

STAY AND RECOVERY OF INCOME TAX

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I) INTRODUCTION:

Law & Procedure

Income Tax Act, 1961, has laid down various provisions for collection and recovery of tax demand. **Sections 220 to 232 of the Act**, Schedules II & III of the Income Tax Act and Income Tax (certificate proceedings) Rules, 1962 are the relevant provisions which deal with various methods of collection of tax demand.

The assessing officer is responsible for recovery of tax, whether the demand represents tax assessed by him or is the result of any order passed by the Appellate Authority or the Commissioner of Income Tax. However, where the assessee is in default in making the payment of tax, the proceedings for recovery are carried out by the Tax Recovery Officer (TRO).

TRO has special powers, under the Act, for recovery of arrears of tax demand by way of causing

- a. attachment and sale of the assessee's movable and or immovable property;
- b. arrest of the assessee and his detention in prison and
- c. appointment of a receiver for management of the assessee's movable and immovable properties.

The administrative machinery of the TRO has been strengthened by allocating one TRO exclusively for each Range with an increased staff strength under him consequent to the implementation of the scheme of restructuring of the department with effect from August 2001.

Objective of the aforesaid sections:

To ascertain, whether the department,

- i. has made all efforts provided under the law for expeditious recovery and liquidation of tax arrears,
- ii. is effectively pursuing the installments granted to the assessee for payment of tax demands,
- iii. is diligently pursuing disposal of appeals by Appellate Authorities,

- iv. is taking necessary steps to get the stays vacated and
- v. has an effective system of internal control and monitoring of its own procedures and guidelines

II) In view of the above, we at the very outset proceed to quote the extract of the aforesaid sections:

Section 220

WHEN TAX PAYABLE AND WHEN ASSESSEE DEEMED IN DEFAULT.

(1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under section 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice :

Provided that, where the Assessing Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty days aforesaid is allowed, he may, with the previous approval of the Joint Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty days aforesaid, as may be specified by him in the notice of demand.

(2) If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one and one half per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid :

Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264, or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded :

Provided further that in respect of any period commencing on or before the 31st day of March, 1989 and ending after that date, such interest shall, in respect of so much of such period as falls after that date, be calculated at the rate of one and one-half per cent for every month or part of a month.

(2A) Notwithstanding anything contained in sub-section (2), the Chief Commissioner or Commissioner may reduce or waive the amount of interest paid or payable by an assessee under the said sub-section if he is satisfied that - (i) Payment of such amount has caused or would cause genuine hardship to the assessee;

(ii) Default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

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

(3) Without prejudice to the provisions contained in sub-section (2), on an application made by the assessee before the expiry of the due date under sub-section (1), the Assessing Officer may extend the time for payment or allow payment by installments, subject to such conditions as he may think fit to impose in the circumstances of the case.

(4) If the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and to the person mentioned in the said notice the assessee shall be deemed to be in default.

(5) If, in a case where payment by installments is allowed under sub-section (3), the assessee commits default in paying any one of the installments within the time fixed under that sub-section, the assessee shall be deemed to be in default as to the whole of the amount then outstanding, and the other installment or installments shall be deemed to have been due on the same date as the installment actually in default.

(6) Where an assessee has presented an appeal under section 246, 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 of.

(7) Where an assessee has been assessed in respect of income arising outside India in a country the laws of which prohibit or restrict the remittance of money to India, the Assessing Officer shall not treat the assessee as in default in respect of that part of the 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, and shall continue to treat the assessee as not

in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation : For the purposes of this section, income shall be deemed to have been brought into India if it has been utilized or could have been utilized for the purposes of any expenditure actually incurred by the assessee outside India or if the income, whether capitalized or not, has been brought into India in any form.

Related Judgments

TUTICORIN VEGETABLE MARKETING CO. (P) LTD. v. INCOME-TAX OFFICER & ANR.

J. JAYALALITHA v. COMMISSIONER OF INCOME-TAX & ORS.

H. A. G. DASTAGIR SHERIF v. COMMISSIONER OF INCOME-TAX & ANR.

ANITA RANI v. TAX RECOVERY OFFICER & ORS.

Section 221

PENALTY PAYABLE WHEN TAX IN DEFAULT.

(1) When an assessee is in default or is deemed to be in default 1892 in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :

Provided further that where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.

Explanation : For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.

(2) 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.

Related Judgments

MITTAL STEEL LTD. v. ASSISTANT COMMISSIONER OF INCOME-TAX & ANR.

Section 222

CERTIFICATE BY TAX RECOVERY OFFICER.

(1) When an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may draw up under his signature a statement in the prescribed form specifying the amount of arrears due from the assessee (such statement being hereafter in this Chapter and in the Second Schedule referred to as "certificate") and shall proceed to recover from such assessee the amount specified in the certificate by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule -

- (a) Attachment and sale of the assessee's movable property;
- (b) Attachment and sale of the assessee's immovable property;
- (c) Arrest of the assessee and his detention in prison;
- (d) Appointing a receiver for the management of the assessee's movable and immovable properties.

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

respect of any period prior to such date.

(2) The Tax Recovery Officer may take action under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

Related Judgments

[VYSYA BANK LTD. v. JOINT COMMISSIONER OF INCOME-TAX & ANR.](#)
[\(GLOBAL TRUST BANK LTD. v. JOINT CIT & ANR.\)](#)

Section 223

TAX RECOVERY OFFICER BY WHOM RECOVERY IS TO BE EFFECTED.

(1) The Tax Recovery Officer competent to take action under section 222 shall be -

(a) The Tax Recovery Officer within whose jurisdiction the assessee carries on his business or profession or within whose jurisdiction the principal place of his business or profession is situate, or

(b) The Tax Recovery Officer within whose jurisdiction the assessee resides or any movable or immovable property of the assessee is situate, the jurisdiction for this purpose being the jurisdiction assigned to the Tax Recovery Officer under the orders or directions issued by the Board, or by the Chief Commissioner or Commissioner who is authorised in this behalf by the Board in pursuance of section 120.

(2) Where an assessee has property within the jurisdiction of more than one Tax Recovery Officer and the Tax Recovery Officer by whom the certificate is drawn up - (a) Is not able to recover the entire amount by sale of the property, movable or immovable, within his jurisdiction, or

(b) Is of the opinion that, for the purpose of expediting or securing the recovery of the whole or any part of the amount under this Chapter, it is necessary so to do, he may send the certificate or, where only a part of the amount is to be recovered, a copy of the certificate certified in the prescribed manner and specifying the amount to be recovered to a Tax Recovery Officer within whose jurisdiction the assessee resides or has property and, thereupon, that Tax Recovery Officer shall also proceed to recover the amount under this Chapter as if the certificate or copy thereof had been drawn up by him.

Section 224**VALIDITY OF CERTIFICATE AND CANCELLATION OR AMENDMENT THEREOF.**

It shall not be open to the assessee to dispute the correctness of any certificate drawn up by the Tax Recovery Officer on any ground whatsoever, but it shall be lawful for the Tax Recovery Officer to cancel the certificate if, for any reason, he thinks it necessary so to do, or to correct any clerical or arithmetical mistake therein.

Section 225**STAY OF PROCEEDINGS IN PURSUANCE OF CERTIFICATE AND AMENDMENT OR CANCELLATION THEREOF.**

(1) It shall be lawful for the Tax Recovery Officer to grant time for the payment of any tax and when he does so, he shall stay the proceedings for the recovery of such tax until the expiry of the time so granted.

(2) Where the order giving rise to a demand of tax for which a certificate has been drawn up is modified in appeal or other proceeding under this Act, and, as a consequence thereof, the demand is reduced but the order is the subject-matter of further proceeding under this Act, the Tax Recovery Officer shall stay the recovery of such part of the amount specified in the certificate as pertains to the said reduction for the period for which the appeal or other proceeding remains pending.

(3) Where a certificate has been drawn up and subsequently the amount of the outstanding demand is reduced as a result of an appeal or other proceeding under this Act, the Tax Recovery Officer shall, when the order which was the subject-matter of such appeal or other proceeding has become final and conclusive, amend the certificate, or cancel it, as the case may be.

Section 226**OTHER MODES OF RECOVERY.**

(1) Where no certificate has been drawn up under section 222, the Assessing Officer may recover the tax by any one or more of the modes provided in this section.

(1A) Where a certificate has been drawn up under section 222, the Tax Recovery Officer may, without prejudice to the modes of recovery specified in that section, recover the tax by any one or more of the modes provided in this section.

