# 3rd Residential Refreshers Course

## At JHADOL

[Jhadol Safari Resort]

**From 5th April 2013 To 7th April 2013**

PAPER WRITERS

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ALL GUJARAT FEDERATION OF TAX CONSULTANTS
Ahmedabad

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C O N T E N T S



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**" Is high pitched assessment made in the case of your client?**

**Is huge demand raised on the basis of high pitched assessment?**

**Some important decisions, circulars, instructions with regard to grant to stay "**

**UPENDRA BHATT**

# Index

**1. Preamble**

It is our practical experience in our day to day practice that high pitched assessments are made in many cases and huge demands are raised against the assesses. It is also experienced that on the basis of such high pitched assessments, the Assessing officers/Additional CITs/CITs take recourse for collection of such arbitrary demands.

Stay applications by assesses are rejected without passing a speaking order. Stays are granted if 50% of such disputed demands are paid and for the remaining 50% demand, installments are agreed.

Due to policy of CBDT of fixing hearing of high demand cases, certain cases are not heard and thus at one end there is pressure of recovery from the I T Authorities and on other hand the cases are not heard by CIT(A). This puts the assesses into helpless position.

CIT(A) are working under CBDT. Thus they cannot function independently. CBDT fixes certain quota for disposal of cases and issuing guidelines for taking certain cases of high demands on priority, on account of this, justice is delayed.

**2.** CBDT has issued instructions / circulars for grant of stay in case of disputed demand. As per section 220(6), even the powers are given to the assessing officers not to treat the assessee in default for not making payment of disputed tax even though the time for payment of tax has expired till the appeals are disposed of. As per this section, the assessing officer may impose such conditions as he may think fit looking to the facts and circumstances of the case. Some of the important instructions / circulars are given here under :

**a. Instruction no.96 / F.No.116/69-ITCC dated 21/08/69**

This instruction is very helpful to assesses. It has been considered in number of cases by various courts.

**Instruction :** One of the points that came up for consideration at the 8th meeting of the Informal Consultative Committee was that income tax assessments were arbitrarily pitched at high figures and that the collection of disputed demands as a result thereof was also not stayed in spite of the specific provision in the matter in section 220 (6) of the Income Tax Act, 1961.

The then Deputy Prime Minister has observed as under :

"…Where the income determined on assessment was substantially higher than the returned income, say, **twice the latter amount or more, the collection of the tax in dispute should be held in abeyance** till the decision on the appeals, provided there were no lapse on the part of the assessee."

The Board desire that the above observations may be brought to the notice of all the Income Tax Officers working under you and the powers of stay of recovery in such cases up **to the stage of first appeal** may be exercised by the Inspecting Assistant Commissioner / Commissioner of Income Tax.

[Source : Instruction No.96 (F.No.116/69-ITCC), dated 21st August, 1969 ]

Instruction no. 96 is clear in such cases, where the assessed income is more than double of the returned income, the assessee should not be treated as assessee in default for not making payment of such disputed tax.

**b. Instruction no.977 dated 13/07/96 (XXII/I/54)**

As per this instruction, it was directed not to treat the assessee in default till the first appeal was decided if there were no lapses on the part of the assessee in the appellate proceedings.

**c. Instruction no.1914 dated 02/12/93**

This instruction is relied by the I T department, as according to the view of department, it is in suppression of all previous instructions.

In this instruction it was directed that in the following cases, the demand should not be recovered when

i. The demand is yet not due

ii. The demand is stayed by any Court, Tribunal, Settlement commission

iii. The demand which is referred to CBDT for write off

iv. The certificates are issued to TRO's in such cases TRO's will recover the demand

v. Stay application to be disposed of within 2 weeks and the assesses to be informed

vi. When the stay application is filed to Deputy CIT/CIT/Chief Commissioner, they should disposed of such stay application within maximum 2 weeks under intimation to the assessee and assessing officer.

vii. Generally the stay applications are to be disposed of by assessing officer. Only in exceptional cases, higher authorities should interfere when they feel that the assessment order is not properly framed and the assessee will face problems on account of such orders.

**d. Specific directions were given in this instruction as under**

i. If there is no reasonable cause to grant stay to the assessee, simply because an appeal is filed, the stay should not be granted

ii. If the issue on which addition is made by the assessing officer is decided in favour of the assessee by appellate authority, in such case, stay should be granted.

iii. The issue involved in the case of the assessee, if there are different judgments of different courts but not from the jurisdictional high court under which the assessee falls and on the basis of some judgment the addition is made in the case of the assessee, the stay should be granted to the assessee

iv. If the issue involved in the case of the assessee is decided in favour of the assessee by jurisdictional high court but the same is not accepted by the I T department, in such case stay should be granted.

v. The assessing officer can impose certain conditions at the time of granting stay like taking security from the assessee, giving installments, taking assurance from the assessee that he will co-operate in early disposal of appeal, to adjust future refunds against outstanding demand etc.

vi. Maximum 18 installments to be granted to the assessee for recovery of disputed tax

viii. Stay application should be decided by passing a speaking order

ix. When the stay is granted by ITAT, such matters should be heard out of turn and for that, departmental representative to make necessary efforts

x. On receipt of appeal order, appeal effect to be given within 2 weeks

**e. Instruction no.96 V/s. Instruction no.1914**

On 01/12/2009 CBDT issued letter bearing no. 404/10/2009-ITCC to clear the controversy regarding the above two instructions.

In this letter, instructions issued for grant of stay i.e.

Instruction no.635 dated 12/11/1973

Instruction no.1067 dated 21/06/1977

Instruction no.1158 dated 27/03/1978

Instruction no.1222 dated 04/10/1979

Instruction no.1362 dated 15/10/1980

Instruction no.1914 dated 02/12/1993

were discussed and further it was stated in this instruction that instruction no.1914 was issued in suppression of all the earlier instructions and thus instruction no.96 was no more in existence.

* **This instruction has no validity. Instruction no.96 was issued in relation to assurance given by Deputy Prime Minister from the floor of the parliament in respect of question asked by the member of parliament in relation to high pitched assessments. Thus the assurance from the parliament has more weightage than the letter of Board. Even different high courts have held in favour of the assesses after considering the above two instructions which are discussed in this paper.**

**f. Circulars issued by CBDT to grant stay**

**i. Circular no.530 dated 06/03/89 reported in 176 ITR 240 Statute**

The assessing officers were directed by this circular that when the appeal is filed by the assessee against the assessment order, stay of disputed tax should be granted by the assessing officer looking to the facts of the case and by imposing certain conditions till the appeal is decided. It was directed in this circular to grant stay in the following circumstances.

- The issue on which addition is made, there are different views by different high courts or
- The issue is decided in favour of the assessee by jurisdictional high court but the same is not accepted by the department or
- The issue on which addition is made, the same is decided in favour of the assessee by appellate authority or court

**ii. <u>Circular no.589 dated 16/01/91 reported in 187 ITR 79 Statute</u>**

In this circular it was directed to consider the above circular as well as it was further directed to grant stay to the assessee by passing a speaking order. **At the time of granting stay, whether the assessee is capable enough to make the payment of disputed tax is not to be taken into consideration.**

## 3. Important land mark decision of Honorable Supreme Courts/High Courts and Income Tax Appellate Tribunals

### a. Cases decided by Honorable Supreme Court

**(1) 71 ITR 815 SC Rel. Page 819**

**INCOME TAX OFFICER vs. M.K. MOHAMMED KUNHI**

In this case it was held that, ITAT has identical powers of an appellate court under civil procedure code in dealing with the appeals. It was further held that ITAT has power to grant stay as incidental or ancillary to its appellate jurisdiction. It was further held that power of stay not to be exercised in a routine way. It can be exercised only when a strong prima facie case is made out. Stay shall be granted in deserving and appropriate cases so that the **entire purpose of the appeal is not frustrated if recovery proceedings are allowed to be continued.**

**(2) 154 ITR 172 SC**

**ASSISTANT COLLECTOR OF CENTRAL EXCISE vs. DUNLOP INDIA LTD. & ORS.**

It was held in this case that stay by high court should be granted in exceptional circumstances. While granting stay, it is to be seen that no prejudice is caused to the tax payer in case they ultimately succeed at the conclusion of the proceedings. On the other hand, the court cannot be unmindful of the need to protect the authority levy the tax for, at that stage, the court has to proceed on hypothesis that the challenge may or may not succeed.

