

# **Stay of Demand under Section 220(6) of the Income Tax Act, 1961**

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As soon as the new financial year starts, the assessing officers' starts a drive for collection of demand arisen out of assessment orders passed within the earlier financial year particularly at the fag end of the year. It is a common practice that high pitched assessments are made and coercive steps are taken by the officers for collection of outstanding demand. A notice of demand is served u/s 156 of the Income Tax Act, 1961 along with the assessment order for making payment within 30 days. Apart from the tax demanded out of assessment orders, the notice of demand is also issued for payment of any outstanding amount of interest, penalty, fine or any sum payable. The assessee is deemed to be in default on failure to pay dues in time as per section 220(4) of the Income Tax Act, 1961. When an assessee is deemed to be an assessee in default, interest u/s 220(2) can be charged on him. Apart from this he may also be charged penalty u/s 221 of the Income Tax Act, 1961 to the extent amount of tax in arrears.

## **Time limit for filing and disposal of stay petition –**

An assessee can make an application for stay of his outstanding demand u/s 220(6) of the Income Tax Act, 1961 if he has filed an appeal before the Commissioner of Income Tax (Appeal) within 30 days of service of demand notice requesting the assessing officer for not treating him as assessee in default. However, the assessing officer should dispose of the petition for stay of demand within 15 days of receipt of the same.

## **Stay of Demand and Appeal –**

Stay of realization cannot be granted simply because an appeal has been preferred held in **Gouri Shankar Awasthi v. ITO (1978) 78 ITR 784 (Cal.)**. Hence, the assessee should mention the reasons for staying his demand.

In **Mrs. Mani Goyal V/s CIT and Anr. (1996) 217 ITR 641 (All-HC)** it has been held that “.....it is opposed to the principles of good conscience and fair play that the disputed amount of tax is sought to be recovered even though the appeal is pending. It adds to the hardship of the appellant in such circumstances....”

## **Opportunity of hearing –**

The assessing officer should provide a reasonable opportunity of hearing in respect of application for stay of demand filed by the assessee. **Pawan Kumar – Vs – ITO (1998) 146 CTR 152 (P & H)**.

## **Speaking Order –**

The assessing officer should also pass a reasoned and speaking order if he rejects the application of stay of demand. The assessee should mention the reasons for staying his demand. He should deal the grounds of appeal in detail justifying his request for stay of demand. It has been held in **Lalit Wadhwa Versus Commissioner of Income-Tax, (2013) 082 DTR 0130 (P&H)** that order passed u/s220(6) of the Income Tax Act should be a speaking

order and hence the Hon'ble High Court quashed the order u/s220(6) passed by the assessing officer. Similar decisions have been taken in the following cases –

**(a) Subhash Chander Seghal – Vs – DCIT, 173 Taxman 412 (Delhi)**

**(b) Viswanatha Sastri v ITO (1956) 30 ITR 252 (A.P.)**

**(c) Seth Gopaldas Paliwal v. WTO [1983] 139 ITR 900 (MP)**

**(d) Teletube Electronics Ltd. V CIT [1998] 230 ITR 705, 707 (Del.)**

#### **Stay petition and assessee not in default –**

Assessee cannot be treated in default until stay application is disposed of. It should be noted also that until application for stay of demand is disposed of by a speaking order, assessee cannot be considered as assessee in default. Moreover demand remains stayed until the disposal of the application for stay. *“Where an application for stay of demand is pending for disposal u/s 220(6), the demand should be stayed until the application is considered and an order is passed”* – **Sat Pal v ITAT 317 (P&H); Bongaigaon Refinery and Petro Chemicals Ltd. V. CIT 256 ITR 698 (Gau.); Debasish Moulik v. DCIT 231 ITR 737 (Cal.).**

#### **Instructions and Circulars by board –**

##### **Instruction No. 96 –**

From time to time various instructions and circulars have been given by CBDT in respect of stay of demand. All such circulars and instructions are dealt below –

The first instruction was given by the CBDT in the year 1969. The purpose of this instruction was to stay demand raised due to high pitched assessment. It was pointed out in the Instruction no 96 dated 21-08-1969 as to where the income determined on assessment was 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 were no lapse on the part of the assessee. The Board desired that the above observations may be brought to the notice of all the Income-Tax Officers and the powers of stay of recovery in such cases up to the stage of first appeal may be exercised by the Inspecting Assistant Commissioner/Commissioner of Income-Tax.

It is therefore, evident that the cases where there was high pitched assessment, the department was under an instruction to grant stay of demand – **MAHESHWARI AGRO INDUSTRIES vs. UNION OF INDIA & ORS 346 ITR 375 (RAJ-HC).**

##### **Instruction no 1362 –**

The CBDT issued Instruction number 1362 on 15/10/1980 in supersession of all the earlier Instructions. It was an Instruction covering the issue in detail and in para 4 of the same there was a clear reference to the proposition laid down in Instruction number 96.

The Calcutta High Court in **Dunlop India Ltd. vs. ACIT (1990) 183 ITR 528 (Cal.)** refused to take cognizance of the Instruction no. 96 because the counsel for the Revenue placed before the court a fresh Instruction, being no. 1362, which was issued in supersession of all the earlier instructions on the issue. The single Bench of the Calcutta High Court in the aforementioned case rejected the writ petition of the assessee for staying the Demand. It

may be observed that the decision of **Dunlop India Ltd. (supra)** is not sacrosanct. After this decision there have been various judgments from the Supreme Court and High Courts who have considered and distinguished the judgment of **Dunlop India Ltd. (Supra)**. One may take note of **M/s. Benara Valves vs CCE 2006 (13) SCC 347** and **Monotosh Saha vs Special Director 2008 (12) SCC 359**. In **M/s. Benara Valves (supra)**, it has been held that the decisions of **Dunlop India Ltd.** are often misread to hold that stay shall never be granted.

### **Instruction No. 1914 –**

It is clear that the substance of the assurance as laid down in Instruction number 96 dated 21.08.1969 was submerged in the Instruction number 1362 dated 15/10/1980 which was issued in supersession of all earlier Instructions on the subject. Instruction No. 1914 [F.No. 404 /72/93/ITCC] dtd. 02.12.1993 was issued subsequently in super-session of all the earlier Instructions on the subject and the said Instruction also covers unreasonably high pitched assessment order and genuine hardship cases. Demand may be kept in abeyance for valid reasons only in accordance with the guidelines given below:

#### **A. Responsibility**

It shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised, except the following:

(a) Demand which has not fallen due; (b) Demand which has been stayed by a Court or ITAT or Settlement Commission; (c) Demand for which a proper proposal for write-off has been submitted; (d) Demand stayed in accordance with para's B & C above.

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.

It would be the responsibility of the supervisory authorities to ensure that the Assessing Officers and the TROs take all such measures as are necessary to collect the demand. It must be understood that mere issue of a show cause notice with no follow-up is not to be regarded as adequate effort to recover taxes.

#### **B. Stay Petitions:**

Stay petitions filed with the Assessing Officers must be disposed of within two weeks of the filing of petition by the tax-payer. The assessee must be intimated of the decision without delay. Where stay petitions are made to the authorities higher than the Assessing Officer, 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. 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.

### **C. Guidelines for staying demand:**

A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. A few illustrative situations where stay could be granted are:

It is clarified that in these situations also, stay may be granted only in respect of the amount attributable to such disputed points. Further where it is subsequently found that the assessee has not co-operated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or court alters the above situation, the stay order may be reviewed and modified. The above illustrations are, of course, not exhaustive. In granting stay, the Assessing Officer may impose such conditions as he may think fit. Thus he may (a) require the assessee to offer suitable security to safeguard the interest of revenue; (b) require the assessee to pay towards the disputed taxes a reasonable amount in lump sum or in instalments; (c) require an undertaking from the assessee that he will co-operate in the early disposal of appeal failing which the stay order will be cancelled. (d) reserve the right to review the order passed after expiry of a reasonable period, say up to 6 months, or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations; (e) reserve a right to adjust refunds arising, if any, against the demand.

Payment by instalments may be liberally allowed so as to collect the entire demand within a reasonable period not exceeding 18 months. Since the phrase "stay of demand" does not occur in section 220(6) of the Income-tax Act, the Assessing Officer should always use in any order passed under section 220(6) [or under section 220(3) or section 220(7)], the expression that occurs in the section viz., that he agrees to treat the assessee as not being default in respect of the amount specified, subject to such conditions as he deems fit to impose.

While considering an application under section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order.

### **D. Miscellaneous:**

Even where recovery of demand has been stayed, the Assessing Officer will continue to review the situation to ensure that the conditions imposed are fulfilled by the assessee failing which the stay order would need to be withdrawn.

Where the assessee seeks stay of demand from the Tribunal, it should be strongly opposed. If the assessee presses his application, the CIT should direct the departmental representative to request that the appeal be posted within a month so that Tribunal's order on the appeal can be known within two months.

Appeal effects will have to be given within 2 weeks from the receipt of the appellate order. Similarly, rectification application should be decided within 2 weeks of the receipt thereof. Instances where there is undue delay in giving effect to appellate orders, or in deciding rectification applications, should be dealt with very strictly by the CCITs/CITs. The Board

desires that appropriate action is taken in the matter of recovery in accordance with the above procedure. The Assessing Officer or the TRO, as the case may be, and his immediate superior officer shall be held responsible for ensuring compliance with these instructions. This procedure would apply mutatis mutandis to demands created under other Direct Taxes enactments also. Many queries were received by the Board regarding the applicability of Instruction number 96 dated 21.8.1969 vis-à-vis Instruction number 1914 dated 02.12.1993. Many assesses were taking the plea that Instruction No. 1914 does not supersede Instruction No. 96 dated 21.08.1969. Therefore, CBDT brought a clarification vide its Letter [F.No. 404/10/2009-ITCC], dated 01-12-2009 in which it has been stated that the substance of the assurance as laid down in Instruction number 96 dated 21.08.1969 was submerged in the Instruction number 1362 dated 15/10/1980 which was issued in supersession of all earlier Instructions on the subject. Instruction No. 1914 dated 2.12.1993 was issued subsequently in super-session of all the earlier Instructions on the subject and the said Instruction also covers unreasonably high pitched assessment order and genuine hardship cases. It is therefore clarified that there is no separate existence of all the earlier Instructions and circulars after issuing of instruction no. 1914. However, Delhi High court has held in **Soul Vs DCIT (2008) 173 Taxman 468** that though instruction no. 1914 dated 02<sup>nd</sup> Dec 1993 supersedes instruction no 96 dated 21st August 1969, it clearly provides that demand should be stayed 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. A case where assessed income is several times the returned income falls within the expression "unreasonably high pitched" and stay on recovery of demand must therefore be granted to the assessee. In **Taneja Developers and Infrastructure Limited Vs ACIT W.P.(C) 6956/2009 Dated 24.02.2009 Delhi HC**, it was held that although instruction no. 1914 dated 2<sup>nd</sup> Dec 1993 has superseded the instruction no. 96 the very question that what would constitute the assessment order as being reasonably high pitched could be taken from the instruction. The Delhi High Court, in its decision of May 20, 2008, in the **Valvoline Cummins Ltd vs DCIT (2008) 307 ITR 103**, directed the I.T. Department relying on Instruction No. 96 to keep the demand in abeyance till the disposal of appeal.

If the assessing officer also rejects the petition without giving hearing or without passing a reasoned order for rejection of stay petition, in such cases, the assessee should approach the higher authority for reconsideration of stay petition.

#### **Stay before CIT –**

In most of the cases, the assessing officer refuses to grant stay. In such situation, the assessee can approach the CIT for grant of stay. By virtue of section 118, the AO is subordinate to CIT. In **RPG Enterprises Ltd. v DCIT (2002), 74 TTJ 391 (Mum.)**, it was held as under:

Thus, there is no doubt that the Commissioner in his administrative capacity, has the power to grant stay of the disputed demand when the appeal is pending in the Tribunal. Under section 118 the Commissioner is having administrative control over the TRO working in his jurisdiction. It is, therefore, implicit that the Commissioner may direct the TRO, to extend the time for the payment of the disputed demand. Hence, the CIT can grant stay of demand if the stay petition is rejected by AO. CIT has the power of revision u/s. 264 against any order passed by AO. In **Daya Shankar's v TRO (1985), 48 CTR 134 (All.)**, it was held that the assessee can apply u/s. 264 for stay of demand, where the stay application was

rejected by AO. On this plea, the Writ petition, challenging the order of refusal to stay was dismissed, granting liberty to the assessee to apply to CIT.

### **Stay before CIT (A) –**

The stay can also be filed before CIT (A) when appeal is pending before him. The CIT (A) is empowered to grant stay of recovery proceedings, on the principle that section 251 grants by implication the power of doing all such acts, as are necessary to its execution. It may be noted that the power of granting justice includes all such powers, which are inherent to grant of such justice. The power of Stay is available as an inherent power. I am citing the following judgments in which it has been held that CIT (A) may grant stay –

**(a) CIT vs Duncan Stratton & Co. Ltd. (1983) 140 ITR 1025 (Bom.)**

**(b) Debasish Moulik vs DCIT (1998) 231 ITR 737 (Cal.)**

**(c) Keshav Cashew Co. 210 ITR 1014 (Ker.)**

### **Stay petition before ITAT –**

U/s. 254(2A) r/w section 253(7) gives the provisions for stay of demand when the appeal is pending before ITAT. Further, Rule 35A of ITAT Rules provide for procedure for filing stay petition.

In **ITO vs Mohammed Kunhi (MK) (1969) 71 ITR 815(SC)** where the Supreme Court was considering whether the Tribunal has a power to stay recovery of demand. It was so held that the ITAT “may pass any order as it thinks fit”. These words are wide enough to state that the ITAT has power to grant stay. Further, in giving justice, every appellate authority has all inherent powers to ensure that the justice when granted does not become futile.

### **Stay before High Court –**

Where the AO refuses to grant a stay, the assessee may prefer a Writ to the High Court. In **K.C. Joy v TRO (1993) 112 CTR 270 (Ker.)**, it was warned that Writ would lie only if there is a demand and refusal for stay of demand. The Writ in other cases would be premature. In most of the cases, the assessing officers are rejecting the stay petition. The CBDT should make the stay petition appealable or should give circular to the assessing officer that in case of merit, the assessing officer may grant stay to the assessee.

### **Parameters by Courts –**

Certain parameters have been fixed by the courts for staying demand. In **KEC International Ltd. Vs. B.R. Balakrishnan & Ors. [2001] 251 ITR 158 (Bom.)**, the Mumbai High Court has suggested the following parameters for the income tax authorities for staying demand –

- (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 like to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

In **Dunlop India Ltd. vs. ACIT (1990) 183 ITR 532 (Cal.)** Hon'ble High Court has given certain guidelines to the A.O .for dealing stay petition of the Assessee –

- (a) Whether the points in dispute relate to facts.
- (b) Whether they arise from different interpretations of law.
- (c) Whether the additions have not been made as a result of detailed investigation.
- (d) Whether the disputed addition to income has been assessed elsewhere by way of protective assessment and the tax thereon has been paid by such person.

### **High pitched Assessment –**

Every year large number of high pitched assessments are made by the assessing officer putting the assessee in great hardship. The weapon of high pitched assessment is used by the assessing officers to harass the assessee. The stay must be given for collection of demand in case of high pitched assessment. The assessing officers should also be liberal in granting stay of demand in case of high pitch assessments. The CBDT circulars and various high court decisions again and again directs the assessing officer to grant stay for high pitched assessment. There are various decisions of the courts and ITAT which has held that stay should be given in case of high pitched assessment. Tax officers cannot enforce collection of taxes till the disposal of appeal, if the assessed income is substantially higher than returned income. The Special Leave Petition (“SLP”) filed by the Revenue against the High Court order was dismissed by the Supreme Court in **CIT vs. Valvolins Cummins Limited (Supreme Court) (2009)(Unreported)**. It has been held in **Maheshwari Agro Industries vs. Union of India & Ors. 346 ITR 375** that the AO has to normally use this discretion in favour of the assessee particularly when high pitched assessments are made and the demand of tax is several times the declared tax. AO should consider the stay application afresh after taking into consideration the various judgments and the circulars cited by the tax payer as held in **Urban Improvement Trust [2012] 20 taxmann.com 192 (Rajasthan)**.

Other important case laws in respect of high pitch assessment are mentioned below –

- (a)Soul Vs DCIT (2008) 173 Taxman 468**
- (b)Taneja Developers and Infrastructure Limited Vs ACIT W.P.(C) 6956/2009 Dated 24.02.2009 Delhi HC**
- (c)CHARU HOME PRODUCTS PVT LTD versus COMMISSIONER OF INCOME TAX-1, NEW DELHI and ORS. W.P.(C) 5149/2014 and CM Nos. 10267-68/2014 – The decision in**

Charu Home p Ltd vs CIT (Supra) came after CBDT brought clarification to instruction no 1914.

### **Conclusion –**

The Income Tax Authorities should play positive role in granting stay of demand. But in spite of CBDT circulars and various high court decisions, the Income Tax Authorities are normally predetermined to reject stay petition either fully or partially. The Court are also not having practical approach in dealing with stay of demand matters. Those assesses which are victim of high pitch assessment and ultimately get favorable decisions by appellate authorities suffer too much during pendency of appeals. The Income Tax Authorities at all level keep pressure on the assesses by threatening them of high pitch assessment or demand arisen out of such high pitch assessment. The Finance minister should look in such matter seriously otherwise it becomes very difficult for genuine assesses to run their business smoothly and properly.

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