2013 (3) ECS (45) (P&H-HC)

CWP No.877 of 2013 & other connected matters

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARAYANA AT CHANDIGARH

M/s PML Industries Limited

Versus

Commissioner of Central Excise & another

CWP No. 877 of 2013

Date of Decision: 26.02.2013

M/s PML Industries Limited ....Petitioner
Versus
Commissioner of Central Excise & another ....Respondents
Chandigarh

CORAM:

HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MS. JUSTICE RITU BAHRI

Present:

Mr. Jagmohan Bansal, Advocate, for the Petitioner.

Mr. Kamal Sehgal, Advocate, for the respondents.

HEMANT GUPTA, J.

“Consequently, the second proviso in sub-section (2A) of Section 35C is ordered to be read down to mean that after 180 days, the Revenue has a right to seek vacation of stay on proof of the fact that the assessee is the one, who is defaulted or taken steps to delay the ultimate decision.” (Para 54)

1. This order shall dispose of the afore-mentioned writ petition along with other writ petitions mentioned in the foot note of this order in respect of the provisions of Section 35C(2A) of the Central Excise Act, 1944 (for short `the Act'), whereby an order of waiver of pre-deposit of duty passed by the Tribunal stands vacated after expiry of 180 days, if the appeal is not decided in terms of the provisions inserted by Section 140 of the Finance Act, 2002 with effect from 11.05.2002 (hereinafter referred as `first set of cases') and writ petitions such as CWP No. 1606 of 2012, wherein the challenge is to the Circular issued by the Central Board of Customs & Excise (for short `the Board') on 01.01.2013 (Annexure P-3) and further quashing of the demand raised in pursuance of such Circular. The Circular dated 1 .1.2013 contemplates that the recovery shall be affected, if stay has not been granted within 30 days (hereinafter referred as `second set of cases').

2. In CWP No.844 of 2013 falling in the first set of cases, the petitioner has pointed out that against the Order-in-Original dated 31.05.2007 and 21.08.2007, the appeals were filed before the Commissioner (Appeals), Customs & Central Excise, Chandigarh. The Commissioner (Appeals) upheld the order passed by the Adjudicating Authority on 1 7.01.2008. The petitioner filed further appeal before the Customs, Excise & Service Tax Appellate Tribunal (for short the Tribunal'). The Tribunal waived the deposit of duty and penalty as well as recovery subject to deposit of Rs.5 lacs vide order dated 19.05.2008. Since the appeal could not be heard within the prescribed period of one hundred and eighty days for no fault on the part of the petitioner, therefore, in terms of the Supreme Court decision in Commissioner of Customs & Central Excise, Ahmedabad Vs. Kumar Cotton Mills Pvt. Ltd. 2005 (180) ELT 434, the Tribunal ordered the interim stay to continue till further orders on 03.03.2009. In spite of such order, the Department initiated the recovery proceedings vide communication dated 20.11.2012 (Annexure P-8), as the stay is said to have come to an end after the expiry of one hundred and eighty days. In pursuance of such communication, the petitioner informed the Department that the Tribunal has granted stay and the same was extended till further orders. However, the Department again directed the petitioner to deposit the dues vide letter dated 17.12.2012 (Annexure P-10), which led to invocation of the jurisdiction of this Court.

3. Mr. Jagmohan Barisal, learned counsel for the petitioner argued that the second proviso incorporating provisions of automatic vacation of stay is onerous and makes the remedy of appeal illusory and nugatory, as on the expiry of one hundred and eighty days of the stay, the stay is automatically deemed to be vacated, even if the assessee is not in fault in any manner. It is argued that the right of appeal has to be meaningful and cannot be a farce, when without any fault of the assessee, the stay is vacated. The petitioner had made out case for waiver of condition of pre-deposit, but still on the basis of administrative circular, the recovery is sought to be initiated. Learned counsel relies upon an order passed by the Supreme Court in Kumar Cotton Mills Pvt. Ltd. case (supra), wherein the Court observed to the following effect:

> "6. The sub-section which was introduced in terrorem cannot be construed as punishing the assesses for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter, namely IPCL Vs. Commissioner of Central Excise, Vadodara 2004 (169) ELT 267 cannot be faulted. However, we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee."

4. He also referred to a Larger Bench order of the Tribunal in IPCL Vs. Commissioner of Central Excise, Vadodara 2004 (169) ELT 267, wherein the Tribunal observed that the inherent jurisdiction of the Tribunal to grant interim relief so as to make the ultimate relief effective cannot be curtailed indirectly by sub-section (2A) of the Act. The Bench observed as under**:**

> "6. The observation of the Bench that if the Tribunal grants further extension of stay beyond the period of 180 days the amendment would become redundant is also not justified. A similar contention raised in regard to sub-section (2A) of Section 254 of the Income

Tax Act was not accepted by the Income Tax Appellate Tribunal in Centre for Women's Development Studies Vs. Deputy Director of Income Tax 2002 (257) 1TR 60. The inherent jurisdiction of the Tribunal to grant interim relief so as to make the ultimate relief effective cannot be curtailed indirectly by sub- section (2A). At the end of the period of 180 days when the appellant makes an application for extension of the stay the Tribunal can always consider whether there is any change in the circumstances which would justify extension or modification of the stay. The Revenue gets an opportunity to bring to the notice of the Tribunal such changed circumstances e.g. a binding decision on the issue in its favour.

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12. We find that in Themis Pharmaceuticals Vs. Commissioner 2003 (157) ELT 569, the Bench has taken note of the fact that it is practically not possible to dispose of the appeals pending before the Bombay Bench of the Tribunal within 180 days. The Bench has also suggested some remedy for the problem. In this connection we may observe that similar situation can arise in other Benches also where an appeal posted within 180 days could not be taken up for different reasons. It may be due to non-availability of time for the Bench or due to non-availability of the Bench itself. Unless the Tribunal has the power to extend stay beyond 180 days, the assessee's interest will be in jeopardy for no fault of his. Even the order granting exemption from pre-deposit will be rendered nugatory as the assessee will be compelled to satisfy the demand during pendency of the appeal. It has been always the judicial view that no party should be prejudiced due to action or inaction on the part of the court (Rajkumar Dey & others Vs. Tarapada Dey. 1987 (4) SCC 398).

13. On going through the decision rendered by a bench of two members in Kumar Cotton Mills Ltd. we find that the Bench taking into consideration the importance of this issue permitted Advocates and Consultants not representing the applicants also to make submissions to assist the Court. A decision rendered after such hearing on the effect of the introduction of sub-section (2A) on the jurisdiction of the Tribunal as above should not have been just

brushed aside as one rendered in 'vacuum'. Even if the Bench which heard Themis Pharmaceuticals took a different view, it should have referred the issue for consideration by Larger Bench as judicial decision would demand.

14. In the light of the above discussion, we are inclined to uphold the view taken in Kumar Cotton Mills and agree with the view expressed in the reference order on the jurisdiction of the Tribunal to pass interim order. We disagree with the view taken in Themis Pharmaceuticals. We therefore, hold that the Tribunal has jurisdiction to grant stay even after die expiry of 180 days from the date of initial order of stay. After answering the issue raised for consideration by the Larger Bench, as above, we send back the Miscellaneous Application for hearing by the appropriate Bench."

5. In CWP No.1606 of 2013 falling in the second set of cases, the Adjudicating Authority passed an order on 20.04.2002 raising demand of Cenvat credit of Rs.1,46,01,332/-. The petitioner filed an appeal before the Tribunal along with an application for waiver of pre-deposit, which is now pending for 07.03.2013. Such application was listed on 30.07.2012, 06.11.2012, 14.11.2012 and 30.11.2012. The Board has issued a Circular dated 01.01.2013 instructing the Administrative Officers to initiate recovery proceedings in the matters which are pending before the Appellate Authorities after filing of an appeal. Thereafter, a notice was served upon the petitioner on 15.01 .2013. Feeling aggrieved, the petitioner challenged the Circular dated 01.01.2013 and notice dated 15.01.2013 before this Court.

6. It is argued that the assessee has no control over the decision of appeals either by the Commissioner (Appeals) or by the Tribunal, as final hearing and the decision thereon is dependent upon numerous factors on which the assessee has no control whatsoever. Non constitution of Tribunal; the lack of infrastructure and non-availability of members etc. can be some of the reasons for not deciding the appeals within 180 and/or 30 days. Still further, the pendency of appeals before each of the Forum is huge and it is practically impossible for most of the Tribunals and/or Commissioner (Appeals) to decide the appeals in a particular time-frame. Since the Statute has conferred a right of appeal, the said right has to be substantive and meaningful and cannot be taken away by imposing onerous, unjustified conditions on which assessee has no control. Once the Revenue is permitted to recover the amount, it seriously prejudices the right of appeal of an aggrieved person. Such recovery of the amount though an appeal is

pending at the instance of the assessee is pre-judging the issue depriving the assessee of fair opportunity of hearing and decision by the Appellate Authorities.

7. On the other hand, learned counsel for the Revenue has pointed out that the Legislature has imposed condition in respect of cessation of interim order after the expiry of one hundred and eighty days. It is contended that the Commissioner (Appeals) as well as the Tribunal are not the Authorities under the Central Government and, therefore, the Central Government cannot ensure that the appeals are decided in a particular time- frame. Therefore, to protect the interest of the Revenue, the Legislature has decided for automatic cessation of stay. The right of appeal is creation of Statute and that Statute can determine the conditions on fulfillment of which alone, the appeal would lie. Therefore, the condition of cessation of interim order cannot be said to onerous or rendering the remedy of appeal as illusory. It is, in fact, pointed out that the Circular was issued as the Hon'ble Supreme Court in case of Collector of Customs, Bombay Vs. Krishna Sales (P) Ltd. 1994 (73) ELT 519 has observed that `mere filing of an Appeal does not operate as a stay or suspension of the Order appealed against'. Therefore, the Board was within its competence to issue Circular to recover the amount of duty, interest or penalty in the absence of any stay by the competent Tribunal.

8. We have heard learned counsel for the parties and find that following questions of law arise for consideration:

(1) Whether the revenue is justified in initiating recovery proceedings on the basis of Circular dated 01.01.2013, even when an application for waiver of pre – deposit is pending before the Appellate Authorities for the reason that on such application for stay or waiver of pre deposit, no orders have been passed?

(2) Whether the second proviso in sub – section (2A) of Section 35 C is directory and that the Tribunal in appropriate circumstances can extend the period of stay beyond 180 days?

9. At this stage, the relevant provisions of the Act as well as the Circular dated 01.01.2003 need to be extracted. The same are as under:

<u>Central Excise Act, 1944</u>

“35 A. Procedure in appeal – (1) The Commissioner (Appeals) Shall give an opportunity to the appellant to be heard, if he so desires.

(2) The Commissioner (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission off that ground from the grounds of appeal was not willful or unreasonable.

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(4) The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(4A) The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed. (sub – section (4 A) inserted by Section 129 of the Finance Act, 2001 w.e.f. 11.05.2001)

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“35 C. Orders of Appellate Tribunal - xx xx
(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 25B, 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. (proviso inserted by Section 140 of the Finance Act, 2002 w.e.f. 11.05.2002)

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"35F. Deposit, pending appeal, of duty demanded or penalty levied-
Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise Authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied;

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

Circular dated 01.01.2003

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(2) Henceforth, recovery proceedings shall be initiated against a confirmed demand in terms of the following order:

Sr.No.	Appellate Authority	Situation	Directions regarding recovery
	xx	xx	xx
3.	Commissioner (Appeals)	Appeal filed with a stay application against an order – in – original	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in

			accordance with the conditions of stay, if any specified, whichever is earlier.
	xx	xx	Xx
6.	CESTAT	Appeal filed with a stay application against an Order-in – Original issued by the Commissioner	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any, whichever is earlier.
	xx	xx	xx
9.	CESTAT	Appeal filed with a stay application against an Order-in – Appeal confirming the demand for the first time.	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay, if any, whichever is earlier
	xx	xx	xx

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10. Some of the judgments, dealing with the right of appeal and conditions for entreating the appeal, need to be mentioned, before we examine the issues raised in the present writ petitions.

11. The right of appeal is a creation of a statute. It is not in doubt. Such right of appeal can be circumscribed by the conditions imposed by the Legislature as well. Such concept has been examined in relation to Sale Tax Laws by the

Supreme Court and a Full Bench of this Court in M/s Lakshmiratan Engineering, Works Ltd. Vs. Asstt. Commissioner (Judicial)-I, Sales Tax, Kanpur Range. Kanpur & another AIR 1968 SC 488 and M/s Emerald International Ltd. Vs. The State of Punjab (1997) 2 PLR 797 respectively; in relation to the right of appeal under the Municipal Laws by Constitution Bench in The Anant Mills Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad & others AIR 1975SC 1234 and Shyam Kishore & others Vs. Municipal Corporation of Delhi & another AIR 1992 SC 2279; in relation to Haryana Ceiling on Land Holdings Act, 1972 in Nand Lal & another Vs. State of Haryana & others AIR 1980 SC 2097 and under the Central Excise Act, 1944 and/or Customs Act, 1962 in Collector of Customs & Excise, Cochin & others Vs. M/s A.S.Bava AIR 1968 SC 18 and Vijay Prakash D. Mehta and Jawahar D. Mehta Vs. Collector of Customs (Preventive), Bombay AIR 1988 SC 2010.

12. In Hoosein Kasam Dada (India) Ltd. Vs. State of Madhya Pradesh AIR 1953 SC 221, the Court held that a provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. It was held that in truth such provisions whittles down the right itself and cannot be regarded as a mere rule of procedure. It was held to the following effect:

> "10. The learned Advocate urges that the requirement as to the deposit of the amount of the assessed costs does not affect the right of appeal itself which still remains intact, but only introduces a new matter of procedure. He contends that this case is quite different from the case of Sardar Ali V. Dolimuddin (L) AIR 1928 Cal. 640, for in this case it is entirely in the power of the appellant to deposit the tax if he chooses to do so whereas it was not within the power of the appellant in that case to secure a certificate from the learned Single Judge who disposed of the second appeal. In the first place the onerous condition may in it given case prevent the exercise of the right of appeal, for the assessee may not be in a position to find the necessary money in time. Further this argument cannot prevail in view of the decision of the Calcutta High Court in Nagendra Nath Vs. Mon Mohan Singha (N) AIR 1931 Cal. 100. No cogent argument has been adduced before its to show that that decision is not correct. There can be no doubt that the new requirement "touches" the substantive right of appeal vested in the appellant. Nor can it be overlooked that such it requirement is calculated to interfere with or fetter, if not to impair or imperil, the

substantive right. The right that the amended section gives is certainly less than the right which was available before. A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. Indeed the new requirement cannot be said merely to regulate the exercise of the appellant's pre-existing right but in truth whittles down the right itself and cannot be regarded as a mere rule of procedure."

13. Such ratio was followed in M/s A.S. Bava's case (supra), wherein it was held that the pre-deposit of duty demand could be dispensed with if it causes undue hardship.

14. In M/s Lakshmiratan Engineering Works Ltd. case (supra), it was observed that an appeal could be entertained only if it is accompanied by satisfactory proof of the payment of the tax. It was held that the rules of procedure are intended to advance justice and not to defeat it. The right of appeal has been made subservient to the payment of the admitted tax.

15. The Constitution Bench in Anant Mills Co. Ltd. case (supra) examined Section406(2)(e) of the Bombay Provincial Municipal Corporation Act, 1949 contemplating that no appeal shall be entertained unless the amount claimed from the appellant has been deposited with the Commissioner. The Bench observed that such condition does not affect the right of appeal and at the same time prevents the delay in payment of tax. The Bench held to the following effect:

"40. .....The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of tax.

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> The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income Tax Act, 1922. The provision to that section provided that "…… no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation and we can discern no contravention of Article 14 in it……."

16. In Sita Rain Vs. State of U.P. AIR 1979 SC 745, the Supreme Court held that appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. The Court also held that the procedure is within the Court's power, but where it pares down pre-judicially the very right, carving the kernel out, it violates the provision creating the right. It observed as under:

> "43. Of course, procedure is within the Court's power, but where it pares down pre judicially the very right, carving the kernel out, it

violates the provision creating the right. Appeal is a remedial right and if the remedy is reduced to a husk by procedural excess, the right became a casualty. That cannot be."

17. In Nand Lal's case (supra), it was argued that if the conditions imposed are unreasonably onerous when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in thereof in fit and proper cases, therefore, the fetter imposed must be regarded as unconstitutional and struck down. The Court rejected the contention, but observed as under:

> "19 In the first place, the object of imposing the condition is obviously to prevent frivolous appeals and revision that impede the implementation of the ceiling policy; secondly, having regard to sub-sections (8) and (9) it is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land; thirdly, the deposit or the guarantee is correlated to the land holdings tax (30 times the tax) which, we are informed, varies in the State of Haryana around a paltry amount of Rs.8 per acre annually: fourthly. the deposit to be made or bank guarantee to be furnished is confined to the land holdings tax payable In respect of the disputed area i.e. the area or part thereof which is declared surplus alter leaving the permissible urea to the appellant or petitioner. Having regard to those aspects, particularly the meager rate of the annual land tax payable, the fetter imposed on the right of appeal.' revision, even in the absence of a provision conferring discretion on the appellate/revisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to Section 18 (7) must, therefore, fail."

It was on the facts of the aforesaid case, the legality of the provision was upheld, and the condition of filing appeal was not negated as not being unreasonable and onerous.

18. In Vijay Prakash D. Mehta and Jawahar D. Mehta case (supra), while examining the provisions of Section 129E of the Customs Act, the Court observed that proviso to Section 129 E of the said Act gives discretion to the authority to dispense with the obligation to deposit in the case of `undue hardship'. The

discretion to waive the condition of pre-deposit must be exercised on relevant materials, honestly, bona fide and objectively. The Court observed as under:

> "13. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right constitutional or statutory without any right of appeal, as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and exercisable to the appellant. The proviso to Section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion vested in an obligation to act judicially and properly.
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> 14. In the facts and circumstances of the cases and all the relevant factors, namely, the probability of the prima facie case of the appellant, the conduct of the parties, have been taken into consideration by the Tribunal. The purpose of the Section is to act in terrorern to make the people comply with the provisions of law."

19. In Shyam Kishore's case (supra), the Court observed that sometimes to compel the assessee to pay up the demanded tax for several years in succession might very well cripple him altogether. The Court found that there is no reason to construe the provision so rigidly as to disable him from availing his right of appeal. It was held that incidental and ancillary powers of the Appellate Authority should not be curtailed except to the extent specifically precluded by the statute. It observed as under:

> "41. .....Though it will not be expedient or proper to encourage adjournment of an appeal, where it is ripe for hearing otherwise, only on this ground and as a matter of course, an interpretation which leaves some room for the exercise of a judicial discretion in this regard, where the equities of the case deserve it may not be inappropriate. The appellate judge's incidental and ancillary powers should not be curtailed except to the extent specifically precluded by the statute "

20. The Full Bench of this Court in M/s Emerald International Ltd. case (supra) examined the laws relating to Sales Tax Act in the States of Punjab and Haryana and condition of pre-deposit of the amount of tax. The Bench has inter alia held that appeal is a creation of statute and in case person wants to avail the right of

appeal, he has to accept the conditions imposed by the Statute and the legislature could impose condition for exercise of such a right. Therefore, neither there is constitutional nor legal impediment for imposition of such a condition.

21. In Mardia Chemicals Ltd. & others Vs. Union of India & others (2004) 4 SCC 311. wherein the condition of pre-deposit in respect of remedy under Section 17 of the Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was found to be bad rendering the remedy illusory. The Court observed as under:

> "61. In the case of Seth Nandlal (supra), while considering the question of validity of pre-deposit before availing the right of appeal the Court held:
>
> > "right of appeal is a creature of the statute and while granting the right the legislature can impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory " (emphasis supplied).
>
> While making said observation this Court referred to the decision in the case of Anant Mills Co. Ltd. (supra). In both the above noted decisions this Court had negated the plea raised against pre-deposit but in the case of Seth Nandlal (supra) it was found that the condition was not so onerous since the amount sought to be deposited was meager and that too was confined to the landholding tax payable in respect of the disputed area i.e. the area or part thereof which is declared surplus by the Prescribed Authority (emphasis supplied) after leaving the permissible area to the appellant. In the above circumstances it was found that even in the absence of a provision conferring discretion on the appellate authority to waive or reduce the amount of pre-deposit, it was considered to be valid, for the two reasons indicated above. The facts of the case in hand are just otherwise."

22. A five Judges' Bench of this Court in Ranjit Singh Vs. State of Haryana 2012 (2) RCR (Civil) 353, examining the condition of pre-deposit in availing right of appeal under the Punjab Village Common Lands (Regulation) Act, 1961, held that while a right of appeal is a pure and simple statutory right yet once such a

right has been conferred its applicability cannot be rendered illusory. It was held to the following effect:

> "21. On a conspectus of the decisions, relied upon by the learned counsel on both sides, it can be concluded that while a right of appeal is a pure and simple statutory right yet once such a right has been conferred its applicability cannot be rendered illusory……"

23. In the light of the precedents mentioned above, the provisions of the Statute and Circular are required to be examined, as to when a provision of a Statute is to be treated as mandatory or directory. It is well settled that the use of expression 'shall' or 'may' is not determinative of the fact whether the provision is directory or mandatory. There is no general rule in respect of as to when a provision is to be treated as directory or mandatory, but in every case the object of Statute must be looked.

24. One of the earlier cases is the Constitution Bench judgment reported as State of U.P. Vs. Manbodhan Lal Srivastava AIR 1957 SC 912, wherein it was quoted that:

> "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision" but also by considering its nature, its design, and the consequences which would follow from construing it the one way
> or the other……"

25. In Banwarilal Agarwalla Vs. State of Bihar AIR 1961 SC 849, a Constitution Bench of the Supreme Court held that no general rule can be laid down for deciding whether any particular provision in a statute is mandatory, meaning thereby that non-observance thereof involves the consequence of invalidity or only directory, i.e., a direction the non- observance of which does not entail the consequence of invalidity, whatever other consequences may occur. But, in each case, the court has to decide the legislative intent. The courts have to consider not only the actual words used but the scheme of the statute, the intended

benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same.

26. In State of Mysore Vs. V.K.Kangan AIR 1975 SC 2190, the Supreme Court held that in determining the question whether a provision is mandatory or directory, one must look into the subject matter and the relation of that provision to the general object intended to be secured. It was held that, no doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview, but it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. The said intention has to be gathered not only from the phraseology of the provision but also by considering its nature, it design and the consequences which would follow from construing it in one way or the other.

27. In Administrator, Municipal Committee, Charkhi Dadri Vs. Ramji Lai Bagla AIR 1995 SC 2329, the Supreme Court ruled that absence of provision for consequence in case of non-compliance with the requirements prescribed would indicate directory nature despite use of word `shall'. In State of Jharkhand V.s. Ainbay Cements (2005) 1 SCC 368, it was ruled that whenever the statute prescribes that a particular Act is to be done in a particular manner and also lays down that failure to comply with the said requirement would lead to severe consequences, such requirement would be mandatory.

28. In Union of India Vs. R.S.Saini (1991) Supp. 2 SCC 151, the Supreme Court held that the office memorandum fixing the time-limit for completion of disciplinary proceedings is only a guideline and non-compliance of such office memorandum will not invalidate the order of punishment. The office memorandum cannot be construed as imposing a rigid time-limit for the imposition of the order of punishment. In Remington Rand of India Ltd. Vs. Workmen AIR 1968 SC 224. non-publication of award under the industrial Disputes Act, 1947, within the period of thirty days would not render the award invalid. Non-publication of award within a period of 30 days does not entail any penalty and, therefore, the provision as to time in section 1 7(1) is merely directory.

29. In Topline Shoes Ltd. Vs. Corporation Bank (2002) 6 SCC 33, the Supreme Court negative the argument raised that the State Commission constituted under the Consumer Protection Act, 1986 has no power to accept a reply filed beyond a total period of 45 days. It was held that such provision is not mandatory in

nature. No penal consequences are prescribed and the period of extension of time not exceeding 15 days', does not prescribe any kind of period of limitation. The provision is directory in nature. The provision is more by way of procedure to achieve the object of speedy disposal of such disputes. It is an expression of desirability in strong terns. But it falls short of creating any kind of substantive right in favour of the complainant reason of which the respondent may be debarred from placing his version in defence in any circumstances whatsoever.

30. In P.T.Raian Vs. T.P.M. Sahir (2003) 8 SCC 498, the Supreme Court held that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. It was held to the following effect:

> "45. A statute as is well known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the user of the words 'shall' or 'may'. Such a question must be posed and answered having regard to the purpose and object it seeks to achieve.
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> 46. What is mandatory is the requirement of sub-section (3) of Section 23 of the 1950 Act and not the ministerial action of actual publication of form 16.
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> 47. The construction of a statute will depend on the purport and object for which the same had been used. In the instant case the 1960 Rules do not fix any time for publication of the electoral rolls. On the hand, section 23 (3) of the 1 950 Act categorically mandates that direction can be issued for revision in the electoral roll by way of amendment in inclusion and deletion from the electoral roll till the date specified for filing nomination. The electoral roll as revised by reason of such directions can therefore be amended only thereafter. On the basis of direction issued by the competent authority in relation to an application filed for inclusion of a voter's name, a nomination can be filed. The person concerned, therefore, would not be inconvenienced or in any way be prejudiced only because the revised electoral roll in form 1 6 is published a few hours later. The result of filing of such nomination would become known to the parties concerned also after 3.00 p.m.

