

Power of Income Tax Appellate Tribunal in Extending Stay beyond Three Hundred and Sixty Five Days



Section 254(2A) of the Income-tax Act, 1961 requires the Income Tax Appellate Tribunal to dispose of the appeal within four years from the end of the financial year in which such appeal is filed. Till the year 2001, there was no proviso to Section 254(2A). Provisos were inserted to this Section by virtue of the Finance Act 2001. The provisos give powers to the Appellate Tribunal to grant stay order for the period of 180 days and require the Tribunal to dispose the appeal within this period. Then, the amendment brought in the Finance Act, 2007 provides that if the appeal is not disposed within 180 days, the Tribunal has the powers to grant stay up to 365 days if the delay is not attributable to the assessee. The amendment brought in the Finance Act, 2008 substituted the third proviso which provided that the Tribunal cannot grant stay order beyond 365 days even the delay in disposing of the appeal is not attributable to the assessee. This proviso has been frequently challenged by the assessees. In some cases, the High Court relied on the legislative provisions, concurrently giving alternate ways for the assessees to get the grievance redressed. However, in the recent case of 'Pepsi Foods Private Limited', the Delhi High Court struck down the said expression as violative of the Article 14 of the Constitution of India.



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Power of Granting Stay

Section 254 of the Income-tax Act, 1961 ('Act') deals with the orders of the Income Tax Appellate Tribunal ('Tribunal'). Section 254(2A) of the Act stipulates that the Tribunal, where it is possible,

By virtue of the Finance Act 2008, the third proviso was substituted by the existing proviso with effect from 1st October 2008. The newly substituted proviso did not allow the Tribunal to extend the stay beyond 365 days even if the delay in disposing of the appeal was not attributable to the assessee. It is evident that the amendment introduced by virtue the Finance Act, 2008 had nullified the effect of the decision of the Bombay High Court in *Narang Overseas Private Limited (supra)*.

may hear and decide the appeal within a period of four years from the end of the financial year in which such appeal is filed under Sections 253 (1), (2) or (2A). Initially, there was no *proviso* to Section 254(2A). The *provisos* were added, for the first time, by virtue of the Finance Act, 2001. The first *proviso* provided that, with effect from 1st June 2001, where an order of stay had been granted, the Tribunal was required to dispose of the appeal within a period of 180 days from the date of the said order. It was further provided that if the appeal was not disposed within the specified period of 180 days, the stay order would stand vacated after the expiry of the said period.

Amendments in Section 254(2A)

The *provisos* to Section 254 (2A) were substituted vide the Finance Act, 2007 with effect from 1st June 2007. The first *proviso* stipulated 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. The second *proviso* stipulated that in case the appeal was not so disposed of within the period initially stipulated by the Tribunal, the Tribunal could, on an application made on this behalf by the assessee and on being satisfied that the delay in disposing of the appeal was not attributable to the assessee, extend the period of stay for a period or periods, provided that the aggregate of the period originally allowed and the period or periods so extended, would not in any case, exceed 365 days. The Tribunal was also required to dispose of the appeal within the period or periods of stay so extended or allowed. The third *proviso* provided

that if such appeal was 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 should stand vacated after the expiry of such period or periods.

In *Narang Overseas Private Limited vs. ITAT – (2007) 295 ITR 22 (Bom)*, the High Court considered the question whether the third *proviso* to Section 254(2A) of the Act had the effect of denuding the Tribunal of its incidental power to grant interim relief. The power to grant stay or interim relief being inherent or incidental is not defeated by the *proviso* 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 a 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. The power of the Tribunal, therefore, to continue interim relief is not overridden by the language of the third *proviso* to Section 254 (2A).

Substitution of Third Proviso to Section 254(2A)

By virtue of the Finance Act 2008, the third *proviso* was substituted by the existing *proviso* with effect from 1st October 2008. The newly substituted *proviso* did not allow the Tribunal to extend the stay beyond 365 days even if the delay in disposing of the appeal was not attributable to the assessee. It is evident that the amendment introduced by virtue the Finance Act, 2008 had nullified the effect of the decision of the Bombay High Court in *Narang Overseas Private Limited (supra)*.

Case Laws

i. *Commissioner of Income Tax vs. Maruti Suzuki (India) Limited (2014) 362 ITR 215 (Delhi)*

In this case, the Delhi High Court considered the amendment brought out in Section 254 (2A) with effect from 1st October 2008. The High Court held that the legislative mandate has to be respected and the courts do not legislate but interpret the statute as a legislative edict. The third *proviso* after amendment undoubtedly bars and prohibits the Tribunal from extending interim stay order beyond 365 days. It stipulates deemed vacation and imposes no fault

consequences in strict terms. The language is clear and, therefore, has to be respected. However, the provision does not bar or prohibit an assessee from approaching the High Court by way of writ petition for continuation, extension or grant of stay. The High Court made the following conclusions:

- In view of the third *proviso* to Section 254 (2A) of the Act substituted by the Finance Act, 2008 with effect from 01.10.2008, the Tribunal cannot extend stay beyond the period of 365 days from the date of order of stay;
- In case default and delay is due to lapse on the part of the Revenue, the Tribunal is at liberty to conclude hearing and decide the appeal, if there is likelihood that the third *proviso* to Section 254(2A) would come into operation;
- The third *proviso* to Section 254(2A) does not bar or prohibit the Revenue or departmental representative from making a statement that they would not take coercive steps to recover the impugned demand and on such statement being made, it will be open to the Tribunal to adjourn the matter at the request of the Revenue;
- An assessee can file a writ petition in the High Court pleading and asking for stay and the High Court has power and jurisdiction to grant stay and issue directions to the Tribunal as may be required. Section 254(2A) does not prohibit/bar the High Court from issuing appropriate directions, including granting stay of recovery.

ii. ***New Delhi Television Limited vs. Deputy Commissioner of Income Tax and another – (2015) 376 ITR 51 (Delhi)***

In this case, the assessee filed an appeal before the Tribunal against the assessment order in relation to the assessment year 2009-10. The Tribunal granted stay of the demand on 26.03.2014 subject to certain conditions which had been fulfilled by the assessee. The Tribunal, subsequently on 10.10.2014, passed an order extending the interim stay. According to the jurisdictional High Court, the Tribunal has no authority to extend the period of stay beyond a period 365 days from the initial date of grant of stay. As 365 days were to elapse on 25.03.2015,

the assessee could not approach the Tribunal for any further extension of stay. In the meanwhile, the assessee's appeal before the Tribunal was listed for hearing but could not be taken up for reasons not attributable to the assessee. The Court held that since the assessee had already been granted conditional stay by the Tribunal in respect of the appeal that the Tribunal was in the midst of hearing the appeal, it would be in the interest of justice that the stay order granted by the Tribunal be continued till the disposal of the appeal pending before it as expeditiously as possible.

iii. ***Deputy Commissioner of Income Tax (TDS) vs. Vodafone Essar Gujarat Limited and another – (2015) 376 ITR 23 (Guj)***

In the above case, the respondent filed appeal against the assessment order to the tune of ₹7.21 crore and interest ₹1.20 crore for the assessment year 2008-09 and the assessment order to the tune of ₹9.04 crore and interest ₹1.75 crore for the assessment year 2009-10. The petitioner paid a sum of ₹6.37 crore for the assessment year 2008-09 and ₹8.13 crore for 2009-10. The petitioner filed a stay petition and stay order was granted by the Tribunal on 25.03.2011 for the period of 180 days from the date of receipt of order or till the appeal got decided. The said stay of demand has been extended from time to time and the stay has been extended beyond the period of 360 days, approximately 1000 days. The Revenue, aggrieved against the extension of stay, filed the present petition under Article 226 of the Constitution of India.

The Revenue contended the following:

- In view of Section 254(2A) of the Act, more particularly the second *proviso* and

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The High Court was of the view that by no stretch of imagination, it can 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.

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the third *proviso* to Section 254 (2A) of the Act, any extension of stay and/or granting of stay or demand beyond the period of 365 days is absolutely illegal, wholly or without jurisdiction and contrary to Section 254(2A) of the Act;

- The Tribunal is barred from passing an order extending the stay of demand beyond 365 days;
- The Tribunal, being a creature of statute, is bound by the provisions of Section 254(2A) of the Act;
- When under the law/statute, it is provided that there cannot be any stay beyond the total period of 365 days, the same has to be responded by everybody including the Tribunal;
- The legislative intent of restricting the period of stay for a maximum period of 365 days is to see that appeals by the Tribunal are heard expeditiously and the assessee may not get undue benefit of the stay;
- In the present case, a huge tax liability is pending since many years and the stay has been extended for about 1,000 days;
- On the one hand, the appeals are not heard and on the other hand, the Tribunal goes on extending the stay of demand and, therefore, the interest of the Revenue has been prejudiced.

The respondent submitted the following:

- There may be number of reasons for the delay in disposing of the appeal by the Tribunal;
- The assessee cannot be punished, more particularly when the initial stay has been granted after due application of mind by the Tribunal and after a strong case is made out by the assessee for the grant of stay of demand;
- In the present case, the appeals were not decided and disposed of by the Tribunal as the issue involved in the appeals was pending before the Hon'ble Supreme Court;
- A substantial amount has already been paid by the assessee;
- The Tribunal has not committed any error in extending the stay of demand for more than 365 days by passing the impugned order.

The High Court analysed the provisions of

Section 254 (2A) of the Act. As per the third *proviso* of the Section, if appeal is not disposed within the period allowed under the first *proviso* i.e., within 180 days from the date of the stay order of the period or periods extended or allowed under the second *proviso*, which shall not, in any case, exceed 365 days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of appeal is not attributable to the assessee. Therefore, the intention of the legislation seems to be very clear. However, the purpose and object of providing such time limit is required to be considered. The purpose and object of providing the time limit seems to be that after obtaining stay order, the assessee may not indulge into delay tactics and may not proceed further with the hearing of the appeal and may not misuse the grant of stay of demand. At the same time, it is the duty of the Tribunal to decide and dispose of such appeals as early as possible within the prescribed period under the first *proviso* and the second *proviso* to Section 245 (2A). There may be number of reasons for the Tribunal in not disposing of the appeal within the maximum period of 365 days despite their best efforts. There cannot be a legislative intent to punish a person though there is no fault of the assessee and/or the appellant.

The power to grant stay being inherent or incident is not defeated by the *proviso* 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 a 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. The power of the Tribunal, therefore, to continue interim relief is not overridden by the language of the third *proviso* to Section 254(2A).

The extension of stay order beyond 365 days from the date of grant of initial stay would always be subject to the subjective satisfaction by the Appellate Tribunal and on an application made by the assessee-appellant to extend stay and on being satisfied that the delay in disposing of the appeal within a period of 365 days is not attributable to the assessee-appellant. The Appellate Tribunal is required to consider the facts of each case and arrive at subjective satisfaction in each case whether the delay is not disposing of the appeal within the period of 365 days is attributable to the appellant-assessee or not and/or whether

the assessee-appellant in whose favor stay has been granted, has co-operated in early disposal of the appeal or not and/or whether there is any delay tactics by such assessee-appellant. Therefore, the Tribunal is required to pass a speaking order on each application and after giving an opportunity to the department and record its satisfaction.

The High Court relied on the judgment in *Maruti Suzuki Limited (supra)* and it held that if the procedure laid down in the above said judgment is followed, it would meet the end of the justice and it may not increase the litigation either before the High Court and/or appropriate forum and the purpose and object of Section 254(2A) of the Act is achieved. The High Court directed the Tribunal to dispose of the appeals in the case where there is stay of demand by following the procedure as observed by that Court and in case of extension of stay, the Tribunal is to satisfy itself and also give a speaking order.

iv. ***'Pepsi Foods P. Limited vs. Assistant Commissioner of Income Tax and another' – (2015) 376 ITR 87 (Delhi)***

In this case, the writ petitioner challenged the validity of the third *proviso* to Section 254(2A) of the Act. The petitioners submitted the following before the High Court:

- The right of appeal is not inherent but once it has been granted it has to be construed as one which effectively redress the grievances;
- The right to obtain a stay of demand was integral and cardinal to an effect right of appeal;
- The introduction of the words '*even if the delay in disposing of the appeal is not attributable to the assessee*' in the third *proviso* by virtue of amendment of the Finance Act, 2008 has made the right of appeal illusory and the amendment is clearly arbitrary and contrary to the provisions of the Article 14 of the Constitution of India;
- The said amendment introduces a classification which has no nexus with the object sought to be achieved;
- It clubs assesseees belonging to two different categories as one class;
- The assesseees who are not responsible for any delay in the hearing of the appeal have been clubbed together with those assesseees

to whom the delay was attributable, which caused hostile discrimination against the assesseees who are law abiding and did not cause any delay in the hearing of their respective appeals;

- It was violative of Article 14 of the Constitution of India and liable to be struck down as being invalid.

The Revenue submitted the following as counter to the contentions of the petitioner:

- There was nothing wrong with the amendment brought about in 2008 in as much as all it did was to clarify the legislative intent and make it explicit;
- What was already provided under the said Act in the third *proviso* to Section 254(2A) has merely been clarified;
- There has been no class treatment given by the Legislature and that the said provision is not discriminatory;
- The intention behind the amendment was to clarify that the period of stay cannot be extended beyond 365 days under any circumstances.

The High Court analysed the provisions of Section 254(2A) of the Act and also the judgments relied on by both parties. The High Court held that this is not a case of excessive delegation of powers. The High Court was 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. The exercise of that power can be subjected to certain conditions. In the present case, the Court found that there are several conditions which have been stipulated.

- As per the first *proviso*, 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 within the period of 180 days, if the delay in disposing of the appeal is not attributable to assessee, the Tribunal has the power to extend the stay for a period not exceeding 365 days in aggregate;
- The third *proviso* 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.

The High Court was of the view that by no stretch of imagination, it can 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 High Court also considered the contentions of the petitioner 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. Such clubbing has led to hostile discrimination against the assesseees to whom the delay is not attributable. It is for the reason, the High Court found 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 High Court struck down the said expression as violative of Article 14 of the Constitution.

Conclusion

The above discussion clearly describes that how Section 254(2A) has travelled various courses of amendments. While the High Courts initially decided by relying and respecting the amendments brought by the legislation, the Delhi High Court in 2015 struck down the expression *‘even if the delay in disposing of the appeal is not attributable to the assessee’* found in third proviso to Section 254(2A) as violative of the Article 14 of the Constitution of India. ■

