आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL, CUTTACK BENCH, CUTTACK

(समक्ष)Before माननीय श्री के. के. गुप्ता, लेखा सदस्य, एवं/and
Hon'ble Shri K.K.Gupta, Accountant Member.
माननीय श्री के.एस्.एस्.प्रसाद राव, न्यायिक सदस्य
Hon'ble Shri K.S.S.Prasad Rao, Judicial Member

आयकर अपील संख्या / I.T.A.No. 91/CTK/2013

निर्धारण वर्ष / Assessment year 2009-10

The Branch Manager (TDS), UCO Bank,Ganeswearpur, Januganj, Balasore PAN: AAACU 3561 B	-वनाम- -Versus-	Adl.CIT (TDS) , Bhubaeswar.
(अपीलार्थी/APPELLANT)		(प्रत्यर्थी/RESPONDENT)

अपीलार्थी की ओर से/ For the Appellant: श्री/Shri S.N.Sahu/D.Mohapatra, AR

प्रत्यर्थी की ओर से/For the Respondent: श्री/Shri N.K.Neb, DR

सुनवाई की तारीख / Date of hearing:	06.03.2013
घोषणा की तारीख / Date of pronouncement:	11.03.2013

आदेश/ORDER

श्री के. के. गुप्ता, लेखा सदस्य,
Shri K.K.Gupta, Accountant Member. This appeal by the assessee raises the following grounds.

"1. That the exparte order passed by the learned CIT(A) vide his order dated 24-12-2012 in appeal No. 0569/2010-il is illegal, arbitrary, uncalled for and without any basis.

2. That the penalty imposed by the Additional CIT (TDS), Bhubaneswar u/s. 272A(2)(k) of the I.T. Act, 1961 vide his order dated 06-01-2011 amounting to Rs. 3,00,900/- being illegal, arbitrary, uncalled for and against the facts on record and the learned CIT(A) should have quashed the same.

3. That the explanation to show cause notice should have been considered by the learned Additional CIT (TDS) judicially and in accordance with law and hence the learned CIT(A) should have considered the same and he is not justified in dismissing the appeal.

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4. That the statement of facts and grounds of appeal before the CIT(A) may kindly be considered as a part of this grounds of appeal.

5. That the taxes having been deposited the authorities below should have taken a liberal view as it is a quasi criminal proceeding and the question of mens rea is involved."

2. At the outset the learned Counsel for the assessee contended that the issue stands covered in favour of the assessee by various decisions of the Tribunal which have been brought on record for the consideration of penalty levied u/s.272(2)(k). He submitted that the assessee is a Nationalize Bank. In compliance to the show cause notice issued by the ACIT(TDS), the assessee stated as follows :

> "Ours is a rural branch and TDS filing is done by us through branch at Balasore. It is a distance place from Balasore. TDS is deposited on due date. We personally go and file TDS at Balasore. This is a very busy Branch and we have no adequate staff in comparison to the volume of business. Due to shortage of staff and heavy pressure of work, sometimes delay occurs in filing the E-TDS within the due date". More so, the PAN Nos of the deductees are not furnished by our business constituents / on whose behalf TDS is made. For lack of information of PAN Nos , the filing of return is also delayed".

Further, the Branch Manager explained that he has joined only two months back. Due to different problems like the one stated above, the then Managers were unable to file return, within the due date. The challans are deposited through their Balasore Branch in time. Thus the circumstances under which the default occurred were explained. But though the returns are not filed in time, but Tax Deducted have been deposited. The ACIT(TDS) did not consider the above explanation and levied the impugned penalty u/s.272(2)(k) of the I.T.Act,1961.

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3. Aggrieved the assessee appealed before the first appellate authority, who having confirmed the same the assessee is in appeal before the Tribunal.

