IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI E BENCH, MUMBAI
(through web-based video conferencing platform)

[Coram: Justice P P Bhatt, President, and Pramod Kumar, Vice President]

SA Nos. 147 and 148/Mum/2020
Arising out of ITA Nos 1423 and 1424/Mum/2018
Assessment years: 2011-12 and 2012-13

Tata Education and Development Trust ……...……..Appellant
Bombay House, 24 Homi Mody Street,
Fort, Mumbai 400 001 [PAN: AABTT5628C]

Vs

Assistant Commissioner of Income Tax
Exemptions Circle 2, Mumbai ……..….....Respondent

Appearances by
P J Pardiwalla, Sr Advocate, *along with* **Sukh Sagar Syal,**
T P Ostwal and Indra Anand *for the appellant*
Avneesh Kumar *for the respondent*

Date of concluding the hearing : June 12, 2020
Date of pronouncement : June 17, 2020

INTERIM ORDER

Per Pramod Kumar VP:

1. By way of these stay applications, the assessee applicant seeks a stay on collection/recovery of the amount of tax and interest etc, aggregating to Rs 88,84,40,520 for the assessment year 2011-12 and aggregating to Rs 10,91,19,880 for the assessment year 2012-13, in respect of the assessment orders under section 143(3) r.w.s. 250 of the Income Tax Act, 1961, which are impugned in appeal before us. As both of these stay applications pertain to the same assessee, arise on a common set of facts and law, they are being dealt with together.

Brief facts of the case:

2. The relevant material facts are like this. The assessee before us is a public charitable trust registered under Bombay Public Trust Act 1950 (now known as Maharashtra Public Trust Act 1950), as also as charitable institution under the Section 12A of the Income Tax Act, 1961. In both of these assessment years, the assessee had returned NIL income, but had also claimed amounts remitted to the educational universities outside India as application of income under section 11(1)(c). This amount, for the assessment year 2011-12, was Rs 197,79,27,500, and,

for the assessment year 2012-13, was Rs 25,37,00,000. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that in terms of proviso to Section 11(1)(c), unless the Central Board of Direct Taxes, by way of a general or special order, specifically approves that the income derived from property held under trust, applied for the purposes of specified under section 11(1)(c)(i) and (ii), shall not be included in the total income of the person in receipt of such income, it shall not be excluded from the total income of the person in receipt of such income. The Assessing Officer further noticed that as no such approval from the Central Board of Direct Taxes has been granted, the amounts remitted abroad for application of trust funds are required to be included in the income of the assessee. These amounts were thus added to the income of the assessee trust. Aggrieved, assessee carried the matter in appeal before the CIT(A), but, even as the appeal was pending before the learned CIT(A), the Central Board of Direct Taxes, vie order dated 10th November 2015, granted approval under section 11(1)(c), which was specifically "stated to have effect for the period covered by assessment years 2009-10 to 2016-17" and it permitted application of funds, by the trust, "for charitable purposes for grant of creation of endowment funds through contribution at the Cornwell University USA, for scholarship of Indian students as well as for foreign collaboration project between Indian and Cornell scientists, and grant of financial assistance to Harvard Business School for construction of a new executive building named Tata Hall, as per details below" which included US $ 43.75 million for the assessment year 2011-12 and US $ 5 million for the assessment year 2012-13. Based on this approval issued by the CBDT, the Assessing Officer rectified, under section 154 of the Act, the assessment orders for the assessment year 2011-12, on 8th December 2015, and for the assessment year 2012-13, on 9th August 2016. The additions in question, i.e. on account of application of funds abroad without specific approval of the CBDT- Rs 192.79 crores for the assessment year 2011-12 and Rs 25.37 crores for the assessment year 2012-13, were thus deleted by the Assessing Officer himself. However, learned CIT(A) disregarded these rectification orders by observing that the rectification order under section 154 "does not merit consideration in this appeal as the present appeal has been filed against the order of the AO passed under section 143(3) of the Act". He proceeded to hold that the CBDT's approval dated 10th November 2015 "is not retrospective in nature", that "the said order of the CBDT has been passed in response to assessee's application dated 31st March 2015, and, therefore, it cannot apply to the assessment year 2011-12 *(and 2012-13)*", and that the related verifications, as is the condition precedent for allowing the benefit, was not carried out in the original assessment proceedings. The impugned additions were thus, in effect, restored by the learned CIT(A). Aggrieved by the action of the CIT(A), the assessee is in appeal before us. The assessee has also filed the present application seeking a stay on collection/ recovery of the disputed demands pertaining to tax and interest etc, till the related appeals are disposed of.

Submissions of the parties:

3. Learned counsel for the assessee begins by taking us through the facts of the case to demonstrate, what he perceives as, very strong merits of his case. He submits that the short reason for which the impugned additions to income of the assessee

were made was the lack of the CBDT approval, as required by proviso to Section 11(1)(c) of the Act, and once that approval has been received, which has been specifically stated by the CBDT to cover the relevant assessment year, that is the end of the matter. He submits that in the rectification proceedings, the Assessing Officer rightly deleted the impugned addition, and, as such, the appeals had infact become infructuous. However, the CIT(A) proceeded to revive the additions based on his understanding of the correct legal position which is contrary to the decision of the CBDT. He submits that it is not open to the CIT(A), in any case, to question the wisdom of the CBDT. It was also pointed out that the CBDT, in its wisdom, has not only set out the assessment years for which the approval will be applicable but has even set out the amounts upto which the application of funds is permitted abroad. In these circumstances, the CIT(A) was blatantly in error in holding that the amounts so spent by the assessee trust abroad, notwithstanding the specific approval of the CBDT, will not be eligible for the benefit of Section 11(1)(c). Learned counsel also took us through several judicial precedents, including Hon'ble Supreme Court's landmark judgment in the case of **Gestetner Duplicators Pvt Ltd Vs CIT [(1979) 117 ITR 1 (SC)]**, in support of the proposition that the CIT(A) could not have sat in judgment over what the CBDT has decided, in exercise of its powers under proviso to Section 11(1)(c), and that the action of the CIT(A) was contrary to the settled legal position. He thus submitted that he has a very strong prima facie case, and very good chances to succeed. It was also suggested that the assessee trusts are well settled public service institutions and there cannot be any *bonafide* apprehension to the legitimate interests of the revenue, by waiting till outcome of the appeals in question. Learned counsel further submitted that he is willing to argue the appeals whenever asked to do so, and offered all his cooperation in expeditious disposal of the appeals. It was thus urged that the assessee has reasonably good case in appeal, that there is no apprehension to the interests of the revenue by waiting till outcome of the appeal, and that, therefore, the balance of convenience is in favour of the demands being stayed till the outcome of the appeals.

4. In response to a specific question from the bench, with respect to the amendment to Section 254(2A) vide Finance Act, 2020, learned counsel for the assessee submitted that this amendment is only directory, not mandatory, in nature, and it does not curtail the powers of the Tribunal. He submitted that any other interpretation will result in unsurmountable practical difficulties. He gave an unexampled of a situation in which the assessee, on an issue covered in favour of the assessee, goes to the Dispute Resolution Panel, and yet the DRP upholds the stand of the Assessing Officer, following its earlier decision, just to keep the issue alive in litigation before higher forums. In such a situation also then, the Tribunal will have to decline complete stay even though the issue is settled by binding judicial precedents in favour of the assessee. He then gives an example of a hypothetical situation in which an issue is settled in favour of the assessee by Hon'ble High Court but the Department is in appeal in the Supreme Court, and the Assessing Officer and the DRP has to hold against the assessee, just to keep the matter alive. If the interpretation that the provision is mandatory will result in a situation in which the assessee will have to pay taxes on an issues, which is settled in his favour by the jurisdictional High Court in his own case- a patently incongruous legal position. The view that this provision is mandatory in nature will result in a situation which is

completely arbitrary, unconstitutional and contrary to the well settled scheme of law. He submits that while interpreting a statutory provision, it cannot be open to us to interpret it so as to render the provision unworkable and contrary to the settled law. He thus urges us to treat this provision as directory in nature and not as a mandatory provision. In this backdrop, learned counsel invites our attention to Hon'ble jurisdictional High Court's judgment in the case of **Narang Overseas Pvt Ltd Vs Income Tax Appellate Tribunal [(2007) 295 ITR 22 (Bom)]** wherein third proviso to Section 254(2A) was in challenge. This proviso provided that where the appeal was not disposed of within 365 days of the stay being granted, the stay will stand vacated. Learned counsel for the assessee submitted that dealing with this issue, Hon'ble jurisdictional High Court has made some observations which are equally relevant in the present context. He read out and emphasized on certain observations made by Hon'ble jurisdictional High Courtwhile holding that third proviso to Section 254(2A) is directory in nature.On a parity of reasoning, learned counsel submits that, the amendment to Section 254 (2A), by the Finance Act 2020, is also required to be read as directory in nature. He submits that it is not a legal position in which partial pre deposit of dues is a condition precedent for admission of appeal, but then if we are to interpret this provision as mandatory we will end up holding that such a pre deposit is *de facto* the legal requirement. Learned counsel further points out that today when appeal is before the CIT(A), the Assessing Officer can grant the stay on payment of 20% of disputed demands but then that amount can be lowered, in deserving cases, apparently referring to the CBDT instructions dated 31st July 2017, subject to approval by the CIT or PCIT concerned, but it is clearly incongruous that the powers of the stay being granted remain fettered by making it a pre-condition of payment of 20% of disputed demands in all situations. There was one more question by the bench at this stage.

5. Learned counsel was asked to elaborate on the connotations of the words "or furnishes security of equal amount in respect thereof" after the words "subject to the condition that the assessee deposits not less than twenty per cent. of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act". He was also asked to address the bench as to the nature of security and whether it is for the Tribunal to decide as to what should be nature of security or whether there are any fetters, on this aspect, on the decision taken by the Tribunal on what would constitute a reasonable security.Learned counsel submits that there is no specific provision with respect to the nature of security or the manner in which the security is to be provided. It is his contention that the true purpose of this provision is to ensure that the income tax department must be secure with respect to its dues on the assessee, and that in the event of assessee losing its case, the interests of the revenue, to recover its dues, should not be adversely affected. Such a security could be in the form of a bank guarantee, a mortgage, a lien, charge or pledge, or even an undertaking or a bond. He submits that anything over and above, or in addition to, what is available to the income tax department under chapter XVII-D of the Act, could be considered security for this purpose. He submits that, for example, a personal bond given by a trustee could also be a reasonable security, or, for that purpose, an undertaking by the assessee that the assessee will not sell its assets of certain amounts, so as that the interests of the income tax department remain intact. He further submits that firstly it is entirely directory as to whether the assessee

should pay a part of disputed taxes or offer any additional security in respect thereof, but, in the event the Tribunal decides that security is given in respect of the disputed demands or part thereof, it is entirely on the discretion to decide as to what is reasonable security or not.

6. Continuing with his arguments, learned counsel for the assessee invites our attention to Hon'ble Punjab & Haryana High Court's judgment in the case of **PML Industries Ltd Vs CCE [2013 (3) ECS (45) (P&H-HC)]**. He first takes us to paragraph 8 of the said judgment which takes note of the questions before Their Lordships, including the question "whether the second proviso in sub – section (2A) of Section 35 C *[of the Central Excise Act, 1944]* is directory and that the Tribunal in appropriate circumstances can extend the period of stay beyond 180 days". He then takes us to paragraph 11 of this judgment which, inter alia, notes that "The right of appeal is a creation of a statute. It is not in doubt. Such right of appeal can be circumscribed by the conditions imposed by the Legislature as well". Our attention is then invited to Their Lordships' observations to the effect that "**In Hoosein Kasam Dada (India) Ltd. Vs. State of Madhya Pradesh AIR 1953 SC 221**, the *(Hon'ble Supreme)* Court held that a provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. It was held that in truth such provisions whittles down the right itself and cannot be regarded as a mere rule of procedure". Our attention was then drawn to Their Lordships' analysis of, and extracts from, Hon'ble Supreme Court's judgment in the case of **Hoosein Kasam Dada (India) Ltd. Vs. State of Madhya Pradesh AIR 1953 SC 221**. Learned counsel submits that viewed thus, the amendment in law will apply only to the appeals filed after the amendment to the statute comes into effect, whereas in the present case not only the appeals were filed much before the amendment came into force but even the stay applications were last listed much before the amendments came into effect. These stay applications were last fixed for hearing on 13th March 2020 but these had to be adjourned as learned Departmental Representative sought time. Thereafter, on account of Covid 19 epidemic, the stay applications could not be heard. Learned counsel submits that the reasons for adjournment must be *bonafide* and the circumstances indeed were such that Departmental Representative could not have attended to the matter, and he has no issues on that aspect, but the fact remains that if these stay petitions were to be disposed of on the day these stay petitions were last scheduled the amendment in Section 254(2A) would not have come into the way. These amendments cannot come into play in respect of the matters which the Tribunal was already dealing with before the amendments came into force. In the light of these discussions, according to the learned counsel, the amendment is to be read as merely directory, not at all mandatory, and, considering very strong prima facie case of the assessee in which the CIT(A) appeals has *de facto* reversed the stand of the CBDT- something clearly contrary to the settled legal position, the unconditional full stay should be granted. Learned counsel further submits that, however, in the event the Tribunal thinks it appropriate to direct that some security should be offered by the assessee, he is ready to file personal undertakings or bonds of the trustees, or, in the alternative, give an undertaking to the effect that the investments made by the trust in the Government securities and mutual funds, which adequately cover the entire disputed demand, will not be

disposed of till the disposal of these appeals. Learned Departmental Representative, on the other hand, submits that so far as the rectification orders passed by the Assessing Officers are concerned, these orders merely refer to the CBDT order which states that verifications are required to be made but these orders do not refer to the fact of verifications having been actually carried out. He further submits that furthermore such a contention issue could not have been subjected to the rectification proceedings. It is also submitted that the learned CIT(A) has passed a detailed order on the subject and he relies upon the same. He further submits that right now the appeals are not being argued on merits, and, therefore, it is not really material whether the assessee has a good case or not. He pointed out that no case has been made out for the paucity of funds, and that, in any case, in view of the amendment to first proviso to Section 254 (2A), the assessee is required to pay at least 20% of the disputed demand raised on the assessee. Learned Departmental Representative further pointed out that the assessee has not paid any part of the disputed demands, and, therefore, he should at least pay 20% of the disputed demands. Learned Departmental Representative then refers to the memorandum to the finance bill 2020 available on the official website www.indiabudget.gov.in which specifically states, under the heading "clarity on stay by the Income Tax Appellate Tribunal", that "It is proposed to provide that ITAT may grant stay under the first proviso subject to the condition that the assessee deposits not less than twenty per cent of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act, or furnish security of equal amount in respect thereof". He suggests that the intention of the legislature is very clear and unambiguous that the assessee has to pay at lelast 20% of demand at this stage, and, as for the nature of security, he submits that while it is a broader question on which call is required to be taken by the higher authorities, in his humble understanding, the nature of security in general should be such that it could be disposed of very quickly and the monies be realized, such as in the bank guarantees. Any other view of the matter, according to the learned Departmental Representative, render the amendment redundant. It is reiterated that even on merits, for the reasons elaborated earlier, the assessee does not deserve any leniency with respect to collection of disputed demands. He, however, leaves the matter to the bench.In his brief rejoinder, learned counsel submits that whatever be the wording of the memorandum to the Finance Bill 2020 states, it is not the case that the amendment is mandatory and not directory. He reiterates his submissions on the legal point as also on the facts with respect to strong case on prima facie merits. He also expresses his willingness for the appeals being heard on an early date- if necessary, through a virtual court hearing. We are once again urged to grant full stay on collection or recovery of the demands impugned in appeal, and to schedule the related appeals for hearing at an early date.

Our analysis and directions:

7. We have given our careful consideration to the rival contentions and the legal position with respect to the powers of the Tribunal to grant stay in deserving cases, and the impact of amendment to first proviso to Section 254(2A) by the Finance Act, 2020. We have also considered legal history on this aspect of the matter vis-à-vis the spate of amendments, from time to time, believed to be having impact on the

powers of the Tribunal. While, for the reasons we will now set out, we refrain from making any observations on merits of these issues, suffice to say that on a careful consideration of all these factors, we find that, broadly speaking, there are two very significant aspects of the whole controversy- first, with respect to the legal impact, if any, of the amendment in first proviso to Section 254(2A) on the powers of the Tribunal, under section 254(1) to grant stay; and, second, if this amendment is held to have any impact on the powers of the Tribunal under section 254(1),- (a) whether the amendment is directory in nature or is mandatory in nature; (b) whether the said amendment affects the cases in which appeals were filed prior to the date on which the amendment came into force; (c) whether, with respect to the manner in which, and nature of which, security is to be offered by the assessee, under first proviso to Section 254(2A), what are broad considerations and in what reasonable manner, such a discretion must essentially be exercised, while granting the stay,by the Tribunal.

8. We are of the considered view that these issues are of vital importance to all the stakeholders all over the country, and in our considered understanding, on such important pan India issues of far reaching consequence, it is desirable to have the benefit of arguments from stakeholders in different part of the country. We are also mindful of the fact, as learned Departmental Representative so thoughtfully suggests, the issues coming up for consideration in these stay applications involve larger questions on which well considered call is required to be taken by the bench. Considering all these factors, we deem it fit and proper to refer the instant Stay Applications to the Hon'ble President of Income Tax Appellate Tribunal for consideration of constitution of a larger bench and to frame the questions for the consideration by such a larger bench, under section 255(3) of the Income Tax Act, 1961.

9. The matter is tentatively posted for hearing on 6th July 2020 or on such other date as may be directed by Hon'ble President and to be heard by this or such a larger bench as the Hon'ble President may be pleased to constitute under section 255(3) of the Income Tax Act, 1961.

10. In the meantime, however, we must take suitable steps to maintain the status quo, so far as collection of disputed impugned demands are concerned, and, at the same time, to protect legitimate interests of the revenue to recover the disputed impugned demands in the event of the assessee not being successful in the present stay applications, or, the assessee not being successful eventually in the appeals. Given the overall situation- as also the fact that the stay petitions have been referred for consideration of constitution of a larger bench, we deem it fit and proper to grant an interim stay on collection/ recovery of the aggregate amounts of tax and interest etc, amounting to Rs 88,84,40,520 and Rs 10,91,19,880 for the assessment years 2011-12 and 2012-13 respectively, impugned in these appeals, on the following conditions:

> ***a. The assessee will, within not more than one week of receipt of this order, furnish an undertaking setting out complete details of investments of amounts not less than Rs 99,75,60,400 which the assessee will not encash till the stay applications are disposed of.***

b. The assessee will fully cooperate in expeditious disposal of the related stay applications which are tentatively fixed for hearing on 6th July 2020, as also the appeals which are being scheduled for hearing for 13thJuly 2020, and, that in the event of physical courts not being functional at that point of time due to Covid 19 health concerns, the assessee will argue the appeals through web based video conferencing in the virtual court.

c. This interim stay will remain in operation till the related stay applications are disposed of, till the appeals are disposed of or till further orders- whichever is earlier.

11. With these observations, and subject to the directions as above, the Registry is directed to place the matter before Hon'ble President, on administrative side, for his appropriate orders. We make it clear that nothing stated in this interim order shall be construed as our observations on merits of the stay applications, which shall be decided in due course.

Sd/- ***Sd/-***

Justice P P Bhatt **Pramod Kumar**
(President) (Vice-President)

Dated: 17th day of June, 2020

Copies to: *(1) The appellant* *(2) The respondent*
(3) CIT *(4) CIT(A)*
(5) DR *(6) Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai