

Delhi ITAT granted stay of penalty proceeding against 'Oracle' during pendency of appeal

Summary – The Delhi ITAT in a recent case of Oracle India (P.) Ltd., (the Assessee) held that Tribunal has power to stay penalty proceedings pending disposal of appeal as being incidental or ancillary to its appellate jurisdiction

Facts

- Penalty proceedings were initiated by the Assessing Officer by issuance of show cause notice under section 274. The assessee, requested the Assessing Officer to keep the penalty proceedings in abeyance pending disposal of first appeal by the Tribunal. The request so made was apparently accepted as for more than three years no further action was taken by the Assessing Officer. Later, *vide* show cause notice under section 271(1)(c) the Assessing Officer wanted to complete the penalty proceedings without awaiting for the order of the Tribunal.
- By way of instant petitions, the assessee sought a stay against penalty proceedings under section 271(1)(c). The assessee was aggrieved by the fresh show cause notices issued by the Assessing Officer in this regard. It was contended by the assessee that as part of exercise of the appellate powers envisaged under section 254(1), the Tribunal also has inherent powers to grant a stay against penalty proceedings pending disposal of quantum appeals before it. Thus, this was a fit case for exercise of such powers, that statutory provisions, merits and equity were in favour of the assessee. It was submitted by assessee that undisputedly, quantum demand had already been paid and the discretion to keep the penalty proceedings in abeyance pending disposal of the quantum appeals by the Tribunal had once already been exercised by the Assessing Officer. It was submitted that provisions of section 275 give ample powers to the Assessing Officer for levying penalty under section 271(1)(c) post disposal of appeal by the Tribunal. It was further submitted that the levy of penalty at this stage was itself bad in law and barred by limitation. Lastly, it was submitted that if the Assessing Officer proceeded to levy penalty at that stage without waiting for the orders of the Tribunal in quantum appellate proceedings then an onerous penalty demand of much higher amount would get created against the assessee.

Held

- It would first be appropriate to adjudicate whether this Tribunal can entertain a petition seeking stay of penalty proceedings pending disposal of the quantum appellate proceedings before it.
- This issue is no more *res integra*. Historically, the nature of powers of the Tribunal has been the subject-matter of consideration in a number of decisions by the Apex Court. First noticeable decision is that of *ITO v. M.K. Mohammad Kunhi* [1969] 71 ITR 815 wherein the Apex Court held that the power to stay recovery proceedings pending disposal of the appeal can be exercised by the Tribunal as being incidental or ancillary to its appellate jurisdiction. When this judgment was passed provision of section 254(1) merely stated that the Tribunal after hearing both the sides may 'pass

such orders thereon as it thinks fit'. There was no power granted by the statute to entertain and decide a petition for stay. This power was for the first time granted by insertion of sub-section (7) in section 253 by Finance (No. 2) Act, 1998 with effect from 1-10-1998. Thereafter, two provisos were inserted in sub-section (2A) of section 254 by the Finance Act, 2001 with effect from 1-6-2001. These provisos have thereafter been amended/substituted by the Finance Act, 2007 and the Finance Act, 2008.

- As is apparent from first proviso to section 254(2A) in an appeal pending before the Tribunal it can pass an order of stay 'in any proceedings relating to an appeal filed before it'. It is important to note that the said sub-section recognizes a stay in 'any' proceedings 'related to an appeal'. It does not say in a proceeding of the appeal. As such the power cannot be read in a limited manner by which the express words employed by the statute are whittled down. When a stay can be granted in any proceeding relating to an appeal then it covers also a proceeding which is a direct result of the pending appeal. Where the gravamen of the default is the same or fallout it will be covered 'in any proceedings relating to an appeal'.
- Moreover, the issue is no more open to debate. Decisions relied upon by the assessee, clearly support the existence of such a power with the Tribunal. The Tribunal possesses the power to stay such related assessment proceedings.
- Moreover, the doctrine of implied and ancillary powers aptly answers the issues raised. If the right of appeal granted is to be given its full effect, then the power to do so cannot be read in a restricted manner. Therefore, the Tribunal has the power to stay related proceedings if it is in the interest of justice.
- Once the statute provides an Assessing Authority the discretion to either levy penalty under section 271(1)(c) immediately after the assessment or after waiting for the outcome of appellate proceedings, it is expected that such a discretion would be carefully exercised by the relevant Assessing Authority. In the instant case, the facts on record clearly establish that the Assessing Officer deemed it fit not to levy penalty immediately after the culmination of the assessment proceedings. Show cause notice issued by the Assessing Officer is also silent on the point as to why suddenly the case warrants levy of penalty without awaiting the outcome of the first appellate proceedings. The reason behind separate limitations as prescribed by the Legislature need to be understood in this context. There may be a case where the discretion to levy penalty will be in order where immediately after the assessment, the Assessing Officer chooses to levy penalty, because in his view the material in assessment proceedings requires such an action. In another case, the correct exercise of discretion will only be to avail the order of the appellate authorities on the material mentioned in the assessment order. There is no power of review and having chosen to exercise the discretion once, the same or the successor Assessing Officer cannot sit in judgment and review or reinitiate the penalty proceedings kept in abeyance. Moreover, taking a *prima facie* view in the matter, if at all the Assessing Officer wanted to levy the penalty without waiting for the orders of the Tribunal in quantum appellate proceedings then, as per the provisions of section 271(1)(c),

such an order could only have been passed by 30-4-2014 and 30-4-2015 for assessment years 2006-07 and 2007-08 respectively. Moreover, even equity demands stay of penalty proceedings be granted in the instant case. Provisions of section 275 adequately safeguard the interest of revenue and hence even after the disposal of the appeals by the Tribunal, adequate time is available with the Assessing Officer for levy of penalty.

- Considering the above legal and factual positions, a stay is granted against penalty proceedings under section 271(1)(c) initiated by the Assessing Officer in the instant case, *vide* show cause notices for a period of six months or till disposal of appeals whichever is earlier.
- As a result, stay petitions filed by the petitioner are allowed in terms of above observations.