

**IN THE HIGH COURT OF JUDICATURE AT HYDERBAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADERSH**

I.T.T.A.Nos.331, 336, 346, 386, 389 and 707 of 2017

Between:

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.,)
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

JUDGMENT PRONOUNCED ON : 18-09-2017

HON'BLE SRI JUSTICE : V. RAMASUBRAMANIAN

AND

HON'BLE SMT JUSTICE : T. RAJANI

1. Whether Reporters of local
Newspapers may be allowed to see
the Judgments? : Yes
2. Whether the copies of judgment
may be marked to Law Reporters/
Journals? : Yes
3. Whether their Ladyship/Lordship
wish to see the fair copy of the
judgment? : Yes

***THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN**

AND

THE HON'BLE SMT JUSTICE T. RAJANI

+ I.T.T.A.Nos.331, 336, 346, 386, 389 and 707 of 2017

% 18-09-2017

Jakir Hussain Kosangi and others

.....Petitioners

And:

State of Andhra Pradesh, represented by its Principal
Secretary to Government, Home,

..... Respondents

! Counsel for Appellants:

Ms. K. Mamtha Chowdary
Senior standing counsel

^ Counsel for respondents:

Mr. A.V.A Siva Karthikeya

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> Head Note:

? Cases referred:

1) {(2017) 79 Taxmann.com 251 (SC)}

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

**The Hon'ble Sri Justice V.RAMASUBRAMANIAN
and
The Hon'ble Mrs. Justice T. RAJANI**

I.T.T.A.Nos.331, 336, 346, 386, 389 and 707 of 2017

I.T.T.A.No.331 of 2017

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.,)
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

I.T.T.A.No.336 of 2017

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.,)
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

I.T.T.A.No.346 of 2017

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.),
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

I.T.T.A.No.386 of 2017

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.),
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

I.T.T.A.No.389 of 2017

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.),
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

I.T.T.A.No.707 of 2017

Between:

The Commissioner of Income Tax (TDS),
Hyderabad.

... Appellant

Vs.

And:

M/s. Vodafone Mobile Services Ltd.,
(formerly Vodafone Essar South Ltd.,)
D.No.1-10-178, Varun Towers-II,
6th Floor, Begumpet, Hyderabad.

..... Respondent

For Appellant : Mrs. K. Mamatha Chowdary

For Respondents : Mr. M.V.A. Siva Karthikeya



HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HON'BLE MRS. JUSTICE T. RAJANI

I.T.T.A.Nos.331, 336, 346, 389, 134, 707 and 386 of 2017

COMMON ORDER: *(V. Ramasubramanian, J)*

The Revenue has come up with the above appeals, challenging the order of Income Tax Appellate Tribunal granting extension of stay beyond the period of 365 days.

2. Therefore, the only substantial questions of law on which the appeals are admitted, are as follows:

“1) Whether on the facts and in circumstances of the case and in law, the Tribunal is justified in extending the stay of collection of taxes beyond 365 days ignoring the third proviso to the Section 254 (2A) of the Act?

2) Whether the Tribunal was justified in keeping the appeals pending for more than one year and extending the stay from time to time in spite of the judgment of this Court in the Assessee's own case for the Assessment Year 2007-08 in I.T.T.A.No.291 of 2013?”

3. Heard Ms. K. Mamtha Chowdary, learned senior standing counsel for the Appellant/Department and Mr. A.V.A. Siva Karthikeya, learned counsel for the respondent-Assessee.

4. On the first question, it appears that a Bench of the Delhi High Court in **Pepsi Foods (P) Ltd., v. Astt. CIT {(2015) 57 Taxmann.com 337}** struck down the third proviso to sub-section (2A) of Section 254 of the Income Tax Act, 1961 as unconstitutional. The matter was carried on appeal to the Supreme Court. But by the time, the delay was condoned and the Special Leave Petition was

taken up for admission, the Tribunal disposed of the main appeal, making the question, merely of academic importance. Therefore, the Supreme Court, by an order reported in **Deputy Commissioner of Income Tax v. Pepsi Foods (P) Ltd.**,¹, closed the Special Leave Petition leaving the question of law on the interpretation of the third proviso to Section 254 (2A) open to be decided in appropriate cases.

5. The third proviso to Section 254 (2A) reads as follows:

“.....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.”

6. Sub-section (2A) of Section 254 was inserted by the Finance Act, 1999 with effect from 01-06-1999, directing the Appellate Tribunals under the Act, where it is possible, to hear and decide appeals 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) of Section 253. In other words, sub-section (2A) itself was incorporated under the Finance Act, 1999 and it reads as follows:

“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) of Section 253.....”

¹ {(2017) 79 Taxmann.com 251 (SC)}

7. After the insertion of sub-section (2A), two provisos were inserted under the Finance Act, 2001 with effect from 01-06-2001.

These two provisos originally inserted, read as follows:

“Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub-section (1) of Section 253, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not so disposed of within the period specified in the first proviso, the stay order shall stand vacated after the expiry of the said period.”

8. Thereafter, by Finance Act, 2007, two provisos as they originally existed, were substituted by three provisos. The third proviso that was inserted by Finance Act, 2008 with effect from 01-01-2008 read as follows:

“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, the order of stay shall stand vacated after the expiry of such period or periods.”

9. Subsequently, the third proviso, was again modified and the modified third proviso is what we have extracted earlier and the interpretation of the said proviso, is the first substantial question of law involved in this case.

10. After having imposed an obligation under sub-section (2A) of Section 254 upon the Appellate Tribunal to decide an appeal within a period of four years, we do not know how the Parliament thought it fit to penalize the Assessee with the stay order getting vacated on account of the failure of the Appellate Tribunal to dispose of the appeal within one year. In fact, the language employed in sub-

section (2A) is to the effect that the Appellate Tribunal may hear and decide the appeal within four years, "Wherever it is possible". Therefore, the Parliament in its wisdom thought it fit not to make it mandatory for the Appellate Tribunal to dispose of the appeal within four years, by employing by the words "wherever it is possible". That there could be cases where it is not possible has been recognized by the Parliament, which is why the words "wherever it is possible" have been used.

11. The obligation to dispose of an appeal within four years, under sub-section (2A), because of the peculiar language used by the Parliament, is apparently only directory and not mandatory. If the obligation to dispose of an appeal within a time frame is only directory and not mandatory, the obligation under the proviso to dispose of an appeal within one year, cannot be said to be mandatory. The proviso will have to be read only as an exception to the main provision. If the main provision expresses a mere hope or impose a pious obligation to dispose of an appeal within four years, if possible, it is not possible to construe the third proviso as mandatory.

12. The real test for finding out whether the obligation imposed by the statute is directory or mandatory, is to see whether the consequences of the failure of one person would adversely affect another person or not. The simple test is to see whether the delay is on the part of a person who stands to benefit by the stay. If an Assessee is responsible for prolonging the matter, after having

obtained a stay, he is certainly not entitled to continue to have the benefit of stay. But if for reasons not attributable to the Assessee, the disposal of the appeal takes a longer time than what is prescribed, it may not be proper to impose the penal consequence upon the Assessee. No law, which imposes a penal consequence upon one for the fault of another, can be said to be mandatory. A penal consequence for non-adherence to a statutory prescription should fall only upon the person, who was the responsible for such failure to adhere to the prescription. Therefore, the applicability of the third proviso, in our considered view, has to be understood with two clear prescriptions on caveat. They are:

- (1) that the third proviso has to be understood primarily as directory and not mandatory;
- (2) that in individual cases where the Tribunal finds that the Assessee is responsible for procrastinating the decision of the appeal, the Tribunal should vacate the stay at its discretion.

13. This, in our considered view, is the manner in which the first question of law has to be answered. In other words, a stay will not stand automatically vacated under the third proviso to subsection (2A) of Section 254, unless the Tribunal records a finding that the Assessee was responsible for the procrastination of the hearing of the appeal.

14. In so far as the second question of law is concerned, it is actually more of a grievance of the department than a real substantial question of law. The grievance of the department is that

despite the department's persuasion, the Tribunal did not take up the appeal for disposal and kept on extending the stay from time to time. Therefore, more than addressing the question of law it is necessary to address the grievance of the appellant/ revenue. The only manner in which the grievance of the appellant could be addressed is to issue appropriate directions.

15. Therefore, the appeals are disposed of answering the first question of law in the manner we have indicated as above and directing the Tribunal to take up the appeals for disposal, hear both parties and dispose of the same in accordance with law, after considering the purport of the decision of the Calcutta High Court, the effect of the stay granted by the Supreme Court and the effect of the judgment of this Court and all the points that are available on both sides, within a period of three months from the date of receipt of a copy of this order. However, it is made clear that the interim stay already granted to continue.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

T. RAJANI, J

Date: 18-09-2017

Note: L.R. Copy to be marked.

B.O./Ksn