

Workshop on Direct Taxes ,
Direct Tax Committee, ICAI

Penalty Proceedings & Recovery Proceedings and Stay of Recovery

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Penalty Proceedings

- Penalty is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that the consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest.

C. A. Abraham vs. ITO Kottayam 41 ITR 425 (SC)

- Imposition of penalty is on contumacious or fraudulent assesses.
- Penalty is in addition to income tax, if any, determined as payable by the assessee.
- Penalty is a liability under the Act.
- Penalty is not merely a sanction.
- It is not merely adjunct to assessment.
- It is not merely consequential to assessment.
- It is not merely a machinery – not automatic- For its levy, application of mind is required.

- It is an imposition of a pecuniary liability which is comparable to a punishment for the commission of an offence.
- A pecuniary liability cannot be imposed on an offence created by mere implication.

Penalty

General Concept

- Penalty proceedings are penal in character. Department must establish their case with cogent material or evidence. Penalty could not be levied solely on the basis of the reasons given in the original order of assessment.

[CIT vs. Khoday Eswara & Sons 83 ITR 369(SC)]

- Finding in the assessment proceedings cannot be regarded as conclusive for the purposes of the penalty proceedings. In the penalty proceedings, the authorities must consider the matter afresh as the question has to be considered from a different angle.

[Anantharam Veerasinghaiah & Co vs. CIT 123 ITR 457

(SC)]

- A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in nature and it is different from penalty for a crime.
- Mens rea is an essential or sine qua non for criminal offence. It is not essential element for imposing penalty for breach of civil obligations or liabilities.
- A straight jacket formula of mens rea cannot be blindly followed in each and every case.
- There can be two distinct liabilities, civil and criminal under the same Act. – Not for the same offence.

- Penalty can be levied only after the defaulter is heard or has given a reasonable opportunity of being heard, hence notice of hearing is necessary.
- All principles of natural justice must be followed in the course of the proceedings.
- Authority must satisfy themselves before issue of penalty notice that the assessee has committed default liable to the concerned penalty.

- Hence application of mind afresh is necessary.
- Additional evidence, if any must be allowed to be produced and must be verified afresh.
- AO must examine the evidence objectively and fairly.
- Surmises, conjectures and suspicion must not be the base in the proceedings.
- Technical mistakes/inadvertence and venial defaults must be considered for accepting reasonable cause.

- Discretion provided under the law must be exercised judicially and reasoned order must be passed.
- Order imposing penalty can be made :
Up to Rs. 10,000/- by the ITO
Up to Rs. 20,000/- by ACIT or DCIT
- If the penalty exceeds the said limits, prior approval of the Jt. CIT is required to be taken by them.
- A copy of the penalty order is to be provided to Assessing Officer unless he is himself the one passing the penalty order.

Penalty Procedure-

Expected approach from the assessee.

- Attend to the notice as per time provided and avoid taking adjournments in the proceedings.
- Clarify if, the offence is not in fact made and how the concerned provisions are not considered applicable.
- Explain facts leading to non compliance, if any.
- Explain circumstances that were beyond control and adduce documentary evidence for the same.
- Explain the default unintended providing past histories/conduct, if available.
- Draw attention to subsequent compliances to support bonafides.
- Reliance if any, made on the professional to discharge the obligation defaulted to be submitted with evidence.

- **Default:** Determination of undisclosed income of the block period .
- **Levied by:** Assessing officer or Commissioner (A)
- **Quantum:** Not less than amount of tax but not more than three times the amount of tax on undisclosed income.
- **Defenses:** At the opportunity of hearing, demonstrate the reasonable cause for the additional income assessed- Explain bonafide efforts made to comply the obligation.
Reliance made on professional, if any.

- Default: Failure to pay tax, i.e non payment of tax required by notice u/s 156.
- Levied by: Assessing Officer.
- Quantum: Not to Exceed total amount of arrears
- Defenses: Financial constraints- Hardship in providing compliance to be established with supporting documents.- Narrate circumstances beyond control & bonafide and voluntary efforts made to meet obligations. Application for stay, if made. details of payments of undisputed part of tax of the demand & payment of interest voluntarily.

- Default: Failure to comply with a notice u/s 142(1) /143(2) or direction u/s 142(2A)
- Levied by: Assessing officer or Commissioner (A)
- Quantum: Rs 10,000/- for each failure in addition to tax,if any.
- Defenses: As mentioned in expected approach. Explain case in detail and provide evidence about the reasons submitted.

- Default: Concealment of income or fringe benefits or furnishing of inaccurate particulars of income or fringe benefits
- Levied by: Assessing officer or Commissioner (A)
- Quantum: Minimum amount of tax evaded but less than three times tax evaded in addition to tax if any
- Defenses: As mentioned in expected approach. Explain case in detail and provide evidence about the reasons submitted. Bring about bonafide & unintended/honest mistake or inadvertance.

- Default: Distribution of profits by registered firm not in accordance with partnership deed and as a result of which partner has returned income below the real income
- Levied by: Assessing officer or Commissioner (A)
- Quantum: Not exceeding 150 per cent of difference between tax on partner's income assessed and tax on income returned, in addition to tax payable
- Defenses: Genuine cause for default, if unintended. Mistake / inadvertance involved- no material benefit quantumplated.

- Default: Failure to keep, maintain, or retain books of account, documents, etc., as required under section 44AA .
- Levied by: Assessing officer or Commissioner (A)
- Quantum: Rs 25,000/-
- Defenses: Circumstances due to which books not available.-Extend to which information still be available. Bonafide efforts

- Default: Failure to keep and maintain information and documents required by section 92D(1) or 92D(2).
- Levied by: Assessing officer or Commissioner (A)
- Quantum: 2% of value of each international transaction or specified domestic transactions.
- Defenses: Circumstances due to which records/documents not available.-Extend to which information still be available. Bonafide efforts.

- Default: Search u/s 132 before 1st july 2012 & finding undisclosed income
- Levied by: Assessing officer
- Quantum: 10 % of undisclosed income.
- Defenses: Explain if income considered did not amount to undisclosed income with supporting evidence-income if belong to other assessee- may use circumstantial evidences.

- Default: Search u/s 132 after 1st july 2012 & finding of undisclosed income
- Levied by: Assessing officer
- Quantum: 10% of undisclosed income if admits during the search.
20% of undisclosed income if assessee admits in return of income filed after the search.
In other cases, minimum 30% but not to exceed 90% of undisclosed income.
- Defenses: Explain for other case that income considered did not amount to undisclosed income with supporting evidence-income if belong to other assessee may use circumstantial evidences.

- **Default:** Failure to get accounts audited or furnish a report of audit as required u/s 44AB.
- **Levied by:** Assessing officer
- **Quantum:** 0.5% of total sales or Rs 150,000/- whichever is less.
- **Defenses:** Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to furnish a report from an accountant as required by section 92E (International transaction)
- Levied by: Assessing officer
- Quantum: Rs 100,000/-
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to deduct tax at source, wholly or partly, under sections 192 to 196D (Chapter XVII-B) or failure to pay wholly or partly tax u/s 115-O(2) or second proviso to section 194B.
- Levied by: Joint Commissioner
- Quantum: Equal to amount of tax failed to be deducted/paid.
- Defenses: Explain reason for failure if out of mistake/ inadvertence/ reliance on advice- Bonafide belief .

- Default: Failure to collect tax at source as required under Chapter XVII-BB.
- Levied by: Joint Commissioner
- Quantum: Equal to amount of tax the person has failed to collect.
- Defenses: Explain reason for failure if out of mistake/ inadvertence/ reliance on advice- Bonafide belief .

- Default: Taking or accepting certain loans and deposits in contravention of provisions of section 269SS
- Levied by: Joint commissioner
- Quantum: Equal to amount of loan or deposit so taken or accepted.
- Defenses: Circumstances compelling-Availability of Identity of the lender-Genuineness of Transaction-established with evidence-availability of confirmation & disclosure of transaction by lender-unintended violation.

- Default: Repaying any loan or deposit specified in section 269T in contravention of its provisions.
- Levied by: Joint commissioner
- Quantum: Equal to amount of loan or deposit so repaid.
- Defenses: Circumstances compelling-Availability of Identity of the lender-Genuineness of Transaction-established with evidence-availability of confirmation & disclosure of transaction by lender-unintended violation.

