

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 341 of 2014**

With

TAX APPEAL NO. 355 of 2014

With

TAX APPEAL NO. 394 of 2014

With

TAX APPEAL NO. 395 of 2014

With

TAX APPEAL NO. 396 of 2014

With

TAX APPEAL NO. 420 of 2014

With

TAX APPEAL NO. 421 of 2014

With

TAX APPEAL NO. 487 of 2014

With

TAX APPEAL NO. 488 of 2014

With

TAX APPEAL NO. 510 of 2014

With

TAX APPEAL NO. 530 of 2014

With

TAX APPEAL NO. 531 of 2014

With

TAX APPEAL NO. 559 of 2014

With

TAX APPEAL NO. 560 of 2014

With

TAX APPEAL NO. 561 of 2014**FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE M.R. SHAH****Sd/-****and****HONOURABLE MR.JUSTICE K.J.THAKER****Sd/-**

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|---|---|------------|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | YES |
| 2 | To be referred to the Reporter or not ? | YES |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? | NO |

5 Whether it is to be circulated to the civil judge ? **NO**

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COMMISSIONER....Appellant(s)

Versus

SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA....Opponent(s)

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TAX APPEAL No.341 of 2014

Appearance:

MR GAURANG H BHATT, ADVOCATE for the Appellant(s) No. 1

MR ANAND NAINAWATI, ADVOCATE for the Opponent(s) No. 1

TAX APPEAL No.355 of 2014

Appearance:

MS SEJAL K. MANDAVIA, ADVOCATE for the Appellant(s) No. 1

MR UDAY JOSHI for M/s. TRIVEDI & GUPTA, ADVOCATE for Opponent(s) No. 1

TAX APPEAL Nos.394 to 396 of 2014

Appearance:

MR GAURANG H BHATT, ADVOCATE for the Appellant(s) No. 1

MR ANAND NAINAWATI, ADVOCATE for the Opponent(s) No. 1

TAX APPEAL No.420 of 2014

Appearance:

MS VD NANAVATI, ADVOCATE for the Appellant(s) No. 1

MR PARESH M. DAVE, ADVOCATE for the Opponent(s) No. 1

TAX APPEAL No.421 of 2014

Appearance:

MR RJ OZA, SR.ADVOCATE for the Appellant(s) No. 1

MR DHAVAL SHAH, ADVOCATE for the Opponent(s) No. 1

TAX APPEAL No.487 & 488 of 2014

Appearance:

MS SEJAL K. MANDAVIA, ADVOCATE for the Appellant(s) No. 1

MR ANAND NAINAWATI, ADVOCATE for the Opponent(s) No. 1

TAX APPEAL No.510 of 2014

Appearance:

MR DARSHAN M.PARIKH, ADVOCATE for the Appellant(s) No. 1

TAX APPEAL Nos.530 & 531 of 2014

Appearance:

MR RJ OZA, SR. ADVOCATE for the Appellant(s) No. 1

TAX APPEAL Nos.559 to 561 of 2014

Appearance:

MS VD NANAVATI, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 09/07/2014

CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.00. As common question of law and facts arise in this group of appeals, all these appeals are decided and disposed of by this common judgement and order.

2.00. In all these Tax Appeals preferred by the revenue, the revenue has proposed the following substantial questions of law :

(i) Whether the learned Appellate Tribunal has jurisdiction to extend the stay granted earlier beyond the total period of 365 days in view of statutory provisions contained in Section 35C(2A) of the Central Excise Act, 1944?

(ii) Whether even if it is held that the learned Appellate Tribunal can extend the stay granted earlier beyond the total period of 365 days, the learned Appellate Tribunal is required to pass a speaking order / reasoned order considering 3rd proviso to section 35C(2A) of the Central Excise Act, 1944?

3.00. At the outset, it is required to be noted that in all these appeals which are pending before the learned Appellate Tribunal, initially the learned Appellate Tribunal granted stay which has been extended by the learned Appellate Tribunal by the impugned orders even beyond the total period of 365 days from the date of granting initial stay. Being aggrieved by and dissatisfied with the impugned orders of extending the stay granted earlier even beyond the total period of 365 days from the date of granting initial stay, the revenue has preferred all these Tax Appeals with the aforesaid substantial questions of law.

3.01. It is the case on behalf of the revenue that in view of the provisions contained in section 35C(2A) of the Act, the Appellate Tribunal has no jurisdiction at all to grant / extend stay granted earlier beyond the total period of 365 days from the date of the order passed under sub-section (1) of section 35 of the Act and as such after expiry of 365 days from the date of order referred to in first proviso, stay order shall stand vacated automatically. Therefore, it is the case on behalf of the learned advocates appearing on behalf of the revenue that any order passed by the learned Appellate Tribunal extending the stay beyond the total period of 365 days shall be without

jurisdiction and hit by section 35C(2A).

3.02. It is further submitted by the learned advocates appearing on behalf of the revenue that when the legislature intended that there shall not be any stay beyond the total period of 365 days and when 3rd proviso to section 35C(2A) provides that any stay beyond 365 days stands vacated, no stay shall be extended beyond the total period of 365 days as by operation of law, after total period of 365 days, the stay granted earlier stands vacated.

3.03. Mr.Yogesh Ravani, learned advocate appearing on behalf of the revenue appearing in some of the appeals has submitted that the appeal is a creation of statute and in case a person wants to avail a right of appeal, he has to accept the condition imposed by statute. It is submitted that therefore, when the right of appeal being a creature of statute, legislation could impose condition for exercise of such right. It is submitted that neither there is unconstitutionality nor there is legal impediment for imposing such a condition. It is further submitted by Mr.Ravani, learned advocate and the other learned advocates appearing on behalf of the revenue that while interpreting the provisions of statute literal and the plain meaning should be adopted. It is submitted that therefore the word "shall" make it mandatory. It is submitted that therefore, the learned Appellate Tribunal has no jurisdiction at all to extend the stay beyond 365 days. It is submitted that the intention of the legislature by section 35C(2A) of the Act is that the appeals involving the revenue are decided and disposed of at the earliest and within stipulated time so that ultimately the revenue may not have to suffer. It is submitted that for

various reasons, the assesses prefer appeals and mainly with a view to delay the proceedings and ultimately to delay the payment of tax liability inclusive of penalty, interest etc. It is submitted that therefore, to overcome the aforesaid and in the interest of revenue when the legislature has inserted third proviso to section 35C(2A) and more particularly when under third proviso to section 35C(2A), after 365 days stay granted earlier stands vacated automatically, the Appellate Tribunal has no jurisdiction at all to extend the stay beyond the total period of 365 days.

3.04. Mr.Yogesh Ravani, learned advocate appearing on behalf of the revenue has further submitted that waiver of pre-deposit would be under section 35F of the Central Excise Act and on the conditions mentioned in Section 35F. It is submitted that therefore, as such the pre-deposit is a condition precedent for considering the appeal on merits and waiver of pre-deposit can be said to be an exception. It is submitted that therefore, by insertion of section 35(2C) it is clear that waiver - partial waiver of pre-deposit will only be upto a year. It is submitted that the intention of the legislature from the Scheme of the Act is clear to collect tax after a year subject to the result of the appeal without any option.

3.05. It is further submitted by the learned advocates appearing on behalf of the revenue that giving option other way would frustrate the object achieved by legislation to collect duty during the pendency of the appeal.

3.06. Mr.Yogesh Ravani, learned advocate appearing on behalf of the revenue has submitted that the section 35C(2A)

is to be treated as enabling provision to arrange duty in a year period by the appellant.

3.07. Mr.R.J. Oza, learned counsel appearing on behalf of the revenue has submitted that even considering 3rd proviso to section 35C(2A) of the Act, it is incumbent on the part of the Appellate Tribunal to pass a speaking / reasoned order as to why the appeal could not be disposed of within a period of 365 days (total) and whether delay in disposal of the appeal is attributable to the original appellant/assessee or not. It is submitted that third proviso to section 35C(2A) which has come into effect by Sec. 98 of Finance Act 2013, if the appeal is not disposed of within the period specified in first proviso, the Appellate Tribunal may, on an application made by the party and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend period of stay. It is submitted that, therefore, even stay can be extended only on subjective satisfaction of the Appellate Tribunal that the delay in disposal of the appeal is not attributable to such party - original appellant/assessee.

3.08. Mr.R.J. Oza, learned counsel appearing on behalf of the revenue has further submitted that in the present case the learned Appellate Tribunal has passed common order extending stay in respective appeals beyond the period of 365 days without assigning any reasons and/or without recording its subjective satisfaction as provided under third proviso to section 35C(2A).

3.09. Mr.Oza, learned counsel appearing on behalf of the revenue has heavily relied upon the decision of the Hon'ble

Supreme Court in the case of **Commissioner of Central Excise, Bangalore Versus Srikumar Agencies**, reported in **2008 (232) ELT 577 (SC)** in support of his above submission.

3.10. Ms.Vaibhavi Nanavati, learned advocate appearing on behalf of the revenue, relying upon the decision of the Supreme Court in the case of **Selvi J. Jayalalithaa & Others Versus State of Karnataka**, reported in **2013 (12) Scale 234** has submitted that as observed and held by the Hon'ble Supreme Court when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It is submitted that therefore, in the present case when the statute provides that in case where stay has been granted by the Appellate Tribunal in an appeal and the appeal is not disposed of within total period of 365 days, stay granted earlier stands vacated automatically. It is submitted that therefore, when the statute provides particular thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible. It is submitted that therefore, any exercise of power by the learned Appellate Tribunal extending stay beyond the total period of 365 days would be in teeth of 3rd proviso to section 35C(2A) of the Act and the same cannot be sustained.

3.11. Ms.Sejal Mandavia, learned advocate appearing on behalf of the revenue, has heavily relied upon the decision of the Karnataka High Court in the case of **Commissioner of Income Tax, Bangalore Vs. M/s.Ecom Grill Coffee Trading Pvt. Ltd.** in Tax Appeal No.160 & 161 of 2012 by submitting that while considering para-materia provisions under the

Income Tax Act, more particularly section 254(2A) of the Income Tax Act, the Karnataka High Court has held that the Appellate Tribunal has no jurisdiction and/or authority to extend the stay beyond the total period of 365 days.

3.12. Learned advocates appearing on behalf of the revenue have also relied upon the decision of the Allahabad High Court dated 8/10/2013 in the case of **Commissioner, Customs and Central Excise Vs. M/s. J.P. Transformers**, rendered in Central Excise Appeal No.277 of 2013 by submitting that while considering the very provisions i.e. section 35C(2A), Allahabad High Court has accepted the prayer made by the department that the Appellate Tribunal could not have extended the stay order by which it has waived demand of pre-deposit indefinitely. It is submitted that the Allahabad High Court in the aforesaid decision has also observed that such an extension of order indefinitely is likely to be misused by the assessee.

Making above submissions and relying upon above decisions, it is requested to answer the aforesaid questions in favour of the revenue and against the assessee.

4.00. All these appeals are opposed by Mr.Paresh Dave, Mr.Uday Joshi, Mr.Dhaval Shah and Mr.Anand Nainavati, learned advocates appearing on behalf of the respective respondents – original appellants – assesses.

4.01. The learned advocates appearing on behalf of the respective respondents herein - original appellants – assesses have vehemently submitted that as such the issue in the

present appeal is as such now not res-integra in view of the decision of the Hon'ble Supreme Court in the case of **Commissioner of Cus. & C. Ex., Ahmedabad Versus Kumar Cotton Mills Pvt. Ltd.**, reported in **2005(180) ELT 434 (SC)**. It is submitted that in the aforesaid decision, the Hon'ble Supreme Court has confirmed the decision of the Appellate Tribunal in the case of Kumar Cotton Mills Pvt. Ltd. Versus Commr. Of Cus. & C. Ex., Ahmedabad-I, reported in **2002 (146) ELT 438 (Tri.Mumbai)** by which it was held by the learned Appellate Tribunal that if stay application is made after 11/5/2002 (after insertion of second proviso to section 35C(2A), the Appellate Tribunal's power to continue protection so given is not circumscribed, and the Appellate Tribunal on an application being made by the applicant is competent to extend the date of coverage of stay order. It is submitted that as such in the decision of the Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd (supra), Hon'ble Supreme Court has also confirmed / approved the decision of the Larger bench of the Appellate Tribunal in the case of IPCL Versus Commissioner of Central Excise, Vadodara, reported in (2004) 169 ELT 267 (Tri.LB).

4.02. Learned advocates appearing on behalf of the respective respondents – original appellants – assesses have submitted that as such third proviso to section 35C(2A) cannot be read down in such a manner that it may punish an honest and genuine assessee who is not at fault for non-disposal of the appeal within 365 days from the date of grant of initial stay. It is submitted that as such the legislature could not have intended to punish the person who is not at fault.

4.03. It is further submitted by the learned advocates appearing on behalf of the respondents – original appellants – assesses that the object and purpose of section 35C(2A) is and provision has been made for the purpose of curbing dilatory tactics of such of the assesseees who after getting interim order in their favour to continue by delaying the disposal of the proceedings and that certainly deprive the revenue not only of the benefit of the assessed value but at the same time of the decision on the point which may have impact on the other pending matters. It is submitted that at the same time, third proviso to section 35C(2A) cannot be construed as punishing the assessee for matters which may be completely beyond their control. It is submitted that in many of the cases, due to large number of the pending appeals and the workload assigned to the Appellate Tribunal, it is not possible for the Appellate Tribunal to dispose of the matters under the mandate of law. It is submitted that therefore, for the reasons of other administrative exigency for which assessee cannot be held liable and if there is no reason attributable to the assessee regarding delay in disposal of the pending appeal or non-cooperation and if the appeal could not be heard which is beyond control of the appellant – assessee, some balance has to be made to protect the right and interest of the assessee during intervening period and the appeal remain pending before the learned Appellate Tribunal .

4.04. It is further submitted by the learned advocates appearing on behalf of the respondents – original appellants – assesses that when initially stay has been granted and/or order for waiver of pre-deposit fully and/or partially is passed, the same is passed by the appellate authority / learned

Appellate Tribunal after applying the mind and on considering various aspects of grant of stay / waiver of pre-deposit. It is submitted that therefore, when stay has been granted and/or order for waiver of pre-deposit is passed after due consideration of the matter on all aspects and thereafter wherever it is found that there is no fault on the part of the original appellant – assessee in not disposing of the appeals within 365 days, such an appellant may not be punished for no fault of them. It is submitted that in such a situation, the Appellate Tribunal would have jurisdiction to continue order of stay granted earlier even may be beyond the total period of 365 days. It is submitted that if such purposive interpretation is not made, in that case, third proviso to section 35C(2A) to the extent it provides that irrespective of whether original appellant was at fault or not, after total period of 365 days stay stands vacated automatically and the Appellate Tribunal would not have any jurisdiction at all to extend / continue the stay beyond the period of 365 days, in that case such provision can be held ultra vires. It is submitted that therefore, to save the aforesaid provision from declaring it as ultra vires, the same is required to be read down by applying the principles of equity, justice and fair play, otherwise it would lead to arbitrary result or make it violative of Article 14 of the Constitution of India or would render it unconstitutional.

4.05. The learned advocates appearing on behalf of the respondents – original appellants – assesses have relied upon the following decision of Various High Courts inclusive of the decision of the Bombay High Court dated 30/7/2007 in the case of **Navrang Overseas Pvt. Ltd. Vs. Income Tax Appellate Tribunal, Mumbai**, rendered in **Writ Petition No.1454 of**

2007, by which, while interpreting the para-materia provisions under Income Tax Act – section 254-2A of the Act, it is held that if it is found by the Appellate Tribunal that delay in disposing of the appeal within 365 days is not attributable to assessee and there is no delay tactics adopted by the assessee – appellant, Appellate Tribunal can extend the stay even beyond the total period of 365 days:-

(i) Poly Fill Sacks Versus Union of India, reported in (2005) 183 ELT 344 (Gujarat) ;

(ii) Navrang Overseas Pvt. Ltd. Vs. Income Tax Appellate Tribunal, Mumbai, Writ Petition No.1454 of 2007 (Bombay High Court);

(iii) Chhote Lal Virendra Kumar Jain Versus Union of India & Others, Civil Writ Petition No.1149 of 2014 dated 9/4/2014 (Rajasthan High Court);

(iv) Commissioner of Cus. & C. Ex., Ahmedabad Versus Kumar Cotton Mills Pvt. Ltd., reported in 2005(180) ELT 434 (SC);

(v) IPCL Versus CCE, Vadodara, (2004) 169 ELT 267 (Tri.LB).

5.00. Heard the learned advocate appearing on behalf of the respective parties at length. Short question which is posed for consideration of this Court is whether the learned Appellate Tribunal can extend the stay beyond the total period of 365 days from the date of passing of the initial stay, despite the fact that the delay in disposing of the appeal within 365 days from the grant of initial stay is not attributable to the assessee? Another question which is posed for consideration of this Court is whether while extending the stay granted earlier, learned Appellate Tribunal is required to pass a speaking and reasoned order or not?

5.01. While considering the aforesaid questions, relevant provisions of Central Excise Act are required to be considered. Section 35C(2A) of the Central Excise Act, 1944 came to be introduced w.e.f. 11/5/2002 by Finance Act 20 of 2002 (20 of 2002) which reads as under :

Section 35C(2A) : The Appellate Tribunal Shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35-B, 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 disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated."

5.02. That thereafter third proviso in section 35C(2A) of the Act came to be further amended by adding third proviso w.e.f. 10/5/2013 by section 98 of the Finance Act, 2013, (17 of 2013). Third proviso to section 35C(2A) reads as under:

"Provided also that where such appeal is not disposed of within the period specified in the first proviso, the Appellate Tribunal may, on an application made in the behalf by a party and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period, as it thinks fit, not exceeding one hundred and eighty-five days, and in case the appeal is not so disposed of within the total period of three hundred and sixty-five days from the date of order referred to in the first proviso, the stay order shall, on the expiry of the said period, stand vacated."

5.03. As per section 35C(2A) as it stood prior to 10/5/2013 i.e. prior to adding second proviso, provided that

when an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35B, Appellate Tribunal shall dispose of the appeal within a period of 180 days from the date of such order. It also further provided that if such appeal is not disposed of within the period specified in the first proviso i.e. within 180 days from the date of order of initial stay, stay order shall, on the expiry of that period stand vacated. It appears that thereafter, third proviso came to be inserted to section 35C(2A) of the Act w.e.f. 10/5/2013 which provides that where such appeal is not disposed of within the period specified in the first proviso, i.e. within a period of 180 days from the date of initial stay order, Appellate Tribunal may, on an application made in this behalf by a party and on being satisfied that delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period as it thinks fit but not exceeding 185 days. It also further provides that in case appeal is not so disposed of within a period of 365 days, from the date of the order referred to in the first proviso, such order shall, on the expiry of such period stand vacated. The second proviso to section 35C(2A) referred to hereinabove came to be considered by the Hon'ble Supreme Court in the case of Kumar Cotton Mills Pvt.Ltd. (supra). It is required to be noted that before the Hon'ble Supreme Court, the revenue was before the Hon'ble Supreme Court against the decision of the Appellate Tribunal reported in 2002 (146) ELT 438 (Tri.Mumbai). The learned Appellate Tribunal in the case of Kumar Cotton Mills Pvt. Ltd., against which the revenue was before the Hon'ble Supreme Court, took the view that where order on the stay application is made after 11/5/2002 i.e. after insertion of section 35C(2A), Appellate Tribunal's power to continue protection so given is

not circumscribed and the Appellate Tribunal on an application being made by the applicant is competent to extend the date of coverage of the stay order. At this stage, it is required to be noted that during the pendency of the appeal before the Hon'ble Supreme Court against decision of the Appellate Tribunal in the case of Kumar Cotton Mills Pvt. Ltd (supra), the aforesaid issue was referred to the Larger Bench of the Appellate Tribunal and the Larger Bench of the Tribunal in the case of **IPCL Versus Versus Commissioner of Central Excise, Vadodara**, reported in **(2004) 169 ELT 267** approved the view taken by the learned Appellate Tribunal in the case of Kumar Cotton Mills Pvt. Ltd. That the Hon'ble Supreme Court while considering the appeal against the decision of the Appellate Tribunal in the case of Kumar Cotton Mills Pvt. Ltd. (supra) also noted decision of the Larger Bench of the Appellate Tribunal in the case of IPCL (supra) and in para 6 has observed and held that the reasoning of the Appellate Tribunal in the Larger Bench matter, namely IPCL Versus Commissioner of Central Excise, Vadodara (supra) cannot be faulted. In para 6 while observing so, the Hon'ble Supreme Court has observed and held as under :

"6. The sub-section which was introduced in terrorem cannot be construed as punishing the assesseees 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 of within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter, namely, IPCL v. 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.”

5.04. Therefore, in light of the above decision of the Hon''ble Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd (supra), third proviso to section 35C(2A) which has come into effect w.e.f. 10/5/2013 is to be construed by holding that if the conditions mentioned in third proviso to section 35C(2A) is satisfied i.e. if the Appellate Tribunal is satisfied on an application made by the assessee / appellant that delay in disposing of the appeal within total period of 365 days from the date of grant of initial stay is not attributable to such party, and despite the fact that the assessee / appellant has cooperated, the Appellate Tribunal could not, for various reasons, dispose of the appeal within 365 days, in that case, power of the Appellate Tribunal to extend stay even beyond 365 days from the date of grant of initial stay are not circumscribed. However, the same shall be subject to satisfaction of the learned Appellate Tribunal that the assessee / appellant is not at all at fault and the delay in not disposing of the appeal within total 365 days is not attributable to such assessee / appellant and that there was no non-cooperation on the part of the assessee / appellant.

5.05. It is true that in a taxing matter any provision is required to be read literal and plain meaning should be adopted, however, while interpreting such a provision Court is also required to see that it may not lead to any arbitrariness and/or is not in violation of Article 14 of the Constitution of India and by such interpretation if a person who is not at fault at all may not be punished. While enacting section 35C(2A)

more particularly third proviso to section 35C(2A), legislature could not have either intended to punish even those persons / assesses / appellants who are not at fault. In other words, the delay in not disposing of the appeal within 365 days is not attributable to them. Therefore, as such in view of the decision of Hon'ble Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd., question No.1 is as such now not res-integra and the question No.1 is required to be answered in favour of the assessee and against the revenue, however, with some further observations which will be made hereinafter.

5.06. At this stage, decision of various High Court on the point are required to be referred to and considered :

5.06.1. In the case of **Poly Fill Sacks Versus Union of India**, reported in **(2005) 183 ELT 344 (Gujarat)** while interpreting section 35C(2A) as it stood prior to 10/5/2013, the Division Bench of this Court in para 6 to 13 held that though language employed by the statute in section 35C(2A) appears to be mandatory in terms, considering the object behind the provision, it has to be understood to mean as being directory in nature. In the said decision it is also further observed and held by the Division Bench that from insertion of section 35C(2A) of the Central Excise Act on statute book, it cannot infer a legislative intent to curtail/withdraw powers of the Appellate Tribunal to grant stay in appropriate cases and it is also not possible to infer any curtailment of such powers beyond the period of six months (180 days). Para 6 to 13 of the decisions of Division Bench in the case of Poly Fill Sacks (supra) reads as under :

“6. Section 35C of the Act deals with the Orders of the Tribunal and sub-section 2A has been inserted w.e.f.11-05-2002 and reads as under:

“[(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed :

Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35B, 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 disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.]”

On a plain reading of the provision it becomes apparent that where an order of stay is made in any proceeding relating to an appeal, the Tribunal is required to dispose of the appeal within a period of 180 days from the date of such an order granting stay of recovery and under the Second Proviso it is laid down that in case such appeal is not disposed of within the period specified in the First Proviso, on the expiry of the said period, the stay order shall stand vacated. The main provision states that the appellate Tribunal shall, where it is possible to do so hear and decide every appeal within a period of three years from the date of filing.

7. Thus, the scheme is that an appeal is required to be disposed of within a period of three years from the date of filing, but where stay is granted by the Tribunal, the said period of three years stands curtailed to 180 days from the date of the order granting stay. Though, the language employed by the statute appears to be mandatory in terms, considering the object behind the provision it has to be understood to mean as being directory in nature. In other words, disposal of appeal has to be within the specified period, three years or 180 days, where it is possible to do so. What meaning does one ascribe to the phrase “where it is possible to do so”, if the contention of Revenue is required to be upheld. If Second Proviso is read in isolation the interpretation

canvassed by Revenue may appear to be correct. But one cannot loose sight of the legal position : a proviso carves out an exception to the main rule. This Court in the case of Indo-Nippon Chemicals Co. Ltd. & Anr. Vs. Union of India & Ors., 2002 (49) RLT 642 (Guj.) has laid down :

“..... The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which, but for the proviso, would be within the purview of the enactment. To this real nature of proviso is also another principle of interpretation that the proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception. Ordinarily, it is foreign to the proper function of proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. Proviso can be taken aid of as useful guide to construction of the main enactment. If the enacting portion of a Section is not clear a proviso appended to it may give an indication as to its true meaning. As stated by Lord Herschel, ‘of course, a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to having this scope or that, which is the proper view to take of it’. Mudholkar, J. in Hindustan Ideal Insurance Co. Ltd. vs. Life Insurance Corporation Ltd. reported in AIR 1963 the Hon'ble Supreme Court 1087 stated the rule thus 'there is no doubt that where the main provision is clear, its effect cannot be cut down by the proviso. But where it is not clear, the proviso, which cannot be presumed to be a surplus age, can properly be looked into to ascertain the meaning and scope of the main provision.’ Since the natural presumption is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and the construction which would make the exceptions unnecessary and redundant should be avoided (See Principles of Statutory Interpretation by Justice G.P.Singh, Eighth

Edition, 2001, pages 168, 169, 174, 175 and 176)."

8. When legislature has provided in the main provision, i.e. sub-section (2A) of Section 35C of the Act, that CESTAT may hear and decide the appeal within a period of three years, where it is possible to so, legislature is well aware of the administrative exigencies and difficulties of the said body. There could be a host of reasons ranging from non-availability of a bench due to non-appointment of adequate number of technical and/or judicial members at a particular station to the quantum and quality of appeals at a particular station. One cannot and should not even attempt to exhaustively list these. Suffice it to state - the discretion available to CESTAT under Section 35C (2A) of the Act does not stand obliterated by insertion of the two provisos, and more particularly by the Second Proviso.

9. The matter may be considered from a slightly different angle. Section 35C(1) of the Act empowers CESTAT to pass such orders, on an appeal before it, as CESTAT thinks fit. The said provision confers on CESTAT powers of the widest amplitude in dealing with appeals before it, grants by implication the power of doing all such acts, or employing such means, as are essentially necessary to its execution. The statutory power under the said section carries with it a duty in proper cases to make such orders for staying recovery of demand of duty, etc. pending an appeal before the Tribunal, as will prevent such an appeal, if successful, from being rendered nugatory. Sub-section (2A) of the Act was brought on statute book to ensure disposal of pending appeals within a reasonable time frame and curtail delays. But from this it is not possible to infer a legislative intent to curtail/withdraw powers of the Tribunal to grant stay in appropriate cases. It is also not possible to infer any curtailment of such powers beyond the period of six months. The legislature would have specifically provided so if it was so intended. Any other interpretation of the sub-section with both the provisos would frustrate the object of Tribunal dispensing justice in deserving cases where the assessee is not at fault in any manner : the assessee having filed appeal and stay application within period of limitation, prima facie proved his case at hearing and obtained stay with or without conditions, and co-operating with Tribunal for hearing and disposal of appeal : but, the Tribunal is not in a position to proceed for various reasons.

10. The contention on behalf of Revenue that the assessee must approach the Tribunal and seek extension of stay already granted is misconceived – at least in relation to orders of the Tribunal made before 11-05-2002. Firstly, it proceeds on a fallacious premise as stated hereinbefore. Secondly, in absence of any change in circumstances why should the Tribunal be inundated with extension applications when admittedly, it is already overburdened and reeling under backlog of pending appeals.

11. However, in cases where the Revenue finds that a particular assessee having obtained stay is adopting dilatory tactics, it is always open to Revenue to move the Tribunal in such an eventuality.

12. For the period subsequent to the insertion of the Second Proviso the Tribunal should, as a matter of practice, specify the time period during which the stay shall operate after exercising its judicial discretion. The period may be limited or could be co-terminous with disposal of appeal – on consideration of all relevant factors in a given fact situation.

13. Therefore, as held by the Apex Court in case of Commissioner of Customs & Central Excise, Ahmedabad Vs. M/s. Kumar Cotton Mills (P) Ltd. (supra) an assessee cannot be punished for matters which may be completely beyond the control of the assessee. The situations set out by the Apex Court in its order are only illustrative and not exhaustive. The object of the provision is expressed by the Apex Court to be for the purpose of curbing the dilatory tactics of assesses, who having obtained an interim order in their favour, seek to continue the interim order while delaying the disposal of the proceedings. The observations i.e. the last sentence on which reliance has been placed by the learned Senior Standing Counsel regarding latitude being given to the Tribunal are relatable only in the situation where extension of period of stay is sought.”

5.06.2. Identical question came to be considered by Rajasthan High Court in the case of **Chhote Lal Virendra**

Kumar Jain Versus Union of India & Others, in Civil Writ Petition No.1149 of 2014 dated 9/4/2014 (supra) and in paragraph Nos. 14 to 16, the Rajasthan High Court has observed and held as under :-

“14. It appears that the provision has been made for the purpose of curbing dilatory tactics of such of the assesseees who after getting interim order in their favour to continue by delaying the disposal of the proceedings and that certainly deprive the revenue not only of the benefit of the assessed value but at the same time of the decision on the point which may have impact on the other pending matters. But, at the same time, the third proviso has been inserted in Sec.35C(2A) by the Finance Act, 2013 cannot be construed as punishing the assesseees for matters which may be completely beyond their control and we can take judicial notice of pendency of appeals and workload assigned to the Tribunal and it is not possible for the Tribunal to dispose of the matters under the mandate of law. Occasionally, for the reasons of other administrative exigencies for which the assessee cannot be held liable and if there is no reason attributable to the assessee regarding delay in disposal of the pending appeal or non-cooperation and if appeal could not have been heard which is beyond control of the petitioner/assessee at least some balance has to be made to protect the right and interest of the assessee during the intervening period the appeal remain pending before the Tribunal.

15. In the instant case, the Tribunal after hearing the parties on application dt.30.10.2013 filed by the assessee seeking extension of stay order passed by the Tribunal dt.20.9.2012, was of the view that the appeal could not be disposed of for no fault of the petitioner assessee but in view of pendency of other old appeals and that was the reason which prevailed upon the Tribunal to extend operation of the stay granted dt.20.9.2012 during pendency of appeal vide its order dt.23.1.2014, in our considered view, after the stay order granted on 20.9.2012 has been allowed to continue to be operative during pendency of appeal vide order dt.23.1.2014, the proceedings which have been initiated by the department during the intervening period which have been treated to be withdrawn vide their later communication dt.29.1.2014 by fiction of law, became nonest and inoperative and the very initiation of the proceedings by the respondent u/s.87(b) of the Finance Act, 1944 dt.21.1.2014

served on the banker of the petitioner and the bank account of the petitioner which was debited through bank attachment on 22.1.2014 could not be held justified in the eye of law and we find substance in the submission made by the petitioner that after passing of the order by the Tribunal dt.23.1.2014 respondents remain under obligation to refund the money which was recovered from the petitioner by debiting the petitioner's account on 22.1.2014 and the very initiation of the proceedings deserves to be quashed in the eye of law in view of the order of tribunal dt. 23.1.2014.

16. Be that as it may, it is the settled principles of law and which is consistent and recognized that where a case is not considered because of multiplicity of business of the Court the party ought not to be prejudiced by that delay and when an act of the Court can prejudice no man, ditto would be for an omission in keeping with the aforesaid principles that if the matter has not been taken up for consideration on a given date at least the litigant cannot be left to suffer for such reason over which he has no control. The reason or cause for such eventuality could be many and usually as we have noticed that because of heavy load of work but still litigant cannot be made to suffer for those reasons but keeping in view the mandate of law by introducing Sec.35C (2A) by Finance Act, 2002 and a third proviso added by Finance Act, 2013 In particular, it will be for the Tribunal to see that the matters must be decided within the period stipulated under the mandate of law, at the same time, where definite stay order has been granted, such cases must be heard on priority basis.”

5.06.3. In the case of **Narang Overseas Pvt. Ltd. Versus the Income Tax Appellate Tribunal, Mumbai**, rendered in Writ Petition No.1454 of 2007, the Bombay High Court had an occasion to consider para-materia provision in the Income Tax Act – Section 254-2A of the Income Tax Act and after following the decision of the Hon'ble Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd (supra), in para 12 it is observed and held as under:

“12. We are of the respectful view that the law as

enunciated in Kumar Cotton Mills Pvt. Ltd. (supra) should also apply to the construction of the third proviso as introduced in Section 254(2A) by the Finance Act, 2007. The power to grant stay or interim relief being inherent or incidental is not defeated by the provisos to the subsection. The third proviso has to be read as a limitation on the power of the Tribunal to continue interim relief in 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 itself. The power of the Tribunal, therefore, to continue interim relief is not overridden by the language of the third proviso to Section 254(2A). This would be in consonance with the view taken in Kumar Cotton Mills Pvt. Ltd (supra). There would be power in the Tribunal to extend the period of stay on good cause being shown and on the Tribunal being satisfied that the matter could not be heard and disposed of for reasons not attributable to the assessee.”

5.06.4. Now, so far as the reliance placed by the department on the decision of Karnataka High Court in the case of M/s.Ecom Grill Coffee Trading Pvt. Ltd., by which the Division Bench of the Karnataka High Court while interpreting the para-materia provisions in the Income Tax Act – Section 254-2A, has held that the tribunal has no jurisdiction at all to continue the stay beyond the period of 365 days is concerned, it is required to be noted that as such before the Karnataka High Court the decision of the Hon’ble Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd. was pressed into service. However, in the said decision, Karnataka High Court did not follow the decision of the Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd. (supra) by observing that interpretation of section 35C(2A) by the Hon’ble Supreme Court in the decision of Kumar Cotton Mills Pvt. Ltd. would not be applicable while interpreting the provisions of section 254-2A of the Income Tax Act. With profound respect, we are not in agreement with the view taken by the Karnataka High Court. If para-materia and/or

similar provision is interpreted by the Ho'ble Supreme Court, the same is binding to the High Court and interpretation of para-materia provisions can be applied even with respect to other similar para-materia provisions in another statute. Under the circumstances, we are not in agreement with the view taken by the Karnataka High Court in the case of M/s.Ecom Grill Coffee Trading Pvt. Ltd. (supra) and we are in agreement with the view taken by the Bombay High Court in the case of Navrang Overseas Pvt. Ltd.. (supra).

5.07. The result of the aforesaid discussion would be that by section 35C(2A) of the Central Excise Act it cannot be inferred a legislative intent to curtail / withdraw power of the Appellate Tribunal to extend stay beyond the total period of 365 days. However, the aforesaid extension of stay beyond the period of total 365 days from the date of grant of initial stay would always be subject to the subjective satisfaction by the learned 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 from the date of grant of initial stay is not attributable to the appellant / assessee. For that purpose, on expiry of every 180 days, the appellant / assessee is required to make an application to extend stay granted earlier and satisfy the learned Appellate Tribunal that the delay in not disposing of the appeal is not attributable to him / it and the learned Appellate Tribunal is required to review the matter after every 180 days and while disposing of such application of extension of stay, the learned Appellate Tribunal is required to pass a speaking order with respect to its own satisfaction that the assessee / appellant is not indulged into any delay tactics and

that the delay in disposing of the appeal within stipulated time is not attributable to the assessee / appellant. However, at the same time, it may not be construed that widest powers are given to the Appellate Tribunal to extend the stay indefinitely and that the Appellate Tribunal is not required to dispose of the appeal at the earliest. The object and purpose of section 35C(2A) of the Act particularly one of the object and purpose is to see that in a case where stay has been granted by the learned Appellate Tribunal, the learned Appellate Tribunal is required to dispose of the appeal within total period of 365 days, as ultimately revenue has not to suffer and all efforts shall be made by the learned Appellate Tribunal to dispose of such appeals in which stay has been granted as far as possible within total period of 365 days from the date of grant of initial stay and the Appellate Tribunal shall grant priority to such appeals over appeals in which no stay is granted. For that even the Appellate Tribunal and/or registrar of the Appellate Tribunal is required to maintain separate register of the appeals in which stay has been granted fully and/or partially and the appeals in which no stay has been granted.

5.08. Now, so far as second question which is posed for consideration of this Court is whether while disposing of the application for extension of stay granted earlier, the learned Appellate Tribunal is required to pass a speaking / reasoned order or not? As observed hereinabove, the learned Appellate Tribunal can extend the stay granted earlier beyond the period of 365 days from the date of grant of initial stay, however, on being subjectively satisfied by the learned 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 from the date of grant of initial stay, is not attributable to the appellant / assessee and that the assessee is not at fault and therefore, while considering each application for extension of stay, the learned Appellate Tribunal is required to consider the facts of each case and arrive at subjective satisfaction in each case whether the delay in not disposing of the appeal within the period of 365 days from the date of initial grant of stay is attributable to the appellant – assessee or not and/or whether the assessee / appellant in whose favour stay has been granted, has cooperated in early disposal of the appeal or not and/or whether there is any delay tactics by such appellant / assessee in whose favour stay has been granted and/or whether such appellant is trying to get any undue advantage of stay in his favour or not. Therefore, while passing such order of extension of stay, learned Appellate Tribunal is required to pass a speaking order on each application and after giving an opportunity to the representative of the revenue – Department and record its satisfaction as stated hereinabove. Therefore, ultimately if the revenue – department is aggrieved by such extension in a particular case having of the view that in a particular case the assessee has not cooperated and/or has tried to take undue advantage of stay and despite the same the learned Appellate Tribunal has extended stay order, revenue can challenge the same before the higher forum / High Court.

5.09. All these appeals, on considering the impugned orders passed by the learned Appellate Tribunal extending stay, it appears that the impugned orders are non-speaking and non-reasoned orders and therefore, as such matters are

required to be remanded to the learned Appellate Tribunal to consider the respective applications for extension of stay afresh and pass a detailed speaking order in each of the matters in light of the observations made hereinabove.

6.00. In view of the above and for the reasons stated above, question No.1 is answered against the revenue and in favour of the assessee and it is held that in case and having satisfied that delay in not disposing of the appeal within 365 days (total) from the date of grant of initial stay is not attributable to the appellant / assessee in whose favour stay has been granted and that the Appellate Tribunal is satisfied that such appellant / assessee has fully cooperated in early disposal of the appeal and/or has not indulged into any delay tactics and/or has not taken any undue advantage, the learned Appellate Tribunal may, by passing a speaking order as observed hereinabove, extend stay even beyond the total period of 365 days from the date of grant of initial stay. However, as observed by the Hon'ble Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd (supra), it should not be construed that any latitude is given to the Appellate Tribunal to extend the period of stay except on good cause and if the Appellate Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Appellate Tribunal for the reasons not attributable to the assessee. It also may not be construed that the Appellate Tribunal can extend stay indefinitely. On expiry of every 180 days the concerned assessee / appellant is required to submit an appropriate application before the learned Appellate Tribunal to extend the stay granted earlier and the Appellate Tribunal may extend the stay for a further period but not beyond 180

days at a stretch and on arriving at the subjective satisfaction, as stated hereinabove, the Appellate Tribunal may extend the stay even beyond 365 days from the date of grant of initial stay and even thereafter. Meaning thereby after 180 days, the Appellate Tribunal is required to review the situation and consider the application for extension of stay appropriately. Thus, on expiry of maximum period of 180 days the assessee / appellant is required to submit application for extension of stay each time and the Appellate Tribunal is required to consider the individual case and pass a speaking order, as stated hereinabove. By the aforesaid it may also not be understood that the Appellate Tribunal may go on extending the stay indefinitely and may not dispose of the appeals within stipulated time i.e. within 365 days from the date of grant of initial stay and/or at the earliest. All efforts shall be made by the learned Appellate Tribunal to dispose of the appeals at the earliest more particularly in a case where stay is operative against the revenue. The learned Appellate Tribunal and/or registrar of the Appellate Tribunal is required to maintain separate register with respect to the appeals in which stay has been granted fully and/or partially and appeals in which no stay has been granted and the Appellate Tribunal must and shall give priority to the appeals in which stay has been granted, continued and/or extended.

So far as the Question No.2 is concerned, i.e. Whether the learned Appellate Tribunal is required to pass a speaking order while extending stay or not, for the reasons stated above, the said question is answered in favour of the revenue – department and against the assessee. Consequently, all the matters are remanded to the learned Appellate Tribunal to

pass appropriate order afresh and pass speaking and reasoned order in light of the observations made hereinabove. Such exercise shall be completed within a period of two months from today. So as to see that the applications of the respective appellants / assesses for extension of stay do not become infructuous, it is directed that the stay order which is extended by the Appellate Tribunal shall be continued for a further period of two months. It goes without saying that even during the aforesaid period of two months, the Appellate Tribunal may dispose of the appeals finally.

All these appeals are partly allowed to the aforesaid extent and the matters are remitted back to the file of the learned Appellate Tribunal for passing orders afresh, as stated above.

Sd/-
(M.R.SHAH, J.)
Sd/-
(K.J.THAKER, J.)

Rafik