48. Furthermore, even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is a well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha Vs. District Magistrate of Monghyr AIR (1966) Patna 144, Nomita Chowdhury Vs. State of West Bengal (1999) 2 Cal. LJ 21 and Garbari Union Coop. Agricultural Credit Society Ltd. Vs. Swapan Kumar Jana (1997) 1 CHN 189).

49. Furthermore, a provision in a statute which is procedural in nature although employs the word 'shall' may not be held to be mandatory if thereby no prejudice is caused (See Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, AIR 1965 SC 895, State Bank of Patiala Vs. S.K.Sharma (1996) 3 SCC 364, Venkataswatnappa Vs. Special Deputy Commissioner (Revenue) (1997) 9 SCC 128 and Rai Vimal Krishna Vs. State of Bihar (2003) 6 SCC 401)."

31. Recently in Delhi Airtech Services Private Limited & another Vs. State of Uttar Pradesh & another (201 1) 9 SCC 354, the Supreme Court held to the following effect:

"117. In Principles of Statutory Interpretation, 12th Edn., 2010, Justice G.P. Singh, at pp. 389-92 states as follows:

“……As approved by the Supreme Court:

`The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.' For ascertaining the real intention of the legislature', points out Subbarao, J.,

'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'.

If object of the enactment will be defeated by holding the same directory. it will be construed as mandatory, whereas if by holding it mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory. But all this does not mean that the language used is to be ignored but only that the prima facie inference of the intention of the legislature arising from the words used may be displaced by considering the nature of the enactment, its design and the consequences flowing from alternative constructions. Thus, the use of the words 'as nearly as may be' in contrast to the words 'at least' will prima facie indicate a directory requirement, negative words a mandatory requirement, 'may' a directory requirement and 'shall' a mandatory requirement."

118. Maxwell, in Chapter 13 of his 12th Edn. of The Interpretation of Statutes, used the word "imperative" as synonymous with "mandatory" and drew a distinction between imperative and directory enactments, at pp. 314-15, as follows:

"Passing from the interpretation of the language of statutes, it remains to consider what intentions are to be attributed to the legislature on questions necessarily arising out of its enactments and on which it has remained silent.

The first such question is. when a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non- compliance, is the requirement to be regarded as imperative (or mandatory) or forms prescribed by

the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially'.

It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule,' said Lord Campbell, L.C. 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.'

And Lord Penzance said:

'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

119. In a recent judgment of this Court, May George v. Tuhsildar (20101) 13 SCC 98, the Court stated the precepts, which can be summed up and usefully applied by this Court, as follows:

(a) While determining whether a provision is mandatory or directory, somewhat on similar lines as aforenoticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;

(b) To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;

(c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;

(d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other:

(e) It is also permissible to examine the impact of other provisions in the same statute and the consequences of non-compliance with such provisions;

(f) Phraseology of the provisions is not by itself a determinative factor. The use of the word "shall" or "may", respectively would ordinarily indicate imperative or directory character, but not always.

(g) The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.

(h) The court has to give due weightage to whether the interpretation intended to be given by the court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.

120. Reference can be made to the following paragraphs of May George (2010) 13 SCC 98: (SCC pp. 103-05, paras 16-17 & 22-23)

> "16. In Dattatraya Moeshwar v. State o/' Bomba AIR 1952 SC 181 this Court observed that law which creates public duties is directory but if it confers private rights it is mandatory. Relevant passage from this judgment is quoted below: (AIR p. 185, para 7)
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> > '7. … It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public

duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of' the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.'

17. A Constitution Bench of this Court in State of U.P. v. Babu Ram Upadhya AIR 1961 SC 751 decided the issue observing: (AIR p. 765, para 29)

> `29 For ascertaining the real intention of the legislature the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non – compliance with the provisions, the fact that the non – compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."
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22. In B.S. Khurana v. MCD (2000) 7 SCC 679 this Court considered the provisions of the Delhi Municipal Corporation Act, 1957 , particularly those dealing with transfer of immovable property owned by the Municipal Corporation. After considering the scheme of the Act for the purpose of transferring the property belonging to the Corporation, the Court held that the Commissioner could alienate the property only on obtaining the prior sanction of the Corporation and this condition was held to be mandatory for the reason that the effect of non – observance of the statutory prescription would vitiate the transfer though no specific power had been conferred upon the Corporation to transfer the property.

23. In State of Haryana v. Raghubir Dayal (1995) 1 SCC 133 this Court has observed as under : (SCC pp. 135 – 36, para 5)

> "5. The use of the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word "shall" prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word "shall", therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose its seeks to serve. The meaning has to be ascribed to the word "shall" as mandatory or as directory, accordingly. Equally, it is settled law that when statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory.'

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129. Statutes which encroach upon rights, whether as regards person or property, are subject to strict construction in the same way as penal Acts. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. (See Maxwell on The Interpretation of Statutes, 12th Edn. by P. St. J. Langan.)

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131. If I analyse the above principles and the various judgments of this Court, it is clear that it may not be possible to lay down any straitjacket formula, which could unanimously be applied to all cases, irrespective of considering the facts, legislation in question, object of such legislation, intendment of the legislature and

substance of the enactment. In my view, it will always depend upon all these factors as stated by nee above. Still, these precepts are not exhaustive and are merely indicative. There could be cases where the word "shall" has been used to indicate the legislative intent that the provisions should be mandatory, but when examined in light of the scheme of the Act, language of the provisions, legislative intendment and the objects sought to be achieved, such an interpretation may defeat the very purpose of the Act and, thus, such interpretation may not be acceptable in law and in public interest."

32. This Court in ITR Nos.40 & 41 of 1991 titled "M/s Somany Pilkington's Ltd. Vs. The Commissioner of Income Tax (Haryana), Rohtak" considered the scope of sub-section (2A) of Section 254 inserted by Finance Act, 1999 in the Income Tax Act, 1961. The Court observed as under:

" We may also notice sub-section (2A) of Section 254, which was inserted by Finance Act, 1999. The same reads as under:

"(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 financial year in which such appeal is filed under sub-section (I) of Section 253."

