



February 20, 2020

To,
Ms. Nirmala Sitharaman
Union Finance Minister of India
15, Safdarjung Road,
New Delhi – 110029

Respected Madam,

Sub.: - Representation for the Amendments made in Section 254 of the Income Tax Act, 1961

We, Bombay Chartered Accountants' Society, Chartered Accountants Association, Ahmedabad, Chartered Accountants Association, Surat, Karnataka State Chartered Accountants' Association and Lucknow Chartered Accountants' Society represent thousands of Chartered Accountants of the country and, through them, a large number of tax payers of the country.

The Finance Bill, 2020 has proposed certain amendments in section 254 of the Income Tax Act, 1961. These amendments need your separate attention; therefore, we are sending a representation describing the hardships to you for your kind consideration.

We will send a detailed representation to your office on other matters contained in the Finance Bill, 2020 shortly. In the meantime, we request you to consider this representation while finalising the Finance Act, 2020.

Thanking you
Yours sincerely,

Manish Sampat
President,
Bombay Chartered Accountants' Society

Anand Sharma
President,
Chartered Accountants Association, Ahmedabad

Rasesh Shah
President,
Chartered Accountants Association, Surat

Chandrashekara Shetty
President,
Karnataka State Chartered Accountants' Association

Anshul Agarwal
President,
Lucknow Chartered Accountants' Society



Points for representation

Amendments made to Section 254 of Income-tax Act, 1961 ('Act') by Finance Bill, 2020 ('Bill') with respect to power of grant of stay by Income-tax Appellate Tribunal ('ITAT')

A. Existing provisions of Section 254:

- ▶ Section 254 of the Act deals with powers of Income Tax Appellate Tribunal (ITAT) to pass order in respect of appeal filed before it.
- ▶ Section 254(2A) was introduced by way of an amendment vide Finance Act, 1999, which provides that ITAT shall endeavour to hear the appeal and decide the appeal within 4 years from the end of financial year in which appeal is filed before it.
- ▶ At present there are three provisos to Section 254(2A) of the Act which provide as under:
 - ▶ **First proviso** - After considering the merits of the application filed by a taxpayer, the ITAT shall pass an order of stay for a maximum period of 180 days in any proceedings against the order of the CIT(A).
 - ▶ **Second proviso** – Where appeal is not so disposed during stay period, ITAT on being satisfied that the delay is not attributable to the assessee, can extend the stay for a further period subject to the restriction that the aggregate of the periods originally allowed and the period so extended shall not exceed 365 days. Further, ITAT shall dispose of the appeal within the period or periods of stay so extended or allowed.
 - ▶ **Third proviso** – Provides that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to taxpayer

Accordingly, as per current provisions, ITAT may grant stay considering the merits of the case for a period up to 180 days and further, the ITAT may extend the same on application filed by taxpayer subject to condition that aggregate period or periods of stay does not exceed 365 days, where delay in disposal of appeal is not attributable to the taxpayer. Based on views taken by several Courts (some of them being - CIT VS. Ronuk Industries Ltd. [(2011) 333 ITR 99 (Bom)]; Narang Overseas (P) Ltd. v. ITAT [(2007) 295 ITR 22] (Bom); Pepsi Foods (P) Ltd vs ACIT (232 Taxmann 78) (Delhi HC) (Struck down validity of insertion of third proviso) etc), ITAT can extend the period of stay beyond 365 days, where delay in disposal of appeal is not attributable to the taxpayer and taxpayer has met the terms and conditions laid down by ITAT in the stay order, inspite of the introduction of third proviso to Section 254(2A) of the Act.



B. Amendments proposed in the Finance Bill, 2020:

- ▶ The Bill proposes amendment in the first proviso and substitution of the second proviso to Section 254(2A) of the Act.
- ▶ It is proposed that first proviso shall be amended to provide that the ITAT, after considering the merits of the application filed by taxpayer, shall grant a stay for a maximum period of 180 days provided that ***taxpayer deposits not less than twenty per cent of the amount of tax, interest, fee, penalty, or any other sum payable under ITA or furnish security of equal amount.***
- ▶ The substituted second proviso provides that **no extension of stay shall be granted by ITAT, where such appeal is not disposed of within the stay period granted.** However, on an application made by taxpayer, ITAT may grant further stay if the delay in disposing of the appeal is not attributable to the taxpayer **AND** the taxpayer has deposited not less than 20% of amount of tax, interest, fee, penalty, or any other sum payable under the ITA or furnish security of equal amount **AND** period of stay granted in aggregate of the period originally allowed and period extended shall not exceed 365 days.

C. Procedure followed by ITAT in granting stay of demand:

As a general practice, the ITAT follows the below mentioned procedure while granting stay of demand:

- ▶ On filing of stay application by an appellant, the ITAT schedules the hearing of the stay petition at the earliest and takes into consideration the merits of the case and also, the disputed demand and how much payment has been made against the same.
- ▶ The ITAT also considers whether the taxpayer has approached the lower authorities i.e Assessing Officer ('AO') and Commissioner of Income-tax ('CIT') and whether the stay of demand has been rejected by the lower authorities and what are the terms and conditions laid down by the lower authorities for granting stay and whether same are reasonable or whether following them would cause undue hardship to the taxpayer.
- ▶ The ITAT also considers the terms laid down under CBDT Instruction No. 1914 dated 21st March, 1996 and further amendments made therein vide Office Memorandums dated 29th February, 2016 and 31st July, 2017, while deciding the stay matters coming up before them. It is to be noted that the ITAT has often taken cognizance of the Office Memorandum issued by CBDT, wherein powers to give stay by payment of lower amount have been granted in following circumstances:
 - taxpayer has a past-history of tax litigation and the taxpayer's appeal on same issues in preceding years has been decided in his favour by the appellate authorities;
 - where the Supreme Court or the jurisdictional High Court has decided on same issue in favour of the taxpayer.

Accordingly, on the whole, ITAT while granting a stay, looks into the merits of the case as well guidelines laid down by CBDT for granting stay of demand, and decides accordingly, so as to not be unfair with the taxpayers. It is to be noted that in several cases (notably - Reuters India (P) Ltd (84 TTJ 95) (Delhi ITAT); KEC International Ltd (136 TTJ 60) (Mumbai Tribunal) etc), it has been held that merely because the taxpayer is in position to pay, but the balance of convenience is in favour of taxpayer, the taxpayer cannot be asked to pay balance/higher demand and that stay of demand must be granted to the taxpayer.



