)of the Act and incorporation thereof in the procedural law (section 273),bears the legislative intent to make the provision of various sections coercive instead of penal.It was held that the amendment was intended to remove the scope of any confusion with regard to the characteristics and nature of the proceedings the various provisions of the Act,that the word "may" had been used only to accommodate the procedural law enabling the assessee to prove that there was reason-able cause for the failure,that unless it was proved that there was reasonable cause for the failure,there was no escape from the imposition of penalty,that it is only when reasonable cause for failure was proved penalty could be avoided,that a combined reading of the sections 271/272 did not admit of any theory of absolute default in order to attract the mischief of those sections.

5.1. The concept that all penalties in civil matters assume quasi-criminal character has of late undergone a change. In fact, the question is dependent on the characteristic of the proceedings. A distinction has to be drawn between the two kinds of proceedings in order to ascertain whether the proceeding is a quasi-criminal one or simply a coercive method to secure compliance of a particular provision. If a penalty provided appears to be a provision for securing compliance by introducing coercive process it is something implicating a penal interest. If instead of penalty interest was payable, in that event, it would not assume the characteristic of quasi-criminal proceedings. Therefore, the nature of the proceeding has to be examined having regard to the context under which the liability is created.If the liability reveals a civil liability only to ensure compliance through a coercive manner, then it is definitely a civil liability without any criminal implication. But as soon as criminal liability is imposed by reason of default in compliance of a particular provision and there is some element of criminality involved in the default, the proceeding can be said to be a quasi-criminal one.The presence of the element of criminality is one of the factors that determines the question.Some of the basic principles regarding levy of penalty can be summarised as under:

i). Levy of penalties u/s.271/272 of the Act,is not automatic. In order to bring in application of those sections in the backdrop of the overriding non obstante clause in section 273B , absence of reasonable cause, existence of which has to be established, is a sine qua non. Before levying penalty, the AO is required to find out that even if there was any omission or commission on part of an assessee,the same was without reasonable cause. The initial burden is on the assessee to show that there existed a reasonable cause for the failure. Thereafter, the AO has to consider whether the explanation offered by the assessee or other person as regards the reason for failure, was on account of reasonable cause.

ii). The words “reasonable cause” in section 273B of the Act,must necessarily have a relation to the failure on the part of the assessee to comply with the requirement of the law which he had failed to comply with.In other words, reasonable cause in section 273B of the Act would mean cause which has nexus to the failure of the assessee to comply with the requirement of law.

iii). The question of venial or technical nature of breach would arise in those cases where the assessee under a bona fide belief may consider that a particular act is not required to be done or the act required to be done has in fact been done,but while doing so the defect of venial or technical nature has occurred.

iv). In the case of delay in compliance, the cause shown must be for the whole of the period of the delay and not merely for a part thereof. If the cause shown is such as to explain the delay as a whole and constitute a good reason for the non-compliance, no penalty would be leviable. However, in cases where the cause shown is such as to explain a part of the delay, or the cause shown is only to mitigate the gravity of the non-compliance, such a cause cannot be extrapolated and treated as being good cause for the whole of the period of the delay in its entirety.

v). Penalty will not be imposed merely because it is lawful to do so.Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

vi). In the case of Schell Intl (278 ITR630)the Hon'ble Court ,while dealing with a penalty matter,started its judgment stating that ignorance of law is no excuse but there is no presumption that everyone knows the law.

5.2. Now,we would like to refer to some of the matters dealing with the issue of reasonableness of cause.In the case of H.M.T. Ltd. -Tractors Division(supra),the assessee had deducted tax at source out of payments made to eight contractors. Under the provisions of section 203 of the Act,r.w.r.31 of the Income-tax Rules, 1962,it was required to issue tax deduction certificate in Form No. 16A to the said parties within the prescribed time. However, the said forms were issued late.The assessee was a branch of a Government of India undertaking having thousands of employees.It had to issue tax deduction certificates not only in respect of payments to eight contractors, but also to its employees and creditors in respect of tax deducted out of salary as well as interest.The assessee stated that the default was merely technical in nature as there was no loss of revenue involved at all and even the contractors had not raised any grievance about late issue of the certificates. This explanation did not find favour with the AO,who levied a penalty of Rs.1,03,900/-.The FAA cancelled the penalty but the order was restored by the Tribunal.On appeal,the Hon'ble P &H High Court held as under:

> *"………….the tax deducted at source had been paid in time and the necessary return in respect thereof was duly filed in time with the Income-tax Department. No loss of revenue had occurred on account of late issue of tax deduction certificates. None of the contractors had raised any grievance on account of late supply of the certificates.Keeping in view these facts and especially that the default was merely technical or venial in nature, penalty could not be imposed."*

In the case of Harsiddh constrctions Pvt. Ltd.(supra),it was found that the tax deducted at source under the provisions of section 194C of the Act,was deposited in the Government account well within the prescribed time. There was no loss of revenue but only a failure to forward the certificate and since the

Tribunal arrived at the conclusion that it was a bona fide mistake.Upholding the order of the Tribunal the Hon'ble High Court held that the Tribunal was justified in cancelling the penalty u/s.272A(2)(g) of the Act.

Facts of the matter of Schell Intl (supra)were that the assessee had taken up the production of the film called "Siyasat" during the financial years 1988-89 to 1992-93. Under the provisions of section 285B of the Act,he was required to file the statement in Form No. 52A for each of the assessment years within 30 days from the expiry of the financial year. As the assessee failed to submit the statement,notice was issued under section 272A.In response to the said notice, he explained that it was his first and last venture which had flopped and due to the ignorance of legal formalities, he could not submit the statements. After hearing, the AO imposed penalty.The Tribunal set aside the order of penalty. On appeal,the High Court held that the assessee was not aware that under the provisions of the Act,he was required to submit the statements within 30 days from the expiry of the relevant assessment year,that as soon as he got the show-cause notice, he submitted the statements,that no tax was due from him,that the explanation appeared to be reasonable,that the Tribunal was justified in quashing the order of penalty.

5.3 Finally,we would like to refer to the case of Superintendent of Police(349 ITR 550)P&H.In that matter the assessee quoted invalid permanent account numbers for 196 deductees. The error was due to wrong quoting of permanent account numbers by the deductees to the assessee. The assessee rectified the mistake by furnishing the correct permanent account numbers as soon as it came to its notice. The revised permanent account numbers and the revised statement were filed. The tax was deducted and deposited in time in the Government treasury. However,the AO levied the penalty u/s.272B of the Act.The FAA deleted the penalty on the ground that there was sufficient compliance with the provisions of section 139A.The Tribunal came to the conclusion that there was

sufficient cause on the part of the assessee and as such no penalty was leviable.Deciding the appeal,the Hon'ble Court held as under:

> *"……there was nothing to show that the findings recorded by the Commissioner (Appeals) and the Tribunal were erroneous in any manner. On appreciation of the entire matter, the Commissioner (Appeals) and the Tribunal examined the explanation of the assessee and came to the conclusion that there was sufficient cause shown which would be a question of fact in the given facts and circumstances.Thus, there was no substance in the argument raised by the Revenue that there was no reasonable cause on the part of the assessee to furnish inaccurate permanent account numbers in Form 24Q."*

After considering the,above what has to seen as to whether the reasons shown by the assessee for not furnishing the TDS returns in time fall within the exception of reasonable cause,as envisaged by the provisions of section 273B of the Act. It is not disputed that the assessee had not only deducted the tax but had also deposited the deducted sum in time.Thus,department had not suffered any revenue loss.It is also a fact that e filing of quarterly returns were introduced for the first time and therefore,if the staff of the assessee was not conversant with e-filing of documents it could be considered a reasonable cause for delay in filing retruns.The omission falls within the category of technical or venial nature of infrigment. Considering the facts and circumstances of the case under consideration,we are of the opinion that there was reasonable cause on part of the assessee for filing returns late. So, reversing the order of the FAA we decide the effective Ground of appeal in favour of the assessee.

ITA/4599/Mum/2014-(10-11)
ITA/4600/Mum/2014-(11-12)

6.The facts and circumstances for both the years are same as earlier year. So, following the order of that year effective grounds for both the years are decided in favour of the assessee.

As a result appeals filed by the assessee for all the three AY.s stand allowed.
फलतः निर्धारिती द्वारा दाखिल की गई तीनों नि.व.की अपीलें मंजूर की जातीं हैं.

Order pronounced in the open court on 27th July,2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 27 जुलाई, 2016 को की गई ।

Sd/-	**Sd/-**
(सी. एन. प्रसाद **/ C.N. Prasad**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 27.07.2016.
Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "E " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//
आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**