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Power of Stay by Income Tax Appellate Tribunal

A Critical Analysis

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INTRODUCTION

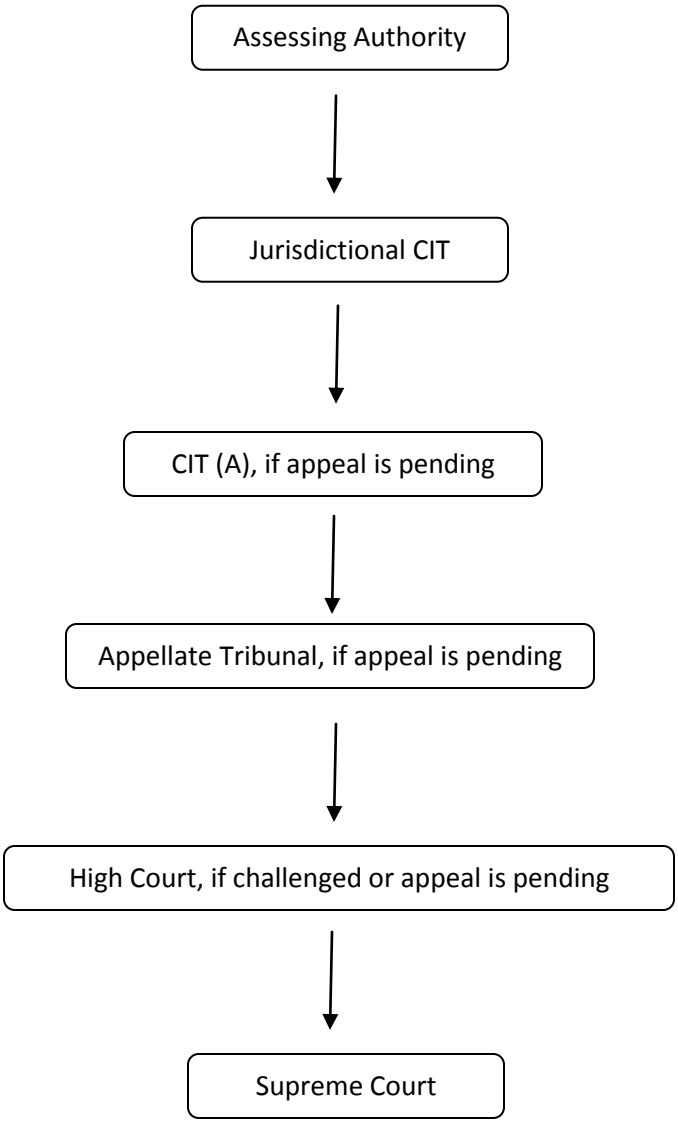
The assessee, tax payer is undoubtly duty bound to pay its taxes. Whether levy of tax is permissible under the law and if permissible, the quantum of such liability is the subject of matter of litigation in most cases. As a matter of ordinary prudence, assessee would not prefer to pay the amount unless the liability is certain and unambiguous. Thus, it is of utmost importance that provision has to be made as clear as possible to avoid uncertainty in tax liability and to avoid delay in collection of revenue by the Department. In addition, the provision should also be reasonable to levy any liability of any payment by the assessee.

The assessee to substantiate its legal right undergoes different rounds of enquiry and legal proceedings. Firstly, it is the assessing officer who makes the initial scrutiny on the genuineness of the accounts and the transactions and passes an order. Where any amount is disallowed or any addition is made by the assessing authority, the assessee prefers an appeal to the Commissioner of Income Tax (CIT) to substantiate its claim. The aggrieved party willing to take up the matter to a higher forum follows the following hierarchical judicial forums to have their grievance addressed.

- Income Tax Appellate Tribunal (ITAT), the final fact finding authority.
- Jurisdictional High Court only on matters involving substantial question of law
- Hon'ble Supreme Court of India

It should be noted that payment of tax is generally due from the assessee to the Department in any disputed tax liability unless a stay is granted by any authority for such recovery. Hence, similar to the hierarchy of above appeal process typically stay of demand can be granted by AO and on appeal, can be granted by jurisdictional CIT, CIT(A), ITAT, High Court and Supreme Court. The article solely deals with power of grant of stay by Tribunal being the 2nd appellate authority under section provisions of the Income Tax Act.

The Flow Chart below shows the authorities under the Act to grant stay:



In practice, the section 254 of the Act, i.e power of stay of Tribunal is of very high significance in light of demand by the Department towards payment of tax without finality in payment of tax.

As a matter of practice prevailing in the Department, the CIT or the ACIT in exercise of their administrative powers can provide relief to the assessee by staying the

recovery of such demands. But that can hardly be placed at par with a statutory power as contained in section 220(6) of the Act. Unfortunately, in view of the aforesaid reasons, most of the CIT(A) are under an erroneous impression that they do not possess the power to stay the disputed demands, which are involved in the appeals filed before them and in view of such assumptions, the CIT(A) do not entertain any such stay petitions. In the case of **Maheshwari Agro Industries Vs UOI & Ors (2012) 346 ITR 0375**, It was held that first appellate authority, namely, Dy.CIT(A) or CIT(A) have inherent, implied and ancillary powers to grant stay against the recovery of disputed demand of tax, while seized of the appeal filed before them under section 246 or 246A. There CBDT circulars and judgments of Tribunals and High Court including the Jurisdictional High Court in this regard which are seldom adhered by the Commissioners.

The Hon'ble Madras High Court in the case of **Vodafone Cellular Limited Vs CIT (W.P. NOS.30650 TO 30652 OF 2014)** held that CIT(A) ought to exercise his power to grant stay in light of the facts of the case and observed as under:

> *"23.This undoubtedly would be a very relevant factor to consider two of the cardinal tests viz. prima facie case and balance of convenience. If the legal issue is now pending before the Hon'ble Division Bench of this Court and order of interim stay has been granted, subject to certain conditions, that should have been considered by the first respondent[CIT(A)] while passing the impugned order dated 17.10.2014."*

It pertinent to note that stay is granted based on the merits of the case. There must be a *prima facie case* for granting a stay. The assessee cannot except a stay on recovery of tax and postpone its liability by filing an appeal before the appellate authorities. It shall also be of utmost importance to recollect the observation of the Hon'ble Apex Court in the case of **ITO vs. M.K.Mohammed Kunhi (71 ITR 815),** which read as under:

> *"**13**. A certain apprehension may legitimately arise in the minds of the authorities administering the Act that, if the Tribunal proceed to stay recovery of taxes or penalties payable by or imposed on the assessees as a matter of course, the Revenue will be put to great loss because of the inordinate delay in the disposal of appeals by the Tribunal. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."*

In the above decision, their lordships have held that prima facie case has to be looked into by the Tribunal in arriving at the decision of granting of stay. Also, another point of consideration is that tax effect should not frustrate the purpose of appeal. The decision has been held as early as 1960's and the rationale of the judgment still holds good.

Stay is mode by which assessee holds the Department from taking coercive action for recovery of disputed tax liability for a temporary period. Within the limited period, the determination of the tax liability is expected, failing which, the Department may proceed towards the collection of disputed tax liability. In practice, the certain percentage of the disputed tax amount should be paid for granting or continuation of the stay.

As per the provision, it is essential to complete the main appeal within the stipulated time period. However, for reasons beyond the control of the assessee, the appeal may extend beyond the allowable time frame. In such cases, the power of the Tribunal under the provision of the Act in light of series of amendments and judicial interpretations is the subject matter of the article we will delve into.

EVOLUTION OF SECTION 254

The following table provides a snapshot of the current provision:

Provision	Extract of the provision	Meaning
Sub-section (2A) of Section 254	*"(2A) In every appeal, the Appellate Tribunal, where it is possible, **may** hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) or sub-section (2A) of section 253 :"*	Case may be disposed by the Tribunal within 4 years from the end of the financial year in which such appeal is filed.
1st Proviso to section 254(2A)	*"Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period **not exceeding one hundred and eighty days** from the date of such order and the **Appellate Tribunal shall dispose of the appeal within the said period** of stay specified in that order:"*	After hearing the case on merits, Tribunal can pass order of stay for a period not exceeding 180 days and dispose the main appeal before the expiration of stay.
2nd Proviso to section 254(2A)	*"Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed s**hall not, in any case, exceed three hundred and sixty-five days** and the **Appellate Tribunal shall dispose of the appeal within the period** or periods of stay so extended or allowed:"*	Where appeal is not disposed in accordance with 1st Proviso of section 254(2A), Tribunal may extend the stay up to 365 days within which the appeal must be disposed off.
3rd Proviso to section 254(2A)	*"Provided also 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, which shall not, in any case, exceed three hundred and sixty-five days, the 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 the assessee."***	After the expiration of 365 days, the stay stands vacated even if the delay in disposing of the appeal is not attributable to the assessee.

Initially, under section 254, the stay was granted by the Tribunal for a period of 180 days within which the appeal has to be disposed off. Where the appeal is not disposed within the period specified, the stay automatically stood vacated.

Subsequently, by the Finance Act, 2007 w.e.f 1-6-2007, an amendment has been made to the provision to insert another Proviso to specifically grant an extension of stay up to 365 days. In the second Proviso, the key factor for consideration is the reasoning for extension of stay for non-disposal of the appeal, which the legislation has taken cognizance of. The proviso clearly excluded adherence to time frame of 180 days towards undisposed stay granted matters where the delay is attributable to the assessee.

Thereafter, **3rd proviso was inserted** to explicitly state that stay shall stand vacated after the period of 365 days even where delay is not attributable to assessee. The 3rd proviso has undergone different rounds of litigation and has been subjected to different interpretation by various courts.

Subsequently, by the Finance Act, 2008 w.e.f 1-10-2008, the 3rd proviso has been amended to deliberately state that stay should stand vacated **even if the appeal has not been disposed off not owing to the fault of assessee**.

POWER AND DUTY OF TRIBUNAL TO GRANT STAY

The Tribunal under the section is provided with the power to stay recovery proceedings. The power so granted by the legislation is within the legislative boundary. The contention of the revenue is fundamentally on the express words of the legislation which has to be respected. What is overseen is the duty of the Tribunal which has not been complied with by the Hon'ble Tribunal.

For instance, the appeal undoubtly is subject to functioning of the Tribunal to pass final orders over which the assessee has no control. In such a scenario, the assessee will not be granted stay of demand beyond the prescribed period, even though on merits he may deserve and has a genuine case of stay.

The first point of consideration is the category of power of stay by Tribunal. Whether the power of Tribunal is **statutory power** or **judicial power**?

Where the power of the Tribunal is considered as statutory power, it cannot be unreasonable or arbitrary. This has been held in plethora of cases where the legislation cannot make laws that are whimsical or unreasonable.

For instance, let as assume that an assessee has preferred an appeal before the Tribunal and also made an application for stay of recovery proceedings. The Hon'ble Tribunal may not be able to take up the case for some reasons which might include non-functioning of the bench, advocate related to member in the bench, Department seeks adjournment etc. These are some of the many examples where the assessee cannot be attributed for the delay in disposing of the appeal.

Such being the case, the question of whether the assessee has prima facie case is omitted for the purpose of extension of stay. It would cause unreasonable hardship in the financials of the assessee to pay an amount which assessee is not liable to pay. It is not disputed that refund of same or adjustment towards the future liability is impermissible under the law, but it causes serious short term and long term hardships to the assessee in the functioning of its business which the legislation fails to look into. Thus, it should be made sure that only the assessee who do not vigorously take the appellate proceedings should alone be made to suffer the fate of the stringent provision.

It is pertinent to note that Hon'ble Chennai ITAT in the case of **MRF Ltd. Vs DCIT (ITA No. 1374 & 1375/Mds/2010)** held as under:

> *"6. In the event that adjournment is sought on the date of hearing by the assessee, the instalment as granted to the assessee shall stand vacated and the Revenue would be at liberty to enforce the demand. In the event that the Revenue seeks an adjournment on the date of hearing, the instalment as granted to the assessee would stand vacated and the balance of demand would be stayed in toto. Ordered accordingly."*

So, while the legislature has plenary powers to impose conditions on the Tribunal in relation to right of appeal, it is equally true that conditions so imposed cannot be so unreasonable or arbitrary that they can forfeit the provision of the said right of appeal itself.

Also, it should be noted that limitation of such power is only upon the Tribunal and assessee has the right to approach the High Court for exercising their legal right. This view has been taken by the Hon'ble Delhi High Court in the case of **CIT v. Maruti Suzuki (India) Limited (W.P (Civil) No. 5086 / 2013).** This would cause series of writs to be filed before the High Court for stay or direction to the Tribunal to stay which dilutes one the primary reason for formation of Tribunal.