D. Impact of the amendment and why the said amendment should be deleted/withdrawn:

PART I – AMENDMENT TO FIRST PROVISOR OF SECTION 254(2A) OF THE ACT

- ▶ This amendment also seems to interfere with the exercise of judicial discretion vested in the Tribunal under section 254(1) of the Act as also declared by the Apex Court in the case of **Mohammed Kunhi (71 ITR 815)**.
- ▶ Also, this gives an impression that the Government seems to be **endeavouring to interfere with the judicial discretion** vested in the Tribunal while **imposing a threshold of 20% payment towards outstanding tax demand in application seeking stay**. From a plain reading of the amendment sought, it appears that all the applications seeking extension of stay coming up after 1st April, 2020 would have to meet the said requirement.
- ▶ Also, in several cases, where stay of demand is sought by taxpayers from ITAT, the demand raised by tax department is subject to rectification issues (like non-grant of credit for tax) etc. or taxpayer is due to large refunds from the tax department which have not been released for some reason or the other. In such cases, recovery of tax demand would cause undue hardship to the taxpayers.
- ▶ It is to be noted that in case of high-pitched assessments, even payment of 20% of demand would severely impact businesses of the taxpayer as payment would entail, huge cash-flow getting blocked with tax department also, providing bank guarantees in this situation will be practically difficult considering the actual credibility of taxpayer vis-à-vis demand created in a high pitched assessment. Accordingly, instead of putting a condition of granting stay of demand, it is suggested that a mechanism be put in place for methodology of granting stay in high pitched assessments.
- ▶ Further, the threshold of 20% which is now sought to be imposed is contrary to CBDT Instructions as well as the stand of the Revenue Department in stay granted matters before the Apex Court i.e. in fit cases, recovery of tax could be kept in abeyance and in deserving cases, stay could be granted on payment of less than 20% of disputed tax demand [please see - LG Electronics India Pvt Ltd ((2018) 168 DTR 0353 (SC)); Flipkart India Private Ltd (396 ITR 0551 (Kar.)) etc.].
- ▶ These amendments proposed in the Bill seem to stem out of the need of the government to meet fiscal targets. However, we strongly believe that these would cause more harm than good in aligning to its own reformative agenda of making India the **“most attractive destination for doing business”**.
- ▶ It is also generally believed that the tax department is the biggest litigant in India with a very low success rate and therefore directing 20% deposit also seems to be counter-productive given the interest cost that it may have to bear when the said amount is to be refunded to the appellant(s).
- ▶ The Government also seems to be unaware that the whole purpose of vesting the judicial discretion in the ITAT was that in an appropriate case (for example where the issues had already been decided in favour of the taxpayer in the preceding years or where the matter stands covered by the decision of jurisdictional High Court or the Apex Court), the Tribunal



was competent to grant stay in recovery proceedings without insisting on payment of disputed tax demand.

- ▶ As a result of the amendment proposed in the Bill, it would now be incumbent upon the ITAT to insist on a payment of 20% in every case. This would result in a flood of litigation and the already burdened High Courts would be burdened even more. Time and again, when unreasonable fetters have been imposed by the Legislature on the Tribunal's power to grant stay, the judiciary has intervened to uphold the principles enshrined in the Constitution of India.
- ▶ The Apex Court in *Venkateshwara Theatre vs. State of Andhra Pradesh* observed that just as a difference in the treatment of persons similarly situated leads to discrimination, so also, discrimination can arise if persons who are un-equals, i.e., differently placed, are treated similarly. In that context it was held that a law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law. It seems that proposed amendment in first and second proviso to section 254(2A) of the Act does the same without shedding any light on the mischief it seeks to remedy. It treats those taxpayers who have a strong prima facie case in their favour at par with taxpayers who do not. Accordingly, the said amendment must be excluded as it leads to discrimination among the taxpayers and is also contrary to the law laid down by the Courts as referred above.
- ▶ Further, the mandate of minimum payment of 20% of demand would mean that even in cases where there is genuine hardship caused to the taxpayer due to non-grant of credit of taxes paid, TDS, foreign tax credit etc, the taxpayer will still need to shell out payment of 20% and only then will a stay of demand will be granted by ITAT. This is contrary to the Office Memorandum issued by CBDT which was embedded with certain level playing principles to protect the parties in appeal. Accordingly, such an amendment, being contrary to judicious powers of ITAT, ought to be deleted/withdrawn before passing of the Finance Act, 2020 as it is likely to cause unnecessary hardship to taxpayers and, it also conveys contrary message to investors & taxpayers of the government's aim of 'Ease of Doing Business', 'Tax friendly atmosphere' and 'Non-adversial Tax regime'.

PART II – AMENDMENT TO SECOND PROVISO OF SECTION 254(2A) OF THE ACT

- ▶ It is to be noted that existing third proviso to Section 254(2A) already provides that ITAT cannot grant stay of demand beyond period of 365 days. Accordingly, inclusion of the said wording in the amended second proviso is not required as the third proviso has not been deleted from the Act and thus both the provisos overlap each other. Hence, this amendment may not be made to second proviso to Section 254(2A).

We strongly urge your Honor to take into consideration the above in the larger interest of tax payers of the country.

Thanking you

CC to:

1. Shri Anurag Thakur - MOS, Finance,
2. Shri Pramod Chandra Mody - Chairman, CBDT
3. Shri Kamlesh Varshney - Joint Secretary, TPL