

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.5 of 2016 (O&M)
Date of decision: 25.4.2006**

Principal Commissioner of Income Tax, Gurgaon

.....Appellant

M/s Carrier Air Conditioning and Refrigeration Limited

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE DARSHAN SINGH**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Mr. Tajender K.Joshi, Advocate for the appellant.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the revenue under section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 12.6.2015, Annexure A.II passed by the Income Tax Appellate Tribunal, Delhi Bench 'I' Delhi (in short, "the Tribunal") in SA No.337/DEL/2015 (in ITA No.1126/DEL/2014) for the assessment

year 2009-10, claiming following substantial questions of law:-

- “1. Whether the Hon'ble ITAT has acted in contravention of the Second Proviso of Section 254(2A) of the Income Tax Act, 1961 as the combined period of stay has exceeded 365 days?
2. Whether the order of the ITAT be treated as void ab initio in the light of third proviso to section 254(2A) of the Income Tax Act, 1961, which provides that stay of demand stands vacated after expiry of a period of 365 days even if delay in disposal of appeal is not attributable to the assessee?”

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The assessee furnished its return of income for the assessment year 2009-10 declaring income of ₹ 54,20,34,020/- on 29.9.2009. The case was selected for scrutiny by issuing notice under section 143(2) of the Act to the assessee. Reference was made to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP). The TPO passed order under section 92CA(3) of the Act on 26.11.2012 and determined the Transfer Pricing adjustment at ₹ 8,50,26,705/-. Draft order was passed on 12.12.2013 after making addition of ₹ 8,50,26,705/- on account of transfer pricing adjustments and disallowance of ₹ 5,51,000/- on account of amount spent towards lease hold improvement. Against the draft order, the assessee moved before the Dispute Resolution Panel III, New Delhi. On 26.11.2013, the Dispute Resolution Panel had given directions under section 144C(5) of the Act

and accordingly, final assessment order under section 143(3) of the Act read with section 144C(13) of the Act was passed by the Assessing Officer on 19.12.2013, Annexure A.1 at a total income of ₹ 62,26,72,260/- which includes addition of ₹ 7,56,79,236/- on account of transfer pricing adjustments and net disallowance of ₹ 49,59,000/- on account of amount spent towards lease hold improvement as per direction of the Dispute Resolution Panel. Accordingly, a demand of ₹ 4,23,82,230/- was raised. Aggrieved by the order, the assessee filed appeal before the Tribunal alongwith stay application. The stay was originally granted on 6.6.2014 and further this stay was extended vide order dated 27.11.2014 upto 5.6.2015 or till the disposal of the appeal. Thus, period of 365 days of stay expired on 5.6.2015. The Tribunal vide order dated 12.6.2015, Annexure A.II further extended the stay for another period of six months or till the disposal of the appeal relying upon the judgment of the Delhi High Court in ***Pepsi Foods Pvt. Limited vs. ACIT and another***, 2015-TIOL-1306 HC-DEL-IT. According to the appellant-revenue, the decision of the Tribunal is not in accordance with law as it is contrary to the second and third provisos to section 254(2A) of the Act. Hence the instant appeal by the revenue.

3. We have heard learned counsel for the appellant-revenue.

4. It would be expedient to reproduce the relevant statutory provision i.e. Section 254(2A) of the Act including its provisos, which reads as under:-

“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](#) :

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:

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 shall 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:

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.”

5. While interpreting the provisions of Section 35C(2A) of the Central Excise Act, 1944 which is *pari materia* to section 254(2A) of the Act, this Court in STA No.15 of 2015 (*Commissioner of Central*

Excise, Rohtak vs. M/s Voice Telesystem) decided on 20.1.2016 after considering the relevant case law on the point concluded that wherever the appeal could not be decided by the Tribunal due to pressure of pendency of cases and delay in the disposal of the appeal is not attributable to the assessee in any manner, the interim protection can continue beyond 365 days in deserving cases and recorded as under:-

“15. In ***Pepsi Foods Pvt. Limited now merged with Pepsico India Holding Pvt. Limited vs. Assistant Commissioner of Income Tax and another***, 2015-TIOL-1306 HC-DEL-IT, the challenge was to the constitutional validity of third proviso to Section 254(2A) of the Income Tax Act, 1961 which was amended to mean that the Tribunal could not grant any further extension of the stay after expiry of 365 days even though the appeals filed by the assessee before the Tribunal were pending and the delay in the disposal of the appeals was not on account of any conduct attributable to the assessee. After considering the relevant statutory provisions and the case law on the point, it was held that the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases. The relevant observations recorded read thus:-

“23.Keeping in mind the principles set out by the Supreme Court in ***Dr Subramanian Swamy*** (supra), [(2014) 8 SCC 682 (SC)] we need to examine whether the present challenge to the validity of the third proviso to Section 254(2A) can be sustained. This is not a case of excessive delegation of powers and, therefore, we need not bother about the second dimension of Article 14 in its application to legislation. We are here concerned with the question of discrimination, based on an impermissible or invalid classification. It is abundantly

clear that the power granted to the Tribunal to hear and entertain an appeal and to pass orders would include the ancillary power of the Tribunal to grant a stay. Of course, the exercise of that power can be subjected to certain conditions. In the present case, we find that there are several conditions which have been stipulated. First of all, as per the first proviso to Section 254(2A), a stay order could be passed for a period not exceeding 180 days and the Tribunal should dispose of the appeal within that period. The second proviso stipulates that in case the appeal is not disposed of within the period of 180 days, if the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to extend the stay for a period not exceeding 365 days in aggregate. Once again, the Tribunal is directed to dispose of the appeal within the said period of stay. The third proviso, as it stands today, stipulates that if the appeal is not disposed of within the period of 365 days, then the order of stay shall stand vacated, even if the delay in disposing of the appeal is not attributable to the assessee. While it could be argued that the condition that the stay order could be extended beyond a period of 180 days only if the delay in disposing of the appeal was not attributable to the assessee was a reasonable condition on the power of the Tribunal to grant an order of stay, it can, by no stretch of imagination, be argued that where the assessee is not responsible for the delay in the disposal of the appeal, yet the Tribunal has no power to extend the stay beyond the period of 365 days. The intention of the legislature, which has been made explicit by insertion of the words – ‘even if the delay in disposing of the appeal is not attributable to the assessee’ – renders the right of appeal granted to the assessee by the statute to be illusory for no fault on the

part of the assessee. The stay, which was available to him prior to the 365 days having passed, is snatched away simply because the Tribunal has, for whatever reason, not attributable to the assessee, been unable to dispose of the appeal. Take the case of delay being caused in the disposal of the appeal on the part of the revenue. Even in that case, the stay would stand vacated on the expiry of 365 days. This is despite the fact that the stay was granted by the Tribunal, in the first instance, upon considering the prima facie merits of the case through a reasoned order.

24. Furthermore, the petitioners are correct in their submission that unequals have been treated equally. Assesseees who, after having obtained stay orders and by their conduct delay the appeal proceedings, have been treated in the same manner in which assesseees, who have not, in any way, delayed the proceedings in the appeal. The two classes of assesseees are distinct and cannot be clubbed together. This clubbing together has led to hostile discrimination against the assesseees 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 assesseees 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’ assesseees 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), [(2007) 295 ITR 22 (Bom.)] 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.”

16. The Apex Court in ***Commissioner of Customs & Central Excise, Ahmedabad vs. Kumar Cotton Mills Pvt. Limited***, (2005) 180 ELT 434, interpreting sub section 2A of Section 35C of the Act as introduced on 11.5.2002 had noticed as under:-

“6. The sub section which was introduced in terrorem cannot be construed as punishing the assessee for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter namely ***IPCL vs. Commissioner of Central Excise, Vadodara*** (supra) cannot be faulted. However, we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not

attributable to the assessee.”

17. In view of the above, the question posed in para 5 above is answered in the affirmative. Accordingly, it would be concluded that wherever the appeal could not be decided by the Tribunal due to pressure of pendency of cases and the delay in disposal of the appeal is not attributable to the assessee in any manner, the interim protection can continue beyond 365 days in deserving cases.”

6. In view of the above position of law, we do not find any error in the order passed by the Tribunal. Thus, no substantial question of law arises. The appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

April 25, 2016
'gs'

(Darshan Singh)
Judge