IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBERAND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.3285/Mum./2018 (Assessment Year :2016–17)	ITA no.3286/Mum./2018 (Assessment Year :2016–17)
ITA no.3287/Mum./2018 (Assessment Year :2016–17)	ITA no.3288/Mum./2018 (Assessment Year :2016–17)
ITA no.3289/Mum./2018 (Assessment Year :2016–17)	ITA no.3290/Mum./2018 (Assessment Year :2016–17)
ITA no.3298/Mum./2018 (Assessment Year :2016–17)	ITA no.3299/Mum./2018 (Assessment Year :2016–17)
ITA no.3301/Mum./2018 (Assessment Year :2016–17)	ITA no.3302/Mum./2018 (Assessment Year :2016–17)
ITA no.3303/Mum./2018 (Assessment Year :2016–17)	ITA no.3304/Mum./2018 (Assessment Year :2016–17)
ITA no.3305/Mum./2018 (Assessment Year :2016–17)	ITA no.3306/Mum./2018 (Assessment Year :2016–17
ITA no.3348/Mum./2018 (Assessment Year :2016–17)	ITA no.3349/Mum./2018 (Assessment Year :2016–17)
ITA no.3350/Mum./2018 (Assessment Year :2016–17)	ITA no.3351/Mum./2018 (Assessment Year :2016–17)
ITA no.3352/Mum./2018 (Assessment Year :2016–17)	ITA no.3353/Mum./2018 (Assessment Year :2016–17)

ITA no.3354/Mum./2018
(Assessment Year :2016–17)

ITA no.3355/Mum./2018
(Assessment Year :2016–17)

ITA no.3356/Mum./2018
(Assessment Year :2016–17)

ITA no.3357/Mum./2018
(Assessment Year :2016–17)

ITA no.3358/Mum./2018
(Assessment Year :2016–17)

ITA no.3359/Mum./2018
(Assessment Year :2016–17)

ITA no.3360/Mum./2018
(Assessment Year :2016–17)

ITA no.3361/Mum./2018
(Assessment Year :2016–17)

ITA no.3362/Mum./2018
(Assessment Year :2016–17)

Cornerview Construction & Developers
Pvt. Ltd., Building no.10, 5th Floor
Guru Hargovindji Road, Andheri (E)
Mumbai 400 093 PAN – AAFCC9548R ……. Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–9 (TDS)–CPC, Ghaziabad ……. Respondent

Assessee by : Shri Jintendra Jain
Revenue by : Shri Neil Philip

Date of Hearing – 15.05.2019	Date of Order – 28.06.2019

O R D E R

PER BENCH

Captioned appeals by the same assessee are against a consolidated order dated 31st March 2018, passed by the learned Commissioner of Income Tax (Appeals)–59, Mumbai, for the assessment year 2016–17. Though, in the impugned order learned

Commissioner (Appeals) has disposed off 87 appeals, however, presently, we are dealing with 29 appeals out of the said bunch.

2. Since, all these appeals pertain to the same assessee involving common issue and arise out of identical set of facts and circumstances, therefore, as a matter of convenience, these appeals were heard together and are being disposed of by way of this consolidated order.

3. The common ground raised by the assessee in all these appeals read as under:–

> *"1(a) The learned CIT(A) erred in confirming the action of the Assessing Officer in levying the fees of ₹ 53,760 under section 234E of the Act (on delay in filing Form 26QB) on purchase of each flat ignoring the fact that the appellant had bought 96 flats through one allotment letter only."*

4. Brief facts are, the assessee company, as stated, is engaged in the business of real estate construction and development. During the previous year relevant to the assessment year under dispute, the assessee entered into an agreement with M/s Accent Construction Pvt. Ltd. for purchase of ninety six flats in three buildings. Vide allotment letter dated 29th October 2015, the developer company allotted the flats to the assessee for a total consideration of ₹ 100,51,65,650. On the date of allotment letter itself i.e., 29th October 2015, out of the total sale consideration, the assessee paid an amount of ₹ 55 crore to

the assessee through cheque and while making such payment the assessee simultaneously deducted tax @ 1% under section 194IA of the Income Tax Act, 1961 (for short *"the Act"*) amounting to ₹ 55 lakh. The TDS amount was deposited in Government account on29th September 2016 and upon such payment challan–cum– statements as required under section 200(3) of the Act was generated on the very same day in Form no.26QB. While processing the TDS statement under section 200A of the Act, the Assessing Officer finding that TDS statements were not filed within the time prescribed under the statute levied fee under section 234E of the Act in respect of each TDS statement filed by the assessee. Challenging the levy of fee under section 234E of the Act, assessee filed appeals before the first appellate authority.

5. Before learned Commissioner (Appeals), assessee pleaded that since the transactions relating to purchase of flats was by virtue of a single allotment letter, it should be treated as a single transaction and the levy of fee under section 234E of the Act should be restricted to one challan–cum– statement of TDS. To support its contention that the transaction is a single one, the assessee furnished a debenture trust deed to contend that the funds for acquiring the flats were sourced by issuing debentures. Further, the assessee also submitted the allotment letter, ledger account showing payment, etc. to emphasize upon the

fact that the purchase of all flats should be treated as single transaction. The learned Commissioner (Appeals), however, did not find merit in the submissions of the assessee. Referring to the provisions of section 234E of the Act, learned Commissioner (Appeals) observed that the fee contemplated therein is not in the nature of penalty, hence, there is no occasion to look into the aspect whether there is reasonable cause for non–filing of TDS statement within the prescribed time. In this context he referred to the decision of the Hon'ble Jurisdictional High Court in Rashmikant Kundalia & Anr. v/s Union of India &Ors., [2015] 373 ITR 268 (Bom.) wherein it is held that fee levied under section 234E is a compensation to be paid for additional burden cast upon the Department due to late filing of TDS statement. Thus, he observed, in such circumstances levy of fee under section 234E of the Act cannot be dispensed with on the ground of reasonable cause for late filing of TDS statement. As regards the contention of the assessee that the entire transaction relating to the sale of flats should be treated as single transaction and fee under section 234E of the Act should be levied by treating the TDS statements filed under section 200(3) of the Act as a single statement, learned Commissioner (Appeals) observed, when the assessee itself has filed separate statements of TDS in respect of each individual transaction relating to purchase of flat, it cannot be said that purchase

of all the flats is to be treated as single transaction, thereby, statements filed under section 200(3) of the Act in respect of such transaction is to be treated as one. Further, learned Commissioner (Appeals) observed, in the decision of the Hon'ble Jurisdictional High Court, it is also held that there is no provision for filing of appeal against levy of fee under section 234E of the Act. Thus, ultimately, learned Commissioner (Appeals) dismissed the appeals filed by the assessee.

6. The learned Authorised Representative submitted, the assessee was compelled to make multiple TDS challan–cum–statements because in one challan particulars of all the ninety six flats could not be filled. He submitted, the online challan–cum–statement also does not have any provision of annexing any attachment giving all the details in one form. He submitted, since all the flats were allotted by one common allotment letter and part consideration was paid by one cheque as well as total TDS on such part payment was remitted to the treasury by one cheque, it should be treated as single transaction and the late filing fee under section 234E of the Act on account of delay in filing TDS statements should be computed in respect of one challan–cum–statement only and should not be computed separately in respect of each of the challan–cum–statement. Without prejudice, it was submitted that the provision of section 194IA of the Act is not