4. The learned Counsel for the assessee reiterated the submissions as were made before the authorities below by submitting that though the ignorance of law is of no excuse, still then actual fact is that may it be Bankers or Govt. Officers, the people or the employees are still in learning stage so far as computerized system of filing is concerned and the E-Banking services have not been fully developed. Staffs are yet to be acquainted with the provisions of I.T. Laws Visa-a-Vis computerized system, that to in rural areas it is under developed. The default is not deliberate or intentional there is no malafide intention or taint in it. In the matters of penalty proceeding always "mensrea" has to be taken into consideration. Here in this case there is no element of fraud or willful neglect. More so, the present Branch Manager was not there when the default was committed. Notice for show cause should have been made to the then Branch Manager, who could explain the default. It is no doubt a bonafide mistake. It is a settled law that an order imposing penalty for failure to carry out a statutory obligation is result of a quasi criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation. Penalty will not be levied merely because it is lawful to do so [Hindustan Steel Vs. State of Orissa, 83 ITR 26 (SC)]. The learned Counsel for the assessee submitted that the provision of I.T. Law in Sec. 272A(2)(k) of the I.T. Act, 1961 is so much complicated with so many provisions that it is very difficult to understand even for a person

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professionally dealing with it. From bare reading of the penalty order, it is apparent that though the Learned Additional Commissioner of Income Tax (TDS), Bhubaneswar has mentioned that deductor's submission has been carefully considered but in fact he has not considered at all. It is settled law that the authority is duty bound to examine the points raised by the parties record definite conclusions of each one of them. It has to indicate reasons in support of its conclusions (A. Venkat Rao - Vrs- CIT 203 ITR 64 (Orissa). Not doing so, his order is illegal and has become a nullity.

4.1. He continued that the assessee the petitioner has already filed the default returns and therefore the matter has been regularized. The amount of TDS due has already been deposited with the Central Government Treasury account on due date. The learned Counsel for the assessee contended that it is a matter concerning a Nationalized Bank and nobody's personal affairs are involved. The non-compliance to the statutory obligation was not with any malafide intention or taint. Law is well settled that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding. Therefore, penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will also not be levied only because it is lawful to do so [Hindustan Steel Ltd. Vs. State of Orissa (972) 83 ITR 26 (SC)]. In view of the above, the learned Counsel for the assessee submitted that the assessee being a Nationalised Bank the question of any such malafides does not arise. Further, he submitted that the assessee could not collect the details of PAN Nos. for all the deductees. There are only technical breach. Assessee did not derive any benefit what so ever by not

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filing the quarterly TDS return in time as the amount of T.D.S. was duly deposited in the Govt. Treasury to the credit of the Govt. In view of the above, he contended that the act of the assessee cannot be said to be intentional and willful and therefore, penalty should not have been levied because the assessee was prevented by sufficient cause. Non filing of statement does not result in any Revenue loss.

4.2. Concluding, the learned Counsel for the assessee submitted that under similar circumstances penalty have been deleted. He relied on the following decisions.

1) Branch Manager, Punjab National Bank Vs. Additional Commissioner of Income Tax (2011) 140 TTJ 622(Lucknow).

2) Garrision Engineer (I) R & D, Chandipur, Balasore Vs. Additional Commissioner of Income Tax (TDS), Bhubaneswar, Order dated 22-02-2013, I.T.A.T. Cuttack Bench Cuttack.

4.3. The learned Counsel for the assessee prayed for cancellation of the impugned penalty levied u/s.272(2)(k) of the I.T.Act.

5. The learned DR opposed the contention of the learned Counsel for the assessee. He submitted that as per the noting for levy of penalty u/s.272A(2)(k), the ACIT(TDS) had received information from the ITO(TDS), Balasore pressing initiation of penalty insofar as he has levied penalty till the date of the penalty order when no purported returns in accordance with the provisions of Section 200(3) had been filed which attracts penalty not because the purported assessee has tried to state its inability due to shortage of staff or incompetent to file such return. The law does not acknowledge such defaults insofar as the Rules for such e-filing was made in 2005 and the matter relating to the Finance Year 2008-09 ought to have

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been complied when the order for levy of penalty is dt.6.1.2011. He fully supported the order of the learned CIT(A) confirming the penalty insofar as the learned CIT(A) has taken into consideration that the assessee could not be considered under the provisions of Section 273 as well on the facts and circumstances of the case.