The Memorandum to the Finance Bill, 2001 and Circular No. 14 of 2001 dated 12th December 2001 [252 ITR 65(St.)] explains the intention of insertion of aforesaid *proviso* to section 245(2A) *vide* the Finance Act, 2001 which reads as under:

> *"….it has been observed that many assessees file appeals to the Tribunal only to obtain stay of demand and avoid payment of justified taxes. In order to discourage this practice, and ensure speedier collection of outstanding tax, the Act has amended Section 254…"*

It is the strong argument of the Department that Tribunal should respect the dictations of the legislature. It is undoubted that legislation is the primary law of land which should be respected. On the other hand, it is the contention of the assessee that the act of the legislation should not be unreasonable. Furthermore, where it is considered that the Tribunal is required to follow the explicit laws of the legislation, the Tribunal ought to have disposed off the case within the stipulated time frame provided under the section. This view has been fortified by the decision of the Hon'ble Mumbai High Court in the case of **Shri Jethmal Faujimal Soni Vs ITAT, Pune & others (333 ITR 96)**.

It is also not superficial to state that power of Tribunal to grant stay is a judicial power. It is an undisputed fact that Tribunal are quasi-judicial bodies that perform judicial functions. The legislation has constituted the Tribunals for speedy disposal of cases which prima facie performs judicial functions. It is also settled position of law that duty and power should be proportionate for the efficient functioning of any constitutional body. It is under this judicial power, the Tribunal has the right to grant Stay of cases even without the explicit provision of law to this effect. It is also pertinent to note that power of stay has been exercised by the Tribunal even before any provision to that effect.

Reliance is placed on the decision of the Apex court in the case of **ITO vs. M.K.Mohammed Kunhi (71 ITR 815),** wherein the court made the following specific observations w.r.t. powers of the Tribunal under the Act:

> *"It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland's Statutory Construction, third edition, Arts. 5401 and 5402). The powers which have been conferred by s. 254 on the Tribunal with widest possible amplitude must* ***carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective****."*

The above decision holds that while the Tribunal is not a Court, it has judicial powers similar and identical to an appellate Court as provided in the Civil Procedure Code.

The question which then arises is the power of the legislature to impose conditions and/or limit the said powers of the Tribunal to grant stay.

GRANT OF STAY BEYOND 365 DAYS BY ITAT

The **constitutional validity** of the third proviso to section 254(2A) of the Act was under challenge in the case of **Jethmal Faujimal Soni vs. ITAT & Ors. (333 ITR 96)(Bom).** However, it was not adjudicated upon on account of request by the Department to instead give directions for expeditiously disposing the appeal, which was accepted by the court.

In the case of **Narang Overseas Vs ITAT (295 ITR 22)**, the court, while considering the powers of the Tribunal to grant stay of demand, made the following relevant observations w.r.t. constitutional validity of the *provisos* to section 254(2A) of the Act, which is as under:

> *"12.……The power to grant stay or interim relief being inherent or incidental is not defeated by the provisos to the sub-section. The third proviso has to be read as a limitation on the power of the Tribunal to continue interim relief in case where the hearing of the appeal has been delayed for acts attributable to the assessee. It cannot mean that a construction be given that the power to grant interim relief is denuded even if the acts attributable are not of the assessee but of the revenue or of the Tribunal itself. The power of the Tribunal, therefore, to continue interim relief is not overridden by the language of the third proviso to s. 254(2A). This would be in consonance with the view taken in Kumar Cotton Mills (P) Ltd. (supra). There would be power*

in the Tribunal to extend the period of stay on good cause being shown and on the Tribunal being satisfied that the matter could not be heard and disposed of for reasons not attributable to the assessee."

Thus, the High Court made it abundantly clear that any arbitrary conditions imposed to defeat the right of appeal for no fault of the assessee would become unreasonable and the said power of Tribunal over interim relief is not overridden by the language of the third proviso to section 254(2A).

Hon'ble Bombay High Court in the case of **CIT vs. Ronuk Industries (333 ITR 99)** relying on the Bombay High Court Judgement in the case of **Narang Overseas (P) Ltd(supra)** held that Tribunal had the powers to grant stay beyond 365 days. However in this judgement, there was no explicit discussion on the amendment carried out by the Finance Act 2008 and hence Departmental authorities took a view that this decision cannot be taken as laying down any *ratio decendi*.

The Hon'ble Delhi High Court in the case of **Pepsi Foods Ltd. Vs ACIT** (**W.P.(C) 1334/2015 & CM 2337/2015**) has struck down the provision on the ground that it violates Article 14 of Indian Constitution. The relevant extracts read as under:

*24. Furthermore, the petitioners are correct in their submission that **unequals have been treated equally**. Assessees who, after having obtained stay orders and by their conduct delay the appeal proceedings, have been treated in the same manner in which assessees, who have not, in any way, delayed the proceedings in the appeal. The two classes of assessees are distinct and cannot be clubbed together. This clubbing together has led to hostile discrimination against the assessees to whom the delay is not attributable. It is for this reason that we find that the insertion of the expression – 'even if the delay in disposing of the appeal is not attributable to the assessee'- by virtue of the Finance Act, 2008, violates the non-discrimination clause of Article 14 of the Constitution of India. The object that appeals should be heard expeditiously and that assesses should not misuse the stay orders granted in their favour by*

adopting delaying tactics is not at all achieved by the provision as it stands. On the contrary, the clubbing together of 'well behaved' assesses and those who cause delay in the appeal proceedings is itself violative of Article 14 of the Constitution and has no nexus or connection with the object sought to be achieved. ***The said expression introduced by the Finance Act, 2008 is, therefore, STRUCK DOWN as being violative of Article 14 of the Constitution of India****. This would revert us to the position of law as interpreted by the Bombay High Court in* ***Narang Overseas*** *(supra), with which we are in full agreement. Consequently, we hold that, where the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases. The writ petitions are allowed as above.*

Also, Hon'ble Supreme Court in the case of **CCE, Ahmedabad v. Kumar Cotton Mills Private Limited [2005] (180 E.L.T 434),** where the matter pertains to section 35-C of the Central excise acts which is *pari material* to section 254 of the IT Act held that amendment could not be construed as punishing the taxpayer for acts beyond its control. The decision has followed by the Hon'ble Madras High court in the case of **CCE & ST Vs Ford India (C.M.A. NO. 1718 OF 2014)** and held as under:

"When the appellate authority itself clearly concedes the fact that the delay is not on account of the respondent/assessee, the Tribunal has rightly relied upon the decision of the Supreme Court in Kumar Cotton Mills case (supra) and we find no reason to differ with the said stand taken by the Tribunal in granting extension of the interim order by relying on the said judgment."

ON THE OTHER HAND, the Hon'ble Karnataka High Court in the case of **CIT Vs M/s Ecom Gill Coffee Trading Pvt. Ltd. (ITA NO. 160 & 161 OF 2012)** took a different view and held that Tribunal does not have the power to grant stay period exceeding 365 days. The Court observed as under:

"35. Viewed from any angle, we are of the opinion that the Appellate Tribunal has committed a positive error in consciously extending the interim order of

stay granted in the pending appeal beyond the period of 365 days, which is the outer limit stipulated in the Statutory provision."

Also in the case of ***DIT (International Taxation) v. Seacor Offshore Dubai LLC (2014) 44 taxmann.com 318 (Uttarakhand)*****,** the court held that the power of stay of tax recovery is to be exercised within the four corners of the statute. The power of the Tribunal to grant stay would stand withdrawn on the expiry of 365 days and, hence, it has no power to grant stay of recovery of tax beyond 365 days from the date of its first order.

Recently, the Hon'ble Special Bench of ITAT Mumbai in the case of **Tata Communications Ltd. vs. ACIT (138 TTJ (Mum) 257) (SB)** held Tribunal has the power to grant stay beyond the period of 365 days even after insertion of third proviso to Section 254(2A) w.e.f. 01.10.2008 in cases where the delay is not attributable to the assessee. While holding so, the Tribunal observed that it is difficult to accept the contention that in absence of any specific discussion on 2008 amendment, the decision of the Hon'ble high court in the case of Ronuk Industries (supra) cannot be considered as ratio decendi and need not be accepted as binding precedent. ITAT further held that as a result of dismissal of appeal filed by the revenue and upholding of the order of the Tribunal, the Hon'ble Mumbai High Court has answered this issue in affirmative.