applicable, hence, there cannot be any levy of fee under section 234E of the Act. He submitted, section 194IA of the Act applies to transfer of immovable property and under the said provision, immovable property is defined to mean land or building or part of a building. He submitted, by virtue of the letter of allotment there cannot be transfer of immovable property as no right, title or interest is created merely on entering agreement to sale. Drawing our attention to the allotment letter, he submitted, as per clasuse–32 of the said allotment letter, a final binding agreement with all terms and conditions in relation to the transaction has to be made. He submitted, through the allotment letter the assessee at the most has acquired right to specific performance which is different from immovable property. Drawing our attention to certain parallel provisions under section 269UA(d) and 54D of the Act, he submitted, 'right in land and building' and 'land and building' are different. Thus, he submitted, since section 194IA of the Act is itself not applicable, there cannot be levy of fee under section 234E of the Act. Without prejudice, he submitted, Form no.26QB is a challan–cum–statement generated on the very date when TDS is paid. He submitted, section 234E(1) of the Act refers to default in section 200(3) of the Act and section 200(3) of the Act states that statement is to be filed only after payment of TDS is made. Thus, he submitted, since in the present case the challan–cum–statements are generated

on the same day i.e., the date of payment itself, the provision of section 200(3) of the Act is not applicable. Therefore, there cannot be levy of fee under section 234E of the Act. Countering the observations of learned Commissioner (Appeals) that levy of fee under section 234E of the Act is to compensate the additional work load of the Department, the learned Authorised Representative submitted, in the present case the challans–cum–statements are dated 29th September 2016, and the due date of filing of return of income by the deductees is 30th September 2016 for the assessment year 2016–17. Therefore, there cannot be any extra work load for the Department due to late filing of TDS statements. Finally, the learned Authorised Representative submitted, the order passed under section 200A imposing fee under section 234E of the Act has become appealable before learned Commissioner (Appeals) w.e.f. 1st June 2015, hence, the appeals of the assessee before the first appellate authority are maintainable. In support of his contention, the learned Authorised Representative relied upon the following decisions:–

1. *Balwant Vitthal Kadam v/s Sunil Baburao I. Kadam, [2018] 2 SCC 82; and*
2. *Tax Practitioners of Indore v/s Union of India, [2015] SCC Online MP 6541.*

7. The learned Departmental Representative strongly relying upon the observations of learned Commissioner (Appeals) submitted, the

assessee itself has treated each transaction relating to purchase of flats as separate transactions and has accordingly deducted tax at source on the basis of purchase value of the flats. He submitted, the allotment letter itself specifically provides the cost of each flat allotted to the assessee. Thus, the contention of the assessee that it is a consolidated payment made to the builder is without any merit. Further, he submitted, when the assessee has filed TDS statements separately towards payment made in respect of each of the flat and when there is a delay in furnishing the TDS statements as per section 200(3) of the Act, the Assessing Officer was duty bound to levy fee under section 234E of the Act while processing the TDS return / statements under section 200A of the Act. Further, he submitted, when there is no provision under the statue to consider the reasonableness of default in filing TDS statements, unlike the provisions contained under section 273B of the Act, there is no question of either waiving the late filing of fee under section 234E of the Act or restricting it to a single challan–cum–statement.

8. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon by the learned Authorised Representative. There is no dispute between the parties with regard to the primary facts. Vide allotment letter dated 29th October 2015, ninety six flats along with car parking space

was allotted to the assessee for a total consideration of ₹ 100,51,64,650, and on the date of allotment itself i.e., on 29th October 2015, the assessee paid a part of the sale consideration amounting to ₹ 55 crore to the developer / builder and while making such payment, the assessee in compliance to the provisions contained under section 194IA of the Act has deducted tax at source @ 1%. Since there was a delay in filing the TDS statements as provided under section 200(3) of the Act, the Assessing Officer while processing the TDS statements under section 200A of the Act has levied fee under section 234E of the Act. Challenging the levy of fee under section 234E of the Act, the learned Authorised Representative has made submissions before us, which can be summarized as under:–

> *i) Due to paucity of space in Form no.26QB, assessee was compelled to deposit TDS in separate challans–cum-statements instead of a single challan-cum-statement. Therefore, late fee should be levied in respect of a single challan–cum–statement;*
>
> *ii) Provision of section 194IA of the Act is not applicable as there is no transfer of immovable property;*
>
> *iii) Since Form no.26QB is a challan–cum–statement which is generated on the very date of payment of TDS, it does not come within the purview of section 200(3) of the Act; and*
>
> *iv) There is no additional work load on the Department as the assessee has filed the TDS statements before the due date of filing of return of income by the deductees for the assessment year 2016–17.*

9. Insofar as assessee's contention regarding applicability of section 194IA of the Act is concerned, we are unable to accept the same due

to following reasons. Undisputedly, at the time of making payment of ₹ 55 crore to the seller of the flats, the assessee itself has deducted tax at source in compliance to the provisions contained under section 194IA of the Act. Thus, it is patent and obvious that the assessee and the seller of the flats have treated the transaction of sale of flats as a transaction coming within the purview of section 194IA of the Act. In any case of the matter, the deductee has not expressed any reservation with regard to the applicability of section 194IA of the Act to the subject transaction. Therefore, the assessee being a deductor cannot plead inapplicability of the aforesaid provision. In fact, in our view, the contention of inapplicability of section 194IA of the Act is redundant and is not available to be taken by the assessee. Once the assessee has proceeded to deduct tax at source under section 194IA of the Act, all legal consequences arising in pursuance thereto would automatically follow. As per rule 30A the tax deducted at source under section 194IA has to be deposited within the time and in the manner prescribed therein and in terms of rule 31A assessee has to submit the statements of TDS as provided under section 200(3) of the Act. In fact, a cursory look at Form no. 26QB would reveal that it refers to Rule 30A and 31A of the Rules. The assessee having deducted tax at source not only has to deposit the TDS amount to the Government account, but it has to file a statement under section 200(3) of the Act

within the prescribed time limit. It is evident, the assessee has also followed the aforesaid procedure. The only default on the part of the assessee is, it has neither paid the TDS amount nor filed the statement under section 200(3) read with rule 30A and 31A within the time prescribed therein. Therefore, in case of any default in filing the statement in terms of section 200(3) of the Act, the provisions contained under section 234E would automatically get triggered and fee prescribed therein has to be paid. While processing the TDS statement under section 200A of the Act, the Assessing Officer is empowered to levy fee under section 234E of the Act, which the Assessing Officer has done in the present case.

10. The validity of the provision contained under section 234A of the Act came up for scrutiny before the Hon'ble Jurisdictional High Court in case of Rashmikant Kundalia & Anr. v/s Union of India, [2015] 373 ITR 268 (Bom). While deciding the issue, the Hon'ble Jurisdictional High Court not only upheld the validity of section 234E of the Act, but also observed that the delay in furnishing of TDS returns/statements has a cascading effect and leads to an additional work burden upon the Department. The Hon’ble High Court held, to compensate for the additional work burden forced upon the Department, the fee under section 234E of the Act is contemplated which is not punitive in nature. The fee is a fixed charge for the extra service which the

Department has to provide due to the late filing of the TDS statement. The Court held, the fee charged under section 234E of the Act is nothing but a privilege and a special service to the deductor allowing him to file TDS returns / statements beyond the time prescribed by the Act and the Rules. The Court has held that on payment of the fee under section 234E of the Act, the deductor is allowed to file the TDS returns/statements beyond the prescribed time so that it can be regularized. Thus, from the aforesaid decision of the Hon'ble Jurisdictional High Court, it is evident that the fee under section 234E of the Act is nothing but a privilege or special service allowed to a deductor for late filing of the TDS statements. In fact, as could be seen from the submissions made by the assessee before the learned Commissioner (Appeals) and even before us, it does not dispute the applicability of section 234E of the Act. The only issue raised by the assessee is, whether it should be made applicable to all TDS statements or to a single TDS statement. Thus, viewed in the aforesaid perspective, the contention of the learned Authorised Representative that the provision of section 194IA of the Act is not applicable deserves to be rejected. The decision of the Hon'ble Supreme Court in case of Balwant Vitthal Kadam v/s Sunil Baburao I. Kadam, (supra), therefore, would not apply.