(2) If any assessee is in receipt of any income chargeable under the head "Salaries", the Assessing Officer or the Tax Recovery Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisition any arrears of tax due from such assessee, and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Government or as the Board directs :

Provided that any part of the salary exempt from attachment in execution of a decree of a civil court, under section 60 of the Code of Civil Procedure, 1908 (5 of 1908) shall be exempt from any requisition made under this sub-section.

(3)(i) The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued 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.

(iii) A copy of the notice shall be forwarded to the assessee at his last address known to the Assessing Officer or Tax Recovery Officer and in the case of a joint account to all the joint holders at their last addresses known to the Assessing Officer or Tax Recovery Officer.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy, or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.

(v) 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 contained in the notice.

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Assessing Officer or Tax Recovery Officer to the extent of his own liability to the assessee on the date of the notice, or to the extent of the assessee's liability for any sum due under this Act, whichever is less.

(vii) The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The Assessing Officer or Tax Recovery Officer shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the assessee to the extent of the amount so paid.

(ix) 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 Tax Recovery Officer 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.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Assessing Officer or Tax Recovery Officer he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear of tax due from him, in the manner provided in sections 222 to 225 and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers under section 222.

(4) The Assessing Officer or Tax Recovery Officer may apply to the court in whose custody there is money belonging to the assessee for payment to him of the entire amount of such money, or, if it is more than the tax due, an amount sufficient to discharge the tax.

(5) The Assessing Officer or Tax Recovery Officer may, if so authorised by the Chief Commissioner or Commissioner by general or special order, recover any arrears of tax due from an assessee by distraint and sale of his movable property in the manner laid down in the Third Schedule.

Related Judgments

VYSYA BANK LTD. v. JOINT COMMISSIONER OF INCOME-TAX & ANR.
(GLOBAL TRUST BANK LTD. v. JOINT CIT & ANR.)

ABDUL KHADER v. SUB-INSPECTOR OF POLICE & ORS.

OIL & NATURAL GAS COMMISSION v. MCDERMOTT INTERNATIONAL INC.

ANITA RANI v. TAX RECOVERY OFFICER & ORS.

Section 227

RECOVERY THROUGH STATE GOVERNMENT.

If the recovery of tax in any area has been entrusted to a State Government under clause (1) of article 258 of the Constitution, the State Government may direct, with respect to that area or any part thereof, that tax shall be recovered therein with, and as an addition to, any municipal tax or local rate, by the same person and in the same manner as the municipal tax or local rate is recovered.

Section 228

RECOVERY OF INDIAN TAX IN PAKISTAN AND PAKISTAN TAX IN INDIA.

OMITTED BY THE DIRECT TAX LAWS (AMENDMENT) ACT, 1987, W.E.F. 1-4-1989

Section 228A

RECOVERY OF TAX IN PURSUANCE OF AGREEMENTS WITH FOREIGN COUNTRIES.

(1) Where an agreement is entered into by the Central Government with the Government of any country outside India for recovery of income-tax under this Act and the corresponding law in force in that country and the Government of that country or any

authority under that Government which is specified in this behalf in such agreement sends to the Board a certificate for the recovery of any tax due under such corresponding law from a person having any property in India, the Board may forward such certificate to any Tax Recovery Officer within whose jurisdiction such property is situated and thereupon such Tax Recovery Officer shall -

(a) Proceed to recover the amount specified in the certificate in the manner in which he would proceed to recover the amount specified in a certificate drawn up by him under section;

(b) Remit any sum so recovered by him to the Board after deducting his expenses in connection with the recovery proceedings.

(2) Where an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may, if the assessee has property in a country outside India (being a country with which the Central Government has entered into an agreement for the recovery of income-tax under this Act and the corresponding law in force in that country), forward to the Board a certificate drawn up by him under section 222 and the Board may take such action thereon as it may deem appropriate having regard to the terms of the agreement with such country.

Section 229

RECOVERY OF PENALTIES, FINE, INTEREST AND OTHER SUMS.

Any sum imposed by way of interest, fine, penalty, or any other sum payable under the provisions of this Act, shall be recoverable in the manner provided in this Chapter for the recovery of arrears of tax.

Section 230

TAX CLEARANCE CERTIFICATE.

(1) Subject to such exceptions as the Central Government may, by notification in the Official Gazette, specify in this behalf, no person -

(a) Who is not domiciled in India; or

(b) Who is domiciled in India at the time of his departure, but - (i) Intends to leave

India as an emigrant; or

(ii) Intends to proceed to another country on a work permit with the object of taking up any employment or other occupation in that country; or

(iii) In respect of whom circumstances exist which in the opinion of an income-tax authority, render it necessary for him to obtain a certificate under this section, shall leave the territory of India, by land, sea or air unless he first obtains from such authority as may be appointed by the Central Government in this behalf (hereinafter in this section referred to as the "competent authority") a certificate stating that he has no liabilities under this Act, the Excess Profits Tax Act, 1940 (15 of 1940), the Business Profits Tax Act, 1947 (21 of 1947), the Indian Income-tax Act, 1922 (11 of 1922), the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1957 (29 of 1957), or the Gift-tax Act, 1958 (18 of 1958), or that satisfactory arrangements have been made for the payment of all or any of such taxes which are or may become payable by that person :

Provided that in the case of a person not domiciled in India the competent authority may, if it is satisfied that such person intends to return to India, issue an exemption certificate either in respect of a single journey or in respect of all journeys to be undertaken by that person within such period as may be specified in the certificate.

(2) If the owner or charterer of any ship or aircraft carrying persons from any place in the territory of India to any place outside India allows any person to whom sub-section (1) applies to travel by such ship or aircraft without first satisfying himself that such person is in possession of a certificate as required by that sub-section, he shall be personally liable to pay the whole or any part of the amount of tax, if any, payable by such person as the Assessing Officer may, having regard to the circumstances of the case, determine.

(3) In respect of any sum payable by the owner or charterer of any ship or aircraft under sub-section (2), the owner or charterer, as the case may be, shall be deemed to be an assessee in default for such sum, and such sum shall be recoverable from him in the manner provided in this Chapter as if it were an arrear of tax.

(4) The Board may make rules for regulating any matter necessary for, or incidental to, the purpose of carrying out the provisions of this section.

Explanation : For the purposes of this section, the expressions "owner" and "charterer" include any representative, agent or employee empowered by the owner or charterer to allow persons to travel by the ship or aircraft.

Section 230A

RESTRICTIONS ON REGISTRATION OF TRANSFERS OF IMMOVABLE PROPERTY IN CERTAIN CASES.

(1) Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under the provisions of clause (a) to clause (e) of sub-section (1) of section 17 of the Indian Registration Act, 1908 (16 of 1908), purports to transfer, assign, limit or extinguish the right, title or interest of any person to or in any property valued at more than five lakh rupees, no registering officer appointed under that Act shall register any such document, unless the Assessing Officer certifies that - (a) Such person has either paid or made satisfactory provision for payment of all existing liabilities under this Act, the Excess Profits Tax Act, 1940, (15 of 1940), the Business Profits Tax Act, 1947 (21 of 1947), the Indian Income-tax Act, 1922 (11 of 1922), the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1957 (29 of 1957), the Gift-tax Act, 1958 (18 of 1958), the Super Profits Tax Act, 1963 (14 of 1963), and the Companies (Profits) Surtax Act, 1964 (7 of 1964), or (b) the registration of the document will not prejudicially affect the recovery of any existing liability under any of the aforesaid Acts.

(2) The application for the certificate required under sub-section (1) shall be made by the person referred to in that sub-section and shall be in such form and shall contain such particulars as may be prescribed.

(3) The provisions of sub-section (1) shall not apply in a case where the person referred to in that sub-section is any such institution, association or body, or belongs to any such class of institutions, associations or bodies, as the Board may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette.

Related Judgments

INCOME-TAX OFFICER v. J. CHITRA & ANR. (R. RENUKASESAN, ITO v. CHINNI MOHAN RAO)

H. A. G. DASTAGIR SHERIF v. COMMISSIONER OF INCOME-TAX & ANR.

Section 231**PERIOD FOR COMMENCING RECOVERY PROCEEDINGS.**

OMITTED BY THE DIRECT TAX LAWS (AMENDMENT) ACT, 1987, W.E.F. 1-4-1989

Section 232**RECOVERY BY SUIT OR UNDER OTHER LAW NOT AFFECTED.**

The several modes of recovery specified in this Chapter shall not affect in any way - (a) Any other law for the time being in force relating to the recovery of debts due to Government; or

(b) The right of the Government to institute a suit for the recovery of the arrears due from the assessee; and it shall be lawful for the Assessing Officer or the Government, as the case may be, to have recourse to any such law or suit, notwithstanding that the tax due is being recovered from the assessee by any mode specified in this Chapter.

IIA) OTHER CONNECTED POINTS TO REMEMBER

1. **Reduction or waiver of interest (section 220 (2A):** The Chief Commissioner of Commissioner may reduce or waive the amount of interest payable by an assessee u/s 220 (2), if he is satisfied that:
 - a) payment of such interest would cause genuine hardship to assessee.

- b) the default in the payment of the amount on which interest was payable was due to circumstances beyond the control of the assessee, and
- c) the assessee has co-operated in any inquiry relating to the assessment or in any proceeding for the recovery of any amount due from him .

2. One should keep in view the following:

- a) The above conditions for waiver must be satisfied cumulatively.
- b) If at the time of relief is sought, the assessee had no hardship, relief cannot be granted by holding that at some time in the past the assessee had hardship.
- c) Mere fact that the assessee is a wealth tax assessee is not a relevant consideration at all for proving that payment of interest would not cause any genuine hardship to assessee.
- d) Power must be exercised judicially and reasonably based on relevant facts.
- e) Application of assessee under section 220(2A) should be decided by a speaking order
- f) Order signed by assessing officer on behalf of commissioner and which does not state reasons for rejection would be liable to be quashed

3. **When assessment reframed:** When an assessment order is cancelled / set aside by an appellate / revision authority and the cancellation / setting aside becomes final (i.e., it is not varied as a result of further appeals/ revisions), no interest u/s 220(2) can be charged pursuant to the original demand notice. The necessary corollary of this point will be that even when the assessment is reframed, interest can be charged only after the expiry of 30 days from the date of service of demand notice pursuant to such fresh assessment order.- CIRCULAR NO 334 DATED APRIL 3, 1982.

Where the assessment made originally by the assessing officer is either varied or even set aside by one appellate authority but on further appeal, the original order of the assessing officer is restored (either in part or wholly), the interest payable under section 220(2) will be computed with reference to the due date reckoned from the original demand notice and with reference to the

tax finally determined. The facts that during an intervening period, there was no tax payable by the assessee under any operative order would make no difference to this position- CIRCULAR NO 334 DATED APRIL 3, 1982.

4. Stay by Tribunal:

- a. Appellate Tribunal has power to grant stay of recovery of interest demanded u/s 220(2).
- b. Separate notice for determination of interest is not necessary.
- c. Where the assessed has not paid interest u/s 234B, which is included in the demand notice issued under section 156, the assessee is liable to pay interest levied u/s 234B.
- d. The scaling down of the rate is not permissible in the sense that the defaulters cannot claim that the amount of interest payable by them on the delayed tax payment should not be scaled down as if they were entitled to claim relief.
- e. The procedure for calculating interest is such that where the interest is to be calculated for every month or part of a month comprised in a period, any fraction of a month shall be deemed to be a full month and interest shall be so calculated.
- f. The effect of second appeal will be such that mere fact that the demand was restored in second appeal did not entitle revenue to charge interest u/s 220(2)
- g. The effect of the rectification order is such that interest could be levied only if there was non payment of the amount covered by the rectification order, pursuant to issue of a demand for the amount assessed. The rectification order cannot include interest u/s 220(2) payable on tax additionally assessed in rectification order unless there is a demand for the amount so additionally assessed.
- h. Interest u/s 220(2) is not leviable in rectification proceedings where liability itself is disputed.
- i. The rate of interest prescribed by statute cannot be varied or altered by any agreement of the parties.
- j. Interest payable by the assessee u/s 220(2) is not allowable as business expenditure u/s 37(1)

k. The recording of reasons while making an order is a must.

5. Minimum and Maximum Penalty: u/s 221(2), a minimum penalty has not been prescribed as quantum of penalty will depend on facts and circumstances of each case. Maximum penalty should not exceed the amount of tax in arrears.