- Default: Failure to furnish return as required by section 139(1) or by its provisos before the end of the relevant assessment year
- Levied by: Assessing Officer
- Quantum: Rs 5,000/-
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to furnish an annual information return as required under section 285BA(1)2 or period specified in notice u/s 285BA(5)
- Levied by: Director of Income tax (Central information branch) OR NSDL
- Quantum: Rs 100/- for everyday during which default continues
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Penalty for furnishing inaccurate statement of financial transaction or reportable account.
- Levied by: Director of Income tax (Central information branch) OR NSDL
- Quantum: Rs 500/- for everyday during which default continues
- Defenses: Explain reason for failure if out of mistake/ inadvertence/ reliance on advice- Bonafide belief .

- Default: Failure to furnish any information or document as required by section 92D(3)
- Levied by: Assessing officer/Transfer pricing officer/commissioner (A)
- Quantum: 2 % of value of International transaction or specified domestic transaction
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to deliver/cause to be delivered a statement within the time prescribed in section 200(3)(TDS returns) or proviso to sec 206C(3)(TCS return) or furnish incorrect information.
- Levied by: Assessing Officer
- Quantum: From Rs 10,000/- to 100,000/-
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Refusal or failure to answer question or sign statement or attend to give evidence or produce books of account, etc., in compliance with summons under section 131(1).
- Levied by: Joint Director /Joint Commissioner
- Quantum: Rs 10,000/- for each failure
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to provide information/ Returns Statement or Particulars/ certificates/ declaration under various noted sections.
- Levied by: Joint Director/Joint Commissioner/Principal Chief Commissioner/Chief Commissioner/Principal Commissioner/Commissioner
- Quantum: Rs 100 for each day
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to comply with section 133B.(Power to collect certain information)
- Levied by: Joint Commissioner/ Assistant director/ Assessing Officer
- Quantum: Upto Rs 1,000
- Defenses: Explain circumstances beyond control with Evidence- Bonafide efforts put in to comply with obligation.

- Default: Failure to comply with provisions of section 139A/139A(5)(c)/(5A)/(5C) - (PAN Application)
- Levied by: Assessing Officer
- Quantum: Rs 10,000
- Defenses: Explain reason for failure if out of mistake/ inadvertence/ reliance on advice- Bonafide belief .

- Default: Failure to comply with section 203A (Non Application for TAN)
- Levied by: Assessing officer
- Quantum Rs 10,000/-
- Defenses: Explain reason for failure if out of mistake/ inadvertence/ reliance on advice- Bonafide belief .

- Default: Quoting false tax deduction account number/tax collection account number/tax deduction and collection account number in challans,certificates,statements or other documents in sec 203 A(2)
- Levied by: Assessing officer
- Quantum: Rs 10,000/-
- Defenses: Explain reason for failure if out of mistake/ inadvertence/ reliance on advice- Bonafide belief .

Penalty - Further Process

- After hearing the assessee, an order of penalty is to be passed.
- Such order shall be detailed/reasoned/speaking order.
- It will demonstrate application of mind to the submissions by the assessee.

The order levying penalty shall not be passed :

After expiry of the financial year in which the proceedings in the course of which action for the imposition of penalty has been initiated are completed.

OR

Six months from the end of the month in which action for imposition of penalty is initiated,

Whichever period expires later.

Penalty - Limitations of time

Sec 275

e.g. where, Asst proceeding commenced on 30th Sept.2013

Penalty proceedings u/s. 271(1)(c) are initiated in the course of assessment proceedings.

Assessment completion date	End of F.Y	End of 6 months from initiation
20 th June, 2014	31 st March 2015	31 st December 2014
20 th February 2015	31 st March 2015	31 st August 2015
29 th March 2015	31 st March 2015	30th Sept. 2015
31 st January 2014	31 st March 2014	31 st August 2014

If the penalty proceedings are initiated u/s. 271(1)(b) for failure to comply with the notice u/S 143(2) on 12th January, 2015, and assessment is completed on 20th February, 2015, the penalty order is to be passed by 31/7/2015.

In the event that the assessment order or the other order is subject matter of appeal before CIT(A) / ITAT:

The order of penalty shall not be passed.