In this judgment there was observation that**, "Governments are not run on mere bank guarantees. Some courts act as if furnishing a bank guarantee would meet the end of justice. Liquid cash is necessary for running of Government."**

This was simply a passing remark by the court but while rejecting the stay application, the above para is referred by I T Authorities and without passing a speaking order, the stays are rejected. This observation is not part of judgment.

**b. Cases decided by Honorable High Courts**

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| **I** | **Reasons to be given for rejection of stay / speaking order to be passed/ Opportunity of being heard to be given/ Judicious view to be taken/ To Act fairly** |

**(1) 43 ITR 562 Asam**

**HARDEODAS JAGANNATH vs. INCOME TAX OFFICER**

This judgment was given in relation to section 45 of the 1922 Income Tax Act. As per this section, the assessing officer was empowered not to treat the assessee in default till the appeal is decided. In this case, the stay application was rejected without giving reasons at all. The court held that an

opportunity to the assessee was required to be given. In this case, the discretion was not exercised by the assessing officer or he exceeded his jurisdiction. Thus the high court can interfere when the writ is filed by the assessee. There may be cases were the exercise of discretion by the Income Tax officer is so arbitrary and capricious that no reasonable man would have acted like wise. This is no exercise of jurisdiction.

* Even in this case it was the view of the court that the stay application should be consider in the light of the facts of the case and if the assessing officer is not satisfied with the reasons stated in the stay application, the order of rejection of stay application should be passed by a speaking order.

**(2) 139 ITR 900 MP**

**SETH GOPALDAS PALIWAL vs. WEALTH TAX OFFICER & ANR.**

This case was pertaining to wealth tax recovery. Application of stay by the assessee was dismissed by the wealth tax officer without giving reasons and opportunity of hearing. It was held that it was no proper exercise of discretion by WTO. Order of WTO was quashed. WTO was directed to consider application of assessee afresh.

**(3) 175 ITR 428 Madras**

**Sri Balaji Trading Co. v. CTO (Deputy)**
**M.C. and Co. v. Appellate Assistant Commissioner**
**Thangaraj (S.M.) v. State of Tamil Nadu**
**Saravana Oil Mills v. Appellate Assistant Commissioner**
**New Steel Industries v. Appellate Assistant Commissioner**
**Rajagopal (G.) v. State of Tamil Nadu**
**Gurunathan (T.) v. Collector of Customs (Addl)**

In this case it was held that while deciding stay of collection of disputed tax, it is discretion of appellate authority to grant or not to grant stay. All the factors and facts to be considered while deciding stay application. Appellate authority must exercise discretion judiciously and pass speaking order.

**(4) 183 ITR 532 Calcutta**

**DUNLOP INDIA LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.**

In this case the issue was with regard to Recovery of tax. It is the discretion of Income-tax Officer to treat assessee as not being in default. This discretion must be exercised in reasonable manner. Reasons for exercising discretion must be given. Relevant factors must be taken into consideration. The matter was sent back to the assessing officer for reconsideration.

**(5) 204 ITR 480 P&H**

**Aggarwal Rice and General Mills v. Commissioner of Income-tax**

In this case application for stay of recovery proceedings was filed till the appeal was decided. The stay application was rejected without affording applicant opportunity to be heard and without giving reasons.

It was held by the court that the Income Tax officer was required to pass a speaking order. As this was not done the order of the assessing officer was quashed and recovery proceedings were stayed till the matter was decided by assessing officer.

**(6) 230 ITR 705 Delhi**

**Teletube Electronics Ltd. Vs. Commissioner of Income-tax**

In this case the contentions for grant of tax of disputed amount was not disposed of by a speaking order. The matter was sent back to the assessing officer with a direction to afford the petitioner an opportunity of being heard and to dispose of its application by a speaking order.

**(7) 266 ITR 62 Allahabad**

**Shivangi Steels (P.) Ltd. V/S. ACIT and Another**

In this case the stay application by ACIT was rejected without giving any reason. The discretion given to the assessing officer was not judiciously exercised. It was directed by the court to decide the stay application in accordance with law and the discretion which has been conferred on the I T authority has to be exercised judiciously by giving reasons.

**(8) 351 ITR 160 Bombay**

**Deloitte Consulting India Pvt Ltd V/s. ACIT**

In this case expenses of Rs.103.04 crore towards software development was rejected. The quantum appeal was rejected by CIT(A) and ITAT. Penalty u/s.271(1)(C) was levied and the order was passed by the commissioner to deposit the entire amount of penalty. It was held by the court that assessee to pay Rs.50 Lacs in two installments and the remaining amount to be stayed till appeal was decided by CIT(A).

**By this court : It was mentioned by the court in this judgment that the stay application cannot be decided in a casual manner. By writing, "Looking to the facts and circumstances of the case, no case has been made out. This is not proper exercise of discretion given by the I T Authority. The assessing officers are required to act fairly while deciding the stay application u/s/220(6).**

**(9) 237 CTR 153 Mumbai**

**PARAMOUNT HEALTH SERVICES (TPA) (P) LTD. & ORS. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.**

In this case no valid reasons were given by the assessing officer for rejecting stay application. While rejecting stay application, it was only mentioned that, "Stay application of the assessee cannot be accepted and to recover the outstanding tax immediately from the assessee."

It was directed by Bombay High Court that the stay application was rejected without considering the parameters prescribed by this court in the case of **KEC International Ltd. V/s. B.R. Balkrishnan and Others reported in 251 ITR 158 Mumbai.** The court directed to dispose of stay application and till it is disposed of, no recovery proceedings should be carried out.

**(10) 249 CTR 190 Bombay**

**UTI Mutual Fund vs. INCOME TAX OFFICER and Ors.**

Recovery of tax from member of AOP u/s. 177 (3) being jointly and severally liable in respect of tax demand against the AOP. Revenue made unfortunate and hasty attempt to make a recovery of demand against the petitioner without enabling it to take reasonable recourse to the remedies available in law. Stay application rejected without hearing the assessee, considering the submission, revenue directed not to take any coercive steps, pending disposal of appeal and for six weeks thereafter.

**(11) UTI Mutual Fund V/s. ITO (Bombay)**

**www.itatonline.org**

Writ was filed against direction of CBDT Chairman's letter dated 07/02/12 promising with good posting in case of substantial recovery.

It was held in this case that, guidelines laid down in the case of **KEC International Ltd. V/s. B.R. Balkrishnan and Others reported in 251 ITR 158 Mumbai** as to how stay application should be dealt with. Recovery cannot be made without following due process of law.

When bank a/c. is attached without giving reasonable prior notice, amount should not be withdraw from the a/c.

It was further held that, financial crises is not only the ground to grant stay to the assessee. Stay can be granted when strong prima facie case is made out by the assessee.

"If the party has made out a strong prima facie case, that by itself would be a strong ground in the matter of exercise of discretion as calling on the party to deposit the amount which prima facie is not liable to deposit or which demand has no legs to stand upon, by itself would result in undue hardship of the party is called upon to deposit the amount."

Where a strong prima facie case has been made out calling upon the Petitioner to deposit, would itself occasion undue hardship. Finally, we express our serious disapproval of the manner in which the Revenue has sought to brush aside a binding decision of this Court in the case of the assessee on the issue of a stay on enforcement for the previous year. The rule of law has an abiding value in our legal regime. No public authority, including the Revenue, can ignore the principle of precedent. Certainty in tax administration is of cardinal importance and its absence undermines public confidence.

| II | **Instruction no.96 considered in various decisions** |
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**(1) 182 ITR 413 Gujarat**

**VIKRAMBHAI PUNJABHAI PALKHIWALA vs. S.M. AJBANI, RECOVERY OFFICER & ORS.**

In this case the assessee filed writ petition to quash the notice of demand and assessment order against which appeal was filed by the assessee. It was held that notice issued u/s.73 and assessment order cannot be quashed in writ petition.

**In this case instruction no.96 with regard to stay in cases of harsh assessments was considered by the Honorable Gujarat High Court on page 420 and 421.**

**(2) 217 ITR 641 Allahabad**

**MRS. R. MANI GOYAL vs. COMMISSIONER OF INCOME TAX & ANR.**

In this case returned income was Rs.11710/-. The income was enhanced and the tax payable was worked out at Rs.3304450/- i.e. more than several times the income returned.

The appeal was pending before appellate authority. Instruction no.96 was considered in this case and stay against disputed tax was grated. **Further it was held that recovery of such huge demand is opposed to principles of good conscious and fair play.**

**(3) 223 ITR 192 Rajasthan**

**Maharana Shri Bhagwat Singhji of Mewar v. Income-tax Appellate Tribunal**

This case was in relation to Estate duty. In this case also instruction no.96 was considered. Circular was CBDT was binding on Income Tax authority. In this case value of estate was determined on assessment more than twice the value returned. It was further directed not to force to the assessee to deposit 25% of the disputed tax.

**(4) 267 ITR 60 MP**

**Jain Cycle Spares and Co. v. Commissioner of Income-tax**

In this case, instruction no.96 was considered by the court. Property of the assessee was attached. CIT(A) was directed to here and decide the appeal expeditiously. Instruction no.96 should be brought to the notice of CIT(A). The shop should remain under attachment but the assessing officer was directed not to take any coercive action against the assessee.

**(5) 303 ITR 115 Madras**

**M. G. M. Transports (Madras) P. Ltd. v. Income-tax Officer**

In this case Instruction No. 96 dated 21-8-1969 was considered by the Honorable Court. In this case return showing loss was filed. Harsh assessment was made and demand of Rs.14025762/- was raised. The

assessee filed application for stay of demand. This application was rejected without giving reasons. It was held by the court that instruction no.96 would squarely apply. Without giving any factual finding and simply by writing, **"No valid reason has been stated for stay of demand"** was not sufficient. The petitioner was entitled to stay for collection to still orders were passed in appeal subject to making certain payments.

**(6) 307 ITR 103 Delhi**

**Valvoline Cummins Limited V/S. SCIT and Others**

In this case instruction no.96 was considered returned income of the assessee was Rs.7.5 crore and which was assessed at Rs.58.68 crore and demand of Rs.25.01 crore was raised and appeal was filed against the assessment order and on the next day stay application was filed to the assessing officer. On mutual understanding Rs.1 crore was paid by the assessee in two installments with a request to grant stay of the remaining disputed demand.

**It was held by the court that, the assessee would in the normal course be entitled to an absolute stay of the demand on the basis of instruction no.96 dated 21/08/79 issued by board. The petitioner was directed to pay 15% of demand in installments after deducting 1 crore.**

**(7) 323 ITR 305 Delhi**

**SOUL V/s. DCIT**

In this case instruction no.96 and 1914 dated 02/12/93 were considered by the Delhi high court.

In this case returned income was Rs.10.16 Lac which was assessed at Rs.7.59 crore and demand of Rs.4.31 crore was raised. On account of notice of assessing officer, the banking operations of the assessee came to stand still. Rs.2.24 crore was recovered from the assessee. Further refund of Rs.3.28 Lac was adjusted. An appeal was filed by the assessee. Application

of stay was also pending before the commissioner. It was directed by the court to decide stay application.

**(8) 324 ITR 247 Delhi**

**Taneja Developers And Infrastructure Ltd. V/s. ACIT**

**And Others Date of Order : 24/02/09**

In this judgment instruction no.96 was considered.

In this case returned income was Rs.4641070/- which was assessed at Rs.1,67,80,23,590/- which was almost 350 times of the returned income.

The commissioner directed to pay 50% out standing demand. It was held by the court that when assessed income is substantially higher than returned income. CBDT instruction 1222 was not suppressed by ins.no.1914 of 1993. Demand must be stayed.

This judgment was given after considering assurance given by Deputy Finance Minister on the floor of the parliament and on the basis of which instruction no.96 (it should be 95) issued on 21/08/1969 and the judgment given in the case of Soul V/s. Deputy CIT (2010) 323 ITR 305 (Delhi) and other judgments cited during the course of proceedings before Delhi High Court.

**(9) 346 ITR 375 Rajasthan**

**246 CTR 113 Rajasthan Date of order 15/12/11**

**MAHESHWARI AGRO INDUSTRIES vs. UNION OF INDIA & ORS**

In this case instruction no.96 was also considered

This is an excellent judgment given by Dr Vinit Kothari of Rajasthan High Court.

It was held in this case that, the tendency of making high-pitched assessments by the AOs is not unknown and it may result in serious

prejudice to the assessee and miscarriage of justice and sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore such powers under sub-s (6) of s.220 also have to be exercised in accordance with the letter and spirit of **instruction no.96, dt. 21st August 1969, which even now holds the field and its spirit survives in all subsequent CBDT circulars and undoubtedly the same is binding on all the assessing authorities created under the act.**

CBDT was urged to issue appropriate guideline for grant of stay in spirit of instruction no.96 dt 21st August 1969 to all the subordinate authorities and to clarify for uniform application all over the country at department level that first appellate authority shall have power to entertain and decide stay application during pendency of appeal before it upon relevant considerations for grant of stay against recovery of disputed demand of tax.

CIT (A) also has inherent and implied powers to grant stay, the assessee-petitioner may also file stay application before the CIT (A), who may also consider such stay application on its own merits upon the relevant factors viz. prima facie case, balance of convenience, irreparable injury, nature of demand and hardship likely to be caused to the assessee, liquidity available to the assessee etc. It is directed that all the first appellate authorities in the cases of other appellant assessees within the State of Rajasthan also would entertain stay applications filed before them during the pendancy of appeals and would decide the same on their own merits in future also.

As the assessed income in this case was 47 times of the returned income, the recovery of entire amount was stayed by the honorable court.

**View of Shri T. N. Pandey Ex. Chairman CBDT**

In the article of stay of demand of disputed assessments by respected Shri T. N. Pandey Ex. Chairman CBDT (published in 297 ITR page 1 journal on page 6) it is mentioned that income assessed is twice the income return or more the demand to such high-pitched assessments, on applications made by the assesses, has to be stayed till the disposal of appeals by the commissioners of appeals. There is no escape from the situation and assessing officers, could not adhere to this instruction and compel the assesses to pay the demand, which his more than the income returned, on the basis of the criterion in instruction no.96 could be held to be guilty of not following the decision of a committee of parliament and could be said to be **committing contempt of parliament. The central board of direct taxes cannot unilaterally issue circulars which are contrary to instruction no.96 dated 21/08/1969** issued with the approval of the informal consultative committee of parliament and the then deputy prime minister / finance minister.

| **III** | **Parameters for grant of stay** |
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**(1) 251 ITR 158 Mumbai**

**KEC International Ltd. V/s. B.R. Balkrishnan and Others**

In this case demand of about Rs.13 crores was raised. The assessee filed stay application till the appeal was heard. The stay application was rejected without giving any reason. The assessing officer issued notice to the assessee's banker for recovery of tax.

Writ was filed to the Bombay High Court. The Bombay High Court set aside the order and issued following parameters to be complied with by the authorities while passing orders on stay applications filed pending appeals to the first appellate authority :

(i) The authority has to at least set out the case of the assessee briefly.

(ii) If the assessed income is higher than the returned income the authority has to consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited, for which reasons should be given by the authority.

(iii) If the authority wants the assessee to deposit the amount he can briefly indicate in his order whether the assessee is financially sound and viable to deposit the amount.

(iv) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may have recourse to coercive action for which brief reasons may be indicated in the order.

**The court clarified that the above parameters were only recommendatory and not exhaustive.**

The court gave direction to the Assessing Officer to dispose of the stay application of the assessee in accordance with law.

**(2) 295 ITR 42 Bombay**

**Mahindra and Mahindra Ltd. v. Assessing Officer**

This is an excellent judgment with regard to recovery of tax. The action of the assessing officer was strongly condemned.

In this case without affording fair opportunity to the assessee to reply to show cause notice, the bank accounts were frozen and the money was also recovered on the same day. It was held by the court that the action of recovery was void ab initio.

The parameters laid down in the case of KEC International Ltd. where also not followed **which amounts to contempt of courts. It is the past experience that the consistent approach of the revenue not to follow**

**the law laid down by this court. Action of respondent no.1&2 shocks our judicial conscience. Rule of law has been given a total go-bye and willfully ignored. The income tax authority have acted in a high handed manner.**

In this case before appeal period was over the attachment was made and the amount was recovered. It was the reply on behalf of the revenue that the department was not willing to bring back the money which was forcibly recovered ignoring the decision of Bombay High Court.

The court directed the department to return Rs.294256264/- and deposit with registrar general of the court.

**The joint commissioner Mr J R Dahad, respondent no.2 who was present in the court and it was made clear that this order has been pronounced loudly in the open court and learned council for the respondent has fully understood the above order and joint commissioner Mr J R Dahad has also fully under stood the above order. Notice of contempt was issued for prima facie knowingly and willfully disobeying the two order of Bombay High Court.**

**(3) 345 ITR 71 Bombay**

**UTI Mutual Fund v. Income-tax Officer**

It was held in this case that this court laid down certain guidelines in the case of **KEC International Ltd. V/s. B.R. Balkrishnan and Others** should be borne in mind by the I T Authorities for effecting recovery of disputed demand. It was directed in that guideline that,

No recovery of tax should be made during the period allowed for filing and appeal against the impugned assessment order or appellate order

No recovery of tax should be made during the pendency of stay petition moved by the assessee and for a reasonable period thereafter, to enable the assessee to move higher forum.

| IV | No recovery till stay application is decided |
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**(1) 256 ITR 698 Gauhati**

**Bongaigaon Refinery and Petro Chemicals Ltd. V/S. CIT and Others**

Sometimes even though stay application is filed to appellate authorities, the I T authorities insist for payment of disputed tax. For such cases, this is the excellent judgment. It was held by the court that demand must be stayed until application is considered and order passed by Tribunal.

**(2) 285 ITR 419 Bombay**

**Coca Cola India P. Ltd. v. Additional Commissioner of Income-tax**

In this case, stay was granted in similar case for earlier years pending disposal of appeal. As the appeals for earlier was fixed by hearing, the court directed to make certain payment towards outstanding tax dues and notice for attaching the bank account of the assessee was quashed.

**Obiter Dicta : Attaching the bank account of the petitioner even before communicating the order passed on the stay application is totally high handed.**

**(3) 351 ITR 302 Bombay**

**Society of the Franciscan (Hospitaller) Sisters V/s. DCIT**

Notice of demand. Stay. Appeal before CIT(A) pending. Withdrawal of huge money in pursuance of notice u/s. 220(6). Enforcement of recovery without disposing of application for stay. Not justified. Sufficient funds to be restored to the bank account of the assessee with a view to allow it to carry on its activities.

| V | ITAT can grant stay |
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**(a) 231 ITR 47 Andhra Pradesh**

**Bhoja Reddy v. Commissioner of Income-tax**

In this case the writ petition of the petitioner was sent back to the income tax appellate Tribunal with a direction to consider demand of interest payable u/s.220(2). The power of Tribunal to grant stay was ancillary to appellate jurisdiction.

**(b) CIT (A) has power to grant stay**

**(1) 149 ITR 120 Kerala**

**Purushothaman (V.N.) v. Agricultural Income-tax Officer**

In this case the issue was weather the appellate assistance commissioner has power to grant stay of disputed tax.

It was held by the court that for effective exercise of the appellate power, the AAC has power to grant stay of collection of stay. It is an inherent and incidental power. This power is to be exercised judicially. The stay petition should be decided by application of mind.

**(2) 208 ITR 461 Allahabad**

**Prem Prakash Tripathi v. Commissioner of Income-tax**

In this case the issue was whether CIT (Appeals) has power to grant stay. It was held that CIT(A) is also an appellate authority like the Tribunal. The CIT(A) must be held to have power to grant stay which is incidental or ancillary to its appellate jurisdiction.

**(3) 210 ITR 1014 Kerala**

**Kesav Cashew Co. v. Deputy CIT**

In this case the assessee filed appeal against the assessment order as well as stay application to CIT(A). Notice was served by TRO for collection of outstanding tax dues. It was the plea of the assessee that it had no liquid funds and there were fair chances of success in appeal.

It was held that when the assessee had not filed an application u/s. 220(6) to the income tax officer he could very well approach the appellate authority to invoke inherent jurisdiction for staying collections of tax pending till the appeal is decided.

**(4) 212 ITR 451 All**

**Tin Manufacturing Co. of India v. Commissioner of Income-tax**

In this case the assessee approach CIT(A) for grant of stay of disputed tax. It was the duty of CIT(A) to dispose of the same expeditiously.

**(5) 231 ITR 737 Cal**

**Debasish Moulik v. Deputy CIT**

In this case the assessee filed stay application for grant of stay of disputed tax to the assessing officer. The assessing officer directed to pay 50% of the demand, then only the stay petition can be considered.

The assessee filed writ to the Honorable court. It was held by the court that appellate authority has inherent and incidental power to grant stay of disputed tax for the effective exercise of the appellate powers. The assessee was directed to approach CIT(A) for grant of stay.

**(6) 239 ITR 871 Gauhati**

**Bongaigaon Refinery and Petro-Chemicals Ltd. v. Commissioner of Income-tax**

In this case the assessee filed writ to the Honorable court to grant stay of disputed tax during pendency of appeal. It was held by the court that Commissioner of Income-tax (Appeals) has power to grant stay. The petitioner was directed to apply within fifteen days to Commissioner of Income-tax (Appeals) and Commissioner of Income-tax (Appeals) directed to apply his mind to application and pass an order within fifteen days. Recovery proceedings were stayed till Commissioner of Income-tax (Appeals) passes his order.

**(7) 59 DTR 333 Karnataka**

**JAGADISH N. HINDUJA vs. COMMISSIONER OF INCOME TAX & ANR.**

CIT(A) has inherent power to grant stay of demand though such power is not expressly conferred on him under s. 246A; order passed by him rejecting the request for stay is set aside and he is directed to consider the application for stay on merits and in accordance with law.

## VI Stay beyond 365 days

**(1) 240 CTR 265 Bombay**

**COMMISSIONER OF INCOME TAX vs. RONUK INDUSTRIES LTD.**

As per section 254(2A) maximum stay for payment of tax can be extended upto 365 days and if the appeal is not decided during this period, the stay shall stand vacated.

In this case it was held that, stay of outstanding demand can be extended beyond the period of 365 days if the delay in disposing of the appeal is not attributable to the assessee.

**(2) 252 CTR 281 Karnataka**

**COMMISSIONER OF INCOME TAX vs. ECOM GILL COFFEE TRADING PVT. LTD. & OTHERS**

In this case it was held that, legislature stipulate time of 365 days in the third proviso to section 254 (2A) within which the stay order granted by Tribunal can operate. The tribunal has no power to pass orders granting stay beyond the period of 365 days.

**(3) 138 TTJ 257 (SB) ITAT Spe. Mumbai**

**TATA COMMUNICATIONS LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX**

It was held in this case that, where the delay in the disposal of the pending appeal is not attributable to the assessee, the Tribunal has the power to

extend the stay beyond the period of 365 days even after the amendment of third proviso to section 254 (2A) wef 01/10/08.

**(4) 150 TTJ 661 Delhi**

**Qualcomm Incorporated V/s. Assistant Director of Income Tax**

It was held in this case that, when assessee paid amount of tax as per direction of ITAT and delay in disposal of appeal was not attributable to the assessee. Recovery of demand stayed though more than 365 days passed.

**VII Others**

**(1) 81 ITR 397 Calcutta**

**HINDUSTHAN RUBBER WORKS LTD. vs. INCOME TAX OFFICER & ORS.**

In this case stay for disputed tax was granted without imposing any condition till the hearing of appeal but for a limited period. As the appeal was not heard till the period of stay, application was moved to the assessing officer by the assessee to extend the stay. No order was passed by the assessing officer. It was held by the court that the stay should continue unless there was anything in the conduct of the assessee.

**(2) 86 ITR 699 Madras**

**R.P. DAVID & ORS. vs. AGRICULTURAL INCOME TAX OFFICER & ANR.**

In this case the stay petition was rejected only on the ground that the assesses were financial sound and in a position to pay tax. It was held by the court that this is not ground to reject stay application.

Power given to public officer is normally for exercise in favour of the person concerned unless there is some sound and relevant reason.

**(3) 165 ITR 650 Kerala**

**N Rajan Nair V/s. ITO and Another**

In this case it was held that the assessing officer should apply his mind to relevant factors and circumstances like the assessment history of the assessee, his conduct and co-operation with the department, point raised in appeal, chances of recovery in case of appeal is dismissed, **the hardship to the assessee by insistence on immediate payment and the like.**

**The assessing officer should remember that he is not the final authority of the dispute involved but the first amongst the statutory authority. The assessing officer should not act as a tax gatherer but as a quasi tax judicial authority vested with the power of mitigating hardship of the assessee.**

In this case return income was Rs.12500/- which was assessed at Rs.139770/- for A.Y.1984-85. The stay application was rejected. The assessing officer was guided solely by consideration of collection of revenue and the relevant factors were not taken into consideration. The order of the assessing officer rejecting stay was quashed and remanded back to him for the consideration in the light of the observations contained in the judgment.

**(4) 213 ITR 299 Allahabad**

**Shiv Shakti Rubber and Chemicals Works v. Income-tax Appellate Tribunal**

In this case it was held that normally, the high court does not interfere in matters decided by judicial authority in a pending judicial proceeding but the reasons recorded by the judicial authority to judicial canons, the high court will interfere so that the authority will act in a judicial manner and to prevent injustice to the litigants.

**(5) 226 ITR 270 Gujarat**

**Gujarat State Fertilizers and Chemicals Ltd. v. Deputy CIT**

In this case the issue in appeal was decided in favour of the assessee in earlier years. Circular no.530 issued by CBDT and reported in 176 ITR (St.) 640 was applicable. The assessing officer was directed not to insist for payment of 20% of tax. In this case there was huge refund payable to the assessee and it was requested by the assessee to adjust it against outstanding demand.

**(6) 314 ITR 288 Calcutta**

**New Rupayan Jewellers v. Union of India**

An appeal was filed by the assessee against the assessment order. Stay application was also filed to the assessing officer. The assessing officer rejected the stay application on the ground that appeal was filed against the order.

It was held by the court that since the assessee has right to prefer appeal against an assessment order, simply on the ground that appeal is preferred by the assessee to reject stay application on this ground was against the spirit of statute. The order was set aside.

**(7) 321 ITR 491 Allahabad**

**230 CTR 173 Allahabad**

**CTR Vol. 50 Part II, Pg. 96 & 97**

**Smita Agrawal V/s. CIT**

In this case the appellant filed appeal as well as stay application to CIT(A). CIT(A) not passing any order for two and half months. It was held by the court that inaction on the part of CIT(A) was depreciated. CIT(A) was directed to hear and dispose of stay application within 15 days. CBDT directed to issue circular if necessary to all appellate authorities to dispose

off stay application expeditiously and A.O. must be slow in initiating recovery process so long the stay application in not disposed off.

**(8) 329 ITR 278 Calcutta**

**Purnima Das V/s. Union of India**

In this judgment it was held that before attaching the bank a/c. of the assessee notice to assessee prior to attachment is mandatory. Before attachment of bank a/c. application for stay should be considered. The contention that serving a copy of notice of attachment on the assessee was not necessary is not acceptable because the word, "Shall is used in section 226(3)(iii). Thus before taking action of attachment notice is required to be served.

**(9) 346 ITR 11 Gujarat**

**Tax Recovery Officer v. Industrial Finance Corporation of India**

In this case this issue was in relation to section 281 which deals with certain transfer to be void and the priority of income-tax debt. If any property is transferred by the assessee during pendency of income-tax proceeding, such transfer is void only if transferee had notice of pendency of income-tax proceedings.

**(10) 225 CTR 358 Calcutta**

**VISHWANATH AGARWALA vs. TAX RECOVERY OFFICER & ORS.**

Attachment and sale of immovable property. Power of TRO to examine the question of benami ownership of property. Assessee given enough time to prove ownership of property. Still sale of property stayed for 45 days to approach Civil Court.

**(11) 246 CTR 176 Delhi**

**Maruti Suzuki India Ltd. V/s. Deputy Commissioner of Income Tax**

If an order for stay of recovery is passed, the Assessing officer should not pass an order of adjustment u/s. 245 to recover the demand; if the same

addition / disallowance / issue has already been decided in favour of the assessee by the appellate authority.

**(12) 254 CTR 569 P&H**

**Motorola Solutions India P Ltd. V/s. CIT**

Till actual demand is created by passing an assessment order. Provisional attachment order u/s.281B will remain in operation.

## 4. Conclusion

**I** Though time and again the courts have given directions to the I T Authorities

1. To Pass a speaking order for rejection of stay application
2. To give reasons for rejecting stay application
3. To give opportunity of being heard to the assessee before passing stay application
4. To take judicious view while deciding stay application
5. To use discretion in reasonable manner
6. To act fairly while deciding stay application etc

but the same has not at all been followed by the I T authorities. The only way to implement the decisions of the courts is to take contempt action against such officers.

**II** Though it has been decided in the case of **MAHESHWARI AGRO INDUSTRIES vs. UNION OF INDIA & ORS reported in 346 ITR 375 Rajasthan that instruction no.96, dt. 21st August 1969, which even now holds the field and its spirit survives in all subsequent CBDT circulars and undoubtedly the same is binding on all the assessing authorities created under the act.**

Though CBDT was urged to issue appropriate guideline for grant of stay in spirit of instruction no.96 dt 21st August 1969 to all the subordinate authorities and to clarify for uniform application all over the country at department level that first appellate authority shall have power to entertain and decide stay application during pendency of appeal before it upon relevant considerations for grant of stay against recovery of disputed demand of tax. Even CBDT has not issued any instruction and the recovery of outstanding demand is yet being forcefully recover though there are number of decisions in favour of the assesses.

Hope that this issue taken by All India Federation of Tax Consultant before Delhi High Court for proper direction in matter of stay application.

