

Whether the stay powers of ITAT would stay within its discretion?

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The Constitution of India grants its citizens various fundamental rights, including the right to appeal under any Law. However, such right shall be explicit through an enactment and cannot be assumed. The Income-tax Act ('Act'), through section 253, enables an assessee to prefer an appeal before the Appellate Tribunal ('ITAT') against certain orders. Section 254(2A) while dealing with the timeline for disposing an appeal, grant power to the ITAT to deal with stay of demand. These provisions undergone certain changes in the Finance Bill, 2020 ('Bill').

Presently, there are 3 Provisos under section 254(2A), which deals with timeline as well power to grant stay. The First Proviso enables the ITAT to grant stay of a demand for a period not exceeding 180 days and shall dispose of the appeal within the said period (granting). Where the appeal is not disposed of within 180 days, the Second Proviso comes in to play for extension of stay for further period, in which case the aggregate period granted from the First and Second Proviso shall not exceed 365 days, and the appeal shall be disposed of, within the 365 days window of stay period (extending). As per the Third Proviso, where completion of appeal is delayed beyond 365 days, the order of stay granted shall get vacated after 365 days, even if the delay in disposing the appeal is not attributable to the assessee (vacating). Accordingly, the 3 stated Provisos may be understood in the order of granting, extending and vacating respectively.

The Bill seeks amendments w.e.f. 1st April, 2020 to the First and Second Provisos. With the proposed amendment, for seeking grant of stay before ITAT, an assessee, as a pre-condition, shall either: (i) deposit a minimum of 20% of the amount of tax, interest, fee, penalty or any other sum ('disputed sum'); or (ii) furnish security equal to disputed sum. As per the proposed amendment to the Second Proviso, if appeal is not disposed of within the stay period by the ITAT, further extension of stay shall be granted only if assessee: (i) makes an application seeking extension; (ii) proves that the reason for delay in disposing appeal is not attributable to him; and (iii) fulfilled the deposit of disputed sum or furnished security, as the may be.

Historically, till 1999, there were no provisions under the Act to provide timeline for disposal of appeals by ITAT. Many assesses used this as an opportunity and filed appeals only to obtain stay to avoid payment of taxes, endlessly, despite the fact that the assessment order and demand are legal and reasonable. To discourage this frivolous practice and indefinite stay period, the Finance Act, 1999 for the first time, enacted time limit for disposal of cases through sub-section (2A) of section 254, which also enabled automatic vacation of stay beyond 180 days (now 365 days). The sub-section employs soft languages, in the form of '*where it is possible*' and '*may hear and decide*', and thus, indicating its nature, being an advisory to ITAT and not directive.

Delay in disposal of appeal

Though the sub-section seems to be mild in its language, the Third Proviso is bit harsh on the tax payers. The said Proviso mandates automatic vacation of stay, if the appeal is not disposed of within the overall 365 days and the cause of such delay is not attributable to the assessee. Judiciary, in India, has been commented upon for the large backlog of disposal of cases and ITAT is no exception. With the new age business models, tax issues, more particularly in respect of transfer pricing or large searches, become too technical, time consuming and challenging and thus, resulting in high-pitched assessment orders. Many a times, appeals could not be concluded due to the pressure of pendency of cases.

In a case where an assessee is not responsible for the delay in disposal of appeal, it may cause irreparable injustice, if the stay gets vacated upon the culmination of 365 days limitation. Time and again, the Judiciaryⁱ held that where an assessee is not responsible for delay in disposal of appeal, **any restriction** to extend the stay beyond 365 days, shall be construed as arbitrary and invalid in law. The Apex Court in **Pepsi Foods case**ⁱⁱ has held that the ITAT has power to extend the stay beyond the period of 365 days, where the delay in disposal is not attributable to the assessee. The Apex Court further held that such unreasonable curbs are violative of Article 14 of the Constitution and the Proviso shall be struck down. Similar proposition has been followed by the Apex Court, recently, while dismissing the SLP filed by the Revenue in **Comverse Network System's case**ⁱⁱⁱ. In view of the stated judicial positions, one could perceive that the matter of grant of stay beyond 365 days shall solely rest on the *subjective satisfaction of the*

ITAT. Factors, including but not limited to assessment history, conduct & cooperation, issues in appeal, chances of recovery if assessee lost the appeal, hardship if immediate recovery is ordered etc. shall be critically evaluated to determine whether the assessee is entitled to stay. Where the stay extension is not accorded by the ITAT, despite there is no fault on the assessee, extraordinary legal remedies in the form of Writ under Article 226/ 227 may be preferred before the High Court to ensure miscarriage of justice is not continued, apart from restoring the right of the tax payer.

