

**RECOVERY PROCEEDINGS  
AND  
STAY OF DEMAND  
UNDER THE INCOME TAX ACT,1961  
AND  
HOW TO FILE APPLICATION FOR STAY OF  
DEMAND  
SAMPLE DRAFT AND DISCUSSIONS THEREOF.**

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- By virtue of the Constitutional right under Article 265 of the Constitution of India 'No tax shall be levied or collected except by authority of law'.
- An assessee of any civilized country is bound to pay the tax to the government for which he is liable under the law. The Government on the other hand is obliged to collect only that amount of tax which is lawfully payable by an assessee.
- The entire object of administration of tax is to secure the revenue for the development of the Country and not charge assessee more tax than that which is due and payable by the assessee.

- To curb the black money the Income-tax Act, 1961 has provided rigorous powers to the revenue department to recover the tax demand including the power to arrest and detain is provided under the Act. Hence it's highly important to understand the provisions for collection and recovery of tax demand and the provisions of filing stay application against such demand as provided under the Act.
- As per Dictionary meaning the term '**Recovery**' implies “the action or proceedings regaining possession or control of something lost or under custody of others”

- Relevant section under the Income-tax Act, 1961 that deals with recovery of tax and stay of demand are as noted hereunder.

- **Section**      **Description**

- 201              Consequences of failure to deduct or pay
- 220              When tax payable and when assessee deemed in default
- 221              Penalty payable when tax in default
- 222              Certificate to Tax Recovery Officer
- 223              Tax Recovery Officer by whom recovery is to be affected
- 224              Validity of certificate and cancellation or amendment thereof
- 225              Stay of proceedings in pursuance of certificate and amendment or cancellation thereof

- **Section**      **Description**
- 226            Other modes of recovery
- 227            Recovery through state government
- 228A          Recovery of tax as per agreements with foreign countries
- 229            Recovery of penalties, fine, interest and other sums
- 232            Recovery by suit or under other law not affected
- 254            Orders of Appellate Tribunal

- **Section**      **Description**

- 276      Removal, concealment, transfer or delivery of property to make bar for the tax recovery proceedings
- 276B      Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B
- 276BB      Failure to pay the tax collected at source.
- 276C      Wilful attempt to evade tax, etc.
- 281      Certain transfers to be void
- 281B      Provisional attachment to protect revenue in certain cases
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- **Assessee in default**

- U/s 220 of the Act, a. Wherein notice of demand has been issued under section 156 of the Act;
- b. The assessee has not paid the demand within 30 days of the service of notice or within such extended time as provided U/s 220(3) of the Act.

- **Assessee deemed to be as Assessee in default**

- An assessee is deemed to be in default when he is required to
- deduct the tax in accordance with the provisions of the Act and does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then regarding such tax he is considered as deemed to be an assessee in default.

- Similarly, when any person is responsible for collecting tax in accordance with section 206C of the Act and such person does not collect the whole or any part of the tax or after collecting fails to pay the tax as required by or under Act,
- However, the first proviso to sub-section 1 of section 201 provides a situation wherein the assessee would not be deemed to be in default. As per such proviso, the person who fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B of the Act on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

- (i) has furnished his return of income under section 139;
  - (ii) has taken into account such sum for computing income in such return of income; and
  - (iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in Form No. 26A as per rule 31ACB of the Income-tax Rules, 1962
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- b. As per sub-section 3 of section 140A of the Act, when an assessee fails to pay the whole or any part of the self assessment tax (or interest or fee) in accordance with section 140A(1) of the Act, he shall be deemed to be an assessee in default.

- **CONSEQUENCES OF BEING ASSESSEE IN DEFAULT**

- The consequences of being assessee in default are as under:

- 1. Levy of Interest u/s 220 of the Act

- The assessee shall be liable to pay simple interest at one per cent for every month or part of a month from the end of the period as mentioned under sub-section 1 and sub-section 3 of section 220 of the Act. However, the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may reduce or waive the amount of interest paid or payable by an assessee under the said sub-section if he is satisfied that—

- payment of such amount has caused or would cause genuine hardship to the assessee ;

- default in the payment of the amount on which interest has been paid or was payable was due to circumstances beyond the control of the assessee; and

- the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

- 2. Penalty U/s 221
- Assessing Officer may direct payment of a penalty which can be any amount or amounts not exceeding the tax in arrears.
- However, where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient
- reasons, no penalty shall be levied by the AO.
- Penalty u/s 221(1) where assessment is merely reduced
- **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)**]

- The A.O. or T.R.O. can undertake the recovery as per the modes specified under section 226 of the Act
- As per section 226 of the Act:
  - i. If any assessee is in receipt of any income chargeable under the head “Salaries”, the Assessing Officer or Tax Recovery Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears of tax due from such assessee, and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Government or as the Board directs :
  - Provided that any part of the salary exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908 (5 of 1908), shall be exempt from any requisition made under this sub-section
  - ii. Sub-section 3 of section 226 is applicable only when money is due to the assessee-in-default from any person (Garnishee proceedings). As per this sub-section:

- iii. The Assessing Officer or Tax Recovery Officer may apply to the court in whose custody there is money belonging to the assessee for payment to him of the entire amount of such money, or, if it is more than the tax due, an amount sufficient to discharge the tax.
- iv. The Assessing Officer or Tax Recovery Officer may, if so authorised by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner by general or special order, recover any arrears of tax due from an assessee by distraint and sale of his movable property in the manner laid down in the Third Schedule. Additionally, the TRO has been granted specific power under section 222 of the Act (The TRO can exercise the recovery under this section, notwithstanding that proceedings for recovery have been undertaken by any other modes)

- **Section 222: Certificate to Tax Recovery Officer**

- When an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may draw up under his signature a statement in Form No. 57 (such statement is referred to as “certificate”) specifying the amount of arrears due from the assessee and shall proceed to recover from such assessee the amount specified in the certificate by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule—

- (a) attachment and sale of the assessee’s movable property;
- (b) attachment and sale of the assessee’s immovable property;
- (c) arrest of the assessee and his detention in prison;
- (d) appointing a receiver for the management of the assessee’s movable and immovable properties.

- Under this section, the assessee's movable or immovable property shall include any property which has been transferred, directly or indirectly on or after the 1st day of June, 1973, by the assessee to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the assessee's movable or immovable property for recovering any arrears due from the assessee in respect of any period prior to such date.

- **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)**

- Once the certificate is drawn up by the TRO, it shall not be open to the assessee to dispute its correctness on any ground as per the provision of section 224 of the Act. But it shall be lawful for the TRO to cancel the certificate if, for any reason, he thinks it necessary so to do, or to correct any clerical or arithmetical mistake therein.
- There is one more section under the Act which protects the interest of the revenue and states certain transfers to be void made during pendency of any proceeding under this Act or after the completion thereof. Section 281 states that before the service of notice by TRO as per rule 2 of second schedule,

- any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever) of, any of his assets in favour of any other person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise. In this section, “assets” means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the business of the assessee.

- The section also provides two condition wherein the charge or transfer shall not be void if it is made:
- ✓ for adequate consideration and without notice of the pendency of such proceeding or, as the case may be, without notice of such tax or other sum payable by the assessee ; or
- ✓ with the previous permission of the Assessing Officer.
- (To understand the procedure of recovery, kindly go through Second Schedule of the Act)

- **Prosecution Proceedings**

- The consequences do not stop at mere imposition of interest, penalties and steps to recover arrears but include the risk of being prosecuted under Chapter XXII of the Act as per sections 276, 276B, 276BB, 276C depending upon the nature and gravity of the default.

• Section	Name	Provision/ Description
• 276	Removal, delivery of property to thwart tax recovery	Whoever fraudulently removes, conceals, transfers or concealment delivers to any person, any property or any interest therein, intending thereby to prevent that property or interest therein from being taken in execution of a certificate under Second Schedule shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine
• 276B	Failure to pay tax to the credit of Central Govt. under Chapter XII-D or XVII-B	Punishable with rigorous imprisonment for a term not exceeding three months but may extend to seven years and with fine

- 276BB Failure to pay the tax collected at source. Same as above not less than three months may extend to Seven years and with fine
- 276C Wilful attempt to evade tax,etc
  - i) In a case where the amount sought to be evaded exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
  - ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine

**If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and shall, in the discretion of the court, also be liable to fine.**

- (i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or
- (ii) makes or causes to be made any false entry or statement in such books of account or other documents; or
- (iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
- (iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

- **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 Ltd. 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 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)**

- **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.
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- ▶ 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.

- ► 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)**

- **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)**

- **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)**

- **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 Vs. 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.

- 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 167 C)**
- ► 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 non resident. For this purpose TRO has to draw a certificate u/s 222 and send to CBDT for further action

- **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)**
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- ► Priority for tax revenue over secured creditors - **Dena Bank Vs. Bhiabai Prabhudas Parekh (2001) 247 ITR 165 (SC)**

## **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, o
- ► 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

## **STAY PROCEEDINGS BEFORE THE L'D A.O.**

- **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 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.

- **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.

- **CBDT Instruction dated 29 February 2016** ☐ **Modifies instruction No. 1914 dated March 21, 1996 to lay down guidelines for stay of demand pending appeal before CIT(A)**
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- 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, subsequently CBDT vide **instruction No. F.NO.404/72/93 – ITCC dt.31/07/2017** replaced 15% by **20%** only keeping all the condition remain enforced lays down exceptions
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- 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
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- 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 20% is warranted
- 
- CIT to hold power of review, all appeal, review and reference to be decided within 2 weeks, A.O. empowered to impose conditions

- **Stay Proceedings before AO**

- Principles/Guidelines prescribed by Bombay High Court in case of UTI Mutual Fund (345 ITR 71) (Bom)
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- ► No recovery of tax should be made pending:-
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- ► 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.
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- ► 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)
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- ► 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.

- **Valid service of Notice of demand made U/s 156**
- **Mohan Wahi v. CIT(2001) 248 ITR 799(SC)**
- The court held that valid service 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.
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- **▶ 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.
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- **▶ 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 Proceedings before CIT(A)**

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

- ► No necessity 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).

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- ► **When an appeal is pending before the CIT(A)**

- ► 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.

- In practice, it is advisable to make application to the Assessing Officer & CIT(A) simultaneously to stay the recovery proceedings. In following cases it has been held that the CIT(A) has the power to Stay the Recovery Proceedings.

- it is judicially accepted that the CIT(A) has the inherent powers to stay the recovery of taxes in appropriate cases, while deciding the appeal pending before it. The same has been held in the following cases:-
- ► MK Mohammed Kunhi 71 ITR 815 (SC)
- ► TIN Manufacturing Co of India 212 ITR 451 (All)
- ► Debasish Moulik 231 ITR 737 (Cal)
- ► Keshav Cashew Co v DCIT 210 ITR 1014 (Ker)
- ► Prem Prakash Tripathi v. CIT(1994) 208 ITR 461 (All) (High Court)
- ► Paulsons Litho Works v. ITO(1994) 208 ITR 676 (Mad) (High Court)
- ► Agricultural Produce Market Committee vs. CIT (2005) 279 ITR 371 (Pat.)(High Court)
- ► Debasish Moulik vs. Dy. CIT (1998) 231 ITR 737 (Cal.)(High Court)

- ► LG Electronics India Pvt. Ltd. v. CIT (2012) 209 Taxman 536 (All)(High Court)
- ► CITY ad Industrial Development Corporation of Maharashtra Ltd. vs. ACIT (2012) 343 ITR 102 (Bom) (High Court)
- ► Idea Cellular Ltd. v. CIT (2012) 75 DTR 105 (MP) (High Court)
- ► Balaji Universal Tradelink (P) Ltd. v. UOI (2012) 76 DTR 132 (Bom) (High Court)

- **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

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

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- ▶ 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

- Procedure for filing and disposal of stay petition [Rule 35A Income-Tax (Appellate Tribunal) Rules, 1963]
- (1) (a) Every application for stay of recovery of demand of tax, interest, penalty, fine, estate duty or any other sum shall be presented in triplicate by the applicant in person, or by his duly authorised agent, or sent by registered post to the Registrar or the Assistant Registrar, as the case may be, at the headquarters of a
  - Bench or Benches having jurisdiction to hear the appeals in respect of which the stay application arises.
  - (b) Separate applications shall be filed for stay of recovery of demands under
    - different enactments.
- (2) Every application shall be neatly typed on one side of the paper and shall be in
  - English and shall set forth concisely the following :-
    - (i) short facts regarding the demand of the tax, interest, penalty, fine, estate duty
      - or any other sum, recovery of which is sought to be stayed ;
    - (ii) the result of the appeal filed before the Appellate Assistant Commissioner, if
      - any;

- (iii) the exact amount of tax, interest, penalty, fine, estate duty or any other sum demanded, as the case may be, and the amount undisputed therefrom and the amount outstanding ;
  - (iv) the date of filing the appeal before the Tribunal and its number, if
  - known;
  - (v) whether any application for stay was made to the revenue authorities concerned, and if so the result thereof (copies of correspondence, if any, with the revenue authorities to be attached);
  - (vi) reasons in brief for seeking stay ; (vii) whether the applicant is prepared to offer security, and if so, in what form ;
  - (viii) prayers to be mentioned clearly and concisely (stating exact amount sought to be stayed); (ix) the contents of the application shall be supported by an affidavit sworn by the applicant or his duly authorised agent ;
- (3) An application which does not conform with the above requirement is liable to be summarily rejected.]

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

- ▶ Reply of the 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.

Thanks for listening the whole slides