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ALL GUJARAT FEDERATION OF TAX CONSULTANTS

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## Analysis of recent Delhi High Court decision on CPC & TDS Credit related issues

**SAMIR JANI**

**Analysis of recent Delhi High Court decision on CPC & TDS Credit related issues.**

On account of a letter addressed by Anand Parkash, FCA, to Delhi High court on issues related to faulty processing by CPC, credit for TDS & erroneous adjustments of wrong demand, the High Court took judicial notice of the letter, converted it into a public interest writ petition and directed the CBDT to answer various grievances made in the letter and certain other issues which the Court raised. Eminent senior counsel Ms. Premlata Bansal, Vice President of AIFTP, was appointed by the court to assist it. But for the splendiferous efforts of Ms Premlata Bansal this landmark directive decision giving relief to a very large mass facing undue harassment would not have been possible. The department accepted that tax payers are facing difficulties in receiving credit of TDS & refunds on account of adjustment towards arrears. Thereafter, as an interim measure to provide immediate relief to the assessees, the Court passed an order dated 31.08.2012 by which it gave detailed directions. After further hearing, HELD by the Court giving seven direction/mandamus:

**Uploading of wrong or fictitious demand**:

The CBDT has accepted that incorrect and wrong demands have been uploaded on the CPC arrears portal. The CIT, CPC, has expressed his concern and anguish on account of uploading of incorrect and wrong data in the CPU and the problem faced by them and by the assesses. The CBDT has issued Circular No. 4 of 2012 in which the burden is put on the assessee to approach the AOs to get their records updated and corrected by filing s. 154 applications. While this may be the easiest option available, it should not be a ground for the AO not to suo motu correct his records and upload correct data. Each assessee has a right and can demand that correct and true data relating to the past demands should be uploaded. Asking the assessee to file s. 154 applications entails substantial expenses and defeats the main purpose behind computerization. In its affidavit dated 05.03.2013 before the High Court, department stated that "recently" they

have prescribed a register for receipt of rectification applications. The said register shall have various columns namely date of disposal, date of service of rectification application, demand/refund etc. This is the right step but it must be ensured by the Board that the registers are made available to all Assessing Officer or at the dak counters. Court directed that the said registers shall be made available to the dak counters and the Assessing Officers within 2 months if not yet provided. The Board will also issue instructions that all Assessing Officers and dak counters shall henceforth in the said register, enter and allocate a serial number on rectification applications and date of receipt. Uploading of the details of the said registers as stated in affidavit should be made online preferably within a period of 6 months. Also, the AO's do not adhere to the time limit prescribed for disposal of the s. 154 applications. To ensure transparency (and accountability), a register must be maintained with details and particulars of each application made u/s 154, the date on which it was made, date of disposal and its fate. The s. 154 application has to be disposed of by a speaking order and communicated to the assessee. There must be full compliance of the said requirements;

(ii) **Re Adjustment of refund contrary to s. 245**:

Initially the court by interim order dated 31.08.12 issued direction to respondent that they shall in future follow the procedure prescribed under section 245 before making any adjustment of refund payable by CPU at Bengaluru. The assessees must be given an opportunity to file response or reply and the reply will be considered and examined by the Assessing Officer before any direction for adjustment is made. The process of issue of prior intimation and service thereof on the assessee will be as per the law. The assessees will be entitled to file their response before the Assessing Officer mentioned in the prior intimation. The said interim order is confirmed by the High Court by order dated 14.03.13. S. 245 postulates two stage action; first a prior intimation to the assessee and then, if warranted, the subsequent adjustments of the refund towards arrears. This is not being followed by the CPC because the computer itself adjusts the refund due against the existing demand. To prevent this breach of the law, the department must follow the procedure prescribed u/s 245 and give the assessee an

opportunity to file a reply which should be considered by the AO before giving the direction for adjustment. As regards the cases where such (illegal) adjustment has been made in the past, the cases must be transferred to the AOs for issue of notice to the assessee seeking adjustment of refund. The assessees will be entitled to file a reply to the notice and the AO will then pass an order u/s 245 allowing the refund. The CBDT has to fix a time limit and schedule for completing the said process. Though the process involves expenditure and paper work, the situation has arisen due to the lapses on the part of the AOs and the assessees cannot be made to suffer for the wrong uploading of arrears and wrong adjustment of refund. Addressing the problem relating to "past adjustment" before passing of interim order dated 31.08.12, the court issued directions only for returns which have been proceed by CPC Bangaluru and adjustments have been made without following the procedure u\s. 245 as under:

- All such cases will be transferred to Assessing Officer
- The Assessing Officer will issue notice to the assessee which will be served as per procedure prescribed under the Act.
- The assessee will be entitled to file response/reply to the notice seeking adjustment of refund
- After considering the reply, if any, the Assessing Officer will pass an order under Section 245 of the Act permitting or allowing the refund
- The Board will fix time limit and schedule for completing the said process.

The question of the assessee's entitlement to interest on the SA tax is left open though when the delay is due to the fault of the Revenue, interest should be paid u/s 244A. False uploading of past arrears and failure to follow the mandate of s. 245 is a lapse on the part of the AO;

(iii) **Re non-communication of adjusted s. 143(1) intimations**:

The Court laid down that claim which has been rejected on the ground of technicalities but there is no communication to the assessee of the order/intimation under section 143 (1) and a demand has been raised by the

Assessing Officer, he cannot enforce the demand created by un communicated order/intimation under section 143 (1).The non-communication of s. 143(1) intimations, where adjustments on account of rejection of TDS or tax paid has been made, is a matter of grave concern. When there is failure to dispatch the intimation within a reasonable time to the assessee, the return shall be deemed to have been accepted and the intimation will be treated as non est or invalid for want of service. The onus to show that the order was served on the assessee is on the Revenue and not upon the assessee. If a TDS or tax credit claim has been rejected on a technicality but there is no communication to the assessee of the order/intimation u/s 143(1), the AO cannot enforce the demand created by the said order/intimation;

(iv) **Credit of TDS**:

The problem regarding credit of TDS or rejection of TDS credit is in two categories. The first is those where the deductors fail to upload the correct particulars of the TDS which has been deducted and paid and the second is where there is a mismatch between the details uploaded by the deductor and the details furnished by the assessee in the ROI. As regards the first, the CBDT had earlier directed that the AOs to accept the TDS claims without verification where the difference between the TDS claimed and the TDS as per AS26 did not exceed rupees one lakh. This figure has now been reduced to a mere Rs.5,000. Ex-facie, there is no justification for the reduction because credit is being given only if the three core fields match namely Name of the assessee, the PAN number and the assessment year. The CBDT must re-examine this aspect and take suitable remedial steps if they feel that unnecessary burden or harassment will be caused to the assessees. As regards cases of mismatch because of different methods of accounting, or offering income in different years, the department must take remedial steps and ensure that in such cases TDS is not rejected on the ground that the amounts do not tally. The department should also fix a time limit within which they shall verify and correct all unmatched challans. An assessee as a deductee should not suffer because of fault made by deductor or inability of the Revenue to ask the deductor to rectify and correct. Once payment has been received by the Revenue, credit

