

# TAX FLASH NEWS

22 June 2020

## The Division Bench of the Mumbai Tribunal refers the matter with respect to the amendment curtailing the powers of the Tribunal on stay matters to a Larger Bench

Recently, the Division Bench of the Mumbai Income-tax Appellate Tribunal (the Tribunal) in the case of Tata Education and Development Trust<sup>1</sup> (the taxpayer) referred the matter to a Larger Bench on the issues arising out of the amendment introduced in the Budget 2020<sup>2</sup> that sought to curtail the powers of the Tribunal in stay matters. The amendment provides that the Tribunal may grant stay subject to the condition that the taxpayer deposits not less than 20 per cent of the amount of tax, interest, fee, etc. or furnish security of an equal amount in respect thereof.

The Tribunal observed that the issue is of vital importance to all the stakeholders all over the country, and it is desirable to have the benefit of arguments from various stakeholders in different parts of the country. The issue for consideration in the instant case involve larger question on which well-considered call is required to be taken by the Bench. Considering all these factors, the Tribunal find it fit and proper to refer the instant stay application to the President of Income Tax Appellate Tribunal for consideration of constitution of a Larger Bench.

### Background and facts of the case

In the present case, the taxpayer is a public charitable trust filed its tax returns for two assessment years<sup>3</sup> claiming amounts remitted to the educational universities outside India as application of income under Section 11(1)(c)<sup>4</sup>. The Assessing Officer (AO) observed that the Central Board of Direct Taxes (CBDT)<sup>5</sup> has not specifically approved the income

derived from the property held under trust, applied for the purposes specified under Section 11(1)(c)(i) and (ii). Accordingly, the AO added these amounts to the income of the taxpayer trust.

Subsequently, CBDT, vide order dated 10 November 2015, granted approval under Section 11(1)(c), which was specifically stated to have effect for Assessment Years 2009-10 to 2016-17. Based on this approval of CBDT, the AO rectified the assessment orders for the AY 2011-12 and AY 2012-13 and the additions made on account of application of funds abroad without specific approval of CBDT for the AY 2011-12 and AY 2012-13, were deleted by the AO himself.

However, the Commissioner of Income-tax (Appeals) [CIT(A)] disregarded these rectification orders stating that it does not merit consideration in this appeal as the present appeal has been filed against the order of the AO passed under Section 143(3). The CIT(A) held that the CBDT's approval dated 10 November 2015 is not retrospective in nature and it cannot apply for the AY 2011-12 and 2012-13. Accordingly, the additions were restored by the CIT(A). Aggrieved, the taxpayer has filed appeal before the Tribunal.

The taxpayer also filed an application seeking for a stay on collection/recovery of the disputed demands pertaining to tax and interest, till the related appeals are disposed of.

### Tribunal's decision

With respect to stay application, the following issues emerged from the amendment to the first proviso to Section 254(2A):

- Whether the amendment is directory in nature or is mandatory in nature

<sup>1</sup> Tata Education and Development Trust v. ACIT (SA Nos. 147 and 148/Mum/2020) – Taxsutra.com

<sup>2</sup> In the first proviso to Section 254(2A) of the Income-tax Act, 1961

<sup>3</sup> AY 2011-12 and AY 2012-13

<sup>4</sup> Section 11(1)(c) of the Act – Income from property held under Trust which is applied for charitable purpose outside India are eligible for exemption

<sup>5</sup> By way of a general or special order

- Whether the said amendment affects the cases in which appeals were filed prior to the date on which the amendment came into force.
- Whether, with respect to the manner in which, and nature of which, security is to be offered by the taxpayer, under the first proviso to Section 254(2A), what are broad considerations and in what reasonable manner, such a discretion must essentially be exercised, while granting the stay, by the Tribunal.

The Tribunal observed that these issues are of vital importance to all the stakeholders all over the country, and on such important pan India issues of far reaching consequence, it is desirable to have the benefit of arguments from stakeholders in different parts of the country. The issues coming up for consideration in these stay applications involve larger questions on which well-considered call is required to be taken by the Bench. Considering all these factors, the Tribunal deem it fit and proper to refer the instant stay applications to the President of Income Tax Appellate Tribunal for consideration of constitution of a Larger Bench and to frame the questions for the consideration by such a Larger Bench.

However, the Tribunal must take suitable steps to maintain the status quo, so far as collection of disputed impugned demands are concerned, and, at the same time, to protect legitimate interests of the revenue to recover the disputed impugned demands in the event of the taxpayer not being successful in the present stay applications, or, the taxpayer not being successful eventually in the appeals. Given the overall situation, the stay petitions have been referred for consideration of constitution of a Larger Bench, the Tribunal deem it fit and proper to grant an interim stay on collection/ recovery of the aggregate amounts of tax and interest etc. for the AYs 2011-12 and 2012-13 respectively subject to following conditions:

- The taxpayer will, within not more than one week of receipt of this order, furnish an undertaking setting out complete details of investments of specified amounts which the taxpayer will not encash till the stay applications are disposed of.
- The taxpayer will fully co-operate in expeditious disposal of the related stay applications which are tentatively fixed for hearing on 6 July 2020, as also the appeals which are being scheduled for hearing for 13 July 2020. Further, in the event of physical courts not being functional at that point of time due to COVID 19 health concerns, the taxpayer will argue the appeals through web-based video conferencing in the virtual court.
- This interim stay will remain in operation till the related stay applications are disposed of, till the appeals are disposed of or till further orders whichever is earlier.

In view of these directions, the Registry was directed to place the matter before President, for his appropriate orders. Nothing stated in this interim order shall be construed as Tribunal's observations on merits of the stay applications, which shall be decided in due course.

### Our comments

The amendment made by the Finance Act, 2020 restricting the powers of the Tribunal to grant stay on the condition of depositing not less than 20 per cent of the amount of tax, interest, fee, penalty, or any other sum payable, or furnish security of equal amount in respect thereof has raised many unanswered questions. The intention behind such a mandatory condition does not seem to be clarified by the Memorandum to the Finance Bill, 2020 or by the notes to clauses.

In the case of M. K. Mohammad Kunhi<sup>6</sup> the issue for consideration was that whether the Tribunal has the power to stay the recovery of the realisation of the penalty imposed during the pendency of an appeal. An application for stay was rejected by the Tribunal which was reversed by the High Court holding that Tribunal can grant a stay under its inherent powers. On appeal before the Supreme Court, the High Court's decision was affirmed.

The present decision of the Division Bench is a welcome decision asking for clarification by referring the matter to a Larger Bench on the issues arising out of the amendment in the first proviso to Section 254(2A). It would be interesting to know how the Larger Bench would deal with the issues arising out of such amendment.

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