

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066  
CUSTOMS APPEAL BRANCH**

Dated: 01/10/2014

To

Appellant as per address in table below

Respondent as per address in table below

**Interim Order No. IO/ST/864-884/2014-CU[DB] dated : 30/09/2014**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

  
Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1 ST/MISC/51150/2014	ST/312/2009	<b>CHHATTISGARH DISTELLERIES LTD.</b> (FORMERLY KEDIA CASTLE DELLEON IND. LTD.), VILLAGE-KHAPRI, KEDIA NAGAR, KUMHARI, DISTT- DURG.
2 ST/MISC/51940/2014	ST/55299/2013	<b>Schlumberger Asia Services Limited</b> 14 Floor,tower C, Building No-10, Dlf Cyber City,phase-ii, GURGAON DELHI-122002
3 ST/MISC/51515/2014	ST/57314/2013	<b>Tics Project Consultancy Pvt Ltd</b> 13,ghuman Colony,sant Nagar PATIALA PUNJAB-147001
4 ST/MISC/52111/2014	ST/97/2009	<b>R.K. &amp; SONS,</b> FATHEBAD ROAD,BHATTU MANDI,DISTRICT- FATHEBAD.
		<b>Name and Address of Respondent</b>
5.		<b>C.C.E. RAIPUR</b> Central Excise Building, Dhamtari Road, Tikrapara, Raipur 492001.

Other Appellants and Respondents as per Annexure

Copy To

6Advocate(s) / Consultant(s):

**V. Lakshmi Kumaran**  
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New Delhi-110014

7.

**Joy Kumar**  
Flat No 261/1, Sec 45 - A,  
Chandigarh

P.T.O.

8. Bar Association, CESTAT, Delhi

9. Director Publications, Customs, Excise. I.P. Estate, Delhi

10.M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

11 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

12. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

13.Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

14.LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

15. TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

16.Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

17. C.D.R.

18. Office Copy

19. Guard File

20. Second Folder

  
Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 12.09.2014  
Date of decision: 30.09.2014

Sl. No.	Excise/ ST Misc. Application No. in Excise / ST Appeal	Appellant	Respondent
1	51744 of 2014 in E/03612 of 2006	M/s Haldiram India Pvt. Limited	CCE, Delhi
2	51532 of 2014 in E/02026 of 2007	M/s International Tobacco Co. Limited	CCE, Ghaziabad
3	51750 of 2014 in E/03793 of 2010	M/s Shree Krishna Paper Mills & Inds. Limited	CCE, Jaipur-I
4	51903 of 2014 in E/00421 of 2011	M/s International Tobacco Co. Limited	CCE, Ghaziabad
5	51628 of 2014 in E/00422 of 2011	R.K. Gupta	CCE, Ghaziabad
6	52171 of 2014 in E/2093 of 2011	M/s Visteon Climate Systems India Limited	CCE&ST, Jaipur-I
7	52899 of 2014 in E/290 of 2012	M/s DSR Steels Pvt. Limited	CCE, Jaipur-I
8	53777 of 2014 in E/00660 of 2012	M/s Shri Rathi Steel (Dakshin) Limited	CCE, Jaipur
9	53776 of 2014 in E/00961 of 2012	M/s Shri Rathi Steel (Dakshin) Limited	CCE & ST, Jaipur
10	51549 of 2014 in E/01190 of 2012	M/s Sonic Biochemextractions Limited	CCE & ST, Indore
11	53345 of 2014 in E/01455 of 2012	M/s Case New Holland Construction Equipment India Pvt. Limited	CCE & ST, Indore
12	53346 of 2014 in E/01456 of 2012	M/s Case New Holland Construction Equipment India Pvt. Limited	CCE & ST, Indore
13	51670 of 2014 in E/55281 of 2013	M/s Raja Udyog Pvt. Limited	CC&ST & ST, Noida
14	51547 of 2014 in E/55443/2013	Govt. Opium and Alkaloid Factories	CCE & ST, Indore
15	51592/2014 in E/55510 of 2013	M/s Barco Electronics Systems Pvt. Limited	CC&CE & ST, Noida
16	51593 of 2014 in E/55511 of 2013	Rakesh Kumar Vohra	CC & CE & ST, Noida
17	51594 of 2014 in E/55512 of 2013	Manish Gaur	CC&CE&ST, Noida
18	52111 of 2014 in ST/97 of 2009	M/s R. K. & Sons	CCE, Rohtak
19	51150 of 2014 in	M/s Chhattisgarh	CCE, Raipur

	ST/312 of 2009	Distelleries Limited	
20	51940 of 2014 in ST/ 55299 of 2013	M/s Schlumberger Asia Services Limited	CST-Delhi.
21	51515 of 2014 in ST/ 57314 of 2013	M/s TICS Project Consultancy Pvt. Limited	CCE & ST, Chandigarh-II

Appearance:

Shri Sh. Ajay Agarwal, Dr. G. K. Sarkar, Sh. B. L. Narasimhan, Puneet Agarwal, Sh. Narendra Singhvi, Sh. Ajay Agarwal, Sh. Yogendra Handoo, Ms. Khushboo Jain. C.A. and Sh. S.S. Dabas, Advocates for the appellant Sh. J. K. Mittal, Advocate for the Bar Association.

Shri Govind Dixit, DR for the Respondent

Coram: Hon'ble Mr. Justice G. Raghuram, President  
Hon'ble Mr. D. N. Panda, Member (Judicial)  
Hon'ble Mr. R. K. Singh, Member (Technical)

Int. Order No. 864-884/2014

Per: Justice G. Raghuram:

*"Whether the third proviso to Section 35C(2A) of the Central Excise Act, 1944 disables CESTAT of the power to grant extension of stay beyond 365 days from the initial grant of an order of stay, notwithstanding that the delay in disposal of a appeal is occasioned not on account of any conduct of the appellant?"*

is the issue referred for consideration by this Bench, by the order dated 02.07.2014 in Misc. application No. 52111 of 2014 in ST Appeal No. 00097 of 2009. Later a few other appeals wherein misc. applications were filed seeking extension of orders of stay, on the ground that stay orders earlier granted stood vacated in view of the provisions of Section 35C(2A) of the Central Excise Act, 1944 (the Act), were also ordered to be placed before this Bench, as the same issue is involved in those applications as well.

2. Heard Dr. G. K. Sarkar, Sh. B. L. Narasimhan, Puneet Agarwal, Ajay Agarwal and other learned Counsel appearing for the several



applicants, Sh. J.K. Mittal, Id. Counsel representing the Advocates association; and Shri Govind Dixit, Id. AR representing Revenue.

3. Sub-section (2A) was inserted in Section 35C of the Act w.e.f. 11.05.2002 by Section 140 of the Finance Act, 2002 (Central Act 20 of 2002). On its introduction in 2002, this provision read 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.]*

4. A third proviso was introduced to the above sub-section w.e.f. 10.05.2013, by Section 98 of the Finance Act, 2013 (17 of 2013). This proviso read:

*"[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 this 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 eight-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. In misc. orders dated 10.06.2014 and 18.06.2014 (as noticed in the referral order dated 02.07.2014) a Id. Division Bench of this Tribunal, following the decisions of the High Courts of Karnataka and Delhi in **Commissioner of Income Tax, Bangalore vs. Ecom Gill Coffee Trading**



*Pvt. Ltd.*<sup>1</sup> and *CIT –II vs. Maruti Suzuki Limited*<sup>2</sup> rejected applications for extension of stay beyond the period of 365 days from the date initial orders of stay were granted, in applications preferred by **M/s Rajasthan State Industrial Development and Investment Corporation Limited and Shilpi Cable Technologies Limited**. Thereafter on decisions of the Bombay High Court in *Narang Overseas (P) Limited vs. ITAT*<sup>3</sup> and of the Rajasthan High Court in *Chote Lal Virendra Kumar Jain*<sup>4</sup> brought to the notice of the Tribunal, (to support the contention that the decisions in *Ecom Gill Coffee Trading Pvt. Ltd.* and *Maruti Suzuki Limited*, of the Karnataka and Delhi High Courts pronounced in the context of a provision of the Income Tax Act, 1961, do not govern interpretation of the true scope and effect of the third proviso to Section 35C(2A) of the Act), the referral order dated 02.07.2014 came to be passed.

6. Provisions of Section 35C and of 35F of the Act were amended by Finance Act, 2014, which received the assent of the President on 06.08.2014. Section 103 of this Act omitted the first, second and third provisos to sub –section 2A of Section 35C of the Act. Section 105 substituted the provisions of Section 35F. Accordingly, in respect of stay applications and appeals, presented subsequent to commencement of the Finance Act, 2014 there is enjoined the requirement of remittance of a specified percentage of duty, in case where duty or penalty or duty and penalty are in dispute, or penalty, where such penalty is in dispute (specified to be 7.5% in respect of an appeal against a decision of an order

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<sup>1</sup> 2012-TIOL-514-HC-KAR-IT

<sup>2</sup> 2014-TIOL-246-HC-DEL-IT

<sup>3</sup> [(2007) 295 ITR 22]

<sup>4</sup> 2014-TIOL-647-HC-RAJ-ST



passed by an Officer of Central Excise lower in rank than the Commissioner of Central Excise and 10% when the appeal is preferred against a decision or order referred to in Section 35B (1)(b) of the Act, so however that the amount required to be deposited shall not exceed Rs. 10 crores). As a consequence of the amendment (substitution) of Section 35F w.e.f. 06.08.2014 the earlier requirement under this provision (of having to deposit the entirety of the adjudicated liability subject to waiver, either wholly or *pro - tanto* of the pre-deposit directed by the Tribunal on exercise of discretion) was repealed and a fixed pre-deposit regime came into existence. Section 35F as substituted w.e.f. 06.08.2014 reads:

*"35F. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —*

*(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];*

*(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;*

*(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against :*

*Provided that the amount required to be deposited under this section shall not exceed rupees ten crores :*

*Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.*

*Explanation. — For the purposes of this section "duty demanded" shall include, —*

*(i) amount determined under section 11D;*



(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.”

7. Initially Shri J. K. Mittal contended that in view of amendments to Sections 35C and 35F of the Act, (by the Finance Act, 2014), the issue referred for consideration by the Larger Bench, no longer survives. The contention in this behalf was that since the three provisos to Section 35C(2A) stand omitted w.e.f. 06.08.2014, the sunset provisions, enjoining vacation of a stay order granted by the Tribunal are currently not in force; consequently where a stay order was granted by CESTAT (after a waiver of pre-deposit, with or without conditions), such stay would operate proprio - vigore during the pendency of the appeal. On further reflection however Shri J.K. Mittal did not pursue with this line of argument, particularly since a stay order earlier granted by the Tribunal and where the period of 365 days [the third proviso to Section 35C(2A)] had lapsed prior to 06.08.2014, in any event would result in such order of stay getting eclipsed, by operation of the sunset clause, enacted in the third proviso. Other Counsel, Sh. Ajay Agarwal, Dr. Sarkar and Sh. B. L. Narasimhan in particular, contended that on application of the provisions of Section 6 of the General Clauses Act and in view of the fact that omission of the three provisos to Section 35C(2A) were simultaneous with substitution of Section 35F (whereby there is ushered a regime of a fixed pre-deposit, not subject to waiver at the discretion of the Tribunal) and in further view of the fact that these changes are not merely procedural but of a substantive pre disposition, amendments to Section 35C(2A) would be prospective and inapplicable to appeals /applications for stay/extension of stay earlier





granted, in respect of such appeals/ applications pending as on 06.08.2014 or in respect of applications for stay filed even after this date but in respect of an order of stay granted prior to 06.08.2014.

8. Reliance is placed for the above contention on the decision of the judicial committee in *Colonial Sugar Refining Co. Ltd. v. Irving*<sup>5</sup>; of the Privy Council in *Delhi Cloth and General Mills Co. Ltd. vs. Income-tax Commissioner, Delhi*<sup>6</sup>; of the full Bench of the Calcutta High Court in *Sardar Ali vs. Dolimuddin*<sup>7</sup>; the decision of a special Bench of the Madras High Court in *In re: Vasudeva Samiar*<sup>8</sup>; decision of a full Bench of the Allahabad High Court in *Ram Singha vs. Shankar Dayal*<sup>9</sup>; full Bench of the Nagpur High Court in *Radhakisan vs. Shridhar*<sup>10</sup>; full Bench of Punjab High Court in *Gordhan Das v. The Governor General in Council*<sup>11</sup>, decisions of the Supreme Court in *Janardan Reddy vs. The State*<sup>12</sup>; *Ganpat Rai vs. Agarwal Chamber of Commerce Ltd.*<sup>13</sup> and in *Hussain Dada vs. State of M.P. and Others*<sup>14</sup>, a decision which referred to and followed the principles spelt out in the precedents earlier referred, to hold that the right of appeal is not merely a matter of procedure; it is a matter of substantive right. The right of an appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given by the

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<sup>5</sup> (1905) A.C. 369

<sup>6</sup> AIR 1927 P.C. 242

<sup>7</sup> AIR 1928 Cal. 640 (F.B)

<sup>8</sup> AIR 1929 Mad. 381 (S.B.)

<sup>9</sup> AIR 1928 ALL, 437 (F.B)

<sup>10</sup> AIR 1950 Nag. 177 (F.B)

<sup>11</sup> AIR 1952 Punj. 103 (F.B)

<sup>12</sup> AIR 1951 SC 124

<sup>13</sup> AIR 1952 SC 409

<sup>14</sup> 4 STC 114 (SC)

inferior Court; to disturb an existing right of appeal is not a mere alteration in procedure and such vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication. Counsel also referred to the judgment of the Delhi High Court dated 08.05.2013 in *M/s Bajaj Overseas Impex vs. Special Commissioner-I and Anr.*

9. The above decisions were also relied upon in support of the contention that the third proviso to Section 35C(2A) is inapplicable to appeals involving causes of action which arose prior to 10.05.2013 (the date of enactment of this proviso). It is contended that in respect of appeals arising out of causes of action which arose prior to 10.05.2013, only the first and second proviso to Section 35C(2A) would apply and consequently the decision of the Supreme Court in *Kumar Cotton Mills Pvt. Limited*<sup>15</sup> would govern the field and the Tribunal would have jurisdiction to grant extension of stay, on fulfilment of the conditions pointed out in *Kumar Cotton Mills Pvt. Limited*.

10. We however decline to pronounce upon the contentions adverted to in the preceding paragraph, since this aspect is beyond the scope of the reference to this Bench (i.e. as to what appeals / order of stay/ applications for extension of stay, the third proviso to Section 35C(2A) applies). This issue will have to be considered when an application for extension is presented and wherein such a contention is pressed into service; in

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<sup>15</sup> 2005 (180) ELT 434 (SC)



appropriate cases and before the appropriate Bench. For this reason the decision of the Constitution Bench in *Kolhapur Canesugar Works Ltd. vs. Union of India*<sup>16</sup> and the speech of the Hon'ble Finance Minister while introducing the Finance Act, 2014, referred to by Shri J. K. Mittal, warrant no analysis.

11. In *Ecom Gill Coffee Trading Pvt. Ltd.*, the issue before the Karnataka High Court was whether the ITAT had power to extend a stay granted, of realisation of the outstanding demand beyond the period of 365 days. The relevant provision of the Income Tax Act, 1961 which governs the *lis* presented to the Karnataka High Court reads:

*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 or 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.*

The aforesaid proviso was introduced into Section 254(2A) of the Income Tax Act, by the Finance Act, 2008 w.e.f. 1.10.2008. On behalf of the assessee it was contended *inter alia* that the decision of the Supreme Court in *Kumar Cotton Mills Pvt. Ltd.* authorised ITAT to extend an interim order of stay beyond the stipulated period if the delay in disposing of an appeal was not attributable to the assessee. Negating this contention the High Court ruled that the language of the third proviso clearly stipulates an outer time limit for the duration of operation of the stay granted by the ITAT and therefore the Tribunal has no power to grant stay beyond the period of 365 days, even where the delay in disposing of an appeal is not

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<sup>16</sup> 2000 (119) ELT 257 (SC)



attributable to an assessee, as that is the clear intendment of the third proviso.

12. The Delhi High Court in *Maruti Suzuki (India) Ltd.* reiterated the same position, again while considering the same provision of the Income Tax Act. The Delhi High Court observed:

*However, the Legislature in view of the said judgment and keeping in view the language of the existing provisions and the reasoning given in the said judgments has specifically introduced and added the words "not attributable to the assessee". This amendment/ substitution made to the third proviso is significant. The said words are not redundant or inconsequential and in fact have been added in view of the ratio and the reasoning given in the aforesaid two decisions. This clearly underscores and highlights the intention of the Legislature.*

13. In *Chote Lal Virendra Kumar Jain* the scope of the third proviso to Section 35C(2A) of the Act was in issue. In the facts of this case, the assessee preferred an appeal to the Tribunal against an adjudication order dated 21.02.2012 confirming the liability to service tax, interest and penalty. On 20.09.2012 waiver of pre-deposit was granted on condition of the specified deposit. After expiry of six months from the date of this order a recovery notice was issued to the assessee. The assessee thereupon filed an application dated 30.10.2013 seeking extension. This application was pending consideration by the Tribunal. While so, Revenue served a notice on the assessee's banker proposing to freeze the bank account. On 23.01.2014 the Tribunal granted extension. Meanwhile, the bank account of the assessee was debited to the extent of Rs. 34,77,714/-. Revenue relied on the third proviso to Section 35C (2A) of the Act. The Rajasthan High Court while observing that the party ought not to be prejudiced by any delay in the disposal of its appeal by the Tribunal, quashed the proceedings initiated by Revenue for recovery of the dues from the



assessee bank account and directed refund of the amount debited on 22.01.2014.

14. In *CCE & ST vs. Ford India Ltd.*<sup>17</sup> the Madras High Court considered a challenge by Revenue to an order of the Tribunal granting extension of stay. Interim order was initially granted by the Tribunal on 08.04.2009 and by further order dated 04.06.2014 was extended till disposal of the appeal. By yet another order dated 28.01.2014 the interim order was extended till disposal of the appeal, after recording that (because of the huge pendency of appeals before the Tribunal), the appeal could not be disposed of and extension is being granted, following the judgment in *Kumar Cotton Mills Pvt. Limited*. The Madras High Court rejected Revenue's challenge to the order of the Tribunal granting extension, with the following observations:

9. *We find that the 3<sup>rd</sup> proviso has incorporated the language of the Supreme Court in para-6 as above to some extent and limit the period by which the Tribunal can extend the interim order. The principle laid down by the Supreme Court in relation to proviso 1 and 2 of sub-section (2A) has been applied to the 3<sup>rd</sup> proviso in the amendment. Nevertheless, if the Tribunal accepts that if the delay is not on account of the assessee, and grants an order of stay, as is passed in the present case, we do not find any reason to find fault with the order extending the interim order applying the same principle as enunciated by the Supreme Court in Kumar Cotton Mills case (supra).*

10. *Accordingly, we find that in the present case, the Tribunal has considered the application filed by the respondent/ assessee and has given a reason for grant of extension of interim order by holding that the Tribunal is granting the extension of interim order only on the ground that the Tribunal is unable to dispose of the appeal in time due to huge pendency of appeals before the Tribunal. When the appellate authority itself clearly concedes the fact that the delay is not on account of the respondent/ assessee, the*

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<sup>17</sup> 2014-VIL-232-MAD-ST



*Tribunal has rightly relied upon the decision of the Supreme Court in Kumar Cotton Mills case (supra) and we find no reason to differ with the said stand taken by the Tribunal in granting extension of the interim order by relying on the said judgment.*

15. Whether CESTAT could grant extension of stay beyond the sunset period set out in the second proviso to Section 35C(2A) of the Act was considered by the Gujarat High Court in ***Poly Fill Sacks vs. Union of India***<sup>18</sup> and by the Punjab High Court in ***PML Industries Limited vs. Commissioner of Central Excise***<sup>19</sup>. Quoting with approval the judgment in ***Kumar Cotton Mills Pvt. Limited*** this decision ruled that from the provisions in question it is not possible to infer a legislative intent to curtail /withdraw powers of the Tribunal to grant stay in appropriate cases or any curtailment of such powers beyond the period of six months. The Punjab & Haryana High Court went further and ruled that the second proviso in sub-section (2A) of Section 35C must be read down to mean that after 180 days, Revenue has right to seek vacation of stay on proof of the fact that it is the assessee who defaulted or was responsible for the delay in disposal of the appeal (para 54 of the decision in ***PML Industries Limited***).

16. The very issue (scope of the third proviso to Section 35C(2A) of the Act) was considered by the Gujarat High Court in ***Commissioner vs. Small Industries Development Bank of India***<sup>20</sup>. The High Court ruled that the third proviso must be construed as meaning that if the conditions mentioned therein are satisfied i.e. the appellate Tribunal is satisfied on an application by the assessee / appellant that delay in disposing of the

<sup>18</sup> 2005-TIOL-233-HC-AHMA-CX

<sup>19</sup> 2013 (290) ELT 3 (P&H)

<sup>20</sup> 2014-TIOL-1103 HC-AHMA CX



appeal (within the 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, the power of the Appellate Tribunal to extend stay even beyond 365 days is not circumscribed. The Court clarified that grant of extension is however subject to satisfaction of the Tribunal that the assessee/ appellant was not at fault and the delay in not disposing of the appeal is not attributable to such assessee/ appellant. Before the Gujarat High Court, Revenue relied on the Karnataka High Court decision in ***M/s Ecom Grill Coffee Trading Pvt. Limited***. Gujarat High Court distinguished the Karnataka High Court judgment with the following observations:

*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. Limited (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 Hon'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).*

17. The conclusion of the Gujarat High Court is set out in para 6 of the judgment, which reads:

6. *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.

18. The above decision and the ratio therein were quoted with approval by the Gujarat High Court in *CCE vs. Disha Engineers*<sup>21</sup> and in *CCE, Ahmedabad-I vs. Sharp Engineers*<sup>22</sup>.

<sup>21</sup> 2014-TIOL-1410-HC-AHM-CX





19. Learned AR has referred to the decision of the Bombay High Court in **Shri Jethmal Faujimal Soni vs. Income Tax Appellate Tribunal, Pune & Others**<sup>23</sup> and the unreported judgment of the Allahabad High Court dated 01.07.2014 in Writ Tax No. 375 of 2014 in M/s **Garg Industries vs. Union of India and Ors.** The judgment of the Bombay High Court was in the context of the third proviso to Section 254(2A) of the Income Tax Act. The Allahabad High Court judgment in **M/s Garg Industries** was however in the context of the powers under the third proviso to sub-section (2A) of Section 35C of the Act. The Allahabad judgment noticed that in the facts before it there was no negligence/default/ wrongful conduct on the part of the petitioner/ assessee. On behalf of Revenue it was urged that the petitioner should have applied to CESTAT either for listing of the appeal or for extension of the stay (beyond the period of 365 days from the date of initial grant of stay). The High Court concluded that in view of the third proviso, it would not have been open to CESTAT to extend stay beyond the prescribed period, while the High Court could, in an appropriate case, grant relief under Article 226 of the Constitution, for any subsequent period. The High Court disposed of the writ petition with a direction to Revenue not to take steps for recoveries during pendency of the appeal and directed the Tribunal to dispose of the appeal within the time specified in the order. It however requires to be noticed that the Allahabad High Court was not sensitised to the difference in the phraseology of the third proviso to Section 35C(2A) of the Act vis-a-vis provisions of the third proviso to Section 254(2A) of the Income Tax Act, 1961. The decision of the Gujarat

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<sup>22</sup> 2014-TIOL-1250-HC-AHM-CX

<sup>23</sup> 2010-TIOL-258-HC-MUM-IT



High Court in *Commissioner vs. Small Industries Development Bank of India*<sup>24</sup> which analysed the text and scope of the third proviso to Section 35C(2A) of the Act in juxtaposition with the provisions of Section 254(2A) of the Income Tax Act was also not brought to the notice of the Allahabad High Court. It also requires to be noticed that the relevant provision in the Income Tax Act reads as follows:

*Provided also that if such appeal is not 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.* (emphasis is added).

The legislative mandate that the sunset period would operate "even if the delay in disposing of the appeal is not attributable to the assessee", thus withdraws any residuary discretion available to the Income Tax Appellate Tribunal to grant extension after this period. In fact, para 11 of the decision in *M/s Maruti Suzuki India Limited* recorded the following observations to hold that the principle enunciated by the Apex Court in *Kumar Cotton Mills Pvt. Limited* would be inapplicable after the lapse of the period of 365 days from the date of initial grant of stay by the ITAT:

*However, the Legislature in view of the said judgment and keeping in view the language of the existing provisions and the reasoning given in the said judgments has specifically introduced and added the words "not attributable to the assessee". This amendment/ substitution made to the third proviso is significant. The said words are not redundant or inconsequential and in fact have been added in view of the ratio and the reasoning given in the aforesaid two decisions. This clearly underscores and highlights the intention of the Legislature.* (emphasis is added).

<sup>24</sup> 2014-TIOL-1102-HC-AHM-CX



20. In the light of the analyses above and following the judgment of the Gujarat High Court in ***Small Industries Development Bank of India***, reiterated in ***Disha Engineers*** and ***Sharp Engineers***, we answer the reference by holding that even in a case where the period of 365 days has passed from the date of initial grant of stay but the appeal could not be disposed of for reasons not attributable to the appellant/ assessee (in whose favour the stay was granted); and where the Tribunal is satisfied that the appellant/ assessee was ready and willing for disposal of the appeal and/ or had not indulged in any protractive strategies, extension of stay could be granted (beyond the period of 365 days) by passing a speaking order disclosing the satisfaction of the Tribunal as to absence of any delay/ protractive stratagems by the appellant/ assessee resulting in non disposal of the appeal or that the appeal could not be disposed of on account of pendency of several appeals or other reasons attributable to the structure and context of the Tribunal or other appropriate reasons. In accordance with the observations and directions set out in para 6 of the judgment in ***Small Industries Development Bank of India***, an assessee/ appellant in whose favour an order of stay earlier granted stood vacated on expiry of 180 days or 365 days as the case may be, may present an application seeking extension of stay by pleading the necessary facts as would authorise the exercise of discretion by this Tribunal for grant of such extension. The Registry is directed to maintain a separate register to record data with respect to the appeals in which stay has been granted and other appeals where no stay is granted, so as to enable prioritised listing of appeals where stay has been granted. subject to infrastructure and organisational limitations of CESTAT.




21. The reference is answered as above. All the present applications/ appeals shall be listed before the appropriate Bench having the roster, for disposal on merits.

(Pronounced on 30.09.14 in open court)

  
30/09/2014

(Justice G. Raghuram)  
President

  
30/9/2014.

(D. N. Panda)  
Member (Judicial)



(R. K. Singh)  
Member (Technical)

Pant.

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