

Stay & Rectification proceedings

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JB Nagar CPE Study Circle of WIRC,
Mumbai

RECENT RECOVERY MEASURES - CBDT Chief Announces Eight Strategies To Enhance Recovery Of Taxes vide F. No. 380/02/2018-IT (B) on 04/01/2019

- (a) **Targeted recovery surveys** in potential cases where high amount of recovery is likely.
- (b) **Sale of attached properties** in appropriate cases by TROs to recover confirmed demand where normal measures of recovery have not yielded results.
- (c) **Initiation of proceedings under section 179** of the Act in eligible cases to make recoveries of outstanding dues of the companies.
- (d) **Filing of prosecution under section 276C (2)** against persons who are willfully evading payment of outstanding taxes.
- (e) **Completion of non-time-barring assessments** in cases where demand is likely to be raised and collected during the current financial year itself.
- (f) Verification of deductors where there is **non-payment of TDS to the Government account though TDS has been deducted** as well as where there is substantially low TDS as compared to last year including launching of prosecution in cases of substantial default.
- (g) **Verification of payment of advance tax by the seller of properties** in cases where TDS under section 1941A has been made by the buyer.
- (h) Monitoring of **payment of Dividend Distribution Tax** by obtaining information from financial websites, SEBI, etc

INDIRECT RECENT RECOVERY MEASURES - CBDT Offers Incentives for Passing Quality Orders and timely disposal of appeals

Incentive for quality orders:

- (i) With a view to encourage quality work by CITs(A), additional credit of 2 units shall be allowed for each quality appellate order passed. The CIT (A) may claim such credit by reporting such orders in their monthly DO letter to the CCIT concerned. Quality cases would include cases where-
- (a) enhancement has been made,
 - (b) order has been strengthened, in the opinion of the CCIT, or
 - (c) penalty u/s 271(1) has been levied by the CIT(A).
- (ii) The concerned CCIT shall examine any such appellate orders referred to him by the CIT(A), decide whether any of the cases reported deserve the additional credit and convey the same through a DO letter to the CIT(A), which can be relied upon while claiming the credit at the year end.

WRIT PETITION FILED AGAINST ABOVE GUIDELINES

ALL INDIA FEDERATION OF TAX PRACTITIONERS (AIFTP) has filed a Writ Petition before the Hon'ble Delhi High Court and CHAMBER OF TAX CONSULTANTS (CTC) has filed Writ before Hon'ble Bombay High Court to challenge the aforesaid move of the CBDT

- The Petition contends that such “incentive” will encourage the CIT(A)’s to pass orders in a “biased and prejudicial manner” in favour of the revenue and against taxpayers
- Attention has also been drawn to section 119(1) of the Income Tax Act 1961 which expressly states that the CBDT shall not issue any order or instruction or direction which interferes with the discretion of the Commissioner (Appeals) in the exercise of his or her appellate functions.

Relevant Provisions Recovery of Demand

- Chapter XVII – Collection and Recovery of Tax
 - Part A – General
 - Part B – TDS
 - Part BB – TCS
 - Part C – Advance Tax
 - Part D – Collection and recovery
(relevant sections 220 to 226)

Relevant Provisions - 220

- **Section 220(1):**

- As per section 220(1), the amount demanded vide such Notice of Demand is payable within 30 days of service of such notice
- AO can demand payment to be made in less than 30 days, with prior approval of JCIT and that it should be detrimental to the interest of the revenue. However, the exercise of the power to reduce the period under the proviso to sub-section (1) cannot be exercised casually and without due application of mind. The reasons for reducing the period should be communicated to the assessee.

Firoz Tin Factory v. ACIT (2012) 359 ITR 296 (Bom HC)

- 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 filing appeal before proceeding to recover the tax due.

- **Section 220(2):**

- If the amount specified in notice of demand u/s. 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at 1% for every month or part of a month till such demand is paid

- **Section 220(2A):**

- The P. CCIT/CCIT or P. CIT/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

Cumulative Conditions – K.C. Mohanan v. CCIT (350 ITR 461) (2013) (Kerala HC)

Haji Ramzan & Sons v. CIT (242 Taxman 380) (All HC)

Relevant Provisions - 220

- **Section 220(3):**

- The AO on application made by the assessee may extend the time of payment or allow payment by installments subject to terms and conditions as he thinks fit

- **Section 220(4):**

- Demand not paid within the time limit of 220(1) or 220(3), then the assessee shall be treated as deemed to be in default

- **Section 220(5):**

- If, in case of payments by installment is allowed and 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 balance demand outstanding

- **Section 220(6):**

- Where an **appeal is pending before CIT(A)** u/s. 246 , the AO **may** subject **terms and conditions** as he thinks fit may treat the assessee as **not being in default** in respect of the **amount in dispute** in appeal, even though the time for payment is expired, till such 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

CBDT Circulars/Instructions on stay of demand

Sr. No.	Date	Particulars	Remarks
1	21-08-1969	INSTRUCTION : NO. 96 [F. NO. 1/6/69-ITCC]	The CBDT had instructed the officers that “where the income determined on assessment was substantially higher than the returned income, say, <u>twice</u> 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”;
2	02-02-1993	Instruction No. 1914	The CBDT has laid down guidelines for stay of demand <u>Broad parameters:</u> <ul style="list-style-type: none"> • Addition made is covered in assessee’s own case; • AO adopts a view where there are 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 judgment; • The instruction also specifically reiterates that the aforesaid illustrations are not exhaustive
3	29-02-2016	Office Memorandum F. No. 404/72/93 – ITCC	<u>Partial modification of Instruction No. 1914</u> CBDT has put in new rules for granting of stay: <ul style="list-style-type: none"> • With payment of 15% of the tax demand the AO shall grant stay to the Assessee. • Further in certain cases if he deems fit he may increase or decrease the payment of 15% he may refer to PCIT/CIT for approval • In case where assessee is aggrieved even by payment of 15% of demand, he may approach PCIT/CIT
4	31-07-2017	Office Memorandum F. No. 404/72/93 – ITCC	<u>Partial Modification of Office Memorandum dated 29-02-2016</u> CBDT hikes standard rate of disputed tax payment to 20% to get stay of demand from AO

Stay Proceedings before the AO

➤ Valid service of Notice 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

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. At the relevant time only service by post or by way of summons issued by court under CPC were available. However, now even Electronic mail or electronic mail message is prescribed u/s 282(2) as acceptable mode of communication of notice.

Kross Television India Pvt Ltd & Anr v. Vikhyat Chitra Production & Ors (NOTICE OF MOTION (L) NO. 572 OF 2017 – BOM HC (2017))

The Bombay HC has held that service of notice about a litigation through WhatsApp is valid.

➤ Discretion of the Assessing Officer

- Though the power of the assessing officer u/s 220(6) is discretionary power, the **Hon'ble Supreme Court in Aeltemesh Rein v. Union of India, 1988 AIR 1768** has held that every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way.

Stay Proceedings before the AO

➤ When can a stay be granted by AO?

- Assessee must present an appeal before CIT(A), only after that section 220(6) becomes applicable and the assessing officer should be intimated of the same.
- The provisions of section 220(6) cannot apply if the appeal is not filed u/s. 246A.
I.V.R. Constructions Ltd v. ACIT (231 ITR 519) (1997) (AP High Court)
- It was held in **Gouri Shankar Awasthi v. ITO (1978) 78 ITR 784 (Cal.)** that stay of demand cannot be granted simply because an appeal has been preferred. Hence, the assessee should mention the reasons for staying his demand.
- However, in cases of Proceedings u/s. 144C pursuant to directions of DRP : Stay application to be made directly before ITAT

➤ Opportunity of hearing

- The assessing officer should provide a reasonable opportunity of hearing and also reasons by speaking order while rejecting the stay application of the assessee. If assessee seeks personal hearing, the same is ought to be provided.
Pawan Kumar v. ITO (1998) 146 CTR 152 (P & H HC)
Smt. Joshna Rajendra v. CIT(A) (2013) (268 CTR 462) (Kar HC)

➤ Whether the AO can ask for more or less than 20% of the demand?

- As per Office Memorandum dated 29-02-2016, yes the AO can demand more or less than 20% of the demand subject to the approval of Pr. CIT/CIT

➤ What if the assessee is aggrieved with the 20% of the demand payment?

- As per Office Memorandum dated 29-02-2016, the assessee can approach Pr. CIT/CIT

Stay Proceedings before the AO

➤ Whether payment of 15% or 20% as the case may be is mandatory?

- Supreme Court has held that Commissioner is not bound by administrative circulars issued by the CBDT and can grant stay of demand on payment of an amount less than 20%

PCIT v. LG Electronics India Pvt Ltd. (Civil Appeal No. 6850 of 2018) (SC)

No. If the AO demands 15% to be paid, the assessee is entitled to approach the Pr CIT for review of the AO's decision. There is no requirement of 15% of pre deposit of demand.

Jagdish Gandabhai Shah v. PCIT (2017) (247 Taxman 414 (Guj HC)

➤ If refund is due, then whether entire demand to be adjusted or 15% or 20% of the demand as the case may be to be adjusted?

- Stay of demand to be granted after adjusting 15% of demand
Andrew Telecommunications India (P.) Ltd. v. PCIT (2016) (295 CTR 557) (Bom HC)
Jinadal Steel and Power Ltd. v. PCIT (391 ITR 42) (2016) (Del HC)
- Assessee raised a plea that it had MAT credit which was far in excess of 20 per cent of disputed tax demand and, thus, same may be adjusted.

Panchmahal Steel Ltd. v. ACIT (2018) (93 taxmann.com 286) (Guj HC)

➤ Rectification filed?

- Demand cannot be recovered until rectification application is disposed off

Allahabad High Court in case of Sultan Leather Finishers Pvt Ltd v. ACIT (1990) (191 ITR 179) (All HC) has taken a view that no recovery proceedings are possible during the pendency of rectification application filed under section 154 of the Act.

Stay Proceedings before the AO

➤ High Pitched assessment; stay should be granted

- Where assessed income of assessee was more than seventy times the returned income, and impugned additions were in respect of contentious points, stay on collection/recovery of disputed demands for a period of six months was to be granted (**Vodafone India Services (P.) Ltd. v. DCIT (2017) (80 taxmann.com 285) (Ahm ITAT)**)
Maheshwari Agro Industries v. Union of India (2012) 346 ITR 375 (Raj HC)

➤ Whether CBDT Instruction No. 96 (high pitched assessment), has been superseded by CBDT Instruction No. 1914 dated 02-12-1993

- No, it even now holds field and, hence, powers under sections 220(3) & 220(6) have to be exercised in accordance with letter and spirit of CBDT Instruction No. 96 which is binding on all assessing authorities created under the Act
N. Jegatheesan v. DCIT (2015) (388 ITR 410) (Mad HC)

Further, the assessee can also approach the High Court under Article 226 of the Constitution by filing a writ petition for redressal of grievance if Pr. CIT/CIT rejects stay of demand.

Practically High Court usually sees that whether there is any fault in the decision making process and not the merits of the decision as such, unless and until you point out something ex facie arbitrary

Guidelines to be adhered by Tax Authorities after assessment

➤ **KEC International Limited v. B.R Balakrishnan (2001) (251 ITR 158) (Bom)(High Court)**

- Parameters:
 - (a) While considering the stay application, the authority concerned will at least **briefly set out the case** of the assessee.
 - (b) In cases 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.
 - (c) 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.
 - (d) 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.

Guidelines to be adhered by Tax Authorities after assessment

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

- Parameters:

(a) **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.

(b) 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)

(c) If the **Assessing Officer 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.**

(d) When a bank account has been attached, **before withdrawing the amount, reasonable prior notice should be furnished to the assessee** to enable the assessee to make a representation or seek recourse to a remedy in law.

(e) 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 facets, **balancing the interest of the assessee with the protection of the Revenue.**

Guidelines to be adhered by Tax Authorities after assessment

➤ **White Pay LLP v. v. ITO (2018) (WP No. 966 of 2018) (Bom HC)**

Facts:

- The AO passed the order confirming the penalty and raised a demand by issuing a notice u/s. 156 of the Act.
- The assessee was directed to pay demand within 7 days.
- The assessee filed stay application before the AO and also sought copy of reasons for granting of less than normal period of 30 days notice u/s. 156 of the Act which would be detrimental to the interest of the Revenue.
- AO rejected the stay application on the ground that stay application would be considered on deposit of 20% of the demand.
- In the meantime, the AO had attached assessee's bank account in exercise of powers u/s. 226 of the Act.

Held:

- Order of the AO rejecting the stay application was set aside.
- The High Court directed the revenue to deposit the amounts withdrawn from the petitioner's bank account on the next bank working day as the withdrawal of the amount from the bank accounts without notice, is in defiance of the order of this Court in UTI Mutual Funds Vs. ITO and Ors. 345 ITR 71.
- The AO shall in accordance with the decision of this Court in Firoz Tin Factory should provide the reasons which lead the Revenue to restrict the notice period u/s. 156 of the Act to only 7 days instead of the normal 30 days period.
- The AO will pass a fresh order on the petitioner's stay application after hearing the petitioner in accordance with law and particularly in accordance with the decisions of this Court in KEC International Ltd. and UTI Mutual Funds.

