

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA-407-2016 (O&M)

Date of decision: 10.01.2017

The Principal Commissioner of Income Tax, Gurgaon

..... Appellant

Versus

Agilent Technologies (International) Pvt. Ltd.

..... Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

PRESENT: Mr. Tajinder K. Joshi, Advocate for the appellant.

AJAY KUMAR MITTAL, J. (ORAL)

1. The appellant-Revenue has filed this appeal under Section 260A of the Income Tax Act, 1961 against the order dated 30.03.2016 (Annexure A-II) passed by the Income Tax Appellate Tribunal, Delhi Bench, New Delhi (in short, “the Tribunal”) whereby the Tribunal, had held that non-disposal of appeal is not attributable to the assessee and, thus, extended the stay for a further period of 180 days or till the disposal of appeal.

2. The appellant-Revenue has claimed the following substantial questions of law in the present appeal:-

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 Sec 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.
3. It was not disputed by learned counsel for the appellant-Revenue that the issue raised herein is squarely covered by various decisions of this Court including ITA-5-2016, (Principal Commissioner of Income Tax, Gurgaon Vs. M/s Carrier Air Conditioning and Refrigeration Limited), decided on 25.04.2016, wherein it was held as under:-

“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.”

in the order passed by the Tribunal. Thus, no substantial question of law arises. The appeal stands dismissed. Needless to say that the Tribunal shall make sincere efforts for expeditious disposal of the appeal, in accordance with law.

(AJAY KUMAR MITTAL)
JUDGE

January 10, 2017
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(RAMENDRA JAIN)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No