

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH
(Conducted Through Virtual Court)
Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 626/Ahd/2018
Assessment Year 2015-16

G.B. Builders, C-2, Jethabhai Park, Narayannagar Road, Paldi, Ahmedabad-380007 PAN: AAJFG0617N (Appellant)	Vs	ACIT-CPC(TDS), Ghaziabad (Respondent)
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Assessee by: Shri Hirak Shah, A.R.
Revenue by: Shri R.R. Makwana, Sr. D.R.

Date of hearing : 31-03-2022
Date of pronouncement : 25-04-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-8, Ahmedabad in Appeal no. CIT(A)-8/737/16-17 vide order dated 02/01/2018 passed for the assessment year 2015-16.

2. The assessee has raised following grounds of appeal:-

“The appellant, being aggrieved by order passed by CIT(A) 8, Ahmedabad dated 2-1-2018 confirming "Late filing levy" of Rs. 74,600 imposed by CPC while processing and passing rectification order dated 16-12-2015 u/s 200A, on following amongst other grounds :

1.1 The learned CIT(A) erred in not appreciating facts and merits of the case that the appellant, as a buyer, has first deposited entire TDS u/s 194IA and thereupon filed prescribed Form 26QB-cum-challan before due date on 24-11-2014, but inadvertently committed an error therein of depositing this TDS using PAN of the seller instead of PAN of the appellant (as the buyer)

1.2 The CIT(A) has omitted to consider cogent submissions on facts and merits of the case and dismissed the appeal solely on law issue

1.3 CPC imposed "Late filing levy" for delay of 373 days in filing amended Form No.26QB filed on 16-12-2015 without linking or considering date of first Form 26QB filed before due date on 24-11-2014

1.4 It is submitted that default committed is a technical one and there is no loss of revenue at any stage, since the appellant had deposited TDS of Rs.2,23,775 first on 24-11-2014 i.e. before date of

sale and again redeposited the same amount of TDS (together with interest of Rs.46,977) on 16-12-2015 with PAN of the appellant as a buyer for filing amended Form No. 26QB. It is submitted that there is no default u/s 234E if filing of date of original Form 26QB is treated as a cause of action for reckoning default thereunder

1.5 It is submitted that "Late Filing Levy" of Rs. 74,600 is imposed u/s 200A without specifying section whereunder it is levied and in any case beyond scope of permissible adjustment then in force thereunder

1.6 It is, therefore, submitted that lenient view be taken and late filing levy of Rs.74,600 be cancelled.

The appellant craves leave to add, to alter and/or to amend all or any of the grounds of appeal."

3. The brief facts of the case are that the assessee has purchased an immovable property from Mrs. Lilavati Jhaveri (seller) for a sum of Rs. 2,23,77,500/- by a registered sale deed on 25-11-2014. The assessee deducted tax u/s. 194-IA of the Act @ 1% amounting to Rs. 2,23,775/- and deposited the same with the Government before due date on 24-11-2014. However, at the time of filing TDS challan cum statement (form 26QB), the assessee inadvertently mentioned Mrs. Jhaveri's PAN under the buyer's column and assessee's PAN was incorrectly captured under the seller's column, as a result of which the seller Mrs. Jhaveri did not get credit of TDS deposited by the assessee u/s. 194-IA of the Act in the form 26AS

downloaded by Mrs. Jhaveri (seller). The assessee approached the Id. jurisdictional Assessing Officer and also the TDS officer who advised that in absence of any CBDT instructions/Circulars to enable such rectification, he may consider again depositing the TDS amount of Rs. 2,23,775/- since the seller (Mrs. Jhaveri) was also pressuring for on-line confirmation of TDS credit in form 26AS. In order to settle the controversy, the assessee again deposited TDS amount of Rs. 2,23,775/- together with interest of Rs. 46,977/- payable for 14 months on 16-12-2015. The assessee deposited the said amount and filed revised form 26QB on 16-12-2015. The CPC, Ghaziabad processed revised form 26QB filed on 16-12-2015 u/s. 200(A)(1) and on 07-02-2016 raised a demand of late fee of Rs. 74,600/- u/s. 234E of the Act for default in furnishing statements. The assessee filed appeal against levy of late filing fee of Rs. 74,600/- u/s. 234E with Id. CIT(A).