6. Leviability of penalty for default in payment of penalty is not imposable.

7. No penalty where reduction of income as well as tax due to relief given by Tribunal in Appeal.

8. Leviability of penalty on legal representative can be imposed.

9. Attachment of Immovable Property belonging to whom:

a) The property of the defaulter, provided he owns the immovable property can be attached.

b). The property of the defaulters spouse cannot be attached by the TRO. However, if the TRO has evidence to prove the benami holding of the assessee in default, then property held in the name of the spouse can be attached.

c) In case if assessee in default who is the karta/ member of the HUF, the immovable property of the HUF can be attached by the TRO to the extent of the share of the member in default , including that of a karta in his capacity as a member of the HUF.

d) In case of an assessee in default who has a right to occupy and use the immovable property through a irrevocable power of attorney and the property belongs to a third party, the TRO cannot attach the said property as it does not bestow on him any title or ownership rights in the property.

e) In case of a builder in default, the unsold flats of the builder and/ or stock in hand can be attached by the TRO.

f) in case of assessee in whose case during the pendency of any proceedings for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the provisional attachment of immovable property belonging to the assessee can be done by the assessing officer with a view to protect interest of revenue.

10. Property exempt from attachment: All properties as is by the Code of Civil Procedure , 1908 exempted from attachment and sale in execution of a decree of a civil court.

11. Stay petitions before ITO/CIT

- a) An appeal should have been presented before a CIT(A).
- b) Sec 220(3) requires an assessee to make an application. However as per sec 220(6), it is not necessary that the assessee should make an application for stay of demand. The AO can act suo moto and treat the assessee not being in default.
- c) The amount of demand whose recovery can be stayed should be in dispute.
- d) The recovery can be stayed till the disposal of the appeal, not beyond that.
- e) The AO can impose such conditions as he may think fit in the circumstances of the case.
- f) The points borne in mind by the AO while exercising his discretion as to whether to grant stay or not are as follows:
 - Whether the points in dispute relate to facts or points of law.
 - Whether additions are made as the result of detailed investigations.
 - Whether any other protective assessment is made in respect of the same income and whether taxes have been paid in that other assessments.
 - Whether the assessee has a fair chance of success in appeal.
 - Capacity of the assessee to make payment. However, merely because the

assessee has financial capacity to pay the taxes demanded cannot to be ground for refusal to use the discretion vested in the AO u/s 220(6).

- Undue hardship suffered by the assessee.
- Whether the assessee is offering any security.

g) The most important point to be taken care of in drafting a stay petition is to make out a clear case why the AO should stay recovery of taxes. The assessee should also bring out the merits of the case and should explain the circumstances under which the additions or disallowances that are the subject matter of appeal came to be made. If the assessee is facing a financial difficulty or thinks that recovery of taxes will cause undue hardship to him or hamper his business, he should bring this fact out with clarity. If the assessee is willing to offer any security that fact should also be brought out in the petition. It is advisable if the assessee can furnish the workings of the amount of tax in dispute. The assessee can do this assuming that he succeeds in all the grounds of appeal. He can work out the tax accordingly. If the assessee is presenting the stay petition within the time stipulated in notice u/s 156 for payment of taxes, he can also ask for installments in respect of undisputed tax.

h) As per CIRCULAR NO 589 DATED 16TH JANUARY '1991, the Ao should deem an assessee as not being in default i) if the demand in dispute has arisen because assessing officer had adopted an interpretation of law in respect of which, there exists conflicting decisions of one or more High Courts or, the High Court of jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment, and, ii) 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.

i) Besides the above circular, the Board has also issued instructions No 96 (F.No 1/6/69-ITCC), dated 21st August, 1969. According to these instructions, where the income determined on assessment is substantially higher than the returned income, say, twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeals, provided there was no

lapse on the part of the assessee.

12. Stay petition before Tribunal:

a) Factors the Tribunal is supposed to take into account while dealing with a stay petition:

- i) A prima facie case in favour of the assessee.
- ii) The balance of convenience (i.e. financial position/ liquidity of the assessed)
- iii) Hardship or irreparable loss, if any to be caused if stay is not granted.
- iv) Interests of the Revenue.
- v) Nature of security offered by the assessed.

