IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5014 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE S.H.VORA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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DEPUTY COMMISSIONER INCOME TAX - TDS CIRCLE....Petitioner(s)

Versus

VADOFONE ESSAR GUJARAT LIMITED & 1....Respondent(s)

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Appearance:

MRS MAUNA M BHATT, ADVOCATE for the Petitioner(s) No. 1

MR SN SOPARKAR, SR. COUNSEL with MR SANDEEP SINGHI, ADVOCATE, MR PARTH CONTRACTOR, ADVOCATE & MR. SIDDHARTH JOSHI, ADVOCATE for SINGHI & CO, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and

HONOURABLE MR.JUSTICE S.H.VORA

Date :12/06/2015

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

Rule. Learned advocate Mr. Sandeep Singhi waives service of rule on behalf of the respondent No.1.

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed to quash and set aside the impugned orders passed by the learned Income Tax Appellate Tribunal (for short "learned Tribunal") in Stay Application Nos.85 & 86/AHD/2011 in ITA Nos.386 & 387/ AHD/2011 for AY 2008-09 and 2009-10, by which the learned Tribunal has extended stay granted earlier beyond the period of 360 days.

2. Feeling aggrieved by and dissatisfied with the earlier orders for AY 2008-09 and 2009-10, the assessee had preferred appeals before the learned Tribunal. That as per the assessment order for AY 2008-09, the tax liability is for an amount of Rs.7,21,19,094/- (including interest u/s 201(1A) of Rs.1,20,19,849/-) and for AY 2009-10, tax liability is Rs.9,04,43,478/- (including interest u/s 201(1A) of Rs.1,75,05,189/-). That in the respective appeals before the learned Tribunal, the assessee preferred stay applications. That out of total tax and the interest liability for AY 2008-09, out of Rs.7,21,19,094/-, the assessee had already paid Rs.6,37,50,000/- and a sum of Rs.83,69,094/- was outstanding. Similarly, for AY 2009-10, out of total tax liability including

interest of Rs.9,04,43,478/-, the assessee had already paid Rs.8,13,50,000/-. Thus, only a sum of Rs.90,93,478/- was outstanding. That the learned Tribunal vide order dated 25.3.2011 in Stay Application Nos.15 and 16 of 2011, stayed the demand for a period of 180 days from the date of receipt of the order or till appeal of the assessee gets decided. That the stay of demand granted earlier has been extended from time to time and the stay has been extended beyond the period of 360 days i.e. in fact for approximately more than 1000 days. Hence, feeling aggrieved by and dissatisfied with the extension of stay of demand granted by the learned Tribunal, more particularly, beyond the period of 365 days, the revenue has preferred present Special Civil Application under Article 226 of the Constitution of India.

3. Mrs. Bhatt, learned advocate appearing on behalf of the revenue has vehemently submitted that extension of stay of demand granted by the learned Tribunal beyond the period of 365 days in all is absolutely illegal and wholly without jurisdiction and contrary to section 254(2A) of the Income Tax Act (for short “the Act”).

3.1 It is submitted that while extending the stay of demand granted earlier beyond the period of 365 days, the learned Tribunal has materially erred in not appreciating the third proviso to section 254(2A) of the Act. It is vehemently submitted that in view of the legislative mandate so provided in section 254(2A) of the Act, the Tribunal has no jurisdiction to extend the stay granted earlier beyond the period of 365 days and in fact, as per third proviso to section 254(2A) of the Act, the order of stay beyond 365 days stands vacated even if

the delay in disposing the appeal is not attributable to the assessee. It is submitted that therefore, in view of section 254(2A) of the Act, more particularly second proviso and 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 without jurisdiction and contrary to section 254(2A) of the Act.

3.2 It is vehemently submitted by Mrs. Bhatt, learned advocate appearing on behalf of the revenue that section 254(2A) of the Act mandates that no stay order can exceed total period of 365 days and Tribunal is foreclosed and barred from passing an order extending stay of demand beyond 365 days. It is further submitted by Mrs. Bhatt that appeal is provided under Statute and even learned Tribunal being a creation of Statute is bound by the provisions of section 254(2A) of the Act. It is further submitted that if the Statute provides grant of stay of demand during the pendency of the appeal before the learned Tribunal, in that case, the same shall always be subject to the provisions of the Act. It is submitted that once under law/Statute, it is provided that there cannot be any stay beyond the total period of 365 days, the same has to be respected by everybody including the learned Tribunal.

3.3 It is vehemently submitted by Mrs. Bhatt that legislative intent of restricting the period of stay of demand 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 of demand granted by the Tribunal. It is submitted that in most of the cases, after obtaining stay

of demand, it is the assessee, who ask for time. It is submitted that to curb such a practice and/or delay tactics, the period of stay of demand has been restricted upto a maximum period of 365 days only. It is further submitted that many a times, though while granting stay, the learned Tribunal generally observes that the appeal to be listed at top of the board, such matters are ordinarily listed at the bottom of the board and no priority is given.

3.4 It is submitted by Mrs. Bhatt appearing on behalf of the revenue that in the present case, there is a huge tax liability pending since many years and the stay of demand granted by the learned Tribunal which has been extended from time to time and in the present case, for approximately 1000 days. It is submitted that on one hand, the appeals are not heard and on the other hand, the learned Tribunal goes on extending the stay of demand and therefore, the interest of the revenue has been prejudiced. It is submitted that in any case, once third proviso to section 254(2A) of the Act provides that beyond the period of 365 days, there shall be vacation of stay of demand granted earlier, the grant of stay of demand and/or extension of stay of demand beyond the period of 365 days is wholly without jurisdiction.

In support of her submission, Mrs. Bhatt, learned advocate appearing on behalf of the revenue has heavily relied upon the decision of the Division Bench of Delhi High Court in the case of Commissioner of Income Tax Vs. Maruti Suzuki (India) Limited decided on 2.1.2014 in Writ Petition (Civil) No.5086 of 2013 and in support of her prayer to allow the present petition and to quash and set aside the impugned

orders passed by the learned Tribunal extending the stay of demand in respective appeals beyond the period of 365 days.

Making above, submissions, it is requested to allow the present Special Civil Application and grant the relief as prayed for.

4. Present petition is opposed by Shri SN Soparkar, learned senior counsel appearing for Singhi & Co. appearing on behalf of the respondent. Shri Soparkar, learned senior counsel has vehemently submitted that as such, the issue in the present petition is now not res judicata in view of the decision of the Hon'ble Supreme Court in case of Commissioner of Customs and Central Excise, Ahmedabad V. Kumar Cotton Mills Pvt. Ltd reported in (2005) 180 ELT 434(SC). Shri Soparkar has also heavily relied upon the decision of the Division Bench of this Court in case of Commissioner Vs. Small Industries Development Bank of India in Tax Appeal No.341 of 2014 and other allied tax appeals, in which the Division Bench had an occasion to consider the *para materia* provisions under the Central Excise Act, more particularly, section 35C(2A) of the Central Excise Act.

It is vehemently submitted that as observed by the Division Bench of this Court in the aforesaid decision, there cannot be any legislative intent to punish a person/assessee for no fault of him.

4.1 It is submitted by Shri Soparkar, learned senior counsel that there may be number of reasons for not disposing of the appeals by the learned Tribunal within the period of 180 days and/or at the earliest. It is submitted that following may

be/can be the reasons for delay in disposing of the appeal by the learned Tribunal.

> "1. Shortage of Tribunal Members and many of the times, Bench is not functioning. Next hearing fixed almost after a month's time.
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> 2. Many a times, the Bench sits one after another due to shortage of Members. As a result, no heavy stay granted matters can be taken up in either sitting.
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> 3. In International tax cases, adjournments are being sought on account of non-availability of Assessing Officer to argue the case.
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> 4. In transfer pricing cases, adjournments are being sought on the ground that comments / report of Transfer pricing Officer has not been received or non-availability of Transfer pricing Officer for the hearing.
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> 5. Adjournments are taken on the ground that Senior people from Department not available to argue in big cases.
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> 6. Many times, stay granted matter cannot be taken up for hearing on the ground that similar issue is involved in earlier years which is not a stay granted matter and pending for disposal.
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> 7. On some occasions, paperbooks are being filed late by the Assessee/ Department (sometimes even on the day of hearing).
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> 8. Assessee's Counsel taken adjournment on account of being not in town, being busy in some High Court matter, etc.
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> 9. On many occasions, the Member who had heard the matter gets transferred and accordingly, the matters gets released for re-hearing which comes in the normal course.
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> 10. Whenever Tribunal grants the stay order, it fixes the appeal/s for early hearing invariably. However when appeal is taken up for hearing sometimes it is found that the AO or CIT(A) have followed order/s of earlier year which is still pending. In such a situation the order of AO and /

> or CIT(A) do not carry any discussion or reasoning; they only follow earlier order. In such as situation it becomes necessary to adjourn the matter and club it with earlier years appeal/s which are pending before the tribunal. This may take some time because where appeal/s are before the different benches power of clubbing is only with Vice President of the Tribunal. Further even after the matters are clubbed, firstly appeal/s of earlier year/s have to be heard first. On some occasions efforts are made to hear the appeals together. However where earlier appeals involves many grounds (so also the stay granted appeal) it may not be feasible to do so. This requires that the earlier year/s appeal/s must be disposed off first and only thereafter stay granted appeal must be heard. In such a situation so long as earlier years appeals are not heard and orders are not available the stay granted matters remain pending to the fault of noone. Sometimes the appeal/s also get blocked because the earlier year/s appeal/S are pending before the Jurisdictional High Court or Hon'ble Supreme Court."

4.2 Shri Soparkar, learned senior counsel appearing on behalf of the respondent assessee has submitted that despite there being no fault on the part of the assessee and/or the delay in not disposing of the appeals by the learned Tribunal within a period of 180/365 days may not be attributed to the assessee, the assessee cannot be punished, more particularly when the initial stay has been granted after due application of mind by the learned Tribunal and after a strong case is made out by the assessee for grant of stay of demand. It is submitted that initially when the stay of demand has been granted by the learned Tribunal, the stay of demand is never granted mechanically. It is submitted that initial stay of demand is always granted by the learned Tribunal after due application of mind and having found a strong prima facie

case for grant of interim relief. It is submitted that therefore, as such, section 254(2A) of the Act is required to be read in such a manner that it may not suffer from vice of unconstitutionality.

4.3 He has further submitted that even some directions can also be issued to the learned Tribunal to see that in the cases were there are stay of demands, priority shall be given to such matters and there is no delay in disposing of such appeals and all efforts are made by the learned Tribunal to decide and dispose of such appeals at the earliest looking to the legislative intent provided in section 254(2A) of the Act.

4.5 It is further submitted by Shri Soparkar, learned senior counsel that in the present case, the appeals were not decided and disposed of by the learned Tribunal as the issue involved in the appeals was pending before the Hon'ble Supreme Court. It is submitted that in the present case, against the total demand of Rs.7,21,19,094/-, substantial amount has already been paid by the assessee. It is submitted that even the initial stay of demand was granted by the learned Tribunal after recording the reasons and considering the fact that in identical matters, the Hon'ble Supreme Court granted stay against coercive steps. It is submitted that therefore, in the facts and circumstances of the case, the learned Tribunal has not committed any error in extending the stay of demand for more than 365 days, by passing the impugned order.

5. Heard learned advocates appearing on behalf of the parties at length.

5.1 By way of this petition under Article 226 of the Constitution of India, the petitioner revenue has challenged the impugned orders passed by the learned Tribunal in respective stay applications in respective appeals extending stay of demand granted earlier beyond the period of 365 days and in the present case, for approximately 1000 days.

It is the case on behalf of the revenue that in view of section 254(2A) of the Act more particularly, third proviso to section 254(2A) of the Act, the learned Tribunal has no jurisdiction to extend the stay of demand beyond 365 days. Section 254(2A) of the Act reads as under:

> "2[(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the fifinancial year in which such appeal is filed under sub-section (1) 3[or sub-section (2)] 4[or sub-section (2A)] of section 253:]
>
> [Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order and the Appellate Tribunal shall dispose of the appeal Within the said period of stay specified in that order:
>
> Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or' periods so extended or allowed shall not, in any case,

> exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:]
>
> [Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee]"

5.2 It is true that as per third proviso to section 254(2A) of the Act, if such appeal is not so disposed of within the period allowed under the first proviso i.e. within 180 days from the date of the stay order 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. Therefore, as such, legislative intent 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 time limit as provided in section 254(2A) of the Act 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, duty is also cast upon the learned Tribunal to decide and dispose of such appeals in which there is a stay of demand, as early as possible and within the period prescribed under first proviso and second proviso to section 254(2A) of the Act of the Act i.e. within maximum period of 365 days.

However, one cannot lost sight of the fact that there may be number of reasons due to which the learned Tribunal is not in a position to decide and dispose of the appeals within the maximum period of 365 days despite their best efforts. Some of the reasons due to which the learned Tribunal despite its best efforts is not in a position to dispose of the appeal/appeals at the earliest are stated herein above. There cannot be a legislative intent to punish a person/ assessee though there is no fault of the assessee and/or appellant. The purpose and object of section 254(2A) of the Act is stated herein above and more particularly with a view to see that in the cases where there is a stay of demand, appeals are heard at the earliest by the learned Tribunal and within stipulated time mentioned in section 254(2A) of the Act and the assessee in whose favour there is stay of demand may not take undue advantage of the same and may not adopt delay tactics and avoid hearing of the appeals. However, at the same time, all efforts shall be made by the learned Tribunal to see that in the cases where there is stay of demand, such appeals are heard, decided and disposed of at the earliest and periodically the position/ situation is monitored by the learned Tribunal and the stay is not extended mechanically.

5.3.1 Identical question came to be considered by the Division Bench of this Court in the case of Small Industries Development Bank of India (supra) and while dealing with similar provisions under the Central Excise Act, 1944 more particularly section 35C(2A) of the Act, following substantial questions of law came to be considered by this Court.

> “(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?"

5.4 After considering the rival submissions and considering various decisions of the other High Courts and this Court and even the decision of the Hon'ble Supreme Court in the case of Kumar Cotton Mills Pvt. Ltd (supra), the Division Bench has observed as under:

"5.04Therefore, 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.

5.06.1. 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 statue 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 cooperating 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 assessees 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 assessees 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 noncooperation 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) shouldalso 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 overriden 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."

5.07. 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 curtain / 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 itsown 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.

6.0. 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."

5.4 Applying the decision of the Division Bench of this Court in the case of Small Industries Development Bank of India (supra) to the facts of the case on hand, more particularly while considering the powers of the Tribunal under section 254(2A) of the Act, it is observed and held that by section 254(2A) of the Act, it cannot be inferred a legislative intent to curtail/withdraw powers of the Appellate Tribunal to extend stay of demand beyond the 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 after having satisfied that the assessee / appellant has 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 appeals 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 should 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.

5.5 The learned Tribunal is also directed to see that the appeals of a particular assessee with respect same or similar issue involved in earlier years/with respect to respective years are clubbed together and heard and decided and dispose of together, may be with respect to a particular year, it is not a stay granted matter. The registry of the Tribunal to draw the

attention of the learned Vice President of the Tribunal with respect to such appeals, so that all the appeals are clubbed together and decided and disposed of together, as it is reported that the powers of clubbing of the matters are only with the Vice President of the Tribunal. Registry also may insist that the paper books are filed by the assessee/ department as early as possible and preferably within a period of three months from filing of the appeals so as to see that the purpose and object of section 254(2A) of the Act is achieved i.e. appeals in which the stay of demand has been granted by the learned Tribunal are decided and disposed of by the learned Tribunal at the earliest and within stipulated time and the learned Tribunal shall not grant unnecessary adjournments frequently due to non-availability of the advocate of the assessee and or the department's representative, unless strong case for adjournment is made out, more particularly in a case where there is stay of demand during the pendency of the appeal.

5.6 It is also observed and held that while disposing of the application for extension of stay granted earlier, the learned 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.

6.0 Now, so far as the reliance placed upon decision in the case of Maruti Suzuki (India) Limited (supra) by learned advocate appearing on behalf of the revenue is concerned, it is required to be noted that while disposing of the writ petition, the Delhi High Court has observed that in respect of section 254(2A) of the Act, the High Court has power under Article 226 of the Constitution of India to grant and extend

stay where the appeal is pending before the Tribunal. However, the learned Tribunal has no jurisdiction to extend the stay beyond 365 days as provided under section 254(2A) of the Act. Ultimately, while disposing of the petition, the Division Bench has observed as under:

> "26. In view of the aforesaid discussion, we have reached the following conclusion:-
> (i) In view of the third proviso to Section 254(2A) of the Act substituted by Finance Act, 2008 with effect from 1st October, 2008, tribunal cannot extend stay beyond the period of 365 days from the date of first order of stay.
> (ii) 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.
> (iii) 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.
> (iv) 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."

6.1 With greatest respect to the Delhi High Court, if the aforesaid procedure is adopted, either it would lead to multiplicity of proceedings before the High Court and/or even granting the stay of demand by the department itself. We are of the opinion that instead if the aforesaid procedure is followed, it would meet the ends of 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.

7 In the present case, it is reported that the appeal before the learned Tribunal is now heard and the judgment is awaited and it is hoped that the same shall be decided and disposed of at the earliest.

8. In view of the above and for the reasons stated above, the present petition stands disposed of in terms of above observations and directions contained in paragraphs 5.4 to 5.6 as above. The learned Tribunal is directed to act as observed herein above and all efforts shall be made by the learned Tribunal to dispose of the appeals in the cases where there are stay of demand by following the procedure as observed herein above and in case of extension of stay, the learned Tribunal to follow the procedure as observed herein above. The learned Tribunal is also directed to act as observed herein above. Rule discharged. No costs.

(M.R.SHAH, J.)

(S.H.VORA, J.)

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