6. We have heard the rival parties and perused the material available on record. On our careful consideration of the facts and circumstances of case as brought on record by the authorities below, we are inclined to find that the penalty has been levied unilaterally by the ACIT(TDS) on the proposal of the ITO (TDS), Balasore who has not bothered to find out whether the banks are to file such statements insofar as he has computed the penalty @Rs.100 per day whether was equal to or more than the tax deducted at source which amount was to be penalized in accordance with the provisions of the said Section. The learned Counsel for the assessee before us has produced the purported statements filed u/s.200(3) for the impugned financial year which have been uploaded by the franchise on 27.11.2009 on a single day for all the four quarters indicating that the particulars reported by the deductor were uploaded even without obtaining the PANs of the deductees. In other words, it has been established that the contention of the Department to correlate the deductees claim vis-à-vis the information submitted by the assessee under the provisions of Section 272(2)(k) were to be related to the ITO(TDS), Balasore as submitted by the learned DR. It was automatic therefore the basic requirement of uploading was available on Form AS-26 which changed in accordance with the PANs obtained at any point of time was known to the Department when the delay in filing such statements was in relation with the levy of penalty. We had occasions to deal with such similar issue in the case of Garision Engineer (I) R & D v. ACIT (TDS) in ITA

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No.69/CTK/2013,wherein the penalty levied u/s.272A(2)(k) was deleted. We have also decided a group of cases of different assessees in the consolidated order passed in ITA Nos.111,97,86,87,88,75 and 67/CTK/2013,the relevant portion of which is reproduced below.

> "3. We have heard the contentions of the rival parties at length. We do find that the penalty so levied by the respective AOs and confirmed by the learned CIT(A) appears to be leaning more on holding assessees in default for such penalty as a mechanical/automatic levy insofar as it is the Department itself, who has insisted the e-filing of such returns as late as making the respective assessees literate about the data to be uploaded on the basis of tax deducted at source already given credit to by the I.T. Department on the basis of TDS certificates furnished by the respective assessees namely the deductees. The bonafide is established beyond doubt when the very fact that the quarterly returns for more than four quarters and less than eight quarters were filed simultaneously on the same date when assuming but not accepting that the assesses in default become suddenly computer literate. We have also considered the submissions of the learned DR that the filing of quarterly statement was in favour of the assessee on the basic connotation that the deductees would only be given credit to such deduction of tax at source once the e-filing by the deductor was on-time not requiring penalty @Rs.100 per day as have been put forth by the Assessing Officer and confirmed by the learned CIT(A) indicating that the provisions of such default is liberal to the extent that the amount so deducted and

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credited to the Government account was not to be more than the penalty so levied. This clearly indicates that the case-laws as submitted by the learned Counsel of the assessees before us indicates that there is no loss to the Revenue for attracting or levy of such penalty. ITAT, Cuttack Bench, in the case cited above, had clearly held that once the amount is deducted by identifying the deductee it was on the basis of obtaining the PAN of the deductee without which the information could not be uploaded in the electronic media which software was only available to the franchisees outsourced by the Department or the NSDL being the apex Nodal Agency. The learned DR has insisted that the proviso to Rule 31-A of the I.T.Rules clearly indicate that the penalty was ripe for levy not because the insistence of the Department on respective assessees to e-file it on a particular date for calculating nymber of days the default continues. We are unable to consider the proposition of the learned DR insofar as the Department itself was handicapped as the bonafide of the assessees has been established in the negative way as they would have filed the hard-copy of the quarterly statements which the Department refused to acknowledge. Therefore, the computer generated number for acknowledging such receipt of such statements was not in the hands of the assessees insofar as the generation of that number would have never occurred till such time the PANs and the information available on AS-26 would have been tallied by the computer system itself. We have been submitted that it was not the case that the assessees were in default not being computer