13. Every Stay Petitions shall be typed neatly on one side of the paper and shall be in English and shall set forth concisely the following:

- i) short facts regarding the demand the recovery of which is sought to be stayed.
- ii) the result of the appeal filed before the Commissioner (A)
- iii) the exact amount of tax, interest, penalty, fine, estate duty or any other sum demanded and the amount undisputed therefrom and the amount outstanding.
- iv) the date of filing of the appeal before the Tribunal and the appeal number, if known.
- v) whether any application for stay was made before the Revenue authorities and the outcome thereof (copies of correspondence to be attached.)
- vi) reasons in brief for seeking stay.
- vii) whether the petitioner is ready to offer any security and if so in what form.
- viii) prayers to be mentioned clearly and concisely (stating exact amount sought to be stayed.), and

ix) the contents of the applications are to be supported by a duly sworn affidavit.

14. A challan evidencing payment of a fee of Rs 500/- in pursuance of section 253(7) should also accompany the stay petition.

15. Recovery of tax through Garnishee proceedings.

16. INSTRUCTION NO 1914 dated 2-12-1993.

A. RESPONSIBILITY

i) It shall be the responsibility of assessing officer and TRO to collect every demand that has been raised , except

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-offs has been submitted.

d) Demand stayed in accordance with paras B & C below.

ii) 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.

iii) It would be the responsibility of the supervisory authorities to ensure that the assessing officer and the TRO's take all such measures as are necessary to collect the demand. It must be understood that mere issue of show cause notice with no follow-up is not to be regarded as adequate effort to recover taxes.

B. STAY PETITIONS

i) Stay petitions filed with the assessing officer 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.

ii) Where stay petitions are made to the authorities higher than the assessing

officer (DCI, CIT, ICC), 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.

iii) 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.

III) Without prejudice to the above, we herebelow state the sequence in which replies can be written to the various Departmental authorities at various levels and stages, requesting for stay of recovery proceedings.

1. Letter/ Reply to Income Tax Officer/ Assessing Officer for keeping the proceedings in abeyance and stay the matter until such time the appeal filed against the assessment order before the Commissioner of Income Tax (A) is disposed off.
2. The Income Tax Officer/Assessing Officer may reject the application of stay.
3. The assessee may apply for reconsideration of stay of recovery of demand.
4. The Income Tax Officer/Assessing Officer may reject the application of reconsideration of stay proceedings.
5. The Income Tax Officer/Assessing Officer may reject the application.
6. Aggrieved by the rejection of the stay application, the assessee may apply for stay of recovery proceedings before the Commissioner of Income Tax City
7. The Commissioner of Income Tax City may reject the application of stay.
8. Aggrieved by the aforesaid rejection, the assessee may apply for stay of recovery proceedings before the Hon'ble Income Tax Appellate Tribunal.

IV) FORMAT OF APPLICATION FOR STAY OF RECOVERY PROCEEDINGS/ RECONSIDERATION OF STAY PROCEEDINGS BEFORE THE INCOME TAX OFFICER/ COMMISSIONER OF INCOME TAX.

Date:.....

To,
The Income Tax Officer/Commissioner of Income Tax City,.....,
Mumbai

Respected Sir,

Ref:

PAN:

Subject: Request for Stay/Reconsideration of
Stay of Recovery of Demand of
Rs.....for asst year

With respect to the above subject matter and in response to your Letter dated....., we hereby take this opportunity to request your goodself to consider/reconsider this application for granting stay of recovery of disputed demand.

With respect to the aforesaid case for the Asst. Year, we state before your goodself that the appeal for the aforesaid Assessment Year..... against the order passed U/s 143(3) has been filed before the Commissioner of Income Tax (Appeal)....., Mumbai. The case is already heard by the Commissioner of Income Tax (A),..... onThere are possibilities of the CIT (A)'s order being passed in the favour of the assessee on meritorious grounds.

Facts and Merits of Clients Case:

1.....

2.....

3.....

.....

Further without prejudice to the aforesaid facts and merits of the said case we place reliance on the following case laws on the issue regarding stay of recovery of demand.

We would like to draw your honour's kind attention to the recent judgement of Kerala High Court in the case of Mr. N. Rajan Nair v. ITO (1987) 165 ITR 650. The Hon'ble Court had in the above case judged that:

It is not as if the order of Commissioner Contentions against the various additions made. Questions of fact and of law are all open to the assessee before the first appellate authority and before the Tribunal.

