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An Enquiry in Relation to Stay of Demand under the Income-Tax Act, 1961

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The constant rise in the income-tax disputes is attributable to the insufficiency of the income-tax act in granting the preferential right in favour of the assessee. Understandably, this makes the process of filing an appeal for availing the stay of demand very crucial. At times it may happen that the taxpayer is aggrieved by an order of the Assessing Officer. In such a case he can file an appeal against the order of the Assessing Officer before the Commissioner of Income-tax (Appeals). This article can help you gain knowledge about various provisions relating to appeals to the Commissioner of Income-tax (Appeals). This article aims at establishing those grounds and procedures based on which an appeal can be disposed of and stay of demand can be invoked accordingly.

Keywords: *tax, income, enquiry.*

INTRODUCTION

Any amount payable in form of tax, fees, interest, penalty, or any other sum as per the Income Tax Act, 1961 is specified in the Notice of Demand issued u/s 156 of the Act. The provision lays down a time limit of 30 days to complete the payment. If there exists any default on the part of the assessee, the assessee is deemed to be an assessee in default as per section 220(4) of

the act. Moreover, in the case of default, the assessee is also charged with interest at the rate of 1% on the amount payable along with a penalty u/s 221(1) of the act. The Assessing Officer determines the income tax liability first. The assessing officer is the person who has complete charge over the process (hereinafter referred to as 'AO'). A taxpayer aggrieved by various actions of the Assessing Officer relating to the demand can appeal before the Commissioner of Income Tax (Appeals). Thereafter appeal can be preferred before the Income Tax Appellate Tribunal. If there arises any substantial question of law, a further appeal can be filed before the High Court and even to the Supreme Court.

There are various appellate procedures at different levels of appellate authority are defined hereunder:

- Appeal to Commissioner of Income-Tax (S.246A to S.249)
- Appeal to Income-Tax Appellate Tribunal (S.252 to S.255)
- Appeal to High Court (S.260 A)
- Appeal to Supreme Court (S.261)

At the same time, the question arises, whether the assesses can delay their tax liability when the matter lies in the appeal? Understandably, the mere filing of an appeal is not sufficient to invoke the stay over the demand. As per section 220(1A), disposal of appeal by the last appellate authority is a pre-requisite to invoke stay of demand. This article aims at establishing those grounds and procedures based on which an appeal can be disposed of and stay of demand can be invoked accordingly.

RULES AND PROCEDURES TO GET STAY OF DEMAND

1. ITAT's Power to Grant Stay: Income Tax Appellate Tribunal (ITAT) has the power as per section 254(2A)¹, to grant a stay under the first proviso subject to the condition that the assessee deposits not less than twenty percent of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act, or can lieu security of equal amount in

¹ Income Tax Act, 1961, s 254

respect thereof in any proceedings against the order of the Commissioner of Income-tax (Appeal). However, the Hon'ble Supreme Court in *the LG Electronics case*², observed that that commissioner has the power to grant a stay on payment of an amount lesser than 20% depending upon the facts of the case. The second proviso to the section states that the stay can be further granted up till the completion of 365 days if it is established that the delay in disposing of the appeal is not attributable to the Assessee. The third proviso to the section authorises automatic vacation of stay of demand after a certain period, even in cases where a delay in hearing of appeals is not attributable to the taxpayer. The third clause was constitutionally challenged in the Supreme Court on the grounds of Article 14.³ The third proviso to section 254(2A) establishes that the unequal has been treated equally, which is violative to the basic principle of 'equality' under Article 14 of the Constitution. The Hon'ble Supreme Court in *DCIT v Pepsi Foods Ltd.*⁴ has held automatic vacation under proviso three to section 254(2A) of the act where the taxpayer is not found at fault would violate Article 14 of the Constitution. Conclusively, it was declared that the proviso would be manifestly arbitrary and irrational if the vacation of stay is in favour of the revenue collection department even for no fault on the part of the taxpayer.

Therefore, a taxpayer can still seek an extension of stay if there is a genuine case, where the delay in disposal of appeal is not caused due to the taxpayer of the action. The courts under several judgements have provided tribunals with some discretionary powers to extend the stay even beyond 365 days provided that the case of the taxpayer merits such interim relief to be granted or extended. The interim relief would be solely granted based on the genuineness of the facts of the case, which are incidental and ancillary to the matter in concern.⁵

2. Power of Assessment Officer u/s 220(6) of the Act: As per section 220(6)⁶, the income tax authorities are equipped with the discretionary power to grant stay against the income tax demand, when the matter is *subjudice* before the CIT(Appeals). The power provided to AO as

² *Janata Industries, Mumbai v Pr Cit* [2016] 388 ITR 135

³ Constitution of India, 1950, art. 14

⁴ *CIT v Pepsi Foods Ltd.* (2021) SCC OnLine SC 283

⁵ *Income Tax Officer v M.K. Mohammed Kunhi* (1969) AIR 430

⁶ Income Tax Act, 1961, s 220(1A)

