

RECOVERY OF TAX & STAY OF DEMAND

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Assessment Order



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SECTION 220

WHEN TAX IS PAYABLE AND WHEN ASSESSEE IS “DEEMED TO BE IN DEFAULT”.

- Amount specified in the notice of demand u/s. 156 to be paid within 30 days of service of notice.
- If demand not paid within 30 days, assessee liable to pay simple interest @ 1% p.m. from the day immediately following the end of 30 days till the day on which the amount is paid.
- If demand not paid within time then the assessee shall be deemed to be in default.
- The AO may extend the time for payment of demand or allow payment in instalments on an application made by assessee u/s. 220(3).

TAX RECOVERY OFFICER

SECTION 222 TO 226

- TRO to draw certificate for recovery u/s. 222.
- Modes of Recovery u/s. 222
 - (i) Attachment and sale of assessee's movable property ;
 - (ii) Attachment and sale of assessee's immovable property ;
 - (iii) Arrest of the assessee and his detention in prison ;
 - (iv) Appointing a receiver for the management of the assessee's movable and immovable property.
 - (v) Any other mode :
 - Bank account will be attached ;
 - Recovery from Debtors etc. u/s 226

Various authorities before whom stay application can be filed

Commissioner
of Income Tax
(Appeal)

Commissioner
of Income Tax

Income Tax
Appellate
Tribunal
u/s. 225(5)

Tax
Recovery
Officer
u/s. 225(1)

High Court
u/A 226

Assessing
Officer
u/s. 220(6)

Supreme
Court
u/A 32



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STAY PROCEEDINGS BEFORE AO – SEC 220(6)

- Where an assessee has presented an appeal before CIT(A)
- AO 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 even though the time for payment has expired,
- as long as such appeal remains undisposed of.



STAY PROCEEDINGS BEFORE TRO U/S. 225(1):

- TRO to draw certification for recovery u/s. 222.
- Check TRO's jurisdiction u/s. 223.
- Check whether Assessee is deemed to be default.



- File a stay application before TRO u/s. 225(1).
- TRO may allow or reject the stay application.
- If stay application is rejected then file an appeal before Chief Commissioner / Commissioner as per Rule 86 of 2nd Schedule – Procedure for Recovery of Tax.

STAY PROCEEDINGS BEFORE CIT (ADM)

No appeal filed

Appeal filed u/s. 246A before CIT(A)

- When ? If AO / TRO exercise jurisdiction in an arbitrary manner.
- No power to grant stay against recovery proceedings.
- u/s. 118 – CIT is empowered to exercise control over AO & TRO.
- He can only guide and instruct the AO / TRO to dispose of the stay application arbitrarily.

STAY PROCEEDINGS BEFORE CIT(A)

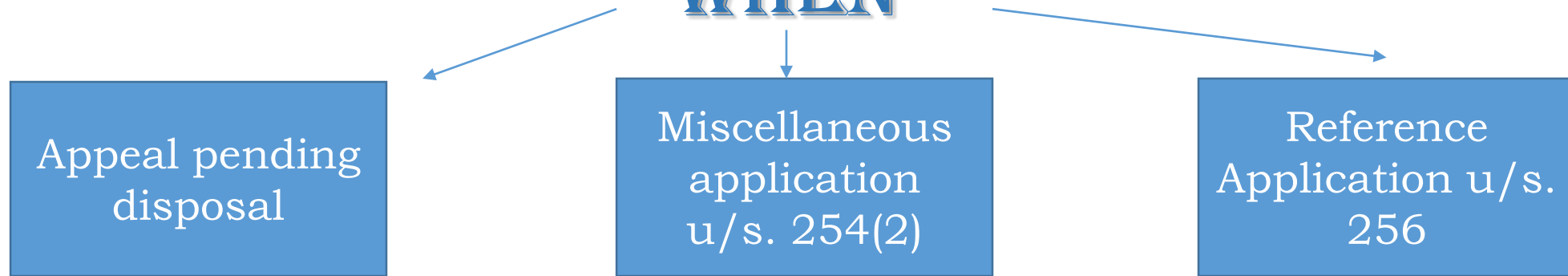
- The Act does not expressly provide power to the CIT(A) to grant stay of demand.
- It is well settled on the principle laid down in ***ITO Vs. M.K. Mohammad Kunhi 71 ITR 815 (SC)*** that the CIT(A) has inherent power to stay the demand when the appeal is pending for disposal before him.
- Is it necessary to exhaust remedy u/s. 220(6) before applying for stay to CIT(A)?

- What if AO attach bank accounts before disposing of stay application by CIT(A) – File a writ in High Court.
- *Smita Agrawal (HUF) v. CIT (2009) 26 DTR (All.) 333 Order dt. 08/04/2009*
- Held :
 - Authorities concerned cannot just sit tight and choose not to pass any order whatsoever on the stay application.
 - Directed CBDT to issue a circular directing the authorities concerned to dispose of the stay application expeditiously.
- However, till date the CBDT has not issued such circular.

- If stay rejected by CIT(A) then appeal can be filed before Tribunal – *Employees’ Provident Fund v. Addl. CIT (TDS)*
ITA no. 1766 to 1768/del/2015 : Order dated 10/04/2015.

STAY PROCEEDINGS BEFORE ITAT

WHEN



- No recovery action till expiry of 60 days.
- File stay application under Rule 35A of the Income Tax (Appellate Tribunal) Rules, 1963.
- May or may not grant stay.
- If stay granted then stay will be granted for 180 days as per 1st Proviso to Sec 254(2A).
- Appeal to be disposed within 180 days.

- If appeal not disposed within 180 days – ITAT may extent stay on application and if satisfied that delay in disposing appeal was not attributable to him - 2nd Proviso. In this case stay cannot exceed 365 days in total.
- Power to grant stay beyond 365 days if assessee is not in default.
 - *Tata Communications Ltd. V. ACIT (2011) 138 TTJ 257 (Mum)(SB) ;*
 - *CIT v. Ronuk Industries (2011) 333 ITR 99 (Bom) ;*
 - *Pepsi Foods Pvt. Ltd. v. ACIT - (Delhi HC) Order dated 19th May, 2015 ;*
 - *DCIT v. Vodafone Essar Gujarat Ltd. – (Gujarat HC) Order dated 12 June, 2015*

- File Early Hearing Petition where appeal is pending before ITAT :

“Minutes of the Meeting held on 18/04/2012 between the hon’ble President of the ITAT and the Managing Committee of the ITAT Bar Association Mumbai” - Point no. 4

- 1) Covered matters.
- 2) Appeals against orders under section 263.
- 3) Appeals of senior citizens aged above 70 years.
- 4) Appeals against orders passed ex-parte by CIT(A) etc.

STAY PROCEEDINGS BEFORE HC WHEN

If order against assessee by
ITAT

File Appeal u/s. 260
+
Notice of motion for asking
an interim relief of stay of
demand

Writ Petition under
Article 226 of
Constitution of India

If dismissed file a
SLP under Article 136
of Constitution of
India

Circumstance under which we can file a writ for stay of demand before High Court

- AO presses recovery without disposing stay application.
- AO / TRO exercise jurisdiction in an arbitrary manner.
- AO not following principles of natural justice.
- AO exceeding his jurisdiction.

TYPE OF ADDITION



Protective Addition / Assessment

- Where it is not clear as to who has received the income, the assessing officer can commence proceedings against the persons to determine the question as to who is responsible to pay the tax.

• Substantive Addition

- Addition other than protective addition.

Protective Assessment :

Protective assessment is permissible. But **recovery** in pursuance of such protective assessment is **not permissible**.

- *Sunil Kumar v. CIT (1983) 139 ITR 880 (Bom.) (High Court)*
- *Lalji Haridas v. ITO (1961) 43 ITR 387 (SC)*

RECTIFICATION PETITION U/s.154

Whenever certain patent mistakes are noticed, it is advisable that the assessee must file rectification application as well as take the issue in appeal before the stay application is preferred.

No recovery when rectification petition is pending disposal :

- *Sultan Leather Finishers Pvt. Ltd. v. CIT (1991) 191 ITR 179 (All)(HC)*
- *Instruction 1914 dated 02/12/1993.*
- Order disposing rectification should be a speaking order
- *Circular / Instruction No. 3 of 2013 dated 05/07/2013*



"I don't care how your dad does it on his return - it's wrong!"

IMPORTANT CIRCULARS / INSTRUCTIONS ISSUED BY CBDT, NEW DELHI :

- [Instruction no. 95 \[F.No. 1/6/1969 – ITCC\] dated 21/08/1969](#)
- Circular regarding assurance given by the Minister for Recovery & Expenditure on floor of Lok Sabha on 11/12/1970
- [Circular no. 530 dated 06/03/1989 – 176 ITR 240 \(St.\)](#)
- Instruction no. 1914 dated 02/12/1993 – Office Memorandum dt. 7/11/2014 point no. vii
- [Circular no. 589 dated 16/01/1991 – 187 ITR 79 \(St.\)](#)
- [Instruction no. 1725 dated 22/08/1986](#)

- **Instruction no. 95 [F.No. 1/6/1969 – ITCC] dated 21/08/1969** - where the income determined is substantially higher than the returned income, i.e., twice the latter amount or more, then collection of tax in dispute should be held in abeyance, till the decision on the appeal is taken.
- Relevant on current date and not superseded by Instruction no. 1914 dt. 02/12/1993 –
 - (a) *Elcid Co-Operative Society Ltd. v. ITO (SA no. 124/M/2003 Order dt. 11/04/2003 (Mumbai ITAT)*
 - (b) *Maheshwari Agro Industries v. Union of India [2012] 65 DTR 129 (Raj)*
 - (c) *Charu Home Products (P.) Ltd. v. CIT (2015) 53 taxmann.com 103 (Del.)*

- **Circular no. 530 dated 06/03/1989 – 176 ITR 240 (St.)**
- Stay to be granted u/s. 220(6) where :
 - (i) the demand 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 ;
 - (ii) the High Court of jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment, or
 - (iii) the demand in dispute 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.
- In any other case, the AO to consider all the relevant factors and communicate his decision in the form of a speaking order. While exercising discretion under the provision, **the financial capacity of the assessee to pay demand will not be relevant.**

- ***Circular no. 589 dated 16/01/1991 – 187 ITR 79 (St.)***
- “The AO while considering the situation for treating the assessee to be not in default, would consider all relevant factors having a bearing on the demand raised and communicate his decision to the assessee in the form of a speaking order.”
- ***Instruction no. 1725 dated 22/08/1986***
- Recovery of demand to be kept in abeyance when the matter is remanded.

KEC International Ltd. v. B.R. Balakrishnan And Ors. (2001) 251 ITR 158 (Bom)

- Parameters while considering the stay application :
 - a) The authority concerned will at least briefly set out the case of the assessee.
 - b) Where the assessed income 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.
 - c) 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.

d) 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.

The above parameters are not exhaustive. They are only recommendatory in nature.

UTI Mutual Fund v. ITO (2012) 345 ITR 71 (Bom.)

Guidelines in respect of recovery of demand :

(a) no recovery of tax should be made pending :

- i. 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 ;*
- ii. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee ;*
- iii. 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;*

(b) when a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to make a representation or seek recourse to a remedy in law ;

(c) in exercising the powers of stay, the ITO should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the AO has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order ; the matter must be considered from all its facts, balancing the interest of the assessee with the protection of the Revenue.

Mahindra and Mahindra v. Assessing Officer & Ors. (2007) 295 ITR 42 (Bom.)

- The Court issued a notice to the assessing officer as to why contempt action should not be initiated under the provisions of the Contempt of Court Act against him for prima facie knowingly and willfully disobeyed the judgments of the Court in the cases *KEC International (Supra)* and *Mahindra & Mahindra Ltd. v. Union of India (1992) 59 ELT 505 (Bom.)*

Maheshwari Agro Industries v. Union of India *[2012] 65 DTR 129 (Raj)*

- **Facts:**

- Stay application before AO was summarily rejected by AO

- **Decision:**

- CIT(A) has inherent, implied and ancillary powers to grant stay against recovery of disputed demand of tax in an appeal filed before him.
- The relevant factors to be considered are prima facie case, balance of convenience, irreparable injury, nature of demand and hardship likely to be caused to the assessee, liquidity available to assessee, etc.
- The AO has to grant stay to assessee in spirit of instruction no. 95 dated 21/8/1969 which still holds the field and is binding on AO.



STAY APPLICATION

Points to be mentioned in Stay Application

- a. Brief facts of the case ;
- b. Whether appeal filed? ;
- c. If Yes, points raised in appeal ;
- d. Assessment history of the assessee ;
- e. Whether any order is passed in assessee;s favour ;
- f. Assessee has a prima facie case for getting relief at the Appellate Stage ;
- g. Rectification petition u/s. 154 if pending disposal ;
- h. Chances of recovery in case the appeal is dismissed ;
- i. Financial Position of assessee ;
- j. Hardship that would be caused to the assessee by insisting on immediate payment of tax by the Department.

Thank you