Deposit of taxes

The Bill proposed, a new condition precedent to grant of stay, being deposit of 20% of disputed taxes. In the past, we have witnessed amendments which are directed towards curbing the powers of the ITAT, in terms of timeline for disposal of appeals, grant & extension of stay and so on and so forth. Seeking deposit of disputed taxes/ security are not new to Tax Law. Through an Office Memorandum (OM)^{iv}, CBDT has issued guiding principles in the matter of appeals before the CIT(A), to streamline the process of grant of stay. As per the OM, 20% of outstanding demand shall be deposited with Revenue for grant of stay till disposal of appeal by the CIT(A). The quantum of sum sought to be deposited may be **increased**, if similar addition was confirmed earlier by the appellate authorities etc. or the addition was made based on credible evidence gathered through exercise of search, survey powers. Similarly, for the tax payer, there is a window for **reduction** of 20% threshold, if he demonstrates that there are favourable pronouncements, against the additions, which resulted in outstanding liability. Accordingly, the OM is embedded with certain level playing principles to protect the parties to appeal. The Bill does not enshrine any of these discretionary provisions while adjudicating on stay by the ITAT. There may be for and against grant of such discretionary powers.

One must appreciate the fact that it is only in respect of appeals preferred by an assessee u/s.253(1) before ITAT, deposit of sum is envisaged and not in respect of departmental appeals u/s.253(2). Assessee, who has not deposited the 20% sum and lost the case before the CIT(A), in any way, does not require any mercy by way of full stay and thus, mandating him to pay 20% as per the Bill appears to be justifiable. On the other hand, if the assessee has already paid 20%

as per the OM while preferring an appeal before the CIT(A), there may not be a need for fresh deposit, while seeking appeal before the ITAT. It appears that in such eventuality, and on an application made, assessee would succeed in obtaining stay.

The view, in favour of incorporating such discretionary powers would reiterate the principle that the Appellate Authorities are bestowed with the duty, in deserving cases to grant of stay of demand, which are intertwined with appeal itself. Any failure on this part, would make the appeal process nugatory. The Apex Court in **M.K.Kunhi's**^v case strongly endorsed this view.

The Bill, by seeking 20% deposit of tax, without any discretion, may be looked upon as - encroaching few more rightful domains of the Appellate Authorities. No doubt, ITAT is a creature of Statute and it cannot function and deliver beyond what is sanctioned^{vi}. However, we have witnessed successful endorsement of many subjective decisions of the ITAT in legal pronouncements. It appears that while dealing with stay petitions before ITAT, the principles laid down in the above stated decisions, shall continue to hold fort in favour of deserving tax payers, even after the introduction of new rule of 20% deposit.

Lastly, the proposed amendment could apply only prospective and thus, the orders made earlier shall be unaltered and remain operative till disposal of its appeal. This view has found favour from the decision of **A.P.State Civil Supplies Corpn. Ltd. Vs.DCIT**^{vii}.

ⁱ Adobe Systems India (P) Ltd.(2014) 51 Taxmann.com 195(All.); Anil Girishbhai Darji (2016) 68 Taxmann.com 308 (Guj.); Carrier Air Conditioning & Refrigeration Lts.(2016) 387 ITR 441 (P&H.); Tata Teleservices 81 Taxmann.com 348 (Bom.).

ⁱⁱ DCIT Vs. Pepsi Foods (P) Ltd. (2017) 79 Taxmann.com 251(SC).

ⁱⁱⁱ PCIT Vs. Converse Network Systems India (P) Ltd. (2019) 262 Taxman 99 (SC).

^{iv} F.No.404/72/93-ITCC dt. 29th Feb.2016 & 31st July,2017

^v ITO Vs. M.K.Kunhi (1969) 71 ITR 815 (SC).

^{vi} Gujarat Mineral Development Corporation Ltd.Vs. ITAT (2009) 314 ITR 14(Guj.); DIT Vs. Seacor Offshore Dubai LLC (2014) 44 Taxmann.com 318 (Uttarakhand).

^{vii} A.P.State Civil Supplies Corpn.Ltd.Vs.DCIT (2002) 83 ITD 398 (Hyd.).