There is also remedy of reference to this court. In these circumstances, it is not open, your honour to place yourself merely in the position of an assessing authority and then to adjudicate whether collection of the tax should be stayed or not, pending the appeal. Your honour is bound to apply his mind to relevant facts and circumstances such as the assessment history of the assessee, his conduct and co-operation in relation to the department points, raised in the appeal chances of re-coverry in case the appeal is dismissed, the hardship to the assessee by insistence on immediate payment and the like. Your honour is not entitled to project his mind as an ITO or as to what your honour did in the assessment in exercising your discretion under sec. 220(6).

In view of above we would request your honour to kindly stay the demand considering the circumstances and the demand being subject matter of appeal.

Your honour the courts have held that the discretionary power conferred by sec. 220(6) upon the ITO is coupled with a duty and if he did not exercise it when the occasion for it or if he exercised it in

such a manner that it is no exercise of discretion at all. He can be compelled to discharge his duties. *Ladhuram Sreeramamurthy v. ITO* (1965) 30 ITR 252 (A) *Aluminium Corporation of India Ltd. v. V.C. Balakrishnan* (1959) 37 ITR 267 (cal.) *Hardeodas Jagannath v. ITO* (1961) 43 ITR 56 594 (Assam) *P.C. Dwadeshshreni & Co. (P) Ltd. v. ITO* (1963) 50 ITR 622 (all.) *Behari Lal Baldeo Prasad v. Commissioner* (1967) 63 ITR 555, 562 (all.) *E. Krishnappa Naiker v. Dy CTO* (1963), 14 STC 162 (Mad) *Shivnarayan Ladhuram v. Asst. Commissioner of Income Tax* (1967), 19 STC 50(A) *Goverdhan Lal Jagdish Kumar v. CIT* (1956) 29 ITR 51 (All.) *Krishimram Agarwala v. Collection of 24 Pargana* (1958) 33 ITR 800 (cal.) *Amarnath Khurana & Sons v. AAC* (1969) 71 ITR 152 (Punjab) *Kundan Lal Behari Lal Behari Lal v. CWT* (1975) 99 ITR 561(SC) *K.M. Rahmath Bibi v. ITO* (1969) 72 ITR 72 (Mad.) *Badrilal Bholaram v. ITO* (1979) 77 ITR 954 (MP).

It has also been held that "The concerned officer should take all the circumstances into account, all the considerations that could be urged or are urged by the assessee why he should be treated as not being in default and then make such order as is appropriate to the facts of the case. Exercise of such powers cannot be similarly rejected on the basis that power is with the officer by that he is not bound to exercise it *M.L.M. Mahaningam Chettiar v. ITO* (1967) 66 ITR 287 (Mad.) *M.M. Rahmat Bibi v. ITO* (1970) 77 ITR 954 (MP). It is however, wrong to assume that the exercise of discretion is only a naked arbitrary power to reject the application for stay of recovery of disputed amount of tax pending the appeal. The statute has conferred upon your honour power to grant stay and it is your duty to examine and scrutinize the grounds on which the stay is asked for (*E. Krishnappa Naicker v. Dy. CTO* (1963) 14 STC 162 (mad.) *B.M. Moidin Kunhi v. State of Mysore* (1971) 27 STC 154 (Mysore).

Such discretion having been by law vested in the authority concerned the power is for exercise and not for a laconic refusal to

exercise it. If the authority refused to grant stay, the order should ex facie disclose why he declined to grant stay (Shesebrough Pon's Inc. v. AAC (1973) 32 STC 464 (Mad.).

Further we place reliance on the recent CBDT Circular as under:

Circular No. 530, dated 6th March, 1989

Subject : Exercise of discretion under section 220 (6) of the I.Tax Act, 1961, to treat the assessee as not being in default in respect of the amounts disputed in first appeal pending before Deputy Commissioner (Appeals)/commissioner of Income Tax (Appeals.)

1. Under section 220 (6) of the Income Tax Act, 1961, where an assessee has presented an appeal under section 246 of the Act before the Deputy Commissioner (Appeals) or the Commissioner (Appeals), Your honour may, in your 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 of.
2. Having regard to the proper and efficient management of the work of collection of revenue, the Board has considered it necessary and expedient to order that on an application being filed by the assessee in this behalf, Your honour will exercise his discretion under section 220 (6) of the Act (subject to such conditions as he may think fit to impose) so as to treat the assessee as not being in default in respect of the amount in dispute in the appeal in the following situation :