per section 220(6) is not absolute and unfettered. The power is based upon rules of reason and justice and is therefore not based upon private opinion as laid down in cases like; *Ladhuram Tapuria's case*⁷, *Aluminium Corporation of India's case*⁸, and *Vetcha Sreeramamurthy's case*⁹. This power under section 220(6) to the tribunal flows from the Supreme Court decision in *ITO v M.K. Mohammed Kunhi*¹⁰. Section 220(6) of the act, establishes that the assessment officer enjoys a discretionary power under the section while hearing an appeal presented under section 246 or 246A. Assessing the officer while keeping in mind the circumstances of the case and the genuineness of the matter will decide, whether the assessee is in default or not, irrespective of the fact that the time for payment has expired. Therefore, the assessee may accordingly apply for a stay of tax demand u/s 220(6) and may pray that he may not be treated as assessee in default. Understandably, such discretionary powers delegated under section 220(6) should not be exercised arbitrarily and without applying the judicial mind. AO while hearing an appeal under section 220(6) is considered as a quasi-judicial body therefore, he is required to exercise the given power within his judicial limits. In addition to that, the order granting the stay on demand must be speaking.¹¹ The Supreme Court, in the case of *Asst CCE v Dunlop*¹², has held that the discretionary power granted to the AO under section 220(6) to stay the tax demand, is required to be exercised by applying judicial mind and reason, on relevant grounds which are incidental and ancillary to the matter; balance of convenience; the possibility of irreparable injury; and safeguarding the public interest.

In addition to this under section 220(6), when the matter is at the stage where the appeal is to be filed before the appellate body, the AO/TRO are restricted from making any recovery of the disputed amount from the assessee, during the period allowed for filing the appeal. No claim will be made during the statutory limitation period of 3 months between the filling of the first appeal as defined under Rule 34(5) of the ITAT Rules.¹³ Therefore, in these 3 months, the automatic stay of demand is invoked. It is, therefore, clearly established that while the stay

⁷ *Ladhuram Tapuria v B. K. Bagchi* (1951) 20 ITR 51(Cal)

⁸ *Aluminium Corporation of India v Mr. C. Balakrishnan And Ors.* (1959) 37 ITR 267 (Cal)

⁹ *Vetcha Sreeramamurthy v The Income-Tax Officer* (1956) 30 ITR 252 (A.P.)

¹⁰ *Income Tax Officer* (n 14)

¹¹ *Vikrambhai Punjabhai Palkhiwala v S.M. Ajbanj, Recovery Office and Ors.* (1990) 182 ITR 413 (Guj.)

¹² *Commissioner Of Income-Tax v Travancore Rubber And Tea Co. Ltd.* (1990) 154 ITR 582 (Cal.)

¹³ *Income Tax Appellate Tribunal Rules, 2017, r 34*

petition is pending before any IT(Appeal) authority, including the CIT(A) or the Tribunal, the ITO/TRO is restricted from taking any steps, for the recovery of the disputed demand. Similarly, in the case of *Glaxo Smith Kline Asia Pvt. Ltd. vs Addl. CIT*¹⁴, the department tried to coercively recover the entire disputed amount even before the assessee filed an appeal to the tribunal. The Tribunal held that such action on the part of AO/TRO was against the rule established by the ITAT and accordingly directed it to refund the amount so collected.

3. Instructions & Circulars By CBDT: Central Board of Direct Taxes (CBDT) has from time to time released several instructions and circulars to guide AOs in respect of matters relating to the exercise of their powers under section 220(6) of the act. In 1969, CBDT released Instruction no. 96. As per the instruction, it was observed that income-tax assessments were pitched arbitrarily and had no nexus with the real income of the assessee. Moreover, the collection of disputed demand as a result thereof was also not stayed despite the specific provision in the matter in s. 220(6) of the IT Act, 1961. As a result, further modification of instruction no. 1914 was made to provide guidelines for a stay of demand. Similarly, in the case of *Pradeep Ratanshi v CIT*¹⁵ and *Soul v Dy CIT*¹⁶, the court found that the assessment was unnecessarily high-pitched without any established grounds. The Court, therefore, observed that the demand is arbitrary and needs to stay given CBDT's circular in 1961 & 1993.

CBDT's Instruction No. 1914, date 2.12.1993, held that the disputed income tax demanded by the authority can be stayed, if the demand in dispute relates to issues that have already been decided in the favour of the assessee by an appellate authority, viz. CIT(A) or ITAT or Court, viz. the High Court or the Supreme Court, or where a dispute has arisen concerning the legal interpretation in respect of which there exist contrary decisions and directions of one or more High Courts, other than the Jurisdictional High Court, or the Jurisdictional High Court has adopted a contrary interpretation but the Department has not accepted that judgement. In all such cases, the disputed income tax demand can stay in favour of the assessee.

¹⁴ *Vasu Dev Pahwa, New Delhi v Assessee* [2005] 2 SOT 457 (Del.)

¹⁵ *Pradeep Ratanshi v Assistant Commissioner of Income Tax* (1996) 221 ITR 502 (Ker.)

¹⁶ *Taneja Developers & Ors. v Assistant Commissioner of Income* (2008) 220 CTR (Del) 211

CONCLUSION

Considering the aforementioned discussions, it is established that the CIT(A) is the appropriate authority for hearing a stay petition concerning the disputed IT demand involved in the appeal pending before him. The CBDT's relevant Instructions and the judgments of the various High Courts have established very reasonable grounds for the CIT(A) and other IT authorities to grant a stay of disputed demand. Following are some essential points that should be kept in mind: -

- It is essential to keep in mind while appealing for a stay of demand that, the mere filing of an appeal is not sufficient to invoke the stay over the demand. Disposal of appeal by the last appellate authority is a pre-requisite to invoke stay of demand.
- It should also be noted that a non-speaking order cannot summarily reject the stay petition. Such an order is bound to get challenged under section 264¹⁷ of the act.
- The order granting the stay of demand with regards to the stay petitions should be a speaking order.
- AO should exercise his discretionary power u/s 220(6) judiciously and reasonably without any arbitrariness.

¹⁷ The Income-Tax Act, 1961, s 264