A careful reading of the provisions reproduced above, makes it clear that the time period of 4 years prescribed in sub-section (2) of Section254 is directory in nature. It is settled that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory - Shiveshwar Prasad Sinha Vs. District Magistrate of Monghry, AIR 1 966 Patna 144. Nomita Chowdhry Vs. State of West Bengal (1999) 2 Cal LJ 21, Garbari Union Coop. Agricultural Credits Society Ltd. Vs. Swapan Kumar Jana, (1997) 1 CHN 189 and Pt. Rajan Vs. T.P,M. Sahir and others (2003) 8 SCC 498.

The language of sub-section (2A), which has been inserted by Finance Act, 1999, makes it clear that the Legislature did not intend to make the time period of 4 years for disposal of the application as mandatory. This view of ours finds support from the

principle stated in Halsbury's Laws of England in the following words:

> "If public officials or a public body fail to perform any public duty with which they have been charged, an order of mandamus will lie to compel them to carry it out, even though the time prescribed by statute for the performance of the duty may have passed."

In view of the above discussion, we hold that failure of the Tribunal to decide an application made under Section 254(2) of the Act within 4 years did not denude it of the jurisdiction to decide the application on merits."

33. A Division Bench of this Court in a judgment reported as Stelco Strips Ltd. Vs. State of Punjab & others (2009) 19 VST 498 (P&H) in which one of us (Hemant Gupta, J.) was a Member examined the provisions of Section 14B(7)(ii) & (iiii) of Punjab General Sales Tax Act, 1948 providing that the proceedings shall be decided within a period of 14 days. The Court held that such provision is more by way of procedure to achieve the object of speedy disposal of the disputes. It is an expression of desirability in strong terms. It was held to the following effect:

> 24 Once there is a provision for release of the goods and the vehicle, the conclusion of enquiry proceedings within 15 days is to impose a duty on the enquiry officer to complete the proceedings expeditiously but it does not follow that any departure from it shall taint the proceedings with fatal blemish. The provision is more by way of procedure to achieve the object of speedy disposal of such disputes. It is an expression of desirability in strong terms. But it falls short of creating any kind of substantive right in favour of the petitioner so as resulting into adjudicating proceedings pertaining to evasion of tax as abated.
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> 26. Therefore, we are of the opinion that the provisions of Section 14B (7)(ii) and (iii) of the State Act are directory in nature and consequently failure to decide such proceedings within the time prescribed will not result into abatement of proceedings."

34. Therefore. the issue raised in these cases are to be examined keeping in view the precedents mentioned above and in respect of (i) appeals filed or pending before the Commissioner (Appeals), and(ii) the appeals filed or pending before the Tribunal.

35. Firstly, we will take up the issues in respect of appeals filed and pending before the Commissioner (Appeals).

36. Section 35 of the Act confers right of appeal to any person aggrieved by any decision or order passed under the Act. Sub-section (4A) inserted in Section 35A vide Section 128 of the Financial Act, 2001 with effect from 11.05.2001 contemplates that the Commissioner (Appeals) shall where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed. Section 35F empowers the Commissioner (Appeals) or the Tribunal to dispense with the deposit of duty demanded or penalty levied, if it causes undue hardship, subject to such conditions as it may deem fit to impose so as to safeguard the interest of Revenue. The further proviso contemplates that where an application is filed before the Commissioner (Appeals) and if it is possible to do so, the Commissioner (Appeals) shall decide such application within 30 days from the date of its filing.

37. Column 4 of the impugned Circular contemplates that if no stay is granted within 30 days, the recovery is to be initiated. The Commissioner (Appeals) is empowered to dispense with the requirement of deposit of duty demanded and penalty levied, if it is satisfied that such levy would cause undue hardship. The provision further contemplates that the Commissioner (Appeals) is to decide such application within 30 days. The effect of the Circular is if such application is not decided within 30 days by the Commissioner (Appeals), the recovery proceedings can be initiated against the assessee.

38. We find that the provision contemplating that the Commissioner (Appeals) should decide application within 30 days is directory. Such intention is evident from the fact that it contemplates that Commissioner (Appeals) shall "where it is possible to do so ", decide application to dispense with the requirement of deposit of duty demanded and penalty levied within 30 days. The assessee in no way can insure that the Commissioner (Appeals) shall decide his application for dispensation of the duty demanded and penalty levied within a period of 30 days. Therefore, for no fault on the part of the assessee, even if the appeal has been presented within the period of limitation along with an

application for waiver of condition of pre-deposit of the duty demanded and penalty levied, the remedy of consideration of his application for pre-deposit pending hearing of appeal provided by the Statute stands negated by the circular. The Revenue cannot take a right which has been conferred by statute only for the reason that the application for waiver of pre-deposit could not be disposed of within 30 days. The Revenue cannot encroach upon the right of due consideration by the Appellate Authority on the strength of circular. The right of consideration on the application cannot be rendered illusory. It would be a farce, if without considering the application for pre-deposit, the recovery proceedings are initiated for no fault of the assessee. The rights of the parties need to be examined on the day, when an appeal is filed. The assessee is entitled to an order on such appeal and the application on that day. If on purely fortuitous circumstance, the appeal or the application are not taken up for hearing, the right of the assessee of due consideration cannot be defeated by virtue of an executive direction. It would be wholly unjustified to recover the amount even though, the assessee has filed appeal and an application but the Appellate Authority is not able to decide the applications within 30 days. Since, the Statute has not provided for such consequence, the executive cannot order the recovery of the amount only for the reason, that the application for waiver of pre deposit has not been decided by the Appellate Authorities.

39. Though in Anant Mills Ltd. and Seth Nandlal cases (supra), the Court has observed that if the condition of pre-deposit is onerous, the same can be set aside. In the present case, the Appellate Authority has a power to waive or reduce the amount of pre-deposit, but such power is sought to be taken away only if the Commissioner (Appeals) is not able to decide the application for stay within 30 days. Such a condition is relevant and meaningful, if the Central Government is in a position to ensure that all appeals and/or the applications for dispensation of duty demanded and penalty levied can be decided within a period of 30 days. If the Central Government has no power to control the working of the Appellate Authorities and also to ensure that all appeals are decided within the time frame, such condition is wholly unwarranted. The assessee has also no control over such Authorities. The Commissioner (Appeals), a quasi judicial Tribunal, has a jurisdiction to waive the condition of pre-deposit of duty demanded and penalty levied, but such judicial discretion vested in the Authority under the Act cannot be interfered with in any manner administratively.

