

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Writ Petition No.15239 of 2015
Date of Decision: 31stOctober, 2015

Pr. Commissioner of Income Tax, Aayakar Bhawan,
Sector-14, Hisar.

...Petitioner

Versus

Income Tax Appellate Tribunal, Delhi Bench,
New Delhi and another.

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MS. JUSTICE REKHA MITTAL

Present: Mr. Yogesh Putney, Advocate,
for the petitioner.

Mr. Ajay Vohra, Senior Advocate with
Mr. Rohit Jain, Advocate,
for the respondents.

RAJIVE BHALLA, J.

The revenue is before us, praying for issuance of a writ in the nature of certiorari, quashing, orders dated 23.01.2015 (Annexure P-12) and 25.03.2015 (Annexure P-16), passed by the Income Tax Appellate Tribunal, Delhi Bench, New Delhi, directing that consideration of the show cause notice for prosecution shall be kept in abeyance.

Counsel for the revenue submits that proceedings for prosecution, under Section 276C(1) are independent of assessment/penalty proceedings. A perusal of the Act, particularly Section 254 of the Act, reveals that it does confer power, upon the Tribunal, to grant of a stay and there is no provision which, whether

directly or by inference confers power to file an appeal against an order directing prosecution much less against a show cause notice proposing to initiate prosecution. The power conferred by Section 254(1) of the Act to “pass such orders thereon as it thinks fit”, is circumscribed by the expression “any proceedings relating to an appeal” used in the first proviso to Section 254(1). The expressions “any proceedings relating to an appeal” and “pass such orders thereon as it thinks fit” have to be read as conferring power in the context of the appeal pending before the Tribunal. The Tribunal was, therefore, required to exercise power within the limits of the powers conferred by Section 254 of the Act but has arrogated to itself the power to stay prosecution. Admittedly, matters pending before the Tribunal are a quantum appeal, an appeal against penalty, and correctness of an order passed under Section 263 of the Act. The mere fact that the prosecution arises as a result of an order passed during assessment does not confer jurisdiction upon the Tribunal to interpret the expression used in Section 254(1) or the first proviso to stay prosecution. Counsel for the revenue further submits that a willful attempt to evade tax having been *prima-facie* established, notice under Section 276 was a necessary but independent consequence. The pendency of the quantum and other appeals cannot be said to be so intrinsically linked to the prosecution as to empower the Tribunal to stay prosecution. Counsel for the revenue also points out that orders against which appeals may be filed are set out in Section 253 of the Act. A perusal of Section 253 reveals that it does not confer any right to file an appeal against prosecution

much less against a show cause to initiate prosecution. As an alternative argument, counsel for the appellant submits that even if it is presumed that the Tribunal has jurisdiction to grant stay against prosecution, the impugned orders are even otherwise without jurisdiction as prosecution has not been launched. The order passed by the Tribunal has brought consideration whether or not to launch prosecution to an halt and, therefore, must be set aside on merits. Counsel for the appellant further submits that the Tribunal having directed the assessee to file its reply, the order directing that prosecution may be kept in abeyance renders the orders meaningless. Counsel for the revenue relies upon the following judgments to support his arguments that the Tribunal is not empowered to stay prosecution:- **Gulab Chand Sharma v. H.P.Sharma etc., (1974) ILR 1 (Delhi), 190; P.Jayappan v. S.K.Perumal, First Income Tax Officer, Tuticorin, 1984 (149) ITR, 692(Mad); P.Jayappan v. S.K.Perumal, First Income Tax Officer, Tuticorin,, 1984 (149) ITR, 696(SC); Ashok Buscuit Works and Ors v. Income Tax Officer, Hyderabad, 1988 (171) ITR 300 (AP); Rinkoo Steels and others v. K.P.Ganguli, Income Tax Officer and another, 1989 (179) ITR 482 (Delhi); Sant Parkash and Ors. V. Commissioner of Income tax and Ors., 1991 (188) ITR 732 (P&H); Universal Supply Corporation and Ors. v. State of Rajasthan and another, 1994(206) ITR 222; Commissioner of Income Tax v. Bhupen Champak Lal Dalal and Anr. Etc., 2001 (248) ITR, 830 (SC).**

