IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.181/Mum./2020
(Assessment Year : 2015–16)

ITA No.182/Mum./2020
(Assessment Year : 2016–17)

Govershan Venture Pvt. Ltd.
Shop no.19/Am Sai Classic CHS
90 Feet Road, Opp. Sabnis Hospital ……. Appellant
Mulund (East), Mumbai 400 081
PAN – AALCS3976P

v/s

Asstt. Commissioner of Income Tax
Centralized Processing Centre – TDS ……. Respondent
Ghaziabad

Assessee by : None
Revenue by : Shri Hoshang B. Irani

Date of Hearing – 03.03.2022	Date of Order – 13/04/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee against separate orders dated 22.10.2019, passed by the learned Commissioner of Income Tax (Appeals)–1, Mumbai ("*learned CIT(A)*"), for the assessment year 2015-16 and 2016–17.

2. Both these appeals involve identical issue and, therefore, these appeals were heard together and are being disposed off by this common order.

3. During the course of hearing before us, neither anybody appeared on the side of the assessee nor filed any written submissions. On a perusal of the record, it is observed that this case was listed for hearing on four prior occasions and none appeared on behalf of the assessee. Therefore, we are proceeding to hear the matter on the basis of submissions made by the learned Departmental Representative ("*learned D.R"*) and the material available on record.

4. The only issue arising in these appeals is, whether fee under section 234E of the Act can be levied while processing of statements of tax deducted at source under section 200A(1) of the Act for the period prior to 1st June 2015, and thus whether clause (c) to section 200A sub–section (1) of the Act, as substituted by Finance Act, 2015, is retrospective in nature.

5. The brief facts of the case are: The assessee filed its quarterly TDS statement in Form no.26Q (Quarter–1 to Quarter–4 for F.Y. 2014–15) and in Forms no.24Q and 26Q (Quarter–1 for F.Y. 2015–16) late for which Income Tax Officer (TDS), Kalyan, had imposed the late filing fee under section 234E of the Act as per the details mentioned below:–

FORM	*F.Y.*	*QTR*	*Due Date*	*Date Of Filing*	*Late Filing Fee u/s 234E*
A.Y. 2015–16					
26Q	*2014–15*	*Q1*	*15.07.2014*	*30.09.2015*	*56,382*
26Q	*2014–15*	*Q2*	*15.10.2014*	*30.09.2015*	*69,800*
26Q	*2014–15*	*Q3*	*15.01.2014*	*30.09.2015*	*51,600*
26Q	*2014–15*	*Q4*	*15.05.2015*	*30.09.2015*	*27,600*
				Total:	*2,05,382*

FORM	*F.Y.*	*QTR*	*Due Date*	*Date Of Filing*	*Late Filing Fee u/s 234E*
A.Y. 2016–17					
26Q	*2015–16*	*Q1*	*15.07.2015*	*15.10.2016*	*45,749*
24Q	*2015–16*	*Q1*	*15.07.2015*	*15.10.2016*	*45,000*
				Total:	*90,749*

6. Aggrieved with the levy of interest under section 234E of the Act vide intimation under section 200A of the Act, the assessee preferred separate appeals before the learned CIT(A). Vide separate impugned orders dated 22.10.2019, the learned CIT(A) by treating the amendment to section 200A sub–section (1) of the Act, whereby clause (c) was substituted by the Finance Act, 2015, w.e.f. 1st June 2015, as retrospective, dismissed the appeals filed by the assessee.

7. The learned D.R. vehemently relied on the order passed by the lower authorities.

8. We have considered the submissions of the learned D.R. and perused the material available on record. Section 234E of the Act provides for levy

of fee for default in furnishing any statement within the time prescribed in section 200(3) of the Act or proviso to section 206C(3) of the Act. Section 234E of the Act was inserted by Finance Act, 2012. Simultaneously, section 271H of the Act was also inserted in the Act providing for penalty for default in furnishing aforesaid statements or furnishing incorrect information in such statements. Further, section 200A of the Act deals with the provisions for processing of statements of tax deducted at source. Till substitution, inter–alia, of clause (c) to section 200A(1) by Finance Act, 2015, w.e.f. 1st June 2015, there was no provision in section 200A(1) for levy of fee, if any, computed in accordance with the provisions of section 234E of the Act. It is only after the aforesaid amendment w.e.f. 1st June 2015, clause (c) to section 200A sub–section (i) was substituted to provide as under:–

> *"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) ……*
> *(b) ……*
> *(c) the fee, if any, shall be computed in accordance with the provisions of section 234E;"*

9. The issue whether clause (c) of section 200A(1), as substituted by Finance Act, 2015, w.e.f. 01.06.2015, whereby the A.O. was enabled to compute the fee under section 234E of the Act while processing of statement of tax deducted at source, is prospective in nature has came up

for adjudication before the Hon'ble High Courts of various States. The first decision was rendered by the Hon'ble Karnataka High Court in Fatheraj Singhvi v/s Union of India, [2016] 73 taxmann.com 252 (Kar.), whereby the Hon'ble High Court held that such an amendment is prospective in nature and thus intimation issued under section 200A of the Act for computation and intimation of payment of fee under section 234E of the Act relating to the period of tax deduction prior to 01.06.2015 was not maintainable, by observing as under:–

> *"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."

10. However, the Hon'ble Gujarat High Court in Rajesh Kourani v/s Union of India, [2017] 83 taxmann.com 137 (Guj.), did not concur with the views expressed by the Hon'ble Karnataka High Court in Fatheraj Singhvi (supra), and held that the aforesaid amendment by Finance Act, 2015, w.e.f. 01.06.2015, is retrospective in nature.

11. Recently, the Hon'ble Kerala High Court had an occasion to deal with this issue in Olari Little Flower Kuries Pvt. Ltd. v/s Union of India, [2022] 134 taxmann.com 111 (Ker.), wherein the Hon'ble Kerala High Court had taken into consideration both the aforesaid decisions passed by the Hon'ble Karnataka High Court as well as Hon'ble Gujarat High Court. The Hon'ble Kerala High Court concurring with the decision passed by the Hon'ble Karnataka High Court in Fatheraj Sanghvi (supra) held that the provisions of section 200A of the Act as amended by Finance Act, 2015, enable

computation of fee payable under section 234E of the Act at the time of processing of statement of TDS, is prospective in nature from 01.06.2015 and thus intimation issued under section 200A of the Act dealing with the fee under section 234E for belated filing of TDS return for the period prior to 01.06.2015, are invalid.

12. We find that the Co–ordinate Bench of the Tribunal in Permanent Magnets Ltd. v/s DCIT, ITA no.6436 to 6442/Mum./2018, order dated 07.08.2019, following the aforesaid decision of the Hon'ble Karnataka High Court in Fatheraj Sanghvi (supra) directed deletion of fee under section 234E of the Act levied vide intimation under section 200A of the Act for the period prior to 01.06.2015.

13. It is well established that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. : CIT v/s Vegetable Products Ltd. [1973] 88 ITR 192 (SC)

14. Thus, respectfully following the aforesaid decision of the Hon'ble Karnataka High Court in Fatehraj Singhvi (supra) which was also concurred by the Hon'ble Kerala High Court in Olari Little Flower Kuries Pvt. Ltd. (supra), the impugned orders passed by the learned CIT(A) is not sustainable and the late fee levied under section 234E vide intimation issued under section 200A of the Act, for the period prior to 01.06.2015, is directed to be deleted for the assessment years under consideration in present appeals.

15. In the result, appeals by the assessee are allowed in terms of our aforesaid findings.

Order pronounced in the open court on 13/04/2022

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 13/04/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai