

**STAY OF INCOME TAX DEMAND
UNDER INCOME TAX ACT**

By

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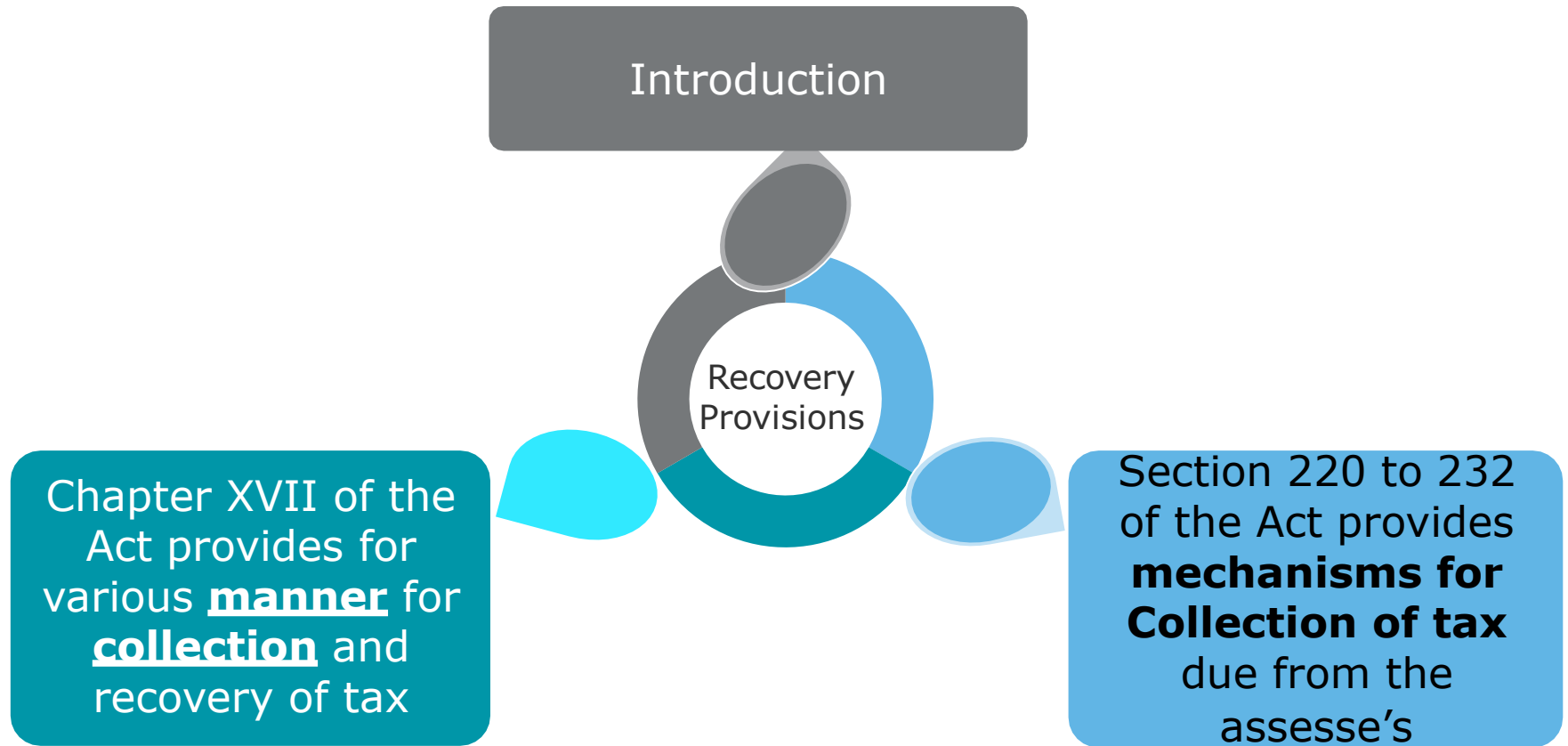
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Stay of Demand - Provisions

Relevant Provisions



Responsibilities of Revenue Authorities

Responsibilities of the AO

- The assessing officer is responsible for recovery of tax, whether the demand represents tax assessed by him or is the result of any order passed by the Appellate Authority or the Commissioner of Income Tax.

Role of Tax Recovery Officer (TRO)

- Where the assessee is in default in making the payment of tax, the **proceedings for recovery are carried out by the TRO**
- TRO have special powers for recovery of arrears of tax demand by way of causing
 - attachment and sale of the assessee's movable and or immovable property;
 - arrest the assessee and his detention in prison and
 - appointment of a receiver for management of the assessee's movable and immovable properties

Relevant Provisions - Section 220

Section 220(1)

- Any amount (otherwise than advance tax) specified as payable as per notice of demand u/s. 156 of the Act shall be paid within 30 days from the service of said notice

Section 220(2)

- If amount specified in notice of demand is not paid within 30 days, the assessee shall be liable to pay interest at the rate of 1% for every month or part of the month till the demand is paid

Section 220(2A)

- The CCIT or CIT may reduce or waive the amount of interest paid or payable if he is satisfied that:
 - i. Payment of interest has caused or would cause genuine hardship
 - ii. Default in payment was due to circumstances beyond the control of the assessee
 - iii. The assessee has co-operated in assessment and recovery proceedings

Section 220(3)

- The AO, on an application by the assessee before the expiry of date mentioned in the demand notice, **may extend** the time limit for payment of outstanding demand or allow installments, subject to such terms and conditions as he thinks fit

Relevant Provisions – Section 220

Section 220(4)

- If the amount is not paid within the time provided under section 220(1) or 220(3), the person mentioned in the demand notice shall be **deemed to be in default**

Section 220(5)

- If, in case of payments by installment is allowed, the assessee commits defaults in payment any one of the installments, within the time allowed, he shall be deemed to be in default as to whole of the amount then outstanding

Section 220(6)

- Where an appeal is pending before Ld. CIT(A) under section 246A, the AO, subject to such conditions as he thinks fit, **may treat** the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, till the appeal is disposed off

Section 220(7)

- Where an assessee has been assessed in respect of income arising outside India in a country which prohibits or restrict the remittance of money to India, the AO shall not treat the assessee as in default in respect of that part of tax which is due in respect of that amount of his income which by reason of such prohibition or restriction cannot be brought into India, until the prohibition or restriction is removed

Framework

It is the right of the assessee to make an application for stay if the appeal is filed under section 246A of the Act

If no appeal is filed and demand raised against the assessee is accepted but the assessee does not have means to make the full payment then also he has a right to make an application for stay of the demand and make out a case based on the facts.

(i.e. either for instalment or for stay upto certain period)

The obligation of the assessee is to make the payment within the stipulated time under section 220(1) of the Act or make an application for stay within the stipulated time under section 220(1) or make an application for stay within the stipulated time under section 220(3) of the Act.

The stay application u/s. 220(3) must be made before the amount stated in the notice of demand becomes due for payment.

No Automatic Stay - The Madras High Court in **Paulsons Litho Works 208 ITR 676, (Mad)** has observed that mere filing or pendency of an appeal does not constitute an automatic stay of the order under challenge or recovery of the tax or penalty under dispute in such appeal. This is so because the mere fact that an order is subject matter of appeal can furnish no ground for not following it unless its operation is suspended by a competent court

Stay of Demand – Macro level Initiative

Sr. No.	Date	Particulars	Remarks
1.	30 Mar 2015	PM Narendra Modi's statement in an article in Indian Express	In a meeting with Revenue Secretary and CBDT chairman, PM had expressed dissatisfaction about delays in responding to public grievances , in response to this CBDT had set deadlines for resolving public grievances and any breach of the timeline will be viewed seriously and accountability will be required to be fixed for such failure.
2.	30 Mar 2015	CBDT statement after PM's direction, Business Standard article	The CBDT has directed the IT department for speedy resolving the public grievances , within the stipulated time frame.
3.	25 May 2015	FM Arun Jaitley address in 31 st Annual Conference of Pr. Commissioners	FM said the senior officers of the Income Tax Department to be prompt in redressing in the grievances of the tax payer , expand the tax base in a non-intrusive manner even as they strive to achieve the revenue generation targets.

Stay of Demand – Recent CBDT Notifications/Circulars/Press releases

Sr. No.	Date	Particulars	Remarks
1.	7 Nov 2014	Press Release by CBDT	In its endeavour towards a non-adversarial tax regime, CBDT had issued instructions to its field officers dated 7 November 2014, wherein instructions dealing with recovery/stay of demand and grant of instalments has been reiterated to ensure that no coercive action is undertaken without disposal of application of stay.
2.	29 Feb 2016	Office Memorandum by CBDT	CBDT has put in new rules for granting of stay. With payment of 15% of the tax demand the AO shall grant stay to the Assessee or in certain cases if he deems fit he may increase or decrease the payment of 15%.Also the application should be disposed off within 2 weeks and if reference is made to Pr CIT/CIT then same should be disposed with 2 weeks from the reference.

Stay of Demand – Recent CBDT Notifications/Circulars/Press

Sr. No.	Date	Particulars	Remarks
3.	3 Mar 2016	Press Release by CBDT	It confirms the issue of revised guidelines for stay of demand at the first appeal stage: 1. With payment of 15% of the Tax Demand, the AO shall grant stay to the assessee or in certain cases if he deems fit, he may increase or decrease the payment of 15% 2. Also, the application should be disposed off within 2 weeks and if reference is made to Pr CIT/CIT then same should be disposed within 2 weeks from the reference
4.	31 July 2017	CBDT Notification	CBDT hikes standard rate of disputed tax payment to 20% to get stay of demand from AO
5.	The Hon'ble SC has recently on 20 July 2018 clarifies that Commissioner is not bound by administrative circulars issued by the CBDT – can grant stay of demand on payment of an amount less than 20% (Civil Appeal No. 6850 of 2018 – PCIT vs LG Electronics India Pvt Ltd)		
6.	The Hon'ble Bombay HC has recently on 11 Sept 2018 held that - S. 220(6)/ 246: The AO is not justified in insisting on payment of 20% of the demand based on CBDT's instruction dated 29.02.2016 during pendency of appeal before the CIT(A). <i>This approach may defeat & frustrate the right of the assessee to seek protection against collection and recovery pending appeal. Such can never be the mandate of law W.P. No. 2157 of 2018 and 2160 of 2018</i>		

Stay of Demand – Before AO

Stay Proceedings before AO

Power of the Assessing Officer to Stay Demand

Issues	Remarks
When can a stay be granted by AO	As per the provisions of section 220(6) of the Act, stay of demand can be granted by the AO, only when the assessee has preferred an appeal before the CIT(A). The AO's power and discretion to keep the demand in abeyance till the disposal of the appeal are exercisable only until the appeal is disposed of by the CIT(A). The powers are generally terminated once the CIT(A) disposes of the appeal. (What will be the position pursuant to DRP Directions?)
When a rectification application under section 154 of the Act is pending before the AO, can the AO recover the tax in dispute?	• If an application under section 154 or a revision petition under section 264 is made, the AO cannot act under section 220(6) of the Act and grant a stay. • However, the Hon'ble Allahabad High Court in case of Sultan Leather Finishers Pvt Ltd (191 ITR 179) (All) has taken a view that no recovery proceedings are possible during the pendency of rectification application filed under section 154 of the Act.
Is it possible to prefer an appeal against the stay rejection order passed by the AO?	There is no provision in the Act in relation to assessee's right of appeal where the Assessing Officer refuses to grant a stay. However, the courts in the following cases have held that in such cases, an application for stay of demand could be made before the CIT(A): • Mohammed Kunhi (1969) 71 ITR 815 (SC) • Keshav Cashew Co v DCIT 210 ITR 1014 (Ker) Further, the assessee can also approach the High Court under Article 226 of the Constitution by filing a writ petition for redressal of grievance

Framework – Discretionary power of AO

Any tax, interest, penalty or fine or any other sum payable by virtue of an order passed under the Income Tax Act as specified in the Notice of Demand issued u/s 156 of the Act has to be paid within 30 days of the service of the notice.

Section 220(4), 220(2) and 221(1)

As per section sec. 220(4) of the Act, on failure to pay the dues within time, the assessee is deemed to be **"an assessee in default"**. The assessee in default is not only liable to pay interest as per sec. 220(2) but may also be subjected to penalty u/s 221(1) to the extent of the amount of tax in arrears.



Section 220(6)

However, discretion has been provided to the assessing officer by sec. 220(6) for not treating the assessee in default provided an appeal has been preferred before the CIT(A).

But before exercising such **discretion** in favour of the assessee he is empowered to impose such conditions as he may think fit to impose in the circumstances of the case.

Court decisions and the propositions laid down therein – Discretionary power



Decision and Propositions

1. Supreme Court is **Aeltemesh Rein vs. Union of India, AIR 1988 SC 1768**
 - has stated that every discretionary power vested even in the executive should be exercised in a just, reasonable and fair way.
2. **Ladhuram Tapuria's case (1951) 20 ITR 51(Cal); Aluminium Corporation of India's case (1959) 37 ITR 267 (Cal) and Vetcha Sreeramamurthy's case (1956) 30 ITR 252 (A.P.)**
 - Coming specifically to the discretionary power conferred by section 220(6) on the Assessing officer, courts have held that such discretion is coupled with duty and if does not exercise it when the occasion called for it or if he exercises it in such a manner that it is not exercise of section discretion at all, he can be compelled to discharge his duties.

Stay Proceedings before AO

How the discretion has to be exercised by the Tax Authorities ?

The Assessing Officer must consider the observation of the Bombay High Court in the case of **KEC International Ltd. 251 ITR 158(160)**. The Hon'ble High Court has given guidelines to the Income tax authorities which should be kept in mind while deciding the stay application which are as under:

While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

In case where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order

Remedy where discretion is not exercised judiciously

Where the Assessing Officer refuses to exercise his discretion or exercises it in a capricious or arbitrary manner or by taking into consideration irrelevant or extraneous considerations, the option before an assessee is to file a writ petition under Article 226 before the jurisdictional High Court.

Dunlop India Ltd vs. ACIT 183 ITR 532

The Division Bench of the Calcutta High Court found that while using discretion for the purposes of section 220(6), the office concerned had not appropriately dealt with or taken into consideration all the relevant factors which were necessary to be dealt with and considered. The Court, therefore, sent back the matter to the officer concerned for reconsideration and for giving due and proper reasons.



However, in **India Foils Ltd. vs. IAC (1990) 186 ITR 429 (Cal.)** the Calcutta High Court dismissed the writ petition because application for stay of tax was rejected by the A.O. by giving proper reasons and there was no perversity in the order.

It may, however be noted that High Court, as a rule, in proceedings under Article 226, does not grant any stay of recovery of tax except under very exceptional circumstances.

Principles/Guidelines prescribed by Bombay High Court in case of UTI Mutual Fund (345 ITR 71) (Bom)

No recovery of tax should be made pending:-

- Expiry of the time limit for filing an appeal;
 - Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.
-

The stay application, if any, moved by the assessee should be disposed of, after hearing the assessee and keeping in mind the guidelines in KEC International Ltd. v. B.R. Balakrishnan (2001) 251 ITR 158 (Bom)

If the AO has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay.

AO's power to curtail the period of payment of 30 days

Though proviso to section 220(1) empowers AO to grant period shorter than 30 days in Notice of Demand for making payment, AO cannot curtail the period of 30 days without valid reasons recorded in writing - **M. Redanna v. Revenue Divisional Officer (1980) 46 STC (232) (FB) (AP) (High Court)**

In **Mahindra and Mahindra Ltd. v. Assessing Officer (2007) 295 ITR 43 (Bom) (High Court)**, the court held that, no coercive action should be taken till the expiry of the appeal period against the said order is over. Therefore the Assessing Officer is duty bound to wait for the expiry of time period of appeal before proceeding to recover the tax due. Contempt of court proceedings initiated against AO and Jt.CIT.

No coercive action/recovery during pending of Stay Application before ITAT

- Mahindra & Mahindra (59 ELT 505) (Bom)
- Maruti Udyog Ltd. vs Addl. CIT (264 ITR 487) (Del HC)
- Western Agencies Ltd v. ACIT (86 ITD 462) (Mad)
- RPG Enterprises Ltd. (251 ITR 20) (Mum)
- Tata Communications Ltd. vs ACIT (138 TTJ 257) (Mum)
- MSEB vs. Joint CIT (81 ITD 299) (Mum)

AO's power to curtail the period of payment of 30 days

Section 220(1) proviso to reduce period of payment of tax to be exercised after application of mind and recording reasons – Firoz Tin Factory (71 DTR 185) (Bom)

The assessing Officer has passed an order under section 143(3) on 9/3/2012 raising huge demand and directed the assessee to pay the entire demand within 7 days even though the period specified in 220(1) is 30 days.

The assessee filed a stay application u/s 220(3) on 12/3/2012 which was rejected on the ground that it did not fall within the guidelines framed in the CBDT's instruction No. 1914

The CIT also rejected stay application, Assessee filed Writ Petition where court observed that the proviso to s. 220(1) which empowers the AO to demand payment within a period lesser than 30 days with the prior approval of the JCIT cannot be exercised casually and without due application of mind.

The AO & JCIT must apply their mind on how it would be detrimental to the interests of the Revenue to allow the full period of 30 days and record reasons. The reasons & approval must be made available to the assessee if he seeks them.

Merely because the end of the financial year is approaching that cannot constitute a detriment to the Revenue. The detriment to the Revenue must be akin to a situation where the demand of the Revenue is liable to be defeated by an abuse of process by the assessee. There is absolutely no justification for the AO to demand payment in 7 days and his action is highhanded and contrary to law.

Valid Service of Notice under section 156

Mohan Wahi v. CIT(2001) 248 ITR 799(SC)

The court held that valid service of notice is mandatory; in case of failure to serve the notice, recovery proceedings are held to be not valid. Service of demand notice constitutes foundation for subsequent proceedings.

Demand Notice not received by assessee, recovery proceeding held to be not valid.

CIT v. Sattandas Mohandas Sidhi (1982) 230 ITR 591 (MP) (High Court)

It was held that, it is mandatory that notice must be served only in the manner provided in section 282 of the Income Tax Act, hence notice by telegram could not be said to be a substitute for notice by post. However, now even **Electronic mode** is prescribed **u/s 282(2)** as acceptable mode of communication of notice. At the relevant time only service by post or by way of summons issued by court under CPC were available.

CIT v. Malchand Surana (1958) 28 ITR 684 (Cal.) (High Court)

General Clauses Act, 1897, Section 27 deals with meaning of service by post. If it is sent by registered post and acknowledgement is produced the presumption is that it is a proper service.

Stay of Demand

- **Stay Proceedings before ITAT**
- Procedure for Stay Petition – Rule 35A of the ITAT Rules 1963
- ► Every Stay Application shall be presented in Triplicate
- ► Application to set forth concisely the following:-
- ► Short Facts
- ► Results of Appeal
- ► Tax, interest, penalty etc. demanded, amount undisputed therefrom and amount outstanding
- ► Date of Filing Appeal
- ► Result of any Stay Application to the lower Revenue Authorities
- ► Reasons for seeking stay
- ► Whether Applicant is prepared to offer security, and if so, in what form
- ► Clear and Concise prayers
- ► Affidavit
- ► An application which does not confirm with the above, liable to be summarily rejected

Stay of Demand

- **Documents to be accompanied when filing Stay Petition to Hon'ble Tribunal**

- ► Covering Letter
- ► Stay Application
- ► Correspondences before lower authorities
- ► Documents highlighting financial position
- ► Any other relevant documents for stay
- ► Duly notarised affidavit on Stamp Paper of Rs. 500
- ► Challan of Rs. 500

- **Stay on Protective assessment**

- **Any Recovery** in pursuance of such protective assessment is not permitted. However order of protective attachment can be made.
- ► Sunil Kumar v. CIT (1983) 139 ITR 880 (Bom) (High Court)
- ► Lalji Haridas v. ITO (1961) 43 ITR 387 (SC)
- ► Jagannath Bawri v. CIT (1998) 234 ITR 464 (Gau)(High Court)
- ► Jagannath Hanumanbux v. ITO (1957) 31 ITR 603 (Cal) (High Court)
- ► R. Rajbabu v. TRO (2004) 270 ITR 256 (Mad) (High Court)
-

Stay of Demand

- **Consequences of being Assessee in Default**
 - ► Charge of mandatory interest under section 220(2). At present it is 1% p.m. or part of a month
 - ► Penalty under section 221 of the Act
 - ► Attachment / auction of moveable / immovable properties
 - ► Prosecution / arrest / detention
 -
- **Stay of Demand : Section 220(3), 220(4)**
 - ► Reply of assessee to keep the demand in abeyance
 - ► An application for stay of disputed demand must be made before the Assessing Officer before the expiry of time prescribed in notice of demand
 - ► Reply should be with reasons stating how the assessee is entitled for stay of recovery, how addition made was not proper, financial difficulties etc.
 - ► The assessee must request for stay of recovery till the appeal is disposed. If the issue is covered by jurisdictional High or Apex Court, refer the case laws.
 - ► Assessee may also refer the financial difficulties faced by the assessee. How the assessee is complying with the guidelines laid down by the courts may also be demonstrated. This will help the assessee, when they approach for stay of recovery before Commissioner or High Court.
 - ► One may also request that if the Assessing Officer decides to proceed further one more opportunity of personal hearing may be given.

Stay of Demand – Before CIT(A)

Stay Proceedings before CIT(A)

Powers of the CIT(A) to grant stay of demand

Issues	Remarks
Is it necessary to approach the AO before the CIT(A)	- Based on certain judicial precedents like Tin Manufacturing Co of India (212 ITR 451) (All) and Kesav Cashew Co (210 ITR 1014) (Ker) , it is possible to contend that the assessee need not approach the AO before applying to CIT(A) for stay of recovery of tax. - However, practically it is advisable to approach the AO before filing a stay petition with the CIT(A). In case the AO rejects the stay petition, then an assessee may approach the CIT(A).
When an appeal is pending before the CIT(A), does he have the power to stay demand?	- The CIT(A) is empowered to stay the recovery of tax against an application filed by the assessee. - The assessee has to first file the appeal before filing the stay application. It is his discretion either to stay the recovery proceedings or to reject the same, depending upon the facts and circumstances of each case. - The power of the appellate authority to stay the recovery of the demand of dues which are the subject matter of appeal pending before him is independent of the provisions of sub-section(6) of section 220 of the Act.

CIT(A)'s power to grant stay

Though the statute has not conferred specific power to grant stay to the Commissioner of Income Tax (Appeals), courts have held that in view of the propositions laid down by the Supreme Court in **ITO vs. M.K. Mohammed Kunhi (1969) 71 ITR 815**, the first appellate authority has power to grant stay, which is incidental and ancillary to its appellate jurisdiction.



Decision and Propositions

- 1. Tin Mfg. Co. of India vs. CIT (1995) 212 ITR 451 (All.) Bongaigon Refinery & Petrochemicals Ltd. vs. CIT(1999) 239 ITR 871 (Gauhati)**
For invoking the power of CIT(A) to grant stay of demand, it is not necessary that the assessee should first approach the Assessing Officer under section 220(6) or that the A.O. should reject the assessee's prayer for stay.
- 2. Pradeep Ratanshi vs. Asst. CIT (1996) 221 ITR 502 (Ker.)**
The recovery proceedings initiated against the assessee shall remain stayed till the disposal of stay petition filed by him.
- 3. Paulsons Litho Works vs. ITO (1994) 208 ITR 676 (Mad.)**
Mere filing/ pendency of an appeal does not constitute an automatic stay.

Stay of Demand – Before ITAT

Stay proceedings before ITAT – Powers of Tribunal to grant stay of demand

Assessee can approach to stay the recovery only when a valid appeal is pending before the Tribunal.

Power of the Tribunal to grant stay of recovery is toward tax, interest and even penalty. The same has been held by High Courts in cases of Bhoja Reddy (231 ITR 47) (AP) and Shiv Shakti Rubber & Chemical Works (213 ITR 299) (All)

Stay application maintainable despite non filing of stay application before lower authorities- DHL Express (India) Pvt. Ltd. (140 TTJ 38) (Mum) and Honeywell Automation India Ltd (138 TTJ 373) (Pune)

Power to grant stay by the ITAT is laid down under the first, second and third proviso to sub-section (2A) of s. 254 of the Income-tax Act, 1961. Under first proviso, the ITAT can grant stay upto 180 days subject to the disposal of appeal within that period.

If the ITAT is not able to dispose off the appeal under first proviso, the stay can be extended upto 365 days subject to the condition that appeal shall be disposed within the extended period.

If for any reason, ITAT is not able to dispose off the appeal within 365 days, the order of the stay shall stand vacated even if the delay in disposing the appeal is not attributable to the assessee.

Penalty proceedings can be stayed to await decision on quantum appeal so as to avoid multiplicity of proceedings & harassment to assessee :

- Wander Pvt Ltd (358 ITR 408) (Bom)
 - GE India Industrial Pvt Ltd (148 ITD 70) (Ahd)
-

Stay proceedings before ITAT

Section 220: Collection and recovery – assessee deemed in default-stay of recovery adjustment of refund against current demand – ITAT has power to stay recovery and not permit adjustment of refund (section 245)

- If the appeal before the Tribunal is against order of the Commissioner under section 263 which is pending and the Assessing Officer is proposing to pass an order in pursuance of an order under section 263, the Tribunal can stay the assessment proceeding. ITO vs. Khalid Khan (1997) 110 ITR 79 (A)(High Court), Puranmal v. ITO (1975) 98 ITR 39 (Pat. High Court), Ritz Ltd. v. Vyas (1990) 185 ITR 311 (Bom) (High Court).
 - Failure to fulfill conditions attached to a stay order, the stay automatically get vacated. This is because in such a case, what is granted is only a conditional stay, that is, subject to fulfillment of the conditions. The Tribunal, in such a case, may refuse to stay, or extend the stay of the recovery proceedings upon non fulfillment of the conditions imposed by it.
-

Whether stay of demand can be granted if appeal before Tribunal pertains to section 263 and 143(3) read with 263 proceedings is pending before CIT(A) ?

- Sudershan Prasad Bajaria (ITA No. 121/Kol/2016) dated 1 June 2016
- Narendra Kumar Mehta (SP No. 31/Kol/2013) dated 24 August 2013

Stay proceedings before ITAT

Various Courts have taken different views on the power of Tribunal to Grant Stay beyond period of 365 days

Favourable Judgements

- M/s Sap Labs India Pvt Ltd (SP No. 58/Bang/2014) dated 8 January 2016
 - Vodafone Essar Gujrat Ltd (93 CCH 96) (Guj)
 - Pepsi Foods Pvt Ltd (376 ITR 87) (Del HC)
 - M/s Tata Teleservices (Maharashtra) Ltd (WP No. 3437 of 2015) (Bom)
 - Ronuk Industries Ltd (333 ITR 99 (Bombay HC)
 - Commissioner v. SIBDI (Gujarat High Court dated 09/07/2014)
 - Tata Communications Ltd. vs ACIT (2011) 130 ITD 19 (SB) (Mum)
 - Van Oord India Pvt Ltd (S A No. 156/Mum/2014) (Arising out of ITA No.6960/Mum/2012) dated 30 May 2014 (Mumbai Tribunal)
 - Skoda Auto India Private Ltd (S.A. No.79/PN/2014 Arising out of ITA No.2344/PN/2012) dated 18 July 2014 (Pune Tribunal)
 - LG Electronics India Pvt. Ltd (WRIT TAX No. - 420 of 2014) dated 7 July 2014 (Allahabad HC)
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Against Judgements

- Ecom Gill Coffee Trading Pvt. Ltd (252 CTR (Kar) 281) (Karnataka High Court)
- CCE v. Kumar Cotton Mills 180 ELT 434 (SC)
- M/s Maruti Suzuki (India) Limited (Writ Petition (Civil) No 5086/2013) (Delhi HC) dated 21 February 2014
- Seacor Offshore Dubai LLC (Income Tax Appeal No. 31 & 32 of 2013) dated 20 March 2014 (Uttarakhand HC)

Stay Proceedings before ITAT

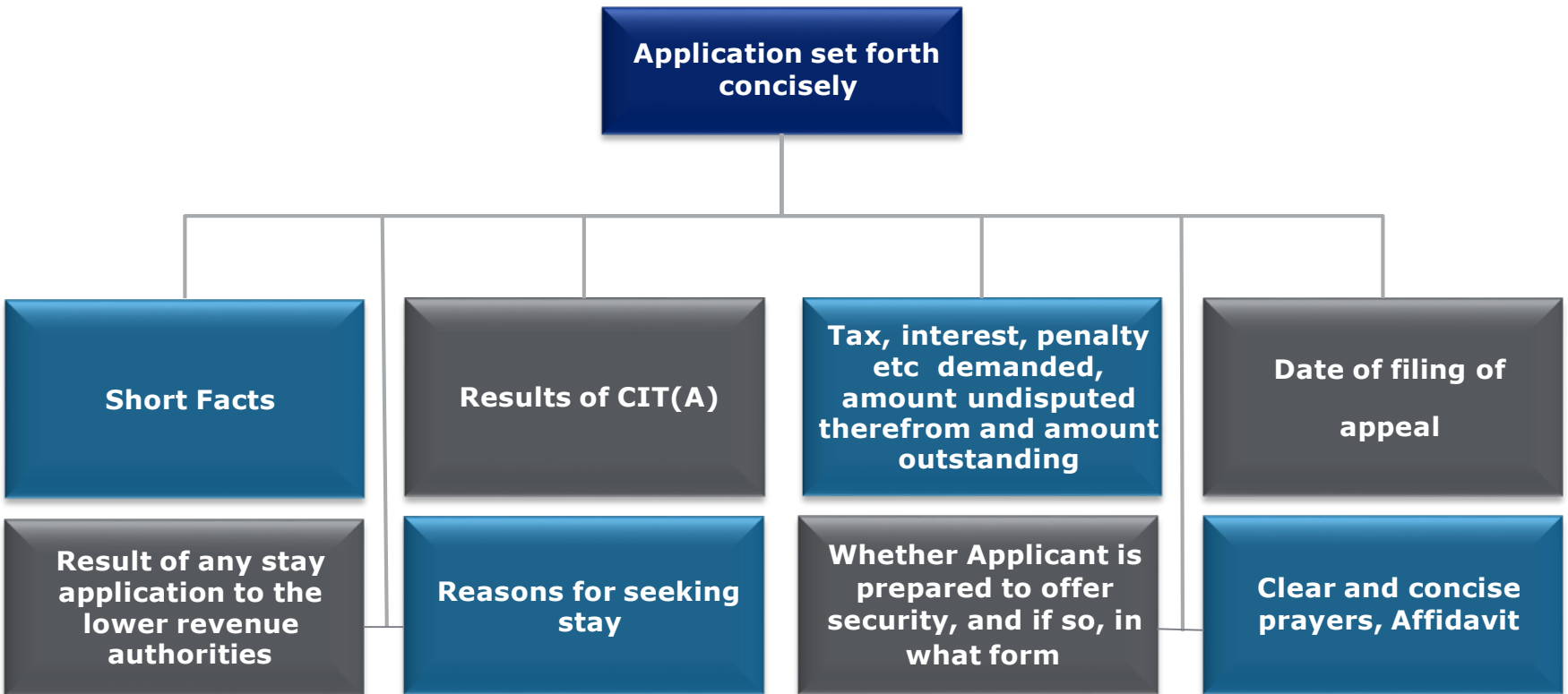
Like in CIT(A)'s case, no specific power has been conferred upon the Income Tax Appellate Tribunal to grant stay of recovery proceedings but the Apex Court in **M. K. Mohammed Kunhi's (71 ITR 815)** case has held that section 254 confers powers of the widest amplitude upon the Appellate Tribunal and by implication it has power to pass orders for staying recovery proceedings pending an appeal before it. But Tribunal should grant stay only when a strong prima facie case is made out and not in a routine way.

Procedure: Procedure for filing stay petition before the ITAT has been laid down by Rule 35A of the Appellate Tribunal Rules. Every application of stay is to be presented in triplicate to the Registrar/ Asst. Registrar of the Tribunal and should be accompanied with the following documents:

- Covering letter
- Stay Application
- Correspondences before lower authorities
- Documents highlighting financial position
- Any other relevant documents for stay
- Duly notarized affidavit on Stamp Paper of Rs.500
- Challan of Rs.500

Procedure for stay petition – Rule 35A of the ITAT Rules 1963

Every Stay Application shall be presented in Triplicate



An application which does not confirm with the above, liable to be summarily rejected

CBDT's Instruction No. 96 (F.No. 1/6/69-ITCC) dated 21 August 1969

Where the income determined on assessment was substantially higher than the returned income, say, twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeals, provided there were no lapse on the part of the assessee

Instruction Followed in the following cases:-

- M.G.M. Transports (Madras) (P) Ltd. vs. ITO & Anr. (303 ITR 15) (MP)
- Jain Cycle Spares and Co. vs. CIT (267 ITR 60) (MP)
- Soul vs. DCIT (323 ITR 305) (Del HC)

Circular No. 530 dated 6 March 1989, Circular No. 589 dated 16 January 1991

The Board has clarified that the AO will exercise his discretion u/s 220(6) where demand:

- arises because AO had adopted an interpretation of law in respect of which, there exist conflicting decisions of one or more High Courts or, the High Court has adopted a contrary interpretation but the Department has not accepted that judgment, or
- relates to issue that have been decided in favour of the assessee in an earlier order by an appellate authority or Court in assessee's own case.

CBDT's Instruction No. 1914 dated 2 December 1993

The Board has provided the following illustrative situations where a stay of demand could be granted:

- If the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier;
 - If the demand in dispute has arisen because the AO had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts;
 - If the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgement
-

- The instruction also specifically reiterates that the aforesaid illustrations are, of course, **not exhaustive**
-

- The said instruction also clarifies that the AO should consider all relevant factors having bearing on the demand raised and communicates his decision in the form of a speaking order

Game Changing CBDT Instruction dated 29 February 2016 and 31 July 2017

Modifies previous instruction no. 1914 dated 21 March 1996 to lay down guidelines for stay of demand pending appeal before CIT(A)

Cases where outstanding demand disputed, AO to grant stay of demand till disposal of appeal by CIT(A) on payment of 15% of disputed demand, lays down exceptions

Illustrates that where addition on same issue confirmed by appellate authorities in earlier years or by SC or HC in favour of Revenue or where such addition based on credible evidence collected in search or survey, AO can refer matter to Pr CIT/CIT if AO feels that payment of lump sum amount higher than 15% is warranted.

CBDT modifies guidelines for stay of demand by the AO vide memorandum dated 31 July 2017 amending the earlier OM dated 29 February 2016, pursuant to which the AO is empowered to grant a stay of the outstanding demand till the disposal of the appeal by the CIT(A) on payment of 20% of the disputed demand replacing the earlier payments of 15% of the disputed demand.

Where addition on same issue deleted by appellate authorities in earlier years or SC or HC decided issue in favour of assessee. AO can refer matter to CIT if it feels that payment of lump sum lower than 15% is warranted

CIT to hold power of review, all appeal, review and reference to be decided within 2 weeks, AO empowered to impose conditions

In a case where stay of demand is granted by the assessing officer on payment of 20% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/CIT for a review of the decision of the assessing officer.

Format to file stay of demand

To

Sir,

Sub: Stay of Demand – AY _____

- In respect of the aforesaid assessment year, the assessee had returned an income of Rs._____. In assessment, the income was assessed at Rs._____. The main additions were as under: -
- The assessee has filed an appeal before the CIT (A)_____, New Delhi against the order of the Assessing Officer. Copy of the appeal along with the grounds taken is enclosed for your kind consideration.
- It is submitted that on merits the additions made by the Assessing Officer are not sustainable in law and on facts. The brief reasons for such an assertion are given as under: -
- Your kind attention is invited to the judgment of the Hon'ble Delhi High Court in the case of Soul....wherein while interpreting the Instruction No. 1914 of 1993 dated 02.12.1993 it has been held that disputed demands should be held in abeyance when the assessed income **is say twice the returned income** or more.

Format to file stay of demand

- From the discussion as regards the merits of the case, your goodself will observe that there is a **dispute about the interpretation of law** in respect of grounds no. _____, _____ and _____. The _____ High Court is squarely on the issue in dispute and is in favour of the assessee. Besides, the ground nos. _____, _____ and _____ have been decided in favour of assessee in an earlier order by the learned CIT (A) _____ ITAT. The Hon'ble CBDT vide Instruction No. 1914 of 1993 dated 02.12.1993 have opined that the demand may be stayed if the dispute is about interpretation of law or where the issue in earlier order is decided in favour of the assessee. The ground mentioned above is squarely covered by the Circular of the Hon'ble CBDT and it is prayed that in respect of the demand arising on account of the said grounds stay may be granted.
- Your goodself will also appreciate that the assessee is **under going acute financial problems**. The business has virtually come to a stand still, the banks are overdrawn, debts are increasing becoming doubtful and the fixed expenses are proving burden some. Under these circumstances, recovery of demand will spell ruin for the assessee. Even otherwise, it would be in the interest of justice that the Department should grant at **least one opportunity to contest** the additions made by the assessee before the first Appellate Authority before any recovery is affected.

Format to file stay of demand

- The Hon'ble CBDT vide their Instruction No. 1914 of 1993 dated 02.12.1993 has directed that the Assessing Officer, while considering the situation for treating the assessee to be not in default to would consider all relevant factors having a bearing of a demand raised and communicate his decision to the assessee in the form of a speaking order.
- In view of the aforesaid submissions, it is prayed that the demand raised in assessment be kept in abeyance till the disposal of appeal by the first Appellate Authority namely CIT (A)_____.
- For this act of kindness the appellant shall ever remain grateful.

Stay of Demand – Case Laws

Stay of Demand – Micro level

Sr. No.	Judgement	Held
1.	UTI Mutual Fund (WP No. 523/2013) dated 6 March 2013	High Court expressed serious disapproval of the manner in which the Revenue has sought to brush aside a binding decision of the Court in the case of the assessee on the issue of stay on enforcement for the previous year
2.	Johnson & Johnson Ltd (ITA No. 829/M/2014) dated 21 March 2014 (Mum) & (TS-665-ITAT-2014(Mum))	Adjusting of the refund amount due to assessee against the demand is not valid when the Tribunal has granted a stay and the matter is pending for disposal, even though no objection is raised by the assessee. ITAT slams AO for collecting additional taxes contrary to ITAT's stay order with specific directions; AO followed innovative method of tax collection by obtaining consent letter from assessee
3.	Society of the Franciscan (Hospitaller) Sisters (WP No. 155/2013) dated 23 January 2013 (Bom)	Stay Applications are not a "Meaningless Formality". No recovery during pendency of a stay application. Section 226(3) notice must ordinarily be pre-served on assessee
4.	L'oreal India Pvt Ltd (SP No. 333/Mum/2016) dated 14 October 2016	Mere issuance of notices u/s 143(2) for subsequent year will not tantamount to creation of demand against the assessee, unless and until assessment orders for the said assessment years are passed and demand is crystallized.

Stay of Demand – Case Laws

Sr. No.	Judgement	Held
5.	Andrew Telecommunications India Pvt Ltd (WP 1021/2016) dated 13 December 2016	Bombay HC has set aside CIT's order refusing to grant stay of demand to assessee while the CIT(A) proceedings were pending. Hon'ble HC observed that in view of O.M dated Feb 29, 2016, AO is obliged to grant stay on payment of 15% of disputed amount where outstanding demand is disputed before the CIT(A); Further, HC noted that AO can adjust the refund to the extent of demand required for granting stay; Accordingly, HC granted interim stay of demand pending appeal disposal by CIT(A) subject to a condition that 15% of disputed demand is adjusted against the refund due.
6.	Maharashtra Airport Development Co Ltd(TS-733-HC-2015(BOM))	Stays demand till disposal of appeal by CIT(A), rejects Revenue's no financial-hardship plea. HC allows assessee's writ, quashes CIT(A)'s order refusing to stay balance 50% demand, directs revenue to abstain from coercive proceedings till CIT(A) disposes assessee's appeal; assessee sought stay balance demand
7.	N Jegatheesan(TS-727-HC-2015(MAD))	Stays demand arising from "high-pitched" assessment; CBDT instruction 95/1969 still binding HC allows assessee's writ, quashes ao's order u/s 220 directing assessee (an individual) to pay 50% of outstanding demand for AY 2012-13; assessee had contended that since it was a case of high pitched assessment

Stay of Demand – Micro level

Sr. No.	Judgement	Held
8.	Jindal Steel & Power Ltd(TS-679-HC-2015(P & H))	Tribunals not empowered to stay 'prosecution', rejects assessee's expansive section 254 interpretation HC allows revenue's writ, sets aside its order, rules that tribunal not empowered to grant stay against launch of prosecution proceedings u/s 276C(1); rejects assessee's stand that since quantum/penalty appeals pending before it
9.	Panasonic India Pvt Ltd (TS-90-HC-2015(MAD))	HC sets aside coercive recovery of 100% demand; Revenue efforts misguided Orders for release of 100% of demand coercively recovered since Revenue acted in haste as the stay of demand application was sub judice before the CIT(A) upon an earlier direction of the HC
10.	Volvo Cummins Ltd v. DCIT (2008) 217 CTR (Del) 292	Addl. CIT having exercised the power of the AO, the application u/s 220(6) filed by the assessee was required to be dealt with only by the Addl. CIT himself and the matter could not be left to the DCIT, though he had concurrent jurisdiction, assessee is entitled to an absolute stay of demand on the basis of Instruction No. 96, dtd. 21st Aug., 1969 as its assessed income is almost 8 times the returned income; writ petition is allowed with costs of Rs. 15,000/-
11	Soul v DCIT (2008) 220 CTR (Del) 211	Assessment at a figure of 74 times the returned income being unreasonably high pitched, garnishee proceedings stayed in view of CBDT Instruction No. 96, dtd. 21st Aug., 1969 r/w Instruction No. 1914 dt. 2nd Dec. 1993.

Stay of Demand – Micro level

Sr. No.	Judgement	Held
12	Subhash Chander Sehgal v. DCIT (2008) 216 CTR (Del) 139	In view of the fact that the assessed income of Petitioner is almost 150 times the returned income and appeal is pending there against before the CIT(A) for more than a year, direction is issued in terms of CBDT Instruction No. 96, dtd. 21st Aug., 1969 to the effect that no recovery is to be made nor any coercive steps are to be taken for enforcing the demand till further orders.
13	JCT Ltd 258 ITR 291 Del	Four factors relevant-a) whether there is a prima facie case in favour of the assessee ; (b) the balance of convenience qua deposit or otherwise ; (c) irreparable loss, if any, to be caused in case stay is not granted ; and (d) safeguarding of public interest
14	M.G.M. Transport (Madras) (P) Ltd v. ITO (2007 209 CTR (Mad) 90	As against tax payable by the assessee at Rs. 3,47,829/-, AO having raised a demand of Rs. 1,40,25,762 CBDT Instruction No. 96, dtd. 21st Aug., 1969 was attracted and AO could not reject stay Petition by merely observing that no valid reason was shown for stay, demand stayed till disposal of appeal subject to payment of Rs. 20 lacs.
15	Maharashtra housing & Area Development Authority .v. ADIT [2014] 361 ITR 469 (Bombay)	Action of revenue in attaching bank account and withdrawing money from bank to recover dues, before expiry of time limit for filing appeal before ITAT was against elementary principles of rule of law; revenue was directed to refund amount to assessee.

Stay of Demand – Micro level

Sr. No.	Judgement	Held
16	Vignahar Sahakari Sakhar Karkhana Ltd. .v. ITO (2013) 219 Taxman 116(Mag.) (Bom.)(HC)	Rejection merely stating that no prima face case was made out held to be not proper Issue: Adjustment of refunds against disputed demand Decision: Stay of recovery of demand could be granted to the taxpayer subject to payment of 15% of the amount demanded after adjusting it from refund of previous year
17	Flipkart India (P) Ltd. v/s. ACIT [2017] 79 taxmann.com 159	Karnataka High Court has held that arguments, if any, made on genuine hardship have to be considered / addressed before directing the tax payer to deposit 15% of the demand
18	Bongaigaon Refinery 256 ITR 698 Gau.	Demand not to be pressed during the period of pendency of application before the Tribunal
19	The Kerala High Court has held in the case of Gajanana Agencies v. ITO (1994) 210 ITR 865 (Ker.) that section 220(6) confers power of the assessing authority to keep the Recovery proceedings in abeyance till the disposal of the first appeal with or without conditions. An order allowing the petitioner to pay the demand in a number of instalments is not an order contemplated under section 220(6). Such an order is another mode of Enforcing the recovery of tax.	

Stay of Demand – Micro level

Sr. No.	Judgement	Held
20	Glaxo Smithkline Asia (2 SOT 457 - Delhi), Hewlett Packard India v Addl CIT (ITA No 5417/DEL/04) and Mahanagar Telephone Nigam Ltd v CIT (187 CTR 177). In the recent case of as KLM Royal Dutch Airlines v DCIT (1 SOT 659 - Delhi ITAT - bench C),	It was held that the tax officer was not justified in attaching the bank account of the assessee for recovery of the demand during the pendency of the appeal.
21	No recovery till CIT / ITAT decides on stay appln - otherwise refund of tax – Pass speaking order after opportunity, RPG Enterprises 74 TTJ 391 (Mum), Maharashtra State Electricity Board 75 TTJ 931 (Mum), Mahindra & Mahindra v. DOI 59 ELT 505 (Mumbai), 86 ITD 462 (Mad), 258 ITR 291(Del). Held that when the assessee is aware of the right of further appeal, he also has a right to reasonably expect that the tax authorities will not destroy his right to ask for a stay	
22	Glaxo Smithkline v. Addl CIT 20SOT 457(Del) & 256 ITR 698. CIT(A) has power – 157 CTR 275 (P & H), 239 ITR 871 (Gau), 208 ITR 676 (Mad)	No recovery till statutory period of filing appeal before ITAT expires

Recovery Proceedings

Recovery Proceedings after Assessment and “Assessee in Default”

When an assessee is served with notice of demand under section 156, if assessee does not pay the demand within 30 days he is treated as “assessee in default”.

If the order is passed under section 179 against Director, the Director of Company can be treated assessee in default under section 220(4), it is not necessary that the Assessing Officer has to issue notice under section 156.

Similarly under section 140A(3), when an assessee fails to pay the whole or any part of the self assessment tax or interest or both in accordance with section 140A(1), he shall be deemed to be an assessee in default.

If the person mentioned in section 200 does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required under this Act, he shall be treated as assessee in default u/s 201(1).

Consequences of being Assessee in Default

- Charge of mandatory interest under section 220(2). At present it is 1% p.m. or part of a month
 - Penalty under section 221 of the Act
 - Attachment / auction of moveable / immovable properties
 - Prosecution /arrest / detention
-

Stay of Demand : Section 220(3), 220(4)

- Reply of assessee to keep the demand in abeyance
- An application for stay of disputed demand must be made before the Assessing Officer before the expiry of time prescribed in notice of demand
- Reply should be with reasons stating how the assessee is entitled for stay of recovery, how addition made was not proper, financial difficulties etc.
- The assessee must request for stay of recovery till the appeal is disposed. If the issue is covered by jurisdictional High or Apex Court, refer the case laws.
- Assessee may also refer the financial difficulties faced by the assessee. How the assessee is complying with the guidelines laid down by the courts may also be demonstrated. This will help the assessee, when they approach for stay of recovery before Commissioner or High Court.
- One may also request that if the Assessing Officer decides to proceed further one more opportunity of personal hearing may be given.

Recovery on the basis of protective assessment

Protective assessment is permissible. But recovery in pursuance of such protective assessment is not permitted. However order of protective attachment can be made.

- Sunil Kumar v. CIT (1983) 139 ITR 880 (Bom) (High Court)
- Lalji Haridas v. ITO (1961) 43 ITR 387 (SC)
- Jagannath Bawri v. CIT (1998) 234 ITR 464 (Gau)(High Court)
- Jagannath Hanumanbux v. ITO (1957) 31 ITR 603 (Cal) (High Court)
- R. Rajbabu v. TRO (2004) 270 ITR 256 (Mad) (High Court)

Vicarious Liabilities

Garnishee proceedings – Recovery from third parties – Section 226(3)

- A Garnishee order is a prohibitory order directing the debtors of the assessee to refuse the payment of the same, as the same is attached by the department for the recovery of its tax dues payable by the assessee.
- Such garnishee proceedings can be initiated after the expiry of prescribed time limits i.e. 30 days as provided under section 220(1) provided for paying demand as mentioned in the notice of demand under section 156.
- If Garnishee fails to comply with the notice under section 226(3), the Assessing Officer/TRO can treat him to be an assessee in default in respect of the amount specified in the notice and further proceedings can be taken against him personally, in the manner provided under section 222 to 225. (226(3)(x))
- Section 226(3) is applicable only when money is due to the assessee-in-default from any person. When an amount is not payable, such person is not required to pay any such amount or part thereof - Administrator, UTI v. B.M. Malani (2008) 296 ITR 31 (SC) affirming 270 ITR 515 (AP)

Provisional attachment – Section 281B

- During pendency of asstt/reasstt proceedings.
- AO to be of opinion – to protect interest of revenue – Assessee about to dispose of property to thwart the collection of demand.
- Previous approval of CIT or CCIT.
- Max period of 2 yrs.
- Property can't be attached and sold for income tax arrears of husband. 248 ITR 785 and 214 ITR 326.

Vicarious Liabilities

Properties which can be attached

Fixed Deposit

- Fixed deposit with bank yet to mature can be covered under section 226(3).
 - In Vysya Bank Ltd. v. JCIT (2000) 241 ITR 178 (Kar.)(High Court) and Global Trust Bank V. JCIT (2000) 241 ITR 178 (Kar) (High Court), the court held that the department can enforce premature encashment of the fixed deposit belonging to the assessee in terms of section 226(3).
-

Rent

- Rent payable by a tenant is a debt and can be subject matter of attachment under section 226(3)
- Tax due can be recovered by attachment of rents accruing after the death of deceased from property inherited by his legal representatives - Sri Ram Lakhan v. CIT (1962) 46 ITR 613 (All. High Court)

Vicarious Liabilities

Properties which cannot be attached

- As per Rule 10(1) of the second Schedule of the Income tax Act, all such property as is mentioned by the Code of Civil Procedure, 1908, (section-60 exemption from attachment and sale in execution of a decree of a Civil Court) shall be exempt from attachment and sale under the said schedule.
- It was held in Stock Exchange v. ACIT (2001) 248 ITR 209(SC) & Vinay Bubna v. Stock Exchange (1999) 97 (Comp Cases) 874 (SC), that on plain and combined reading of rules relating to membership of the Ahmedabad Stock Exchange, it is clear that the right of membership is merely a personal privilege granted to a member, it is not transferable and incapable of being alienation by the member or his legal representatives and heirs except to the limited extent as provided in the rules on the fulfilment of conditions provided therein. Hence, the garnishee notice against stock exchange was set aside.

Vicarious Liabilities

Property of sons not be attached in case of liability of father

Properties belonging to the joint family was attached by TRO for realization of tax arrears of firm in which the assessee karta was a partner. Father was a partner of the firm in his individual capacity investing his monies and not on behalf of HUF though he was a joint family manager. It was held that only share belonging to father was liable to be attached and not the rest belonging to the sons. - **ITO v. Tippala China Appa Rao & Ors.(2011) 331 ITR 248 (AP) (High Court)**

- Salary of debtor cannot be attached – **Tejal R. Amin (Smt.) v. Asst. CIT(1994) 208 ITR 103 (Guj.) (High Court)**
- Overdraft bank accounts having certain limit cannot be attached. **K.M. Adam v. ITO (1958) 33 ITR 26 (Mad)(High Court)**
- Attachment of immovable property - bank and stocks to be last resort – should not have irreversible detrimental effect on business. **239 ITR 337 (Bom)**

Liability of Director

- Liability of the Director can be only in respect of the arrears of tax during the period in which the person was director. - Darshan Kumar v. CIT (1996) 222 ITR 608 (P&H)
- Salary earned by the Director from another company can also be attached. When a Private company converted into Public Limited company, the Directors cannot be held liable from the date of conversion. - M. Rajamoni Amma & Anr. V. Dy. CIT (1992) 195 ITR 873 (SC)
- Remedy against proceedings u/s 179 - Bhupatlal J. Shah v. ITO (2012) 210 Taxman 481 (Bom HC)
 - The assessee can file a revision application under section 264 against said order to the CIT.
 - If Commissioner rejects, the assessee has to file a writ petition under 226 of the Constitution of India against the said order.
 - Tax component and not penalty contemplated u/s 179 - Dinesh T Tailor 326 ITR 85 Bom. E Ebrahim 332 ITR 122 Kar.
- Tax returns not filed for ten years- recovery due to neglect of directors. **Ebrahim 332 ITR 122 Kar.**
- Directors siphoning funds from company and therefore no assets for recovery- held neglect. **Alex Cherian 320 ITR 49 Ker.**

Firm & Partners – Partners liability to pay the firm tax

Section 25 of the Partnership Act and Section 188A of the Income tax Act

- All partners including legal heirs of the deceased partners are jointly and severally liable for the dues of partnership, if they were partners of firm at the relevant time. These dues include tax, interest and other sums payable under the Act. - ITO v. Arunagiri Chettiar (1996) 220 ITR 232(SC) and Iqtida Khan v. ITO (1941) 41 ITR 165 (All High Court)
- Arrears of tax of firm can be recovered from erstwhile partner. - Kethmal Parekh v. TRO (1973) 87 ITR 101 (AP) (High Court)

Limited liability partnership (Section 167C)

- Section 167C of the income tax act, where the tax is due from the limited liability partnership and if such tax cannot be recovered then every partner of the LLP at any time during relevant previous year shall be jointly and severally liable unless he proves that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of LLP.

Hindu undivided family-Members of HUF, section 171(6)

- If Commissioner rejects, the assessee has to file a writ petition under 226 of the Constitution of India against the said order.
- As per section 171(4), the liability of the members of HUF is joint and several, however, if the demand pertains to the period after partition of the HUF, then the liability of the members is restricted to the portion of the joint family property allotted to each of them.

Other Issues

Property located outside India - Recovery therefrom

- As per section 228A (2), if India has an agreement with the country, where the assets are located in the other country, the same can be attached through CBDT, if the tax is due in India from nonresident. For this purpose TRO has to draw a certificate u/s 222 and send to CBDT for further action.

Imposition of penalty u/s 221(1) during pendency of an appeal

- Pendency of appeal against an assessment or against validity of an assessment is no bar to the imposition of a penalty for non-payment of assessed tax. - **J.K. Iron & Steel Co. Ltd. vs. CIT 63 ITR 97 (All)**
- However, where an assessee has presented an appeal and has applied for stay of the disputed amount of tax u/s 220(6), the AO has to first dispose off the same without which levy of penalty u/s 221(1) is invalid. - **Omprakash Agarwal vs. ITO 66 ITR 175 (All) and M.L.M. Mahalingam Chettiar vs. ITO 66 ITR 287 (Madras)**

Other Issues

Penalty u/s 221(1) where assessment is merely reduced

G. Rajeswara Reddy vs. CIT 84 ITR 556 (AP)]

- Assessee arranged to pay full assessed tax by installments but disputed a part of the assessment in an appeal filed by him.
- On failure to pay some instalment, a penalty was imposed on him. The arrears of tax and penalty were later paid by him in instalments.
- The assessee finally succeeded in his appeal and then it was seen that tax paid till the date of imposition of penalty was more than what was found due after giving appellate effect.
- The assessee applied for refund of penalty amount. It was held that assessee not having kept alive the penalty order by preferring appeal etc. was not entitled to refund since penalty order became final and validated u/s 3 of the Taxation Laws Validation Act of 1964
- However, if complete assessment is set aside, penalty has no legs to stand. This is also as per provisions of section 221(2) which says that when demand is wholly reduced, the penalty levied would be cancelled. - **[T.R. Rajkumari vs. ITO 83 ITR 189 (Madras)]**

Other Issues

Priority of dues of Government

- Priority of dues to Government – secured creditor – Income tax department by way of attachment of assets cannot claim for priority over secured creditor for realization of Income-tax due. (S.13, 35, securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002). - Asset Reconstruction Co.(India) Ltd. v. CIT AIT 2012 (NOC) 196 (Guj) (High Court)
- Pendency of income tax proceedings – Transfer can be held void only if transferee had notice of pendency of income tax proceedings. - Tax Recovery Officer v. Industrial Finance Corporation of India and another (2012) 346 ITR 11 (Guj) (High Court)
- Priority for tax revenue over secured creditors - Dena Bank v. Bhiabai Prabhudas Parekh (2001) 247 ITR 165 (SC)

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Other Issues

Power of Arrest: Rule 73 – Second Schedule

- Revenue can resort to attachment as well as arrest-Simultaneous execution both against the property and person of judgment debtor is allowed. **Padrauna Raj Krishna Sugar Works Ltd. v. Land Reforms Commissioner, UP and other (1970) 75 ITR 358 (SC), K.T. Thomas v. CIT (1990) 185 ITR 292 (Ker) (High Court) (SLP dismissed (1988) 173 ITR 1(SC).**
- For tax arrears of HUF, arrest and detention of members of HUF cannot be made; however, karta of HUF deemed to be defaulter. - **Kapurchand Shrimal v. TRO (1969) 72 ITR 623 (SC)**
- When a firm is in default, if partner of firm is treated as assessee in default, he can be arrested. Partner is not immune from arrest in the proceedings for recovery of income tax due. - **S.M. Ibrahim v. Dy. Collector Sales tax (1978) CTR 356(all) (High Court)**

Other Issues

Who cannot be arrested

- Legal representatives cannot be arrested for tax arrears of deceased.
- Prohibition against arrest of women or minor etc.

Rule 81 – Schedule-II of Income tax Act

- The Tax Recovery Officer shall not order the arrest and detention in the civil prison of:
 - A woman or
 - Any person who in his opinion is minor or of un-sound mind
- The object of Rule 73 is not to punish the defaulter but to recover the arrears of tax.
- On payment of due amount by defaulter, he can be entitled to be released from custody. - **Collector of Malbar and another v. Erimmal Ebrahim Hajee (1957) 32 ITR 124 (SC).**

Q&A



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