4. In appeal, the Id. CIT(A) dismissed the assessee's appeal by observing as under:-

"5. I have perused the facts of the case. I have perused the case laws relied on by appellant. After careful consideration of facts, submission and contention of both AO as well as of appellant, ground wise adjudication is as follows:

6. Briefly stated the issue in the appeal is that provisions of sub section 3 of Section 200 of the income Tax Act, 1961 (hereafter referred to as " the Act") require any person deducting tax at source to prepare the prescribed statement and deliver or cause to be

delivered the same to the prescribed Authority within the given time, the forms for such statements are prescribed in Rule 31A of the income Tax Rules, 1962. Section 200 A of the Act enumerates the manner of processing of such statements and section 234E of the Act inserted by Finance Act,2012 w.e.f. 1.6.2012 provides for levy of fees for default in furnishing the statements under sub section 3 of section 200 of the Act. In section 200A which deals with processing of the Statements prescribed the specific provision for levy of fee under section 234E was inserted w. e. f. 1.6. 2015. The main grievance of the appellant is that though section 234E came into effect w.e.f. 1.6. 2012 but since the enabling provision for computation of fee while processing the statements was inserted in Section 200A w.e.f. 1.6.2015 only the charging section i.e. section 234 E cannot be enforced prior to 1.6.2015.

6.1 Recently, the Hon'ble High Court of Gujarat in the case of Rajesh Kourani vs. Union Of India (2017) 83 taxmann.com 137 (Gujarat) have comprehensively dealt with the issues arising in the present appeal . On the ground of the appellant that the provisions of section 234E cannot be applicable prior to 01.06.2015 i.e. the date w.e.f. the provision was inserted in section 200A of the Act, The Hon'ble jurisdictional High Court in the case of Rajesh Kourani (supra) held the following:

“19. In plain terms, section 200A of the Act is machinery provision providing mechanism for processing a statement of deduction of tax at source and for making adjustment, which are as noted earlier,

arithmetical or prima-facie in nature. With effect from 01.06.2015, this provision specifically provides for computing the fee payable under section 234E of the Act. On the other hand, section 234E is a charging provision creating a charge for levying fee for certain default in filing the statements. Under no circumstances a machinery provision can override or overrule a charging provision. We are unable to see that section 200A of the Act creates any charge in any manner. It only provides a mechanism for processing a 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 been necessary to have yet another provision creating the same charge. Viewing section 200A as creating a new charge would bring about a dichotomy. In plain terms, the provision in our understanding 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.

20. Even in absence if section 200A of the Act with introduction of section 234E, it was always open for the Revenue to demand and collect the fee for late filing of the statement. Section 200A would merely regulate the manner in which the computation of such fee would be made and demand raised. In other words, we cannot subscribe to the view that without a regulatory provision being found for section 200A for computation of fee, the fee prescribed under section 234E cannot be levied. Any such view would amount to a charging section yielding to the machinery provision. If at all, the recasted clause (c) of sub section (1) of section 200A would bein

nature of clarificatory amendment. Even in absence of such provision, as noted, it was always open for the Revenue to charge the fee in terms of section 234E of the Act.

27. counsel for the petitioner however, referred to the decision of Supreme Court in case of CIT v. B. C. Srinivasa Setty [1981] 128 ITR 294/5 Taxman 1 (SC), to contended that when a machinery provision is not provided, the levy itself would fail. The decision of Supreme Court in case of B C Srinivasa Setty (supra) was rendered in entirely different background. Issue involved was of charging capital gain on transfer of capital asset. In case on hand, the asset was in the nature of goodwill. The Supreme Court referring to various provision concerning charging and computing capital gain observed that none of the these provisions suggest that they include an asset in the acquisition of which no cost can be conceived. In such a case, the asset is sold and the consideration is brought to tax, what is charged is a capital value of the asset and not any profit or gain. This decision therefore would not apply in the present case. "

6.2 As the issue in ground of appeal and in the submission made in the present case is squarely covered by the judgment of Hon'ble High Court of Gujarat in the case of Rajesh Kourani (supra), respectfully following the same, I am not inclined to accept the appellant's contentions and accordingly, the action of the AO levying fee u/s.234E is hereby upheld.

