

STAY OF DEMAND

Collection and recovery is covered in Part D of Chapter XVII of the Income Tax Act.

VALID DEMAND

- Notice under section 156

Recovery of tax commences with notice of demand.

Notice should specify amount payable to whom payable assessment year to which it relates.

Absence of assessment year invalidates the notice of demand.

- Service of the notice

Service of notice of demand is mandatory before initiating recovery proceedings and constitutes foundation of subsequent proceedings.

248 ITR 799 (SC) Mohan Wahi vs. Commissioner of Income Tax
347 ITR 161 (Guj) Saraswati Moulding Works vs. & Commissioner of
Income Tax Ors

In absence of service of notice the assessee cannot be considered an assessee in default.

Merely because the assessee had knowledge of the demand is not enough. Notice has to be drawn in the name of the assessee and served.

106 ITR 540 (ALL) Satya Pal Verma vs. Income Tax Officer & Anr.

TAX WHEN PAYABLE – Sec 220(1)

- within 30 days of service of notice u/s 156 or
- within such time (lesser than 30 days) that the notice may specify. In case the assessing officer has reason to believe that a period of 30 days will be detrimental to the revenue he may, with the approval of the joint Commissioner, specify a shorter period.

STAGES AND AUTHORITIES FOR GRANT OF STAY

In case the demand is not disputed

Application to	Section	When can you apply	Relief
Assessing officer	220(3)	Before expiry of time permitted for payment u/s 220(1)	On such terms and conditions as he deems fit - extended time of payment - allow payment by instalments

In case the demand is disputed

Application to	Section	When can you apply	Relief
Assessing officer	220(3)	Before expiry of time permitted for payment u/s 220(1)	On such terms and conditions as he deems fit - extend the time of payment - allow payment by instalments
Assessing officer	220(6)*	After filing of 1st appeal but before disposal of the appeal. No time limit prescribed	Treat the assessee as not in the default
Commissioner (Appeals)	Inherent power	After filing of 1st appeal but before disposal of the appeal	As they deem fit
Tribunal	254(2A)	After filing of 2 nd appeal but before disposal of the appeal	As they deem fit
High Court	Writ	Failure of authorities to consider stay application and act judicially	As they deem fit
Tax recovery officer (TRO)	225(1)	After issuance of certificate u/s 222(1)	Grant time and stay recovery until expiry of time so granted

* there is no stay but assessing officer may treat the assessee as assessee not in default.

It should be borne in mind that the time limits are for making application by the assessee and not for passing of orders by the authorities.

As per Citizens Charter declared by Income Tax Department application of stay shall be disposed off within one month.

While the application for stay is pending the assessee may approach the Joint Commissioner or the Commissioner for appropriate instructions. Although no such specific power is given but considering that the assessing officer is under the jurisdiction of the Joint Commissioner and Commissioner, directions can be obtained.

The power of the assessing officer to grant a stay u/s 220(6) is only till disposal of the 1st appeal and comes to an end immediately thereafter. Courts have placed enormous responsibility on the assessing officer while disposing stay petitions u/s 220(6). In case the stay petition is rejected the assessing officer should pass a composite order and also deal whether there is existence of a prima facie case.

332 ITR 224 (Del) KLM Royal Dutch Airlines & Anr. vs. Deputy Director of Income Tax

POWER OF COMMISSIONER (APPEALS) TO GRANT STAY

The Commissioner(appeals) has an inherent power to grant stay although no specific section empowers him.

Hon'ble Supreme Court while examining the powers of the appellate tribunal held that appellate authorities have inherent powers to grant stay.

71 ITR 815 (SC) Income Tax Officer vs. M.K. Mohammed Kunhi

In line with the view of the Hon'ble Supreme Court is adopted by many High Courts.

246 CTR (Raj) 113 Maheshwari Agro Industries vs. Union of India & Ors.

STAY BY TRIBUNAL

The tribunal is specifically empowered to grant stay. U/s 254(2A) after considering the merits of the application made by the assessee the tribunal may grant stay on such terms and conditions as it deems necessary.

Even where stay is granted by the Commissioner the tribunal cannot refuse to consider the stay application of the assessee.

226 ITR 490 (Del) Ashok Kumar Aggrawal vs. Income Tax Appellate Tribunal & Ors.

Single application is sufficient for all assessment years. Separate applications are required under separate enactments as per Rule 35A.

66 TTJ (Mumbai) 728 Chiranjilal S. Goenka vs. Wealth Tax Officer

It should be kept in mind that when stay is granted appeal is taken up on priority basis.

Period of stay by Tribunal : As per the Proviso to Sec 254(2A) stay shall be granted for a period not exceeding 180 days. Further stay can be granted on an application by the assessee only if the delay in disposing the appeal is not attributable to the assessee. Total period of stay cannot exceed 365 days and it is provided that stay shall automatically stand vacated after the expiry of the period even if the delay is not attributable to the assessee.

Whether tribunal can grant stay in excess of 365 days.

This question is raised before the High Courts.

In Narang Overseas the Bombay High Court affirmed the power provided, good cause being shown and the delay in disposing appeal is not attributable to the assessee.

295 ITR 22 (Bom) Narang Overseas (P) Ltd vs. Income Tax Appellate Tribunal & Ors.

To negate this the 3rd Proviso was inserted by Finance Act 2008.

Even after introduction of the 3rd proviso in Sec 254(2A) the Bombay High Court confirmed it's earlier view in Ronak Industries.

333 ITR 99 (Bom) Commissioner of Income Tax vs. Ronak Industries Ltd

However, the Karnataka High Court in Ecom Gill Coffee Trading Pvt Ltd has taken a different view. Holding that the tribunal is a creature of the statute and draws its powers from the statute, it should confine its boundaries to statutory provisions.

The delivery of the judgement has lead to a situation wherein two High Courts have expressed divergent views on this issue. The judgement of the Hon'ble Karnataka High Court seems to be in line with the intention of the amendment. The assesseees in Maharashtra will get the benefit of the judgement of jurisdictional High Court whereas on the same issue, the assessee in Karnataka might have to face recovery and coercive action from the Department.

Recently Delhi ITAT in Qualcomm Incorporated vs. Director of Income Tax (order dated 28-9-12) followed the approach of the Bombay High Court.

Till the time this issue is settled by the Hon'ble Supreme Court the assesseees will have no option but to file writ petition with the respective High Court and seek instructions.

PARAMETRES FOR GRANT OF STAY

There are no set parameters. However, powers are expected to be exercised judicially, through a speaking order, in the interest of justice, to avoid genuine hardships.

In 165 ITR 650 N. Rajan Nair vs. Income Tax Officer & Anr. the Rajasthan High Court observed:

“It is not open to the ITO to place himself 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. He is bound to apply his mind to relevant factors and circumstances like the assessment history of the assessee, his conduct and co-operation in relation to the Department, points raised in the appeal, chances of recovery in case the appeal is dismissed, the hardship to the assessee by insistence on immediate payment and the like.

He is not entitled to project his mind as an ITO or as to what he did in the assessment, in exercising his discretion under s. 220(6).”

In 251 ITR 158 (Bom) KEC International Ltd vs. B.R. Balakrishnan & Ors. the Bombay High Court laid down certain parameters:

- (a) 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 a part of the amount should be ordered to be deposited for which prima facie reasons must be given by the authority.
- (c) In cases where the assessee relies upon financial difficulties, the authority must briefly indicate whether the assessee is financially sound and viable to deposit the amount.
- (d) 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.

Bombay High Court in 345 ITR 71 (Bom) UTI Mutual Fund vs. Income Tax Officer and Others laid down guidelines for effective recovery:

1. No recovery of tax should be made pending
 - a) expiry of the time limit for filing an appeal
 - b) 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.
2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International :
3. 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 :
4. 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 :

5. In exercising the powers of stay, the Income-tax Officer should not act as a mere tax gatherer but as a quasi-judicial authority vested with the public duty of protecting the interests of the Revenue while at the same time balancing the need to mitigate the hardship to the assessee. Though the Assessing Officer 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.”

STAGE AT WHICH STAY SHOULD NORMALLY BE GRANTED/ASSESSEE SHOULD NOT BE DEEMED TO BE IN DEFAULT.

- In the gap period from passing of order and time permissible for filing the appeal.
Mahindra & Mahindra Ltd vs. Union of India (1992) ELT 505 (Bom)
Firoz Tin Factory vs. ACIT (Bom) Order dated 26-03-2012
- Period between filing of appeal and application for stay to tribunal till orders passed on stay application.
256 ITR 698 (Gau) Bongaigaon Refinery & Petro Chemicals Ltd.vs. Commissioner of Income Tax & Ors.
- During pendency of rectification petition
191 ITR 179 (All) Sultan Leather Finishers (P) ltd vs. Assistant Commissioner of Income Tax & Anr.
- When application for stay is pending
329 ITR 278 (Cal) Purnima Das vs. Union of India & Ors.
Mahindra & Mahindra Ltd vs. Union of India (1992) ELT 505 (Bom)
251 ITR 20 (A.T.) (Mum) RPG Enterprises Ltd vs. Deputy Commissioner of Income Tax
- In high-pitched assessments.
303 ITR 15 (Mad) M.G.M. Transports (Madras) (P) Ltd vs. Income Tax Officer & Anr.
- Where demand is due to additions on issues already covered in favour of assessee in earlier years.
347 ITR 43 (Del) Maruti Suzuki India Ltd vs. Deputy Commissioner of Income Tax

CIRCULARS AND INSTRUCTIONS RELEVANT TO STAY AND RECOVERY.