should be given to the assessee. The CBDT should issue suitable directions in this regard. The department's response on the action taken against deductors for non-compliance is unfortunate and unsatisfactory and it purports to express complete helplessness on the part of the Revenue to take steps and seeks to absolve them from any responsibility. Denying benefit of TDS to a taxpayer because of the fault of the deductor causes unwarranted harassment and inconvenience. The deductee feels cheated. The Revenue cannot be a silence spectator, wash their hands and pretend helplessness. The problems highlighted here are normally faced by middle class on their pay rolls. The Act empowers and authorizes the Assessing Officer to verify the contents of the return and notices can be issued to a third party i.e. the deductors, to furnish information & details. The deductor, the principal officer or person responsible for making deduction, once issued notice to appear, in most cases, would like to comply with the statutory requirements and also furnish details with regards to TDS deducted from the income of the assessee. Therefore, we direct that when an assessee approaches the Assessing Officer with requisite details and particulars, the said Assessing Officer will verify whether or not the deductor has made payment of the TDS and if the payment has been made, credit of the same should be given to the assessee. These details or the TDS certificates should be starting point for the Assessing Officer to ascertain and verify the true and correct position. The Assessing Officer will be at liberty to get in touch with the TDS Circle in case he requires clarification or confirmation. He is also at liberty to get in touch with deductor by issuing a notice and compelling him to upload the correct particulars/details. The said exercise must be and should be undertaken by revenue i.e. the Assessing Officer as an assessee who suffers in such cases is not due to his fault and can justifiably feel deceived and defrauded. We do not accept the stand of the Revenue that they can only write a letter to the deductor to persuade him to correct the uploaded entries or to upload the details. Power and authority of the Assessing Officer cannot match and are not a substitute to the beseeching or imploring of an assessee to the deductor. The directions given above are in accord with the provisions of the Act, namely, section 133 and TDS provisions of the Act. If required and necessary, the Income Tax

authorities can obtain prior approval from the Director or Commissioner. The authorities can also examine as to whether general approval can be given. The stand of the Revenue that they can only write a letter to the deductor to persuade him to correct the uploaded entries or to upload the details is not acceptable. S. 234E has now been inserted by the Finance Act, 2012 to levy a fee of Rs.200 per day for default of the deductor to file TDS statement within due date. It is unfortunate that the Board did not take immediate steps after even noticing lacuna and waited till Finance Act 2012.Denying benefit of TDS to a tax payer because of the fault of the deductor, which is not attributable to the deductee, causes unwarranted harassment and inconvenience. The AO must use his power and authority to ensure that the deductor complies with the law. The assessee in question will be at liberty to correspond with his Assessing Officer or the TDS circle pointing out the said factual position and appropriate action as directed in the aforesaid paragraphs, will be taken by the Assessing Officers concerned.

In the affidavit filed on 5 th. March, 2013 respondents have stated as under:

*"5.1 That with regard to the query raised by the Hon. Court in order dated 05.02.2013, following is submitted that*

*(i) I state that assessee is being given benefit of 20% in case details are received subsequently by the department. Assessee has to refer back to the deductor to correct the details/statement already filed. However, inspite of the assessee having furnished details to the deductor, somehow deductor does not upload/correct the statement but assessee had evidence/necessary proof and documents, than assessee will be entitled to approach the concerned Assessing Officer and who after due verification will allow such credit".*

Steps for implementation and to ensure that credit is given to such assessee should be taken by the respondents in this regard and for compliance instructions should be circulated to the Assessing Officer.

The Court suggested that the assessee should register its grievance on the website under the head My Account or if the directions issued by them are not followed approach the writ court.

The court also permitted the respondent or the petitioner All India Federation of Tax Practitioners to move an application for modification/clarification of the order dated 14.03.2013. In view of these directions I would suggest to all fellow delegates that if they have any suggestions on modification of the order the same may please be communicated to Ms. Premlata Basal Vice President of All India Federation of Tax Practitioners.

I have tried to read & analysis the directions of Hon. High Court. Errors, if any, in finding may please be brought to my notice at samirjani@yahoo.co.in.

**MERLYIN SHIPPING & TRANSPORTS IS STILL A GOOD LAW**

We are to discuss today the special bench decision in the case of M\S. MERLYIN SHIPPING & TRANSPORTS Vs. ACIT 146 TTJ 1 (Vizag) which brought smiles on the face of assesses who were cowering terror in the face of unbearable burden of tax liability imposed invoking section 40 (a) (ia).

The provision was brought on the statute book by Finance Act, 2004 w.e.f A.Y.2005-06. It entail 100 percent disallowance of certain expenditure for the technical default of no deduction of TDS or after deduction, non-payment thereof to the government treasury.

Then came the amendment by Finance Act 2010 which granted small relief by laying down that when TDS is deducted and paid on or before the due date of filing of return of income no disallowance would be made.

Finally, amendment by Finance Act, 2012, which introduced a proviso as:

**Provided further** *that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of* section 201*, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.*

Until these amendments, it was an era of litigation, demand & stay. Then came the Special Bench decision of **M\S. Merlying Shipping & Transports 146 TTJ 1 (Vizag)** which laid down that disallowance under section 40 (a) (ia) was applicable only to amounts outstanding or provisions made on the date of balance sheet on which there was default in complying with TDS provisions. This decision was being followed by all appellate authorities granting relief to the appellants.

Department went in appeal to Andhra Pradesh High Court and prayed for stay of special bench decision. The A.P. High Court passed an order dated stating "Interim suspension. Notice." Since then there is confusion as to the order of Special Bench after the stay from A.P. High Court still holds good or not.

Recently, the Kolkatta B Bench had the occasion to deal with issue in **I.T.O., Wd.3(1),Asansol Vs. M\S. MGB Transport ITA No.2280/Kol/2010 order dated 15.03.2013** wherein the bench relying upon the Hon'ble Calcutta High Court in the case of **Piyush Kanji Chowdhury Vs. State of West Bengal & Ors dated 14 th May 2007** wherein at para 10 and 13 it has held as under:

*10. After hearing the learned counsel for the parties and after going through the aforesaid provision we find that the supreme court by this interim orders has no doubt stayed the operation of the Division Bench of this court by directing the parties to status quo and at the same time restrained the state from inducting third parties on the lands which was subject matter before Apex Court. Such interim order is binding upon the parties to the proceedings but the law is equally settled that by mere passing of an interim order staying the operation of a judgment with certain further conditions, the existence of the said judgment is not wiped out and at the same time, for such interim orders inter parties, the authority of a decision as precedent is never undermined. Unless a decision is set aside by superior court, the said decision remains binding as precedent though may not be binding upon the parties to the proceedings where the superior court has granted interim order. Moreover, once a provision has been declared ultravires the constitution of India, at is why the state cannot invoke the said ultravires proceedings against the citizens of*

*the country simply because an interim order of stay of operation order declaring the provision as ultravires has been passed in an appeal against such order. The object of granting interim order is to see that the relief claimed in the appeal may not become in appropriate or the appeal does not become in fructuous for not granting such interim order, but by mere grant of interim stay, the effect of a binding precedent is not destabilized. Over and above, the interim orders of the stay granted by supreme court clearly indicate that the said court never intended that notwithstanding the decision of High Court declaring a part of the provision of vesting as ultravires the state would never the less be free to proceed with the process of vesting during the pendency of the proceeding before the supreme court and that is why status quo as regards possession has been maintained and even, the state has been restrained from crating any third party interest in the land in question.*

*13. Therefore, the effect of order of state in pending appeal before the Apex Court does not amount to any declaration of law but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High court as a precedent because while granting the interim order, the Apex Court had no occasion to lay down any proposition of law inconsistent with the one declared by High Court which is impugned.*

*6. Even, Hon'ble Supreme Court, in the case of Shree Chamundi Moped Ltd. Vs. Church of South India Trust Association, Madras AIR 1992 Sc 1439,1444 has analyzed the difference between "stay of operation' of an order and "quashing of an order" and held that 'stay of order' of an appellate authority/court by a higher court means that the order passed by the appellate authority/lower court still continues to exist in law inspite of the 'stay ' and its existence is not destroyed. But where the order of appellate/lower court is quashed and the matter is remanded back, it means that the appeal disposed of by the said order of the appellate authority/lower court would be restored and it can be said to be pending before the said authority/lower court.*