7. In the, the appeal fails and is dismissed.

5. Before us, Ld. Counsel for the assessee submitted that section 234E, providing for "Fee for default in furnishing TDS Statement" was enacted w.e.f. 1-7-2012 and since there was then admitted legal lacuna as to lack of jurisdiction for imposing levy thereunder, several Hon'ble High Court orders struck off such levy and therefore the Central Government, realizing and admitting the legal drafting lacuna, took curative action and enacted sub-clause (c) to (f) to section 200A(1). The enabling sub-clause (c) to (f) to section 200A(1) in respect of Late Filing Levy u/s 234E were enacted by Finance Act 2015 w.e.f. 1-6-2015. Ld. Counsel for the assessee submitted that in the instant case, the chargeable transfer of immovable property had taken place on 25-11-2014 and appellant had filed original Statement 26QB with TDS deposit on 24-11-2014 i.e. much before enactment of enabling section 200A(1) (c) which came into effect from 1-6-2015. The fact that rectified Statement 26QB was filed on 16-12-2015 would not render enactment in section 200A (introduced w.e.f. 1-6-2015) to apply retrospectively to TDS deposited on 25-11-2014 and cannot be invoked to levy considerable punitive liability of Rs. 74,600. He relied on the decision of **Omkar Saran 195 ITR 1(SC)** where it has been a settled ratio that the law applicable would be on the date on which the return of income is filed and not on the date on which return was revised or the penalty order is passed. Ld. Counsel for the assessee submitted that substantive provisions of section 194-IA have been fully complied with during November, 2014 i.e. before due date but only due to one technical lapse in filling up this Form No. 26QB on 24-11-2014, the appellant was required to make good again TDS shortfall with huge interest charge on 16-12-2015. In any case the Department is not at revenue loss, since it has already received TDS fund of

Rs. 2,23,725 on 24-11-2014 (which was later refunded much after the corrected Statement 26QB was filed on 16-12-2015) and that the refund of duplicate TDS was granted without allowing interest for late deposit. Ld. Counsel for the assessee also relied on the on decision of the Kerala High Court in the case of **Olari Little Flower Kuries (P.) Ltd. v. UOI [2022] 134 taxmann.com 111 (Kerala)** which distinguished the above Gujarat High Court decision and held that Provisions of section 200A were amended to enable computation of fee payable under section 234E at time of processing of return and said amendment came into effect from 1-6-2015, thus, intimations issued under section 200A dealing with fee for belated filing of TDS returns for period prior to 1-6-2015 were invalid. In response, the Ld. Departmental Representative relied on the observations made by Ld. CIT(A) in the appeal order.

6. We have heard the rival contentions and perusal the material on record. We note that in the present facts, the assessee had initially deposited the entire TDS in respect of purchase of immovable property on 24-11-2014 u/s 194-IA of the Act i.e. within the due date from purchase of immovable property. Due to certain technical error committed (incorrect interchanging of PAN numbers of buyer and seller in online filing of Statement 26QB), the seller could not get credit of TDS and later, on the advise of Revenue authorities again the buyer (the assessee) paid the TDS again amount along-with interest for late deposit. The CPC, Ghaziabad processed revised form 26QB filed on 16-12-2015 u/s. 200(A)(1) and on 07-02-2016 raised a demand of late fee of Rs. 74,600/- u/s. 234E of the Act. In appeal, the Ld. CIT(A), mechanically relied upon the jurisdictional High Court decision in