Guidelines to be adhered by Tax Authorities after assessment

➤ **Vodafone India Ltd. v. Commissioner of Income Tax [2018] (400 ITR 516) (Bom HC)**

- **Merely because no financial hardship** would be caused to assessee would not itself justify the deposit of demand where a prima facie case was made out.

➤ **Vodafone M-Pesa Ltd. v. PCIT (2018) (256 Taxman 240) (Bom HC)**

- Power of suo motu enhancement of payment of tax demand during pendency of appeal as ordered by Assessing Officer is not available to Principal Commissioner in terms of CBDT Circular dated 29-2-2016

➤ **Piramal Fund Management (P.) Ltd. v. DCIT (2016) (383 ITR 581) (Bom HC)**

- Held that this conduct on the part of the Assessing Officer to accept a stay application and not immediately issue acknowledgement of its receipt was unacceptable. The least that was expected of an Officer was that when a person files an application/letter, which is accepted by him, an acknowledgement should be forthwith given to the party filing the application or letter.

➤ **HDFC Bank Limited v. ACIT(2013) 354 ITR 77 (Bom) (HC)**

- Demand on covered issues cannot be adjusted. The adjustment of a refund is a mode of effecting recovery. Once an issue has been covered in favour of the assessee in respect of another assessment year on the same point, it was wholly arbitrary on the part of the department to proceed to make an adjustment of the refund

Can there be recovery on the basis of protective assessment

➤ **Protective assessment is permissible. But recovery in pursuance of such precautionary assessment is not permitted**

- Sunil Kumar v. CIT (1983) 139 ITR 880 (Bom) (High Court)
- 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 (2003) 270 ITR 256 (Mad)(High Court)

Specimen letter of stay of demand before AO

To,
Sir,
Re:

Sub: Application for stay of demand u/s 220(6) of the Income-tax Act, 1961 (“The Act”)

The assessee is in receipt of order u/s. _____ of the Act dated _____ along with notice of demand u/s 156 of the Act, directing it to pay a sum of Rs. _____ for the captioned year.

In the said order, various additions have been made. On Merits the assessee relies on the submission made during the course of assessment proceedings.

Submissions on Stay:

May we invite Your Goodself’s attention to the case of **CEAT Limited Vs. Union of India wherein the Hon’ble Jurisdictional High Court** has observed that, *“If the party has made out a strong prima facie case, that by itself would be a strong ground in the matter of exercise of discretion as calling on the party to deposit the amount which prima facie is not liable to deposit or which demand has no legs to stand upon, by itself would result in undue hardship of the party is called upon to deposit the amount.”*

Also in the decision of **UTI Mutual Fund v. ITO(345 ITR 71), the Hon’ble Jurisdictional High Court, following CEAT Limited (supra)**, observed that, where the assessee has raised a strong prima face case which requires serious consideration as in the present case, a requirement of pre- deposit would itself be a matter of hardship.

3. Further, Your Goodself’s attention is also invited to the CBDT Instruction No. 96 [F.No.1/6/69-ITCC] dated 21-Aug-1969 wherein it has been clarified as follows:

“Where the income determined on assessment was substantially higher than the returned income, say, twice the 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”.

Specimen letter of stay of demand before AO

To,
Sir,
Re:

Sub: Application for stay of demand u/s 220(6) of the Income-tax Act, 1961 (“The Act”)

The above instruction have been followed in the following decisions:

- i. Valvoline Cummins vs. DCIT(171 Taxman 241) (Del);
- ii. Charu Home Products Pvt. Ltd. v. CIT (229 Taxman 576) (Del HC)
- iii. N. Jegatheesan v. DCIT (64 taxmann.com 339) (Mad HC)
- iv. Dimension Data Asia Pacific (Pte.) Ltd v. DCIT (67 taxmann.com 326) (T Mum);
- v. Mrs. R. Mani Goyal v. CIT (217 ITR 641) (All);
- vi. Maharana Shri Bhagwat Singhaji of Mewar (Late his highness) v. ITAT, Jaipur Bench & others (223 ITR 192) (Raj.);
- vii. I.V.R. Constructions Ltd. v. ACIT (231 ITR 519) (A.P.)

It is imperative to note that the assessed income is significantly higher than the returned income. Thus, in view of the foregoing facts and CBDT Instructions, we most humbly state that it is a fit case for granting stay and thus, we request Your Goodself to kindly keep the aforesaid demand in abeyance.

The Applicant submits that irreparable harm and injury will be inflicted on the Applicant, if the Applicant is made to pay such erroneous amount of tax.

Your goodself will also appreciate that the assessee is under going acute financial problems. See latest financial details.

Specimen letter of stay of demand before AO

To,
Sir,
Re:

Sub: Application for stay of demand u/s 220(6) of the Income-tax Act, 1961 (“The Act”)

Further, we would like to draw Your Goodself’s kind attention to the fact we have already preferred an appeal before the Hon’ble Commissioner of Income-tax (Appeals)-____, Mumbai (“the CIT(A)”) (copy of acknowledgement enclosed as “Annexure 1”) against the aforesaid order and on the basis of the legal position and fact of our case, we are confident of succeeding in the same. As a result of which the aforesaid demand raised by the A.O. may ultimately not remain payable by the assessee.

In the light of foregoing, we request Your Goodself to kindly exercise the powers vested in you under section 220(6) of the Act and accordingly, keep the present impugned demand of Rs. _____/- in abeyance till the time our appeal is finally disposed of by the Hon’ble CIT(A).

For this act of kindness the appellant shall ever remain grateful.

You Goodself is further requested to grant us the personal hearing in the matter in case if Your Goodself decides otherwise.

Stay of demand before Commissioner of Income-tax (Appeals)

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

Commissioner (Appeals) is vested with power of granting stay order for recovery of demand till disposal of appeal pending before him even if assessee has not approached the Assessing Officer under section 220(6) or his application has not been decided

- **Tin Manufacturing Co of India v. CIT (1994) (212 ITR 451) (All HC)**
- **GERA Realty Estates v ACIT [2014] 368 ITR 366 (Bom)(HC)**

➤ Whether appeal to Tribunal against stay rejection order of CIT(A) is maintainable?

Favourable Judgments

- **Bharat Heavy Electricals Ltd (ITA No. 4675/Del/2015) dated 31 July 2015**
- **Employees Provident Fund Organization v. ACIT(2015) (153 ITD 642) (Delhi Tribunal)**

Against Judgments

- **PCIT v. M/S U.P. Shram Evam Nirman Sahkari Sangh Ltd. (ITA No. 36 of 2016) (2017) (Allahabad High Court)**
- **Rajya Krishi Utpadan Mandi Parishad v. ITO (2014) 153 ITD 101 (Lucknow Tribunal) (TM)**

RECOVERY AFTER CIT(A)'s ORDER

Chennai Central Cooperative Bank Ltd v. ACIT (2017) (248 Taxman 366) (Madras HC) - Recovery of demand from bank account of assessee immediately after communication of disposal of appeal is improper but not illegal, especially when liability of petitioner exists

Facts:

- The order of assessment under section 143(3) read with section 147 were made.
- The assessee challenged the order before the CIT(A). The said appeal was dismissed vide order dated 24.03. 2017 which served on the assessee on 30.03.2017. The assessee filed a rectification application before the CIT(A) u/s. 154 of the Act on 31.03.2017
- The revenue authorities initiated recovery proceeding on the same day viz. 31.03.2017 which the assessee challenged by way of a writ petition.

Held:

- After the dismissal of the appeals, there is no necessity for issuing a fresh notice of demand under Section 156 in view of Section 220(1A) of the said Act, which contemplates that a notice of demand originally served on the Assessee shall be deemed to be valid till the disposal of the appeal by the last appellate authority.
- Section 3 of the Taxation Laws (Continuation & Validation of Recovery Proceedings) Act, 1964, makes it abundantly clear that no such notice is to be served on the assessee, if the quantum of Government dues is not varied as a result of any order passed in any appeal or other proceedings.
- On the date of issuance of the notice under Section 226(3), there is no legal impediment or bar for the first respondent to recover such dues. Section 226(3) of the Act also enables and empowers the Assessing Officer or the Tax Recovery Officer to seek such payment from the person to whom such notice was issued either forthwith or within the time specified in the notice. In other words, it is the discretion of such authority to specify the time for such payment in the said notice. In this case, the first respondent directed the second respondent to make the payment forthwith. Therefore, legally, the first respondent is not barred from seeking such payment forthwith.

Stay of demand before Income-tax Appellate Tribunal

➤ Legislative Background

- **Section 254(1) of the Act**

“ The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit”

- **Section 255(5) of the Act**

“ Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings”

- **Section 253(7) of the Act**

“An application for stay of demand shall be accompanied by a fee of five hundred rupees”

Stay of demand before Income-tax Appellate Tribunal

➤ Legislative Background

- **Provisos to Section 254(2A) of the Act**

“Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order and the Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order:

Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:

Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee”

Stay of demand before Income-tax Appellate Tribunal

Procedure for Stay Petition – Rule 35A of the Income-tax (Appellate Tribunal) Rules, 1963

- An Application for stay of demand be made in triplicate
- Application to set forth concisely the following:
 - Short facts;
 - Result of the appeal filed before the [CIT (Appeals)]/DRP ;
 - Tax, interest, penalty, etc demanded, amount undisputed therefrom and the amount outstanding;
 - Date of filing the appeal before the Tribunal and its number, if known;
 - Result of stay application before lower authorities;
 - Reasons in brief for seeking stay;
 - Whether the applicant is prepared to offer security, and if so, in what form ;
 - Clear and Concise prayers
 - Affidavit

Stay of demand before Income-tax Appellate Tribunal

Documents to be Annexed while filing stay petition before Hon'ble ITAT

- Covering Letter
- Index of Documents Attached
- Stay Application
- Correspondences before lower authorities
- Documents highlighting financial difficulties if any
- Duly notarized affidavit on Stamp paper of Rs. 100
- Challan of Rs. 500
- Letter of Authority on Rs. 500 stamp paper

Stay of demand before Income-tax Appellate Tribunal

Procedures Evolved by Hon'ble Tribunal

➤ **Hon'ble Tribunal has framed guidelines in a meeting held on April 03, 2007 in consultation with Members of ITAT, Members of Department and Members of ITAT Bar Association.**

Gist of guidelines are as under:

- Stay petitions filed upto Wednesday of a week will be listed on the Friday of the very same week;
- No insistence of rejection letter either from the AO/CIT
- Assessee to intimate AO/TRO regarding stay petition filed before the Tribunal and also request the AO not to enforce recovery pendency the stay petition, relying on the Bombay High Court decision in the case of Mahindra & Mahindra (1992) 59 ELT 505, which the AO is bound to follow in its letter and spirit;
- If coercive steps for recovery have already been taken by the AO/TRO, the same should be mentioned in stay application;
- The Departmental Representatives (DR's) shall intimate the proceedings in the court to the AO/TRO, so that they can follow these directions as if they are written orders of the Bench;
- No recovery should be done either by the AO/TRO in violation of the interim orders or oral direction of the Bench communicated by the DR's till the disposal of the stay petition

Stay of demand before Income-tax Appellate Tribunal

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 v. CIT (1997) (231 ITR 47) (AP)** – Stay of Interest u/s. 220(2)
 - **Shiv Shakti Rubber & Chemical Works v. ITAT (1995) (213 ITR 299) (All)** – Stay of demand arising out of penalty order passed by the AO
- Whether Tribunal has the power to extend stay of demand beyond 365 days, even after amendment to Third Proviso to Section 254(2A) of the Act, even though the delay is not attributable to the assessee

Yes, as per the following judgments:

- **Pepsi Foods (P.) Ltd. v. ACIT (2015) (376 ITR 87) (Delhi HC)** –
 - ✓ Third proviso to section 254(2A) and, particularly, amendment introduced therein by virtue of Finance Act, 2008, with effect from 1-8-2008, which added words 'even if delay in disposing of appeal is not attributable to assessee' has to be struck down being violative of Article 14 of Constitution of India.
 - ✓ SLP dismissed before SC in **DCIT v. Pepsi Foods (P.) Ltd. (2017) (246 Taxman 223)**
- **Narang Overseas (P.) Ltd. v. ITAT (2007) (295 ITR 22) (Bom HC)**
- **PCIT v. Carrier Air Conditioning & Refrigeration Ltd. (2016) (387 ITR 441) (Punjab & Haryana HC)**
- **DCIT v. Vodafone Essar Gujarat Ltd. (2015) (376 ITR 23) (Gujarat HC)**

Stay of demand before Income-tax Appellate Tribunal

Powers of Tribunal to grant stay of demand

- **When a stay application is rejected by the Tribunal due to certain reasons, in such a scenario, whether the concerned assessee can move a second application for stay before the Hon'ble Tribunal?**

If the circumstances so warrant, the assessee can move a second stay application before the Hon'ble Tribunal

- **S.K. JAIN v. DCIT (2003) (130 Taxman 86) (Nagpur Mag)**

- **Whether penalty proceedings before lower authorities can be stayed when the quantum appeals are pending before the Tribunal:**

Yes

- **ACIT v. GE India Industrial (P.) Ltd. (2013) (358 ITR 410) (Guj HC)**
- **CIT v. Wander (P.) Ltd. (2012) (358 ITR 408) (Bom HC)**
- **Agra Beverages Corpn. (P.) Ltd. v. ITAT (1995) (216 ITR 835) (Allahabad HC)**

- **Whether Stay application maintainable despite non filing of stay application before lower authorities**

Favourable Judgments:

- **DHL Express (India) Pvt. Ltd. (140 TTJ 38) (Mum)**
- **Honeywell Automation India Ltd (138 TTJ 373) (Pune)**

Against Judgment:

- **Sun Pharmaceutical Industries Ltd. (SP No. 58/Ahd/2017) (Ahmedabad Tribunal)**

Stay of demand before Income-tax Appellate Tribunal

Powers of Tribunal to grant stay

- **During pendency of appeal against order u/s. 263 whether Tribunal has power to stay assessment proceedings and the resultant demand arising out of order giving effect to the directions of the CIT u/s. 263 of the Act?**

Yes

- **CIT v. ITAT (2012) (216 Taxman 14) (Del HC)**
- **M/s. IGHCC Loan Trust Limited v. CIT (2012) (SA No. 199/Mum/2012) (Mumbai Tribunal)**
- **Shanti Builders v. JCIT (2007) (74 TTJ 578) (Pune Tribunal)**

- **Whether Tribunal has a power to stay prosecution proceedings when appeal is pending before it?**

No

- **PCIT v. ITAT (2015) (236 Taxman 39) (Punjab & Haryana HC)**
- **Vaishali Pigments P. Ltd. v. CIT (2017) (SA No. 42/PUN/2017) (Pune Tribunal)**

Pendency of appeals regarding quantum, penalty and an appeal challenging an order passed under section 263 would not confer power upon Tribunal to stay consideration of a show-cause notice calling upon assessee to show cause why prosecution be not launched against it.

- **Stay of proceedings - Tribunal – Failure to fulfill conditions**

Stay gets vacated.

- **Sachdeva & Sons vs. UOI (2003) 264 ITR 695 (P&H) (High Court)**
- **Endeavour Investments Ltd. vs. DCIT (1999) 70 ITD 17 (Chennai)(TM)(Trib)**
- **Shanti Builders v. JCIT (2007) (74 TTJ 578) (Pune Tribunal)**

Stay of demand before Income-tax Appellate Tribunal

Powers of Tribunal to grant stay of demand

- **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)**

NO

- **Mahanagar Telephone Nigam Ltd v. DCIT (2001) (77 ITD 8) (Delhi Tribunal)**
- **Technib Italy Spa v. ACIT (2005) 147 Taxman 114 (Mag.)(Delhi)(Tribunal)**

- **Whether Tribunal has power to grant refund when the department violates its stay order**

Yes

Dept hauled up for “overzealousness” and “ham-handed” attempt to recover taxes in violation of stay order. Tribunal is duty-bound to order refund of amount appropriated by revenue in violation of stay order.

- **DCIT v. ITAT (262 CTR 569) (P & H) (HC)**
- **Motorola solutions India P. Ltd. v. Dy. CIT (2013) 144 ITD 246 (Delhi Tribunal)**

- **Where more than one year is involved, whether stay application is to be filed for each assessment year:**

Separate stay petition should be filed seeking stay of recovery of demand for different assessment years even though pertaining to same enactment.

- **Special Bench decision in the case of Mrs. Sushma Gaggar (SA No. 215/D/2003) (Delhi)**
- **Wipro Ltd. v. ITO (2003) 86 ITD 407 (Bangalore Tribunal)**

Stay of demand before Income-tax Appellate Tribunal

➤ **Whether the Assessing Officer can ask for security only in particular form?**

Assessing officer can not insist on any particular form of security, in connection with grant of stay, granted by Tribunal, on condition of furnishing security to satisfaction of assessing officer.

- **Dhruv N Shah v. Dy. CIT (2003) 1 SOT 528 (Mum.)(Trib.)**

➤ **Whether Tribunal has the power to impose certain conditions for the purpose of granting stay, for example, payment by installments, furnishing security, etc?**

Yes

The powers of stay not only include power to grant absolute stay but also stay on terms like stay on payment of installments or stay on furnishing of security to the satisfaction of the authorities concerned. This is a discretionary power to be exercised by the Tribunal in the manner which is appropriate in each case, taking into account not only the prejudice to be caused to the appellant but also public interest.

- **CIT v. G.S.R. Krishnamurthy (1990) (33 ITD 258) (Madras Tribunal)**

Practically, the usual practice in Tribunal is that let the assessee first exhaust the remedy available before lower authority and that let P. CIT reject the stay. Usually they give direction that no coercive proceedings to be taken till P. CIT disposes the stay application.

Specimen Stay Application before Hon'ble ITAT

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APPENDIX X (e)

SPECIMEN FORM OF APPLICATION FOR GRANT OF STAY IN THE INCOME TAX APPELLATE TRIBUNAL

.....BENCH

Stay Application No. of
in the case of
For the assessment year(s)
under the Act for stay of
recovery of tax/ interest/ penalty/ fine/ other items.

1. Name and address of the applicant :

2. Act under which the demand is raised (i.e. Income-tax etc. for which stay application is moved) :

3. Assessment year(s) involved :

4. Date of filing of appeal before the Tribunal and its number, if known :

5. From the demand give break up :

Tax :

Interest :

Penalty :

Fine :

Others :

6(a) Amount already paid :

6(b) Amount outstanding :

6(c) Amount which is not disputed out of (b) :

7(a) Details of application for stay made to the revenue authorities. :

1. AO 2. C.I.T. :

(b) Result :

8. * Reasons for seeking stay :

9. (a) Whether the applicant is prepared to offer security :

(b) If yes, in what form :

10. Prayer stating exact amount sought to be stayed :

11. If stay is sought in relation to a matter pending before the High Court, give full particulars. :

Date _____ Signature of the applicant _____

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Specimen Stay Application before Hon'ble ITAT

IN THE INCOME-TAX APPELLATE TRIBUNAL '___' BENCH, MUMBAI

IN THE MATTER OF ASSESSMENT OF

STAY APPLICATION NO. ___ OF 2019
(ARISING OUT OF _____)

ASSESSMENT YEAR: 2010-11

PREVIOUS YEAR: 2009-10

INCOME TAX OFFICER – 18(2)(3)

vs.