*7. In view of the above, particularly the decision of Hon'ble jurisdictional High Court in the case of Pijyush Kanji Chowdhaury (supra), as alos in obidence to decision of the Hon'ble Supreme Court in case of Shree Chamnundi Mpoed Ltd. (spra), we are of the view that the decision of Special bench of this Tribunal in the case of Merlyn Shipping & Transports (supra) still holds ground and accordingly, TDS provisions will apply, for the purpose of invocation of the provisions of section 40 (a)(ia) of the Act, only on the amounts remain payable at the end of financial year and not on the paid amounts. Hence, we direct the AO to recompute the disallowance accordingly. Appeal of assessee is partly allowed for statistical purpose.*

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ALL GUJARAT FEDERATION OF TAX CONSULTANTS

Ahmedabad

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# "ANALYSIS OF THE IMPORTANT PROVISIONS OF FINANCE BILL 2013"

**JIGAR PATEL**

# NO SWEET TAX TUNES FROM FM!

## Tricky & Illusive Tax Reliefs Coupled With Mischievous Tax Provisions Disappoint Tax Payers!

The FM announced the setting up of 839 new FM radio stations in 294 Indian cities in his Budget speech 2013. However, quite ironically, the FM's Budget did not play any sweet music for taxpayers of India.

P Chidambaram, the FM who in 1997 endeared himself to India's taxpayers with his dream budget has only flattered to deceive in 2013! Opening his budget speech, he quipped that, "I intend to keep my speech simple, straight forward and reasonably short." However, only when one goes through the details of the 50 clauses, as contained in the Finance Bill, 2013, does one discover the number of tax googlies astutely thrown in by PC, almost in the style of his name sake, the great magician P C Sarkar!

### HIGHLY DISAPPOINTING RELIEFS

Indeed, there are a few tax reliefs, in his otherwise disappointing budget for the common tax-payer, but even these have been packaged with numerous riders, in the form of 'terms and conditions apply,' which we commonly come across attached with seemingly enticing proposals.

How else can you explain the scheme for tax credit of Rs.2,000, which will be available only to taxpayers having income upto Rs.5 lakhs. PC said this was being given to cover an inflation rate of 10% on the basic exemption of Rs.2 lakhs. As if, those with incomes more than Rs.5 lakhs have not encountered inflation. The FM paid rich tributes to women, but had nothing to offer them concrete, in terms of income-tax relief.

### ILLUSIVE HOUSING INCENTIVE!

14 years since the prevailing deduction for interest on housing loan of Rs.1,50,000 was introduced in 1999, when the FM talked about granting additional benefit of Rs.1 lakh, in respect of interest on housing loan, it did bring smiles on the faces of many prospective house owners, who thought their relief in this regard was being enhanced to Rs.2,50,000. But this joy turned out short

lived, as soon they got to know the numerous ifs and buts, linked with the new proposal under Sec.80EE of the Income-tax Act.

Taxpayers residing in metros may hardly get to enjoy this benefit, as the proposed relief is restricted only for houses, which do not exceed Rs. 40 lakhs in value! Moreover, this benefit, which would be available only in respect of loans not exceeding Rs.25 lakhs, that too sanctioned between April, 2013 to March, 2014, has been restricted to an all time Rs.1 lakh only. Quite surprisingly, the FM has obliged only banks and housing finance companies in respect of such loans and hence, a taxpayer cannot enjoy this deduction, if the loan is taken from any private source including his employer.

# NIGHTMARE FOR PROPERTY BUYERS!

## FM thrusts onerous obligation of deducting TDS on all purchasers of immovable property over Rs.50 lakhs

The taxing proposal, which came to be announced by Pranab Mukherjee in his Budget proposals in February, 2012, but soon came to be rolled back, when he realized its harsh implications, has quite astonishingly been sneaked in once again by P. Chidambaram in the Finance Bill, 2013.

### ILLOGICAL JUSTIFICATION

Attempting to justify the reintroduction, the FM tried to explain in his Budget speech, "Transactions in immovable properties are usually undervalued and underreported. One-half of the transactions do not carry the PAN of the parties concerned. With a view to improve the reporting of such transactions and the taxation of capital gains, I propose to apply TDS at the rate of one percent on the value of the transfer of immovable property where the consideration exceeds Rs.50 lakhs. However, agricultural land will be exempt."

At the outset, it needs to be pointed out that PC's claim to the effect that, "agricultural land will be exempt" is factually incorrect, in as much as what has been excluded under the language of the new Section 194-IA is only agricultural land situated in non-urban areas (which in any case do not attract capital gains tax) and transfer of all other agricultural lands would very much attract the charge of TDS.

It is also difficult to believe the the FM's statement that one half of the transactions do not carry PAN. Infact, the Memorandum explaining the provisions of the Finance Bill has also observed with reference to the reporting requirements under Section 285-BA of the Income-tax Act, read with Rule 114-B of the Income-tax Rules that, "the information furnished to the Department in Annual Information Returns by the Registrar or Sub-Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at Rs.30 lakh or more, during the financial year 2011-12 did not quote or quoted invalid PAN in the documents relating to transfer of the property."

It is well known that both the purchaser and seller are required to present their original PAN card for verification to the Registrar or Sub-Registrar at the time of property registration. Moreover, I.T. Rules require the filing of an elaborate

Declaration in Form 60 alongwith supporting evidence of identity of proof and address by persons who do not possess PAN. Under the circumstances, it is truly difficult to believe that the reporting system is faulty as alleged in the Memorandum. Infact, if this is so, the tax administration authorities need to explain, as to whether any action was taken against any Registrar or Sub-Registrar for not correctly discharging their obligation.

## TEDIOUS TDS TO TAKE TOLL

Why should a common investor in property bear the huge burden of compliance that has been proposed to be thrust by the proposed TDS provision? PAN alone will now be not enough. If the provision as proposed is passed, with effect from 1st June, 2013, no purchaser would be able to buy a property worth Rs.50 lakhs or more, without obtaining a Tax Deduction Account Number (TAN). He would be required to deduct 1% by way of TDS from the sale consideration he pays to seller and if the payments involve installments, such TDS would be required to be made out each such payment. Onerous responsibilities of depositing the tax deducted in the Govt. treasury, filing of quarterly TDS returns, issue of TDS certificate, payment of interest and penalty in case of any default etc., which even organised business entities find tedious to discharge, would now be required to be fulfilled even by a senior citizen, widow or farmer wanting to buy an immovable property.

And just imagine the practical complications that may arise if a purchaser, who has booked a property by paying an advance, seeks refund on cancellation of his booking. The seller may refuse to return TDS to the purchaser on the ground that the same is blocked with the I.T. Department. The purchaser has collected the TDS and paid it to the Department, but he cannot claim it back from the Department.

On the other hand, the seller would still be required to bear the brunt of 1% TDS, even if he sells the property at a loss, or even where he is lawfully not required to pay any tax, being entitled to enjoy exemption from capital gains under the provisions of Section 54, 54B, 54EC or 54F of the Income-tax Act.

## MISSING LOGICAL RELAXATION

It is further surprising that even while the earlier dumped proposal has been now revived, the logical relaxation, as announced by Pranabda in his original proposal in 2012, is conspicuously absent in PC's Finance Bill 2013. The Memorandum last year had explained that, "For reducing the compliance burden on the transferee or purchaser, it is also proposed that a simple one page challan

for payment of TDS would be prescribed containing details (including PAN) of transferor and transferee and also certain details of the property. The transferee would not be required to obtain any Tax Deduction and Collection Account Number (TAN) or to furnish any TDS statement as this would be mostly a one time transaction. The transferor would get credit of TDS like any other pre-paid taxes on the basis of information furnished by the transferee in the challan of payment of TDS."

* * * * * * * * * *

President
Shailesh C Desai

Secretary
CA Hersh S Jani

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