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literate their principal officers who have been held responsible for such late filing of the quarterly statements was an administrative glitch. It was not in the interest of the Government employee to hold back the information which they have already gathered insofar as they are now being governed by the computer which software has its own filters for accepting the quarterly statements for which the assessees in default have not maintained any record to establish that efforts were made by them to reduce the time delay in filing such statements. Concluding, we observe that it is only a question of delayed filing of the e-TDS quarterly return, which was entrusted to an authorized service provider and the delay has occurred unintentionally. The assessees deductors are law compliant and the delay occurred only due to the reason that the assessees deductors are dependent on information of TDS and its deposit from the sub treasury of the Government and filing of e-return through the designated service provider of Income-tax Department. The assessees deductors have no technical competency to file the return by themselves without external aid. The assessees are also not competent to do so by themselves as per rule 37B and "Filing of Return of Tax deducted at source" scheme 2003, which requires the submission of quarterly statement through NSDL or other approved agencies i.e third party, not under the control of the assessees. There is neither any willful negligence nor any malafide on the part of the assessees in the matter of compliance and the delay was due to reasonable cause, the

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default being beyond the control of the assessees deductors. It is at best a technical or venial breach of the provisions of the act or where the breach flows from a bonafide belief that the assessee is not liable to act in the manner prescribed by the statute. The penalty u/s 272(A)(2) cannot be levied in a routine manner. Law is well settled that a bonafide breach cannot lead to a penalty u/s. 272(A) [Hindustan Steel Ltd. Vrs. State of Orissa (1972) 83 ITR 26 (SC)]. In the present case of the respective assessees either Government bodies or aided by Govt., are public office and since the tax deduction and payment are made by treasury and there is undisputedly no default. There arises no reason for non-filing of TDS return with an intentional act or willful act to attract a quasi-criminal, imposition of penalty. The assessees have relied on the decisions of the honorable High Court of Rajsthan in the case of CIT Vrs. Superintendent Engineer [2002] 177 CTR (Raj) 586 and the decision of ITAT, Mumbai Bench in the case of Royal Metal Printers Pvt. Ltd. Vrs. Asst CIT [2010] 37 SOT 139(Mum) and the decision of ITAT, Cuttack Bench in the case of Garrision Engineer (I) R & D, Chandipur, Balasore Vrs. The Addl. Commissioner of Income Tax (TDS), Bhubaneswar (supra), wherein it has been clearly held that for such technical or venial breach supported by reasonable cause, penalty under section 272(A)(2) is not leviable and imposition of penalty is not justified for the reason that it was for the first time the requirement to convert the hard-copy into soft-copy was to be learnt by respective Government DDOs from the department

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officials. There is reasonable cause for delay in filing ETDS return U/s 273B. Considering the facts and circumstances of the cases in its entirety, we are of the considered view that the penalty so levied in the case of the respective assessees are not all justified. We, therefore, cancel the penalty levied u/s.272A(2)(k) for the respective assesses for the respective AYs as captioned in the cause title of this order by allowing the appeals under consideration. In consequence thereof, the respective Stay Petitions become infructuous."

Consistent with the view taken therein on very much similar facts and circumstances as are in the present case at hand, we hold that the impugned penalty levied u/s.272A(2)(k) against the assessee is not justified and as such we cancel the same by allowing the appeal of the assessee.

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

Sd/-
(के.एस्.एस्.प्रसाद राव), न्यायिक सदस्य
(K.S.S.Prasad Rao), Judicial Member

Sd/-
(के. के. गुप्ता), लेखा सदस्य,
(K.K.Gupta), Accountant Member.

(तारीख)Date: 11.03.2013
(हरेकृष्ण पाढी), वरिष्ठ निजी सचिव
(H.K.Padhee), Senior.Private Secretary.

आदेश की प्रतिलिपि अग्रेषितः-
Copy of the order forwarded to:

1. अपीलार्थी / The Appellant : The Branch Manager (TDS), UCO Bank,Ganeswearpur, Januganj, Balasore
2. प्रत्यर्थी / The Respondent: Adl.CIT (TDS) , Bhubaeswar.
3. आयकर कमिशनर/The CIT,
4. आयकर कमिशनर (अपील)/The CIT(A),
5. वभागिय प्रतिनीधी /DR, Cuttack Bench
6. Guard file.

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

वरिष्ठ निजी सचिव
Senior Private Secretary
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
कटक न्यायपीठ, कटक
Cuttack Bench, Cuttack

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