(“the Applicant”)

(“the Respondent”)

The humble Application of the Applicant above named sheweth as follows:

The above named Applicant has filed an appeal on _____ before the Hon'ble Income tax Appellate Tribunal – Mumbai against the order dated _____ of the Commissioner of Income tax (Appeals) – __, Mumbai (“Ld. CIT(A”).

The aforesaid application has arisen out of the order dated _____ of the Hon'ble CIT(A) upholding the action of the Assessing Officer (AO) against the order dated _____ u/s 143 of the Income-tax Act, 1961 (“the Act”) passed by Income-tax Officer – _____, Mumbai (“the Ld. AO”).

Pursuant to the order of Hon'ble CIT(A), the Applicant, is in receipt of notice of demand dated _____ – **See Page No.** _____ determining the liability of Rs. _____/- + Interest u/s. 220(2) of the Act (approximately Rs. _____/-).

As required by Rule 35-A(2) of the Appellate Tribunal Rules, the Applicant submits hereunder the necessary information. This Rule applies to stay of demand

Specimen Stay Application before Hon'ble ITAT

I. BRIEF BACKGROUND:

II. RESULT OF APPEAL FILED BEFORE THE HON'BLE CIT(A)

III. THE PARTICULARS OF THE AMOUNT OF THE TAX DEMAND, THE AMOUNT DISPUTED THEREFROM AND THE ANTICIPATED OUTSTANDING DEMAND AFTER THE ORDER OF CIT(A):

Particulars	Tax *	Interest*	Total
Amount of tax demanded	xxx	xxx	xxx
Amount of tax disputed therefrom	xxx	xxx	xxx
Amount of tax outstanding	xxx	xxx	xxx

IV. REASONS FOR SEEKING STAY [POINT NO. OF APPENDIX X(e)]:

V. THE APPLICANT'S PRAYER:

- (i) Grant stay of demand of Rs. _____/- till the appeal filed before Hon'ble Tribunal is decided;
- (ii) Direct the AO or the Commissioner of Income-tax or their subordinates restraining them from taking any coercive action as regards recovery of tax, interest and penalty levied or leviable for the subject assessment year;
- (iii) Grant an early hearing of the appeal;
- (iv) Pass such other order and or grant relief as Hon'ble Tribunal, in the facts and in the circumstances of the case, may consider appropriate.

“Assessee in Default”

Cases where assessee would be deemed to be in default

- If the assessee does not pay the demand with the time allowed u/s. 220(1) or 220(3) (i.e. more or less than 30 days as the case may be), the assessee shall be deemed to be 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)
- 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

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, if the assessee is in default of payment of tax
- Attachment / auction of moveable / immovable properties
- Prosecution /arrest / detention

SECTION 221 – PENALTY PAYABLE WHEN TAX IN DEFAULT

- When an assessee is in default or is deemed to be in default in making payment of tax he shall be liable to pay penalty, in addition to the amounts of arrears and the amount of interest payable under sec. 220(2) of the Act
- Before levying any penalty, the assessee may be provided an opportunity of being heard.
- If default for not making payment was for good and sufficient cause, no penalty shall be levied.
- Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded

Issues under Section 221 of the Act

➤ **Tax does not include interest for the purpose of levying penalty u/s. 221 of the Act**

• **CIT v. Oryx Finance and Investment P. Ltd. (2017) 395 ITR 745 (Bom HC)**

Section categorically and specifically states that when an Assessee is in default or is deemed to be in default in making payment of tax, he shall in addition to the amount of arrears and the amount of interest payable under Sub-Section 2 of Section 220, be liable, to pay penalty, however the amount of penalty does not exceed the amount of tax in arrears.

The terminology “default in making a payment of tax and amount of interest payable” are considered to be separate for imposition of penalty and penalty is to be levied on account of default in making a payment of tax. Tax in arrears would not include the interest payable under section 220 (2) of the Act

Similar views in :

Shreeniwas & Sons v. ITO (1974) (96 ITR 562) (Cal HC)

CIT v. Great Value Food (2013) (228 Taxman 133) (P & H) HC

➤ **Financial Difficulties in payment of tax – penalty was deleted**

• **Life Time Realty (P.) Ltd. v. DCIT (2017) 163 ITD 553 (Mumbai Tribunal)**

• **Orbit Resorts (P.) Ltd. v. Addl. CIT (2017) 162 ITD 477 (Chand Tribunal)**

Issues under Section 221 of the Act

➤ **Penalty under section 221 will continue to be imposable even if tax has been deposited before initiation of penalty proceedings**

• **Reliance Industries Ltd. v. CIT (2015) (377 ITR 74) (Bom HC)**

The penalty is imposed upon the assessee under Section 221 of the Act for the default in not having paid the tax deducted at source within the time provided under the Act. This default is not wiped away by the assessee depositing the tax after the prescribed time.

➤ **Penalty not imposable when stay application is pending before the AO**

• **CIT v. DLF Universal Ltd. (297 ITR 342) (Delhi HC)**

➤ **Where an assessee does not pay self assessment tax under section 140A at time of filing original return of income, he is liable to pay penalty under section 221(1) even though he subsequently revises his return of income and pays self assessment tax at time of filing said revised return of income**

• **Claris Life Sciences Ltd. vs. DCIT [2017] 167 ITD 1 (Ahmedabad - Trib.) (SB)**

SECTION 222 – CERTIFICATE TO RECOVERY OFFICER

- When an assessee is in default or is deemed to be in default in making payment of tax, the TRO may proceed to recover from such assessee the amount specified in such certification by one or more of the following modes:
 - Attachment and sale of movable property
 - Attachment and sale of immovable property
 - Arrest of the assessee and his detention in prison
 - Appointing a receiver for the management of the assessee's movable and immovable properties

- The assessee's movable or immovable property shall include any property which has been transferred, directly or indirectly by the assessee to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration.

- As per rule 68B of the Second Schedule of the Act (Procedure for Recovery of Tax), where the property is not sold within a period of three years from the date of attachment, the stay gets vacated.

Issues under section 222 of the Act

- **Where assessee's husband transferred a property to her for inadequate consideration during block period for which search was carried out against him, in case of failure of assessee to pay tax demand determined in block assessment proceedings, department could proceed against aforesaid property of assessee under Explanation to section 222(1)**

T.S. Sujatha vs. TRO [2017] 78 taxmann.com 93 (Kerala HC)

- **PPF account cannot be attached for recovery of income-tax dues**

Dineshchandra Bhailalbai Gandhi vs. TRO [2014] 362 ITR 380 (Gujarat HC)

- **Cash-credit account or term loan account cannot be attached for recovery of unpaid tax**

In case of cash credit account or term loan account, bank and assessee do not have debtor-creditor relationship and, hence, said account could not be attached for recovery of unpaid tax.

Kaneria Granito Ltd. v. ACIT (2016) (241 Taxman 315) (Guj HC)

Sargam Foods (P.) Ltd. v. State of Maharashtra (2010) (WP No. 4313 of 2008) (Bom HC)

K. M. Adam v. ITO (1957) (33 ITR 26) (Mad HC)

- **Where sale of immovable property attached for recovery of any tax, interest, penalty or any other sum was not made within 3 years as required under rule 68B to Second Schedule, attachment order of said property would be deemed to be vacated**

K. Venkatesh Dutt v. TRO (244 Taxman 1) (2016) (Kar HC)

Noorudin v. TRO (251 ITR 357) (2001) (Mad HC)

Issues under section 222 of the Act

➤ **Whether escrow account can be attached?**

No. AAA Portfolios (P.) Ltd. v. DCIT (2013) (261 CTR 239) (Del HC)

Facts:

- A company held shares of 'X' Company. A Company decided to sell shares of 'X' Company to 'Z' and entered into share purchase agreement.
- Pursuant to share purchase agreement, Company A and Company Z entered into escrow agreement with the bank wherein an escrow account was opened.
- Purchaser was required to deposit the entire sale consideration with the escrow agent and the sellers agreed to deposit certain documents including share transfer deeds and instructions with the escrow agent
- AO passed assessment order on Company X and raised a demand.
- AO issued notice to the bank to attach the escrow account.
- A company objected on the ground that escrow agent did not either hold any money on account of the assessee or owed any money to the assessee.

Held:

- Section 226(3) confers upon an Assessing Officer a special jurisdiction to proceed directly against a person, other than an assessee, for recovery of income-tax demands due from the assessee .
- Once the third party has disputed that he owes any money or holds any money on account of the assessee, the Assessing Officer would not have any jurisdiction to proceed further against the third party. This is also abundantly clear from the language of clause (vi) of section 226(3).
- A transaction relating to sale and purchase of shares is a transaction inter-se the selling shareholders and purchasers and a company cannot stake claim to any part of the consideration as shares of a company are not the assets of the company but those of its shareholders.

Issues under section 222 of the Act

➤ **Whether Fixed Deposits (FD's) can be attached**

Yes

Shree Aashrayar Souhard credit Society Ltd. .v. ACIT (2014) 269 CTR 82 (Karn.)(HC)

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)

➤ **Attachment of 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)

➤ **Since entire tax liability of assessee was wiped off pursuant to order of Tribunal, in such a case, even if revenue's appeal was entertained by High Court, that by itself would not make assessee as an assessee-in-default - Tax recovery Officer was directed to lift the attachment of the immovable property**

Coromandel Oils (P.) Ltd. v. TRO (2017) 244 Taxman 165 (Mad HC)

Garnishee proceedings –Recovery from third parties – S.226(3)

- Notice in writing to any person from whom money is due to assessee or holds money for or on account of the assessee to pay to the Assessing Officer or to TRO so much of money as is sufficient to pay the amount by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.
- A notice to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal
- A copy of notice shall be forwarded to the assessee at his last known address and in case of joint holders at their last address known to Assessing Officer or TRO.
- Every person to whom notice under this sub section is issued shall be bound to comply with such notice.
- Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand in the notice

Garnishee proceedings –Recovery from third parties – S.226(3)

- Where a person to whom notice under this sub-section is sent objects to it through statement on Oath that the sum so demanded or any part thereof is not due to the assessee or that he does not hold any money on account of the assessee, then, nothing contained in this section is applicable to him for payment of any part of the demand. However, if subsequently discovered that such statement is false, that person is personally liable to make payment to the extent of his own liability to the assessee on the date of the notice.
- Any person discharging any liability to the assessee after receipt of a notice under this sub-section shall be personally liable to the Assessing Officer or TRO to the extent of his own liability to the assessee so discharged or to the extent of the assessee's liability for any sum due under this Act, whichever is less
- If a person to whom notice under this sub-section is sent fails to make payment in pursuance thereof to the Assessing Officer or TRO he shall be deemed to be an assessee in default.

Issues under section 226 of the Act

- **Requirement of garnishee proceedings is that only that copy of notice should be forwarded to assessee and need not be served on assessee in advance or simultaneously**

Against decisions

GECAS Services India P. Ltd. v. ITO (2017) 396 ITR 305 (Del HC)

Favourable Decisions

Farrukhabad Gramin Bank v. ACIT (277 ITR 320) (All HC)

Mohan Singh v. CIT [1993] 204 ITR 571 (P & H HC)

RECTIFICATION OF MISTAKES

Rectification of mistake u/s.154

- Rectification of only those **mistakes** that are apparent from the **record** and not otherwise
- Rectification can be done-
 - On **own motion**; or
 - On application made by assessee bringing mistake to the notice of authority concerned
- If rectification results in Enhancement, opportunity of being heard has to be given to the assessee
- If rectification results in enhancement, notice of demand u/s.156 is to be given to the assessee alongwith the order passed, which can be then appealable to CIT(A)
- Rectification can also result in reducing the assessment
- The order for rectification can be any order and not necessarily the original order.

Time Limit for Rectification u/s. 154

- **154 (7) - No amendment shall be made after the expiry of four years from the end of the financial year in which the order sought to be amended was passed (This is subject to certain exceptions as provided in section 155(4) and section 186 of the Act)**
- **154 (8) – Where an application is made by the assessee or the deductor, the authority shall pass an order within a period of six months from the end of the month in which the application is made by either:**
 - Making the amendment or**
 - Refusing to allow the claim**

Issues under Rectification u/s. 154

➤ Meaning of Records

- ‘Record’ under section 154 means record of the case comprising the entire proceedings including documents and materials produced by the parties and taken on record by the authorities which were available at the time of passing of the order which is the subject-matter of the proceedings for rectification. They cannot go beyond the records and look into fresh evidence or materials which were not on record at the time the order sought to be rectified was passed

Gammon India Ltd. v. CIT [1995] 214 ITR 50 (Bom.)