After expiry of the financial year in which the proceedings in the course of which action for the imposition of penalty has been initiated, are completed.

OR

Six months from the end of the month in which the order of CIT(A) or as the case may be of ITAT is received by PCC/CC/PC/C

Whichever period expires later.

In the case of the order of CIT(A) is passed on or after 1st June, 2003, the time for passing of the penalty order is amended by the provision to sub-section(1) to section 275.

The order is to be passed:

Before expiry of the financial year in which the proceedings in the course of which action for the imposition of penalty has been initiated are completed.

OR

Before one year from the end of the financial year in which the order of CIT(A) is received by the PCC/CC/PC/C

Whichever period expires later.

- If the relevant assessment order or other order is subject matter of revision u/s 263 or 264, penalty order cannot be passed after the expiry of six months from the end of the month in which the order of revision was passed

Penalty - Limitations of time Sec 275 (1A)

- The order of penalty shall be revised pursuant to revision of the order of assessment by CIT(A)/ITAT/HC/SC or by CIT u/s 263 or u/s 264. If the order imposing penalty was already passed before the appellate order from the said appellate authority was received by PCC/CC/PC/C.
- In the event of such revision of assessment order after the order levying penalty was already passed, such order imposing penalty or enhancing, reducing or cancelling the penalty or dropping the penalty proceedings shall be revised based on the revision of the assessment order.

Penalty - Limitations of time Sec 275 (1A)

- The revision order under this section (1A) of section 275 can again be revised under this sub-section.
- Before revising the order of penalty, an opportunity of being heard has to be provided to the assessee.

Penalty - Limitations of time Sec 275 (1A)

- No such order of revision could be passed after the expiry of six months from the end of the month in which the order of the CIT(A), ITAT, HC or SC is received by PCC/CC/PC/C.

OR

- The order of revision by CIT under section 263 or 264 is passed.
- In computing the time limit of six months, the time taken to give reasonable opportunity to the assessee of being heard and any period for which the proceedings for levy of penalty are stayed by an order of injunction of the court or the period during which immunity was granted u/s. 245H will be excluded.

Penalty - Limitations of time Sec 275 (1A)

- The provision of section 274(2) is applicable to the order of revision of penalty under this section. i.e. in case of penalty exceeding Rs. 10,000/- the ITO and in case the penalty exceeds Rs. 20,000/- ACIT or DCIT shall pass order after taking prior approval of JT. CIT.

- Penalty imposed / imposable u/s. 271(1)(c) can be waived or reduced by PC/CIT on his own or otherwise using his discretion and subject to following conditions:
 1. If he is satisfied that prior to the detection by the AO of the concealment of particulars of income or inaccuracy of the particulars furnished in respect of such income, the person has voluntarily and in good faith made full and true disclosure of such particulars.

2. The person has co-operated in any enquiry relating to assessment of his income and
3. He has paid or has made satisfactory arrangements for payment of tax or interest payable in consequence of an order passed under Income Tax Act in respect of the relevant assessment year.

- If the amount of penalty imposed or imposable for the relevant year or if the disclosure relates to more than one assessment year, the aggregate amount of such disclosure exceeds a sum of Rs. 5 lacs, the order reducing or waiving the penalty shall be made by PC/C with the prior approval of the PCC/CC/ Principal Director General / Director General.
- On the order once made in his favour, the person shall not be entitled to any relief under this section in relation to any other assessment year at any time.

- Sub- section (4) provides for relief in respect of “any penalty” payable by the assessee under Income Tax act.
- The power is conferred on the PC/C in this regard. It is without prejudice to his powers under any other provision of the Act.

- Application for waiver/ reduction is to be made in this regard by the assessee.
- After recording reasons for his doing so, PC/C may reduce or waive the amount of any penalty payable by the assessee under Income Tax Act or stay or compound any proceedings for the recovery of any such amount if he is satisfied that :
 1. To do otherwise would cause genuine hardship to the assessee having regard to the circumstances of the case and
 2. The assessee has co-operated in any enquiry relating to the assessment or any proceedings for the recovery of any amount due from him.

