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Certificate Course on Filing of Returns

STAY OF DEMAND



Provision related to stay Application for stay of demand and how to draft. Discussion on sample copy of stay application

Background

- Whenever assessing officer issues assessment order u/s 143(3), 147, 271(1)(c) along with it notice of demand u/s 156 is also raised.
- This demand notice is usually required to be paid within 30 days of service/receipt of the same.
- In case assessee fails to pay the demand within the required time, he/she becomes assessee in default. 2. Then as per section 220(2) assessee is required to pay simple interest at 1 % for every month or part of month comprised in the period commencing from the day immediately following the end of the period mentioned in demand notice and ending with the day on which demand is paid.
- This default may also accompany penalty u/s 271. In case demand amount along with interest and penalty if any is not paid within respective time, then AO may take coercive methods to recover the same such as attachment of bank account of assessee etc.

STAY OF DISPUTED INCOME TAX DEMAND

- In scrutiny assessments it is sometimes seen that huge demands are created against the assessee by framing high pitched assessments due to difference in opinion on interpretation of law or interpretation of facts or due to the fact that AO is not satisfied with the explanations offered by the assessee in regard to loan creditors or cash credits or gifts etc.
- After the assessment a notice u/s 156 for recovery of tax demand created in concluded assessment proceedings, is issued. If a person fails to pay such tax demand then section 220 of Income Tax Act provides for treating such assessee as assessee-in-default as a result of which not only interest @ 1% u/s 220(2) on the tax demand is charged but penalty proceedings u/s 221 may also be initiated.
- The assessee may file an appeal against such huge assessment and can also consequently apply for stay of such disputed tax demand since right to request for stay of demand in question is incidental to the right of appeal.

Petition for Stay of Demand

- Section 220(6) provides that Where an assessee has presented an appeal under section 246 or section 246A the Assessing Officer may, in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, 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, as long as such appeal remains undisposed off.
- Thus assessee may apply for stay of tax demand u/s 220(6) and may request that he may not be treated as assessee in default. It should be noted here that accepting the request of an assessee u/s 220(6) is within the discretionary power of the AO. But such discretionary power cannot be exercised arbitrarily but has to be exercised judicially and reasonably as the AO while exercising such discretionary power is always treated as quasi-judicial authority.

Time limit for deposit of tax demand u/s 156

- Section 220(1) provides that demand raised u/s 156 shall be paid within **30 days** from the date of service of notice, however such period may also be reduced to less than 30 days with the prior approval of Joint Commissioner if AO has any reason to believe that allowing full period of 30 days would be detrimental to the interests of revenue.
- The assessee may also apply for extension of time before the due date for the payment of demand or he may also apply for payment of demand in installments.
- The assessee will be treated as assessee in default only after the end of such period as mentioned in notice u/s 156. If the installments have been allowed and installment is not paid within time fixed for payment of installment then the assessee will be treated as assessee-in-default after the end of such period fixed.

What should be done for stay of disputed demand:

- If the assessee has filed an appeal against any order and consequent demand, he should write to the AO for stay of such demand and request him as not to treat him as assessee in default. The petition u/s 220(6) should be formulated keeping the following points in mind:
- The petition should state the prima facie merits of the appeal. The test of merit of appeal lies much upon the grounds of appeal, which should be strong enough.
- The hardship involved in the recovery of the disputed demand should be clearly and precisely stated. The petition should state why and how the balance of convenience is in favor of the stay, e.g. bad effect on the liquidity position of the business, jeopardy of the employment of workmen through possible closure of business and possibility dead lock in wage payment etc. as the case may be.
- Copy of grounds of appeal as well as statement of facts should accompany the petition to show the prima facie merits of the appeal.
- The petition should be submitted within 30 days of receipt of demand notice.

Discretionary power has to be exercised judicially

- The discretion vested in the ITO u/s 220(6) is not merely a naked and arbitrary power but a power coupled with a responsibility and the concerned officer should take all the circumstances into account and all the considerations that could be urged or are urged by the assessee as to why he should not be treated as not being in default and then make such order as is appropriate to the facts of case. In other words, a request for the exercise of the power u/s 220(6) cannot be merely summarily rejected on the basis that the power is there with the officer but that he is not bound to exercise it- M.L.M Mahalingam Chettiar v. Third ITO [1967] 66 ITR 287 (Mad.).

AO should give reasons for dismissing an application for stay

- The AO cannot simply reject the stay application without giving any reason for the same., AO must pass a speaking order while dismissing stay application.
- As the exercise of discretion by AO u/s 220(6) is quasi-judicial function and he has to exercise his power fairly and reasonably and not arbitrarily or capriciously, the AO should give reasons for dismissing an application made by an assessee for involving his discretion and should also hear the assessee.

Assessee cannot be treated in default until stay application is disposed off

- It should be noted also that until application for stay of demand is disposed off by a speaking order assessee cannot be considered as assessee in default. Moreover demand remains stayed until the disposal of the application for stay. "Where an application for stay of demand is pending for disposal u/s 220(6), the demand should be stayed until the application is considered and an order is passed

Stay should be granted if grounds of appeal are not frivolous:

- Normally, once the officer is satisfied that an appeal has been filed (and the grounds are not frivolous), he has to treat the assessee as not in default to the extent of the portion of tax disputed in the appeal. Though section 220(6) does not indicate in what cases denial of discretion shall be justified, the fact that the assessee is financially sound and is in a position to pay is not in itself a ground for refusing to exercise the discretion in granting the stay.

Penalty cannot be imposed before disposing off of the stay petition:

- As noted earlier till the time stay application is disposed off by the AO, the demand remains stayed and hence assessee is not considered in default. Thus until the time stay application is being disposed off, no penalty can be imposed for non-payment of demand because assessee will not be considered as assessee in default till the disposing off of stay application.

CBDT's guidelines on stay of demand:

[Instruction No.1914 F.No.404/72/93 ITCC dated 2-12-1993 from CBDT]

- The Board has felt the need for a comprehensive instruction on the subject of recovery of tax demand in order to streamline recovery procedures. This instruction is accordingly being issued in supersession of all earlier instructions on the subject and reiterates the existing Circulars on the subject.
- The Board is of the view that, as a matter of principle, every demand should be recovered as soon as it becomes due. Demand may be kept in abeyance for valid reasons only in accordance with the prescribed guidelines.

Prescribed guidelines.

Responsibility:

- A. It shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised, except the following : (a) Demand which has not fallen due;(b) Demand which has been stayed by a Court or ITAT or Settlement Commission;(c) Demand for which a proper proposal for write-off has been submitted;(d) Demand stayed in accordance with paras B & C below.
- B. Where demand in respect of which a recovery certificate has been issued or a statement has been drawn, the primary responsibility for the collection of tax shall rest with the TRO.
- C. It would be the responsibility of the supervisory authorities to ensure that the Assessing Officers and the TROs take all such measures as are necessary to collect the demand. It must be understood that mere issue of a show cause notice with no follow-up is not to be regarded as adequate effort to recover taxes.

Stay Petitions:

- A. Stay petitions filed with the Assessing Officers must be disposed of within two weeks of the filing of petition by the tax- payer. The assessee must be intimated of the decision without delay.
- B. Where stay petitions are made to the authorities higher than the Assessing Officer (DC/CIT/ CC), it is the responsibility of the higher authorities to dispose of the petitions without any delay, and in any event within two weeks of the receipt of the petition. Such a decision should be communicated to the assessee and the Assessing Officer immediately.
- C. The decision in the matter of stay of demand should normally be taken by Assessing Officer/ TRO and his immediate superior. A higher superior authority should interfere with the decision of the AO/TRO only in exceptional circumstances; e.g., where the assessment order appears to be unreasonably high-pitched or where genuine hardship is likely to be caused to the assessee. The higher authorities should discourage the assessee from filing review petitions before them as a matter of routine or in a frivolous manner to gain time for withholding payment of taxes.

Conclusion:

It should be kept in mind that there is no default deemed to have occurred until disposal of stay petition therefore no penalty is imposable without disposal of stay petition. Demand remains automatically stayed during the period stay application is pending before AO.

Summary rejection of stay petition by non-speaking order is invalid. The refusal may be challenged in application u/s 264 before C.I.T. The refusal by CIT, if unreasonable and inconsiderable, is open to challenge in writ petition.

Stay petitions u/s 220(6) should not be dealt with in mechanical manner but the discretionary power to grant stay should be exercised judicially and reasonably and a speaking order should be passed while disposing off the stay petitions.





THANK YOU!