40. Since the Statute confers a right of appeal on the assessee and also right to make an application to dispense with deposit of the duty demanded and penalty

levied in the manner which the Appellate Authority deems appropriate. Therefore, unless such jurisdiction is exercised by the Appellate Authority either way i.e. to grant benefit of waiver or impose such conditions as it may consider appropriate, the Board cannot direct the Administrative Officers to recover the demand raised against the assessee. The statutory right of appeal or of consideration of an application for pre-deposit cannot be frustrated administratively.

41. In terms of a judgment of May George's case (supra) as referred to and followed in Delhi Airtech Services Private Limited's case (supra), the provision of a Statute creating public duties are directory, whereas those conferring private rights are imperative.

42. In a judgment reported as Commissioner of Customs (Imports). Mumbai vs. m/s Tullow India Operations Ltd. AIR 2006 SC 536, the Supreme Court was examining issuance of Essentiality certificate to avail benefit of exemption notification. The provision contemplated that such Essentiality certificate has to be produced at the time of import of goods. The Supreme Court referring to its earlier judgment in Commissioner of Central Excise Vs. M.P.V. & Engineering Industries 2003 (153) ELT 485 held that the requirement of certificate to be produced, means only if its within the control and power of the importer. If it is not within the power and control of the importer and depends upon the acts of other public functionaries, non-compliance of such condition, cannot be held to be a condition precedent. The Court observed as under:

> "28. The Directorate General of Hydrocarbons is under the Ministry of Petroleum and Natural Gas of the Government of India. The functions performed by it are public functions. The notification never contemplated that a public functionary, having regard to the importance of the subject matter and in particular when such importations are being made in public interest, would not dispose of the application for grant of essentiality certificate within a reasonable time so as to enable the importer to avail the benefit thereof……..
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> 29. Both the Customs Department and Ministry of Petroleum and Natural Gas are departments of the Central Government. The substantive provisions which were required to be complied with for the purpose of obtaining the benefits under the said exemption notification have indisputably been complied with. It is not the case of the department that the assesse has anything to do with the

grant of certificate except to pursue the matter to the best of its abilities. It is not in dispute that the importers were, but for production of the certificate, otherwise entitled to the grant of benefit in terms of the said notification.

30. The conditions referred to in Sub-section (1) of Section 25 as regard time when such certificate is to be produced would, thus, mean those which were within the control and power of the importer. If it is not within the power and control of the importer and depends upon the acts of other public functionaries, non-compliance of such condition, subject to just exception cannot be held to be a condition precedent which would disable it from obtaining the benefit therefrom for all times to come."

43. Thus, an aggrieved party such as an assessee could only file appeal along with an application for waiver of' the pre-deposit. It is, thereafter, for the public functionary i.e. Commissioner (Appeals) or the Tribunal to pass an order on such appeal and/or application. The decision on appeal and on application is not within the power and control of the assessee, but depends upon the acts of public functionary. The provisions of a Statute relate to performance of a public duty. The failure of the Appellate Authority to decide appeal and/or application would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty. In view of the said principle, we find that the Commissioner (Appeals) is discharging a public duty and that failure to decide an application for waiver of deposit would lead to serious injustice to the assessee; who has no control over the Commissioner (Appeals), who is entrusted with the duty to decide such application. Therefore, such provision is only directory.

44. The Circular is purportedly issued in terms of judgment in Krishna Sales (P) Ltd. case (supra). The said judgment lays down that mere filing of an appeal does not operate as stay or suspension of the order appealed against. But the Board over-looked the fact that the assessee is not seeking stay only on account of filing of an appeal, but for the reason that the assessee e has sought dispensing with the pre-deposit of duty demanded and penalty levied and has a right to demand decision on such application, the right which is created by the Statute. Therefore, the very basis of the Circular is untenable, misconceived, wholly illegal and arbitrary. Therefore, the condition of recovery, if no stay is granted within 30 days, is illegal, arbitrary unjustified and consequently set aside.

45. The Bombay High Court in Writ Petition No.380 of 2013 titled " Larsen & Toubro Ltd. Vs. Union of India & others" decided on 01.02.2013 has held to the following effect:

> "13. The decision of the Supreme Court and the situation which led to the decisions of the Delhi High Court and of this Court take due notice of the fact that the delay in the disposal off an appeal by an assessee or for that matter the delay in the disposal of a stay application may take place for reasons which lie outside the control of the assessee. Where the failure of the Appellate Authority to dispose of the appeal or the application for stay arises without any default on the part of the assessee, and without the assessee having resorted to any dilatory tactics, there would, in our view, be no reason or justification to penalize the assessee by recovering the demand in the meantime. Undoubtedly, where the assessee has been responsible for the delay in the disposal off the stay application, such an assessee cannot be heard to complain if the Revenue were to initiate steps for recovery. But the vice of the circular of the Board dated 1 January, 2013 is that it mandates that steps for recovery must be initiated thirty days after the filing of the appeal if no stay is granted. Counsel appearing on behalf of the Revenue submits that the Board has directed that a period of thirty days should be allowed to lapse after the filing of the appeal, allowing the assessee time to move the Appellate Authority for the disposal of the stay application. The reason why the submission cannot be accepted is because, in a situation where the Commissioner (Appeals) or, as the case may be, the CESTAT are unable to decide the application for stay within a period of thirty days of' the filing of' the appeal, it would be completely arbitrary to take recourse to coercive proceedings for the recovery of the demand until the application for stay is disposed of. Administrative reasons including the lack of adequate infrastructure, the unavailability of the officer concerned before whom the stay application has been filed, the absence of a Bench before the CESTAT for the decision of an application for stay or the sheer volume of work are some of the causes due to which applications for stay remain pending. In such a situation. where an assessee has done everything within his control by moving an application for stay and which remains pending because of the inability of the Commissioner (Appeals) or the CESTAT to dispose of the

application within thirty days, it would, to our mind, be a travesty of justice if recovery proceedings are allowed to be initiated in the meantime. The protection of the revenue has to be necessarily balanced with fairness to the assessee. That was why, even though a specific statutory provision came to be introduced by Parliament in Section 35C(2A) to the effect that an order of stay would stand vacated where the appeal before the Tribunal was not disposed of within 1 80 days, the Supreme Court held that this would not apply to a situation where the appeal had remained pending for reasons not attributable to the assessee.