- If the amount of penalty imposed or imposable for the relevant year or if the disclosure relates to more than one assessment year, the aggregate amount of such disclosure exceeds a sum of Rs. 1/- lac, the order reducing or waiving the penalty shall be made by PC/C with the prior approval of the PCC/CC/ Principal Director General / Director General.
- The order made under this sub-section shall be final and shall not be called in to question by any court or any other authority.
- The provision of this section 273A are applicable to and relate to all previous assessment years too.

- A person may make an application to PC/C for availing immunity from any penalty :
 - when the person has made application for settlement u/s 245 C and
 - proceedings for settlement have abated u/s 245HA and
 - the penalty proceedings have been initiated under this Act.
- The application shall not be made after the imposition of the penalty after abatement

- PC/C may subject to such conditions as he may think fit to impose, grant the immunity from the imposition of any penalty under this Act if he is satisfied that :
- The person has, after the abatement, co-operated with the income Tax authority in the proceedings before him and
- Has made full and true disclosure of his income and the manner in which such income has been derived

- The immunity so granted shall stand withdrawn if such person fails to comply with any condition subject to which the immunity was granted. On such withdrawal, the provisions of Income Tax Act shall apply as if no immunity was granted.
- The immunity may also be withdrawn if at any time PC / C is satisfied that in the course of the proceedings claiming immunity, the person had concealed any particulars material to the assessment from the Income Tax Authority or had given false evidence. On such withdrawal, the provisions of Income Tax Act shall apply as if no immunity was granted.

Recovery Proceedings & Stay of Recovery

Where and what?

- Chapter XVII of the Income Tax Act contains the substantive provisions concerning Collection and Recovery of Tax.
- The Second Schedule and The Third Schedule to the Income Tax Act are self-contained codes which lay the procedure for recovery of tax and procedure for distraint by Assessing Officer (**AO**) or Tax Recovery Officer (**TRO**).

Against whom?

Recovery proceedings can be initiated only against an assessee who is held as an “Assessee in Default”

Assessee in default

- The assessee is held in default under the following sections:

140A (3) In respect of the tax or interest remaining unpaid, on the basis of any return required to be furnished under [section 115WD](#) / [115WH](#) / [139](#) / [142](#) / [148](#) / [153A](#) or, [158BC](#)

201(1) If a person does not deduct the whole or any part of the tax or after deducting, fails to pay the tax as required by or under this Act,

218 If any assessee does not pay any installment of the advance tax that he is required to pay u/s. 210

Assessee in default (contd....)

- 220 (4) If the amount is not paid within the time limit under sub-section (1) or extended under sub-section (3) of section 220,
- 220(5) If, in a case where payment by installments is allowed under sub-section (3) of sec. 220, the assessee commits defaults in paying any one of the installments within the time fixed under that sub-section, the assessee shall be deemed to be in default

Assessee in default (contd....)

226 (3)(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the AO/TRO, he shall be deemed to be an assessee in default in respect of the amount specified in the notice.

Sec. 230 Owner or Charterer of any ship or aircraft who has failed to procure clearance certificate from persons specified in sub sec (1) and (1A)

Consequence for being assessee in default

- The vigor of the proceedings of recovery are commenced
- Interest u/s. 220 (2) is payable on the amount remaining outstanding.
Simple interest is payable @ 1% for every month or part of the month
and
- Penalty u/s. 221 (1) is payable
 - Levy of penalty is not mandatory. It is discretionary.
 - A show cause notice is necessary to be issued before levy
 - Total amount of penalty could not exceed the amount of tax in arrears.

Interest u/s. 220(2)

- Liability to pay interest u/s 220(2) is statutory and absolute. No opportunity is necessary to be provided to the defaulter
[Jayalalitha Vs CIT (1999) 244 ITR 74 (Mad)]
- Under specified circumstances, the interest may be waived by PCC/CC/PC/C on satisfaction of the cumulative conditions laid in sec 220(2A)
 - a) payment of interest would cause genuine hardship to the assessee;
 - b) non payment due to circumstances beyond control;
 - c) Assessee co-operated in proceedings for recovery of amount due from him

Interest u/s. 220(2)

Whenever an authority makes an order in exercise of its quasi-judicial function, it must record its reasons in support of the order it makes. Provide speaking order. Principles of natural justice are applicable

[