the case of Rajesh Kourani vs. Union Of India (2017) 83 taxmann.com 137 (Gujarat) to uphold levy of late filing fee of Rs. 74,600/- u/s. 234E of the Act for late filing of TDS statement. However, in our considered view, the issue for consideration in Rajesh Kourani case *supra* and the issue for consideration in the assessee's case are different. The Gujarat High Court in the case of Rajesh Kourani *supra* held that section 234E is a charging provision creating a charge for levying fee for certain defaults in filing statements and fee prescribed under section 234E and could be levied even without a regulatory provision being found in section 200A for computation of fee. The assessee is not disputing that at the time of filing of revised Form 26QB on 16-12-2015, s. 234E of the Act (which came into effect from 01-06-2015) was in force and in effect. The issue for consideration is when the assessee had initially deposited TDS u/s 194-IA of the Act and accordingly filed TDS statement within due date from time when the immovable property was transferred, but committed a technical default while filing the TDS Statement resulting into non-grant of TDS credit, compelling the assessee to again deposit TDS along-with interest, can the assessee be penalized for late filing of revised TDS Statement u/s 234E of the Act. In our considered view, the Ld. CIT(A) has not taken a judicious view of the matter while upholding levy of late filing fee of Rs. 74,600/- u/s. 234E of the Act in the particular facts of the case. The Ld. CIT(A) did not take into consideration the peculiar facts and circumstances of the instant case, where the assessee had initially deposited TDS u/s 194-IA of the Act on purchase of immovable within due date on 24-11-2014. Due to a technical error, since the seller could not get credit of TDS deposited in the initial deposit, on the advise of Revenue Authorities, the assessee had again deposited TDS along-

with late filing interest Rs. 46,977/- payable for 14 months on 16-12-2015. Ld. CIT(A) also did not appreciate that had the assessee at the time of initial deposit of TDS mentioned the correct PAN numbers i.e. had the assessee not committed the aforesaid technical error, there would have been no question of levy of interest u/s 234E of the Act. The Ld. CIT(A) also did not take cognizance of the fact that in the facts of the case, there was no loss caused to the Revenue. While, respectfully following the jurisdictional High Court in the case of Rajesh Kourani *supra*, we are also of the view that machinery provisions cannot override the substantive provisions, but in the instant facts, the issue for consideration and facts before us are different as compared to Rajesh Kourani case (*supra*), on which reliance has been mechanically placed by Ld. CIT(A). It is a settled law as held by the Hon'ble Gujarat High Court in the case of **Rajkot Engineering Association v. UOI [1986] 26 Taxman 60 (Gujarat)** that the Revenue authorities should adopt a judicial approach and consider all attendant circumstances. Again, the Gujarat High Court in the case of **Trust For Reaching The Unreached Through Trustee v. Commissioner of Income Tax (Exemptions), Ahmedabad[2021] 126 taxmann.com 77 (Gujarat)** has stressed the need for the Revenue Authorities taking a judicious approach. The Gujarat High Court in the case of **Sarvodaya Charitable Trust v. ITO 2021] 125 taxmann.com 75 (Gujarat)** held that the approach of the authorities should be justice oriented so as to advance the cause of justice. The Gujarat High Court in the case of **CIT v. Gujarat Oil and Allied Industries Ltd. [1993] 201 ITR 325 (Guj.)**, took the view that the benefit of exemption should not be denied merely on account of delay in furnishing the same and it is permissible for the assessee to produce the audit report at a later stage

either before the Income-tax Officer or before the appellate authority by assigning sufficient cause. In view of various authorities cited above, we are of the considered view that Ld. CIT(A) did not consider the facts and attendant circumstances of the case while upholding levy of penalty u/s 235E of the Act. Once the assessee has initially deposited TDS and furnished Statement in Form 26QB within time, but committed a technical error while depositing TDS resulting in non-grant of TDS to transferor, compelling it to again deposit TDS along-with interest for late deposit, then, in the interests of justice and considering the fact that no loss is caused to the Revenue, the assessee cannot be saddled with levy of late filing fee u/s 234E of the Act, taking a judicious view of the matter. In result, we hold that Ld. CIT(A) has erred in law and in facts in upholding levy of penalty u/s 234E of the Act.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 25-04-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 25/04/2022

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद

SAG