Counsel for the assessee submits that, admittedly, three

appeals are pending before the Tribunal, namely, an appeal challenging the order passed under Section 263, the second against the assessment order and the third against an order imposing penalty. The show cause notice proposing to initiate prosecution, is based in its entirety upon the order passed under Section 263 of the Act, the assessment order and the order passed in penalty proceeding. The question, therefore, is not whether prosecution proceedings are independent of assessments and penalty but whether the show cause notice proposing to initiate prosecution is so intrinsically linked to the out come of the appeals as would require the revenue to keep consideration of the show cause notice in abeyance. Counsel for the assessee also submits that decision in the pending appeals would have a direct bearing on the consideration of the show cause notice and in case the appeals are allowed or the impugned orders are modified, the show cause notice would either be rendered infructuous or the matter would have to be reconsidered.

Counsel for the assessee further submits that the words “relating to an appeal”, used in Section 254 of the Act and the words, “pass such orders thereon as it thinks fit” used in the proviso empower the Tribunal to stay consideration of the show cause notice. The consideration of the notice is so intrinsically linked to the out come of the appeals, as to be inseparable. Counsel for the assessee further submits that as there is no limitation for launching prosecution, it is rather surprising that authorities have decided to issue a show cause particularly when they are contesting the

appeals filed by the assessee.

Counsel for the assessee also contends that while considering the power of the Tribunal to grant stay, the Supreme Court of India has held in **Income Tax Officer, Cannanore v. M.K.Mohammed Kunhi, 1971, I.T.R., 815**, though, prior to conferment of the power of stay, by Section 254 of the Act that, though, the power of stay cannot be spelt out, the Appellate Tribunal, must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. The Supreme Court has also held that appellate power, in the absence of any specific provision for grant of stay inhere the power to do all such acts or employ all such means as are essentially necessary for the exercise of this power which carries with it the duty in proper cases to pass such orders for staying proceedings as will prevent the appeal from being rendered nugatory. The Supreme Court has also referred to a judgment in **Burhanpur Tapti Mill Ltd. v. Board of Revenue, Madhya Pradesh, 1955(6) STC, 670**, that where the legislature invests an Appellate Tribunal with powers to prevent injustice, it impliedly empowers the Tribunal to stay the proceedings which may result in causing further mischief. The prosecution of the assessee being intrinsically linked to the outcome of the appeals and the Tribunal merely having directed that consideration of the show cause notice shall be kept in abeyance the order may be affirmed. Counsel for the assessee also relies upon a Division Bench judgment of the High Court of Delhi in **The Commissioner of Income Tax (Central-II) v. Income Tax Appellate Tribunal and others**, to contend that in a similar situation,

the High Court of Delhi has held, while considering stay of proceedings, consequent to directions by the Commissioner of Income Tax, under Section 263 of the Act, that such an order is relatable to the appellate power of the Tribunal under Section 254(1) of the Act, i.e., the power to prevent multiplicity of proceedings, harassment to the assessee and possibility of proceedings before the Assessing Officer being rendered meaningless if ultimately the order passed by the CIT is found to be invalid on grounds of jurisdiction or on merits. Counsel for the assessee also relies upon *Income Tax Officer, J-Ward, Circle-II, Hyderabad v. Khalid Mehdi Khan (Minor), 1977(110), ITR, 80*; *Puran Mal Kauntia v. Income Tax Officer and othres, 1975(80), ITR, 39*; *Commissioner of Income Tax v. Wander Pvt. Ltd., 2013 (358) ITR 408(Bom)*; *Assistant Commissioner of Income Tax v. GE India Industrial Pvt. Ltd., 2013(358), ITR, 410(Guj.)*; in support of his arguments relating to the power of the Tribunal to stay collateral proceedings, namely, the show cause notice issued to the assessee why prosecution be not initiated.

Before we record our opinion, it would be appropriate to delimit the facts.