- Authorities can not consider fresh material or evidence. Documents outside record can not be referred for the purpose of rectification

CIT Vs. Keshari Metal P. Ltd. (1999) 237 ITR165 (SC)

➤ Mistake

T.S. Balaram ITO Vs. Volkart Brothers (1971) 82 ITR 50 (SC)

- A mistake apparent on the record must be an obvious and patent mistake.
- It should not be something which can be established by a long drawn process of reasoning
- It should not be a mistake on points on which there may conceivably be two opinions
- The mistake can be either mistake of fact of fact or mistake of law. However it must be an error which is apparent on the examination of the record itself without entering into any fresh or additional investigation.

Issues under Rectification u/s. 154

➤ **Mistake from Interpretation off Law**

a) Where only one interpretation of a provision of law is possible:

Where only one interpretation one section of the Act is possible and any other is not possible, an earlier order which is not in conformity with the only possible interpretation of the section would be liable to be rectified as the mistake would be regarded as one apparent from record.

ITO vs. Raleigh Investment Co. Ltd. (1976) 102 ITR 616 (Cal)

India Carbon Ltd. vs. CIT (1989) 175 ITR 27 (Gau)

(b)Where two interpretations of a provision of law are possible:

If a statutory provision was capable of two interpretations, and one such interpretation has been adopted in passing the original order, such an order cannot be amended so as to bring it in conformity with the other possible interpretation by exercise of power of rectification under s. 154. Thus where issues are debatable no rectification can be resorted to.

Travancore Rayons Ltd. vs. ITO &Anr.(1977) 109 ITR 43 (Ker)

Md. Serajuddin & Bros v. CIT (2012) (210 Taxman 84) (Cal HC)

Issues under Rectification u/s. 154

- **Time Limit – Whether if no order is passed within six months, the order is deemed to be rectified?**

No. Assessing Authority can pass order in respect of application under section 154, even after expiry of 6 months on merit in accordance with law.

Mac Charles (India) Ltd. v. ACIT (2014) (48 taxmann.com 184)(Kar HC)

Assessee filed a rectification application before Tribunal on 2-8-2000, praying for recall of its own order dated 9-12-1996 - Tribunal allowed rectification application by order dated 31-1-2003. Department when to HC. HC held that time limit has been expired. Supreme Court held that

“since application for rectification was filed within four years and it was Tribunal, which took its own time to dispose of application, High Court had erred in holding that application could not have been entertained by Tribunal beyond four years”

Sree Ayyanar Spinning & Weaving Mills Ltd v. CIT (2008) (301 ITR 434) (SC)

Desai Investment (P.) Ltd. v. ITO (2010) (45 DTR 75)(Mumbai Tribunal)

Issues under Rectification u/s. 154

➤ **Rectification of mistake – Time limit – Beyond four years from the end of financial year in which assessment was completed is barred by limitation?**

Assessment was completed on 29-12-2006. Notice for rectification was issued on 2-3-2012 and order was passed on 23-3-2012. Thereafter, demand was raised against assessee pursuant to order passed under section 154. Assessee claimed that as per section 154(7), limitation period for rectification is four years from end of financial year in which assessment is completed, which was 31-3-2011 in this case. It was held that demand raised pursuant to order under section 154 was time barred.

Vodafone Mobile Service Ltd. v. UOI (2013) 86 DTR 332 (Del HC)

➤ **Effect of Retrospective amendment?**

A mistake can be glaring and obvious in the light of a retrospective amendment of the statute, unless the extend of retrospectivity is debatable.

ITO v Bombay Dyeing & Mfg Co Ltd (1958) 34 ITR 143(SC)

Haryana State Co-op Supply and Marketing Federation Ltd. v. CIT (2016) 389 ITR 266 (P&H)(HC)

➤ **Review permissible?**

Review of the earlier decision is not permissible in the form of rectification

CIT Vs. United Mercantile Co. P. Ltd. (1986) 158 ITR 41 (Raj)

Issues under Rectification u/s. 154

➤ **Multiple Rectification?**

Where original assessment was subsequently rectified, a second application for rectification made within four years from date of rectificatory order was valid.

Hind Wire Industries Ltd v. CIT (212 ITR 639) (1995) (SC)
CIT v. Shan Elahi (2003) 132 Taxman 89 (All.)(High Court)

➤ **AO makes addition to the closing stock in Year 1. Whether in Year 2 rectification can be filed to give effect to opening stock?**

Yes. Closing stock of earlier year has to be treated as opening stock of current year and therefore where the opening stock of current year shows a lower value than the value of closing stock of earlier year as finally determined by the Assessing Officer, the same is amenable to rectification under section 154.

V. K. J. Builders & Contractors (P) Ltd. v. CIT (2010) 318 ITR 204 (SC)

➤ **Non-consideration of decision of Jurisdictional High Court or Supreme Court whether mistake apparent on record?**

Yes

ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) (305 ITR 227) (SC)

Issues under Rectification u/s. 154

- **Subsequent decision of High Court or Supreme Court, where no appeal is filed against the order of the AO, whether 154 maintainable?**

No, If the assessee does not challenge the order of assessment in which Assessing Officer has refused the relief by filing an appeal, the assessment order becomes final and the rectification application under section 154 cannot be entertained in such case, to grant relief on the basis of a subsequent decision of the High Court or the Supreme Court

CIT v. Krone Communications Ltd. (2010)(233 CTR 203) (Kar HC)

- **Subsequent decision of Supreme Court/Jurisdictional High Court.**

In view of subsequent judgment of the Supreme Court setting aside the judgment of the High Court, the Assessing Officer is directed to rectify the assessment order.

K. R. Alagappan & Ors. v. ACIT (2011) 332 ITR 517 (Mad.)(High Court)

Dy. CIT v. Vijay V. Meghani (2007) 109 TTJ 7 (Mumbai ITAT)

- **AO resorted to rectification without serving any notice, whether valid?**

No. Failure to serve notice before passing order of rectification violates the requirement of section 154(3), hence order is bad in law.

Mintri Tea Company P. Ltd. v. CIT (2009) 319 ITR 264 (Cal HC)

Issues under Rectification u/s. 154

➤ **Whether rectification can be filed against CIT(A)'s order?**

Commissioner (Appeals) is an authority of Income Tax which is authorised to rectify its order as per provisions of sections 154 and 116.

Shokat Ali Contractor v. ITO (2007) (112 TTJ 547)(Jodh.)(Trib.)