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17. For these reasons, we have come to the conclusion that the provisions contained in the impugned circular dated 1 January, 2013 mandating the initiation of recovery proceedings thirty days after the filing of an appeal, if no stay is granted, cannot be applied to an assessee who has filed an application for stay, which has remained pending for reasons beyond the control of' the assessee. Where however, an application for stay has remained pending for more than a reasonable period, for reasons having a bearing on the default or the improper conduct of an assessee, recovery proceedings can well be initiated as explained in the earlier part of the judgment."

46. Therefore, we are of the opinion that right of consideration in appeal and on an application for waiver of pre-deposit, is a right conferred by the Statute and such right cannot be defeated on the basis of Circular. which contemplates that the recovery can be effected, is stay is not granted within 30 days. Therefore, such condition in the Circular is not legal and is therefore set aside with the observation that till such time, the application for waiver of pre-deposit is decided in an appeal filed in terms of the Statute, the Revenue shall not proceed to recover the same provided that the assessee does not delay the hearing of the appeal directly or indirectly. In the event, the assessee is delaying the decision, the Revenue shall be at liberty to move an application before the Commissioner (Appeals) to take the application for waiver of pre-deposit and seek orders thereon in accordance with law. If such an application is filed by the Revenue, the Commissioner (Appeals) shall decide the same expeditiously.

47. Thus, in respect of first question of law, it is held that direction to recover the duty demanded and penalty levied, if the stay was not granted within 30 days, contravenes the right of consideration of appeal and of an application for waiver of pre-deposit conferred under Section 35B read with Section 35F of the Act and is illegal. Such direction to the Administrative Officers to recover the amount pending consideration of application of waiver of pre-deposit is not justified and, thus, not enforceable in law.

48. Coming to the appeals filed or pending before the Tribunal, the right to appeal before the Tribunal is conferred under Section 35B of the Act. The Appellate Tribunal passes an order in terms of Section 35C of the Act. Sub-section (2A) contemplates that the 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. The second proviso inserted contemplates that if an order of stay is made in any proceedings relating to an appeal filed under sub section (1) of Section 35 B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order. The further proviso is if an 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.

49. The Bombay High Court in Nedumparambil P. George Vs. Union of India 2009 (242) ELT 523, where stay has been granted by the Tribunal, but the appeal could not be disposed of within the stipulated period for the reason not related to the appellant, observed as under:

> "8. Relying on the said judgment, the Court in the case of Narang overseas P. Ltd. Vs. Income tax Appellate Tribunal and others 2007 (295) ITR 22 (Bom) in respect of similar provision under the I.T. Act had applied the said ratio and observed that the power to grant interim relief is inherent and inheres in a tribunal vested with the power to finally hear an appeal. A provision like the second proviso must be read to mean that such a power not to continue a stay beyond 180 days, is in those circumstances where the failure is on account of the acts of the appellant. The appeal here could not be disposed of within 180 days. The said proviso cannot be read to defeat the vested right of appeal of an appellant when the appellant is not at fault. We adopt the reasoning given in Narang Overseas P. Ltd. (supra). In our opinion the case where the appellant is not at fault and the failure is on account of the tribunal

to hear the appeal for whatever reason or on account of the acts of the respondent, the law as explained in the judgment in Narang (supra) will have to be applied also under the provisions of the Customs Act."

50. A Division Bench of Andhra Pradesh High Court in Lanco Kondapalli Power Private ltd. Vs. Union of India 2009 (242) ELT 340, wherein relying upon the judgment of Delhi High Court in Delhi Acrylic Manufacturing Co. Ltd. Vs. Commissioner 2002 (144) ELT 24 (Del.) and of Rajasthan High Court in Shree Cement Ltd. Vs. Union of India 2001 (133) ELT 301 (Raj.), has held that invocation of Bank guarantee during the period of limitation available for filing an appeal or during the pendency of stay application. would mean to coercive measures prohibited by the Circular dated 25.05.2004.

51. Though the right of appeal is a creation of Statute and it can be exercised only subject to the conditions specified therein, but the conditions specified have to be in relation to the assessee as something which is required to be complied with by the assessee. But where the assessee has no control over the functioning of the Tribunal, then the provision of vacation of stay cannot be sustained.

52. The assessee having preferred appeal and that Tribunal being satisfied that condition for dispensing with the pre-deposit of duty demanded and penalty levied is made out, is compelled to pay the duty demanded and penalty levied, if the appeal is not decided within 180 days. The assessee has no control in respect of matters pending before the Tribunal; in the matter of availability of infrastructure; the members of the Tribunal and the workload. Therefore, for the reason that the Tribunal is not able to decide appeal within 1 80 days, the vacation of stay is a harsh and onerous and unreasonable condition. The condition of vacation of stay for the inability of the Tribunal to decide the appeal is burdening the assessee for no fault of his. Such a condition is onerous and renders the right of appeal as illusory. An order passed by a judicial forum is sought to be annulled for no fault of assessee. Therefore, in terms of judgments in Anant Mills Ltd. and Seth Nandlal cases (supra), such condition of automatic vacation of stay on the expiry of 180 days, has to be read down to mean that after 180 days the Revenue has a right to bring to the notice of the Tribunal the conduct of the assessee in delay or avoiding the decision of appeal, so as to warrant an order of vacation of stay. If the provision is not read down in the manner mentioned above such condition suffers from illegality rendering the right of appeal as redundant.

53. The Larger Bench in Ranjit Singh's case (supra) referred to Sunil Batra Vs. Delhi Administration & others AIR 1978 SC 1675 noticing the principle of reading down the provision so as to render it constitutional. The Larger Bench read down the provision of Section 13-B of the Punjab Village Common Lands (Regulation) Act, 1961 and held to the following effect:

> "24. Resultantly, by reading down the provision, it is held that Section 1 3B of the Act would be read down to incorporate within it the power in appellate authority to grant interim relief in an appropriate case where, the grounds so exist by passing a speaking order, even while normally insistence may be made on pre-deposit of' penalty. In adjudicating the whether in a particular case interim relief of stay of a portion or the entire penalty has to be granted, the appellate authority would have to give r-cons why it proposes to dispense with the normal procedure of insistence of pre-deposit. Consequently, this writ petition is allowed and the matter is remitted back to the appellate authority to consider the appeal in terms of the law set down above."

54. Consequently, the second proviso in sub-section (2A) of Section 35C is ordered to be read down to mean that after 180 days, the Revenue has a right to seek vacation of stay on proof of the fact that the assessee is the one, who is defaulted or taken steps to delay the ultimate decision.