Instruction No. 95, dt. 21st Aug., 1969

Board's Letter F. No. 404/132/70-ITCC, dt. 14th Sept., 1970

Circular No. 119, dt. 26th Sept., 1973
Circular No. 530, dt. 6th March, 1989
Circular No. 589, dt. 16th Jan., 1991
Instruction No. 1914, dt. 2nd Dec., 1993
Board's Letter (F.No. 404/10/2009-ITCC), dt. 1st Dec., 2009

STAY DOES NOT MEAN STAY OF INTEREST U/S 220(2).

RECOVERY PROCEEDINGS

Recovery proceedings can be initiated only when the assessee is in default or is deemed to be in default.

WHEN AN ASSESSEE IS DEEMED TO BE IN DEFAULT

As per Sec 220(4) the assessee shall be deemed to be in default if the amount specified in the notice u/s 156 is not paid within the time allowed under subsection (1) or within the extended time under subsection (3) of section 220.

Where payment is allowed by instalments and the assessee defaults on any instalment then for the entire balance payable he is deemed to be in default on the same date.

CIRCUMSTANCES WHEN THE ASSESSEE MAY NOT BE DEEMED TO BE IN DEFAULT.

1. If the Assessee presents an appeal to the CIT(Appeals), the Assessing Officer may, in his discretion and subject to such conditions as he may think fit to impose, treat the Assessee as not being in default as long as the appeal is not disposed off. [Section 220(6)]
2. Where the Assessee is assessed in respect of income arising outside India in a country the laws of which prohibit remittance, the Assessee shall not be treated as Assessee in default in respect of tax due on such income [Section 220(7)].
3. Where the demand in dispute has arisen because the Assessing Officer has adopted an interpretation of law in respect of which there are conflicting High Court decisions and the Department has not accepted the interpretation of the jurisdictional Court, the Assessee shall not be deemed in default. [Circular No. 530/6-3-1989]
4. Where the demand in dispute relates to issues which are decided earlier in the Assessee's favour by an appellate authority/Court in his own case for preceding assessment years, the Assessee shall not be deemed to be in default to the extent of tax liability relatable to such disputed points. [Circular No. 530/6-3-1989].

RECOVERY BY ASSESSING OFFICER

In case certificate is not drawn u/s 222 by Tax Recovery Officer (TRO) the assessing officer can recover tax by the following modes:

a) Attachment of salary except where salary is exempt from attachment under Code of Civil Procedure (CPC)

b) By Notice in writing (Garnishee order) requiring any person:

- From whom money is due or may become due to the assessee
- who is holding or may hold any money on behalf of the assessee

to pay the money to the person and within the time mentioned in the notice

- Monies not due cannot be compelled to be paid.
- Copy of the notice needs to be sent to the assessee at his last known address. Notice should be sent prior to action of recovery.
329 ITR 278 (Cal) Purnima Das vs. Union of India & Ors.
- In cases a joint accounts the share of the joint holder, until contrary is proved, shall be presumed to be equal. Copy of notice needs to be sent to all joint orders in case of attachment joint accounts
- After issuing garnishing orders the TRO/assessing officer can grant time for payment off the amount demanded. [Sec 226 (3)(vii)]
- Notice is valid for existing obligations. In case there is no obligation to pay on the date of the notice subsequent obligation cannot recover by the early notice.
52 ITR 321 (Mad) Buddha Pictures vs. Income Tax Officer & Anr.
- Certain properties as provided in section 60 of the Code of Civil Procedure cannot be attached
- Unutilised bank overdraft cannot be used to pay taxes since unutilised limit does not make the bank a debtor.
33 ITR 26 (Mad) K.M. Adam vs. Income Tax Officer.
- In case the debtor fails to pay pursuant to the notice, the debtor may be considered as assessee in default and proceedings can be initiated against him for recovery of the amount by the TRO. [Sec 226 (3)(x)]

c) In case, money belonging to the assessee is lying in the custody for a court the same can be recovered by an application to the court.

- d) If authorised by the Commissioner or Chief Commissioner by a general or special order the movable properties can be seizure and sold. The sale can be executive as laid down in the Second Schedule.

RECOVERY BY TAX RECOVERY OFFICER (TRO)

In addition to the powers of recovery with the assessing officer the TRO is granted special powers. Despite all his powers the assessing officer does not have the power to sell immovable properties. This power is only granted to the Tax Recovery Officer.

Where the assessee is in default the TRO draws up under his signature a statement in prescribed form specifying the amount of arrears. This statement is referred to as the "Certificate". [Sec 222(1)]. The certificate is the source of power of recovery. TRO cannot effect any recovery unless he draws a Certificate.

Once certificate is issued by the TRO the power of the assessing officer to recover taxes comes to an end.

The certificate drawn by the TRO can be amended to correct any clerical or arithmetical mistakes therein. The TRO is also authorised to amend the certificate to give effect to the reduction of demand consequent to appeal orders.

The Certificate so drawn cannot be challenged for its correctness by the assessee. However, in case the mistake is brought to the notice of the TRO he is expected to consider the same.

In 183 ITR 204 (Bom) Duncan Stratton & Co the recovery proceedings were cancelled as the Asstt Year to which the demand related was not ascertainable.

Where the certificate is issued in the name of a deceased recovery cannot be made.

164 CTR 237 (Ker) CIT vs. T.K. Shahal Hasan Musaliar.

69 ITR 401 (Mys) (FB) Raja Pid Naik vs. Agricultural Income Tax Officer & Anr.

After drawing a certificate the TRO may proceed to recover the dues by the following modes:

- a) attachment and sale of movable property
- b) attachment and sale of the immovable property
- c) arrest of the assessee and his detention in prison
- d) appointing a receiver for the management off movable and immovable properties

RECOVERY THROUGH STATE GOVERNMENTS [Sec 227]

It is provided in the constitution that the President with the consent of the Government of the state may entrust the powers of recovery to the state and its officers.

RECOVERY THROUGH GOVERNMENTS OF FOREIGN COUNTRIES. [Sec 228A]

If the assessee in default has property in a country with which the central government has an agreement for recovery of tax, the TRO shall forward the Certificate to the Board (CBDT) which may take necessary action.

OTHER POINTS

- Where protective assessment is made recovery proceedings are not permissible.

31 ITR 603 (Cal) Jagannath Hanumanbux vs. Income Tax Officer
139 ITR 880 (Bom) Sunil Kumar vs. Commissioner of Income Tax

- Tax revenue has priority over secured creditors

247 ITR 165 (SC) Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co & Ors.

- Tax recovery under modes specified under Income Tax Act is not exhaustive. Recovery can be made through other modes available under general laws. [Sec 232]

88 ITR 443 (SC) Raja Jagadish Pratap Sahi vs. State of Uttar Pradesh.

PROVISIONAL ATTACHMENT [Sec 281B].

Section 281B is an extraordinary power available to the Assessing Officer to attach provisionally any property belonging to the assessee for protecting the interest of the Revenue against a possible demand which may arise in pending tax proceedings.

It can be so attached only with the previous approval of the Joint Commissioner or Commissioner. The section provides for maximum period of six months from the date of the order. There will be no need for extension, if the pending proceedings are completed before this date, so that such attachment is either lifted or is substituted by regular attachment proceedings against the outstanding demand, if such demand is meanwhile raised and not met. The proviso to section 281B(2) provides that such time limit may be extended from time to time by the Chief Commissioner, Commissioner, Director General or Director with the over-all period of attachment under this section not exceeding two years for reasons to be recorded in writing. It stands to reason that such extension should be granted only for exceptional circumstances, because taxpayer's assets cannot be tied down by attachment without some good reason to safeguard the public revenue.

The Hon'ble Courts have observed that the power given to the authorities under Section 281B must be exercised with extreme care and caution. It should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Attachment of bank accounts and the trading assets should be resorted to only as a last resort. In any event, attachment under section 281B should not be equated with attachment in the course of recovery proceedings.

239 ITR 337 (Bom) Gandhi Trading vs. Asst. Commissioner of Income Tax & Ors

252 ITR 642 (AP) Society for integrated Development in Urban and Rural Areas v CIT

Circular explaining the provision of section 281 B (1976) 102 ITR St. 9 (20) 239

ADJUSTMENT OF REFUNDS

Recovery includes both, coercive steps to recover as well as adjustment of refunds. Adjustment is a method of recovery u/s 245.

Sec 245 permits adjustment of refunds due but after giving an intimation in writing to the assessee.

NO TIME LIMIT FOR RECOVERY. VERY OLD DEMANDS ALSO RECOVERABLE.