M/s Jindal Steel & Power Ltd., respondent no.2, filed a return of income for assessment year 2008-09, declaring an income of Rs.7,66, 99,04,200/-. A revised return was filed on 29.03.2010, reducing the earlier return of income by Rs.26,24,296/-. The return was selected for scrutiny vide order dated 27.12.2010, passed under Section 143 (3) of the Income Tax Act, 1961 (hereinafter referred to

as 'the Act'). The total income was assessed at Rs.10,33,26,17,030/-. The Commissioner of Income Tax noticing that a deduction of Rs.81.59 crore on account of sales tax subsidy/capital reserve, entry tax subsidy and electricity duty subsidy have been wrongly claimed, variation in the statutory liability regarding provision for gratuity and as a consequence in the claim for deduction under Section 43B of the Act and additional depreciation of Rs.5,91,106/- has been wrongly claimed on computers, initiated proceedings under Section 263 of the Act and vide order dated 25.03.2013, partly set aside the assessment order, and restored the assessment to the file of the Assessing Officer. A fresh assessment was made on 19.09.2013, by adding Rs.81.59 crores, claimed on account of sales tax subsidy, Rs. 1.40 crores claimed on account of Section 43B of the Act and Rs.5,91,106/- on account of additional depreciation for computers.

The assessee filed an appeal against the order passed under Section 263 of the Act, before the Tribunal. After re-assessment, the assessee filed an appeal against the fresh assessment before the Commissioner of Income Tax, Rohtak, which was dismissed on 10.03.2014. The Assessing Officer had also initiated penalty proceedings under Section 271(1)(c) of the Act and eventually passed an order dated 28.11.2013, imposing penalty. The assessee challenged the order imposing penalty before the Commissioner of Income Tax(Appeals), Rohtak, which was also dismissed. The assessee, thereafter, filed two appeals, one being the quantum appeal and the other against the penalty. Thus, three appeals, one against the order passed under Section 263, the second against the

assessment order and the third against the levy of penalty, were filed, were pending before the Income Tax Appellate Tribunal, when the revenue served a notice dated 26.12.2014, calling upon the assessee to show cause, why prosecution be not initiated, under Section 276C(1).

The assessee, did not file a reply but instead filed an application in the appeal, challenging the imposition of penalty, before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') for stay of prosecution. The revenue urged before the Tribunal, lack of jurisdiction to stay prosecution, as well as raised other pleas. The Tribunal, vide order dated 23.01.2015, ordered that launching of prosecution shall remain in abeyance upto the next date of hearing i.e. 02.02.2015. A relevant extract from the order reads as follows:-

“4. Regarding application for staying the prosecution under Sec. 276C(1) of the Act, we direct that so far as filing of reply to show-cause notice and rejoinder, if any, are concerned, the Department will be at liberty to proceed but will keep in abeyance the launching of prosecution before the Court concerned till the next date of hearing i.e. 02.02.2015. We also direct that on 02.02.2015, the priority of hearing will be given to the appeal questioning the penalty. Copy of this order be supplied to both the parties.”

The application for stay was adjourned to 10.02.2015,

17.02.2015 and 18.05.2015. In between, the stay application was taken up for hearing on 13.02.2015 and while adjourning the matter to 27.02.2015, interim order dated 23.01.2015 was ordered to continue. The application for stay, finally came up for hearing on 23.03.2015, when the Tribunal granted a stay against initiation of prosecution. A perusal of this order reveals that the Tribunal has recorded a finding that it is empowered by Section 254 of the Act to stay prosecution. The said finding is the bone of contention between the parties.

After appraising submissions by counsel for the parties, the findings recorded in the impugned order, the following questions were framed:-

- “a) Whether Section 254 of the Income Tax Act, 1961 empowers the Income Tax Appellate Tribunal to interfere in prosecution proceedings either at the stage of show cause notice or at any other stage?
- b) Whether pendency of quantum appeals by the assessee and the revenue, appeals against penalty and appeals challenging orders passed consequent to an order passed under Section 263 of the Income Tax Act, would confer power/jurisdiction upon the Tribunal to stay a show cause notice calling upon the assessee to show cause why prosecution be not launched?”

We have heard counsel for the parties, perused the impugned orders but before proceeding to answer the questions

posed, would once again recapitulate that proceedings pending before the Appellate Tribunal are an appeal challenging an order passed under Section 263 of the Act, a quantum appeal against an assessment order, passed pursuant to the order passed under Section 263 of the Act, and an order imposing penalty. The revenue has served a notice upon the assessee to show cause why prosecution be not launched. The Tribunal has recorded a finding, while directing the revenue to keep consideration of the show cause notice re-prosecution in abeyance that it is empowered by Section 254(1) to pass such an order.

An answer to the questions posed would require consideration as to the nature of the power conferred by Section 254 of the Act. Section 254 of the Act as originally enacted did not confer power upon the Income Tax Appellate Tribunal to grant stay. A debate, therefore, raged whether Section 254 of the Act inhered the power, to grant, stay. After considering the countors of Section 254 of the Act as well as various precedents, the Supreme Court in **Income Tax Officer, Cannanore (supra)** held as follows:-

*“According to the decision in **Burhanpur Tapti Mill Ltd. v. Board of Revenue, Madhya Pradesh,** since the Board of Revenue had the power to adjudge the correctness of an order passed by the Commissioner under Section 22B reopening an assessment, the Board had also the power to stay the fresh assessment proceedings started by the Assistant Commissioner in pursuance of that*

order. It was said that the general principle was that in a taxing statute there was no room for what could be called the equitable construction, but that principle applied only to the taxing part of the statute and not to the procedural part. It has further been observed that “where the legislature invests an Appellate Tribunal with powers to prevent an injustice, it impliedly empowers it to stay the proceedings which may result in causing further mischief.”

and, thereafter, held as follows:-

Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion, the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when section 220(6) deal expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It would well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially

necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.”

A perusal of the aforesaid judgment reveals that the power to grant stay was held to be inherent in Section 254, (as it existed before the power to grant stay was conferred), i.e., inhere a power to do all such acts or employ all such means, as are essential for the exercise of the power of appeal including the power to grant stay, in proper cases and to make such orders for staying proceeding to prevent the appeal, if successful being rendered nugatory. Thus, the power to grant stay was read into Section 254 of the Act but to a limited extent. Section 254 (1) was, thereafter, amended and as existing on the statute book, reads as follows:-

“254(1)- The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, “pass such orders thereon as it thinks fit”

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 subsection (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”

Counsel for the parties have fairly conceded that the Act does not empower the Tribunal to consider or entertain an appeal against the legality or validity of a prosecution launched under the Act. The arguments for and against the impugned orders have primarily centered around the interpretation of the words “pass such orders thereon as it thinks fit”, used in Section 254(1) and “any proceedings relating to an appeal” used in the first proviso to Section 254(1) of the Act, with counsel for the revenue urging that power conferred by Section 254(1) to grant stay cannot be extended to any matter, which is not subject matter of an appeal before the Tribunal, whether incidental or collateral but with counsel for the assessee urging to the contrary, namely, that these expressions inhere a plenary power, in the Appellate Tribunal, to stay proceedings which though independent are intrinsically linked to the outcome of an appeal.

A due consideration of the arguments, the statutory provisions and the precedents cited for and against reveal that Section 254(1) confers the power to decide an appeal and “pass such orders thereon as it thinks fit” and when read along with the proviso includes the power to pass interim orders, “in any proceeding relating to an appeal”, thereby indicating that the stay order so passed must relate to proceedings in the appeal pending before the

Tribunal. The question that, however, requires an answer is whether these words and expressions would include the power to stay proceedings or orders, which are not appealable or appealed against during pendency of an appeal but are likely to be affected by the outcome of the appeal.

A key to the understanding of the power to grant stay lies in the expressions “pass such orders thereon as it thinks fit” and “any proceedings relating to an appeal”, used in Section 254(1) and the proviso appended thereto. The aforesaid expressions, in our considered opinion, confine the power of a Tribunal, to pass an interim order in relation to matters pending before the Tribunal and at best to matters that are so intrinsically linked to the lis pending before the Tribunal, as to be inseparable. The exercise of power must be confined to matters that are directly and substantially in issue or matters that flow directly and substantially from the order impugned before the Tribunal but cannot be extended to matters in which the Tribunal has no jurisdiction even, though, these matters may be incidentally affected by the outcome of the appeal.

This apart once it is accepted that proceedings for prosecution are independent of assessment and penalty, and the Tribunal is neither the appellate nor the revisional authority in a case where prosecution is launched, the mere fact that the decision in the appeal may have an impact on the prosecution, in our considered opinion, cannot be used to read into the expressions “pass such orders thereon as it thinks fit” or “any proceedings relating to an

appeal”, a power in the Tribunal to direct that prosecution or a show cause notice shall be kept in abeyance. There is another aspect of the case, namely, if such a power, as has been canvassed by the assessee, were available to the Tribunal, prosecution would have to await the final outcome of proceedings up to the Supreme Court.

We are unable to discern any legislative intent or power as would confer upon the Tribunal power to stay consideration of a show cause notice proposing to initiate prosecution, by reading into Section 254, the power to stay independent proceedings merely because they may be affected by the decision of a pending appeal. The legislature having conferred power to grant stay in terms, used in Section 254 (1) and the first proviso, we cannot add to or subtract from the words and expressions used in Section 254(1) or by a process of interpretation confer jurisdiction which legislature, in our considered opinion, did not intend to confer. A prosecution being a consequence of infractions by an assessee cannot be said to be act of harassment or mischief so as to confer power upon the Tribunal, to order that prosecution shall be kept in abeyance.

The judgment by the Delhi High Court in **The Commissioner of Income Tax (Central-II) v. Income Tax Appellate Tribunal and others (supra)**, has to be read in the context of its own peculiar facts, namely, an order was passed under Section 263, restoring the assessment to the Assessing Officer, The assessee filed an appeal. The Income Tax Appellate Tribunal, stayed assessment proceedings. The order was upheld, by the Delhi High Court as assessment proceedings were intrinsically linked to and not

severable from the legality of the order passed, under Section 263, namely, jurisdiction to re-open an assessment.

The situation in the present case, as already noticed, is entirely different. All that the revenue has initiated is a notice to show cause why prosecution be not launched. Admittedly, the Tribunal is neither the appellate nor the revisional forum against a prosecution. A prayer for stay of prosecution or stay of the show cause would, therefore, have to be made by resort to other remedies provided under law and not by praying for a stay before the Tribunal. It would also be appropriate to point out that the notice to show cause why prosecution be not initiated is a purely administrative act and it is only after consideration upon the notice and the reply reaches fruition, may the assessee seek his legal remedies in accordance with law.

As already recorded, the appeal may have a bearing on the consideration of the show cause notice and the reply filed thereto, but we are not inclined to read into Section 254(1) or the proviso thereto, power in a Tribunal to stay consideration of the show cause notice or the power to direct that the show cause notice be kept in abeyance.

The judgments pressed into service by counsel for the revenue, namely, **Gulab Chand Sharma v. H.P.Sharma etc., (1974) ILR 1 (Delhi), 190; P.Jayappan v. S.K.Perumal, First Income Tax Officer, Tuticorin, 1984 (149) ITR, 692(Mad); P.Jayappan v. S.K.Perumal, First Income Tax Officer, Tuticorin., 1984 (149) ITR, 696(SC); Ashok Buscuit Works and Ors v. Income Tax Officer, Hyderabad, 1988 (171) ITR 300 (AP); Rinkoo Steels and others v.**

K.P.Ganguli, Income Tax Officer and another, 1989 (179) ITR 482 (Delhi); Sant Parkash and Ors. V. Commissioner of Income tax and Ors., 1991 (188) ITR 732 (P&H); Universal Supply Corporation and Ors. v. State of Rajasthan and another, 1994 (206) ITR 222; Commissioner of Income Tax v. Bhupen Champak Lal Dalal and Anr. Etc., 2001 (248) ITR, 830 (SC) are not relevant as they only hold that prosecution is independent of assessment proceedings. The judgment in The Assistant Commissioner, Assessment-II, Bangalore and ors v. Velliappa Textiles Ltd. and Ors., 2003(263) ITR, 550 (SC) pertains to the question whether a company can be prosecuted and is, therefore, not relevant at this stage. The judgment in Madras Bar Association v. Union of India, 2014 (10) SCC 1, is also irrelevant as it does not advance the arguments raised by counsel for the revenue.

Consequently, we answer the two questions by holding that we cannot read into Section 254 of the Act, any power in the Income Tax Appellate Tribunal to interfere in a prosecution under the Act, either at the stage of a show cause notice or at any other stage. The pendency of appeals regarding quantum and penalty and an appeal challenging an order passed under Section 263 would not, in our considered opinion, confer power upon the Tribunal to stay consideration of a show cause notice calling upon the assessee to show cause why prosecution be not launched.

Before we part with the judgment, we would like to clarify that we have confined consideration to the power of the Tribunal but