For the sake of completeness, it is pointed out that it is an established principle of law that law declared by the superior courts is binding upon the lower courts. The principle also applies to the Commissioners of Income Tax (Appeals) who is required to follow the directions of the Tribunal. The CIT(A) cannot hold that order of the Tribunal is against the provision of the Act and pass an order which is inconsistent to the order of Tribunal. . If at all, it is against the provision of law, thereby making it ultra virus the Act, even so, it the superior courts that posses the authority to set aside the order.

On a different issue, the Hon'ble Chandigarh Tribunal in the case of **DCIT Vs Shyam Sundar Sharma (ITA No. 966/Chd/2014**), held as under:

> *"11. Considering the facts of the case in the light of the findings of the learned CIT (Appeals) in the impugned order, we are of the view that the* ***order of the learned CIT (Appeals) cannot be sustained in law and is passed by the learned CIT (Appeals) clearly in defiance of the order of the Tribunal****. Since it is a first matter reported to us during the course of arguments by the learned D.R for the Revenue that the order of the learned CIT (Appeals) shows complete defiance of the order of the Tribunal, therefore, we do not propose at the stage to initiate contempt proceedings against the learned CIT (Appeals) , however* ***, we warn him to be careful in future in following the order of the Tribunal in accordance with law and should not show any defiance to the order of the Tribunal****. ……."*

It is not a peculiar case where two High Courts expressed two different views. This issue is squarly covered in favor of assessee by the Hon'ble Apex Court in the case of **Vegetable Products Vs CIT (88 ITR 192)**. This view has been taken by Hon'ble Delhi ITAT in the case of **Qualcomm Incorporated vs. Asst. Director of Income Tax (ITA NOS. 3696 TO 3702 of 2009)** after relying on the decision of the Special Bench judgement in the case of Narang Overseas (P) Ltd. Vs ACIT 114 TTJ 433 (SB) held that if there is a cleavage of opinion among different High Courts and there is no decision of the jurisdictional high court on this issue, then the view favourable to the assessee needs to be followed. Based on the decision, it has been held that Tribunal has the powers to grant stay of demand even after the expiry of three hundred and sixty five days, if the delay in disposal of the appeal is not exclusively attributable to the assessee.

THE TAXPAYER'S DILEMMA

The delivery of the above mentioned judgments has led to a situation where two high Courts have expressed different views on the same issue. The judgment of the Hon'ble Karnataka High Court seems to be in line with the intention of the amendment. The Bombay High Court and Delhi Court has expressed a view favorable to the assessee. Hence the assessees in Delhi and Maharashtra will get the benefit of the jurisdictional high court order whereas on the same issue, the assessees in Karnataka might have to face recovery and coercive action from the Department.

As noted, it is likely that assessee's in other States also will be eligible for favorable interpretation of the provision in light of the Hon'ble Supreme court decision in the case of **CIT Vs Vegetable Products (88 ITR 192)**.

CONCLUSION

From the foregoing paragraphs, it is clear that neither the Department nor the assessee is willing the sacrifice their stands in this regard. As expected from any ordinary law, the provision is both logical is one sense and acts arbitrary in another angle. The strict legal conclusion of the provision harasses the genuine assessee whereas it undoubtly takes care of the undue delay in the recovery of tax liability.

Thus, to meet the ends of the Department as well as the assessee, the middle path has to be drawn where assessee is not strained and that no liability escapes payment. A legal and a logical conclusion have to be arrived by the legislation or the Hon'ble Supreme Court to put an end to the long standing legal dispute between the assessee and the Department.

Hence the need of the hour would have enhanced administrative measures to avoid delay in deposing the cases. It is worthwhile to note that in practice matters involving

stay, adjournments are seldom entertained by the Benches and even where adjournments are inevitable, a very short adjournment alone is given. In spite of the above, there are cases where the stay granted matters exceeds the time limit of 365 days. The authors opine that enhanced administrative measure and similar such measures would be a more appropriate solution in this regard rather than legislative interference of broad sweep, so much so it goes against the principle of natural justice and requires judicial interpretations.

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