11. As regards the second contention of the learned Authorised Representative that section 200(3) of the Act, would not apply to a statement in Form no.26QB, as it is a challan–cum–statement generated on the date of payment itself, we are unable to accept the same. No doubt, the provision contained under section 234E of the Act makes it clear that it will be applicable if the deductor fails to deliver the TDS statement within the time prescribed in sub–section (3) of section 200 of the Act. Whereas, sub–section (3) of section 200 of the Act makes it clear that furnishing of TDS statement in the prescribed form, manner and time applies to all TDS provisions including section 194IA of the Act contained under Chapter–XVII. Therefore, assessee's claim that since the challan–cum–statement is generated on a single date, therefore, it will not come within the purview of section 200(3) of the Act, is unacceptable. Thus, we are of the view that the TDS statements in Form no.26QB also comes within the ambit of section 200(3) of the Act.

12. The next contention of the learned Authorised Representative that no additional burden is cast on the Departmental Authorities is also equally unacceptable considering the fact that there is a delay in filing the TDS statement in Form no. 26QB. As held by the Hon'ble Jurisdictional High Court in case of Rashmikant Kundalia & Anr. (supra) for the purpose of allowing the assessee to file TDS statement beyond

the prescribed time and for regularizing the same, fee under section 234E of the Act has to be charged as it is in the nature of a privilege and special service provided to the assessee. Therefore, this contention of the learned Authorised Representative also fails.

13. Now, coming to the primary contention of the learned Authorised Representative that all the transactions relating to purchase of flats should be taken as a single transaction for the purpose of filing the TDS statement and computing fee under section 234E of the Act, we do not find any merit in such contention. On a perusal of the allotment letter dated 29th October 2015, a copy of which is placed in paper book and, more particularly, Annexure–B to the said letter reveals that the details and description of each of the flat along with cost thereof has been specifically mentioned. It is also a fact that the assessee has computed and deposited the TDS amount on the basis of the cost of each flat. In that view of the matter, the claim of the assessee that purchases of all the flats is to be taken as a single transaction, therefore, the levy of fee prescribed under section 234E of the Act is to be restricted to one challan–cum–statement filed in Form no.26QB, is unacceptable. When the assessee itself has filed separate TDS statements in respect of the tax deducted at source relating to the respective flats, while processing such statements under section 200A of the Act, the Assessing Officer has to levy fee under section 234E of

the Act taking into account the delay in filing each of the statements. That being the case, assessee's contention that fee under section 234E of the Act is to be restricted to one transaction is not acceptable. At this stage, it will be relevant to observe, clause (c) of sub–section (1) of section 200A of the Act contemplates that while processing the TDS return, fee under section 234E of the Act shall be computed. Thus, use of word *"shall"* in the aforesaid provision makes it mandatory on the part of the Assessing Officer to levy fee under section 234E of the Act. Since, the assessee has filed separate TDS statements under section 200(3) of the Act read with rule 26QB, there is no error on the part of the Assessing Officer in computing fee under section 234E of the Act while processing such statements.

14. As regards the contention of the learned Authorised Representative that appeal against levy of fee under section 234E of the Act is maintainable before the learned Commissioner (Appeals), we find merit in the same. Therefore, to that extent, the assessee's contention is accepted. However, it will not make much difference as learned Commissioner (Appeals) has decided the issue on merit. In view of the aforesaid, we do not find any reason to interfere with the decision of learned Commissioner (Appeals) on the issue. Grounds are dismissed.

15. In the result, all the appeals of the assessee are dismissed.

Order pronounced in the open Court on 28.06.2019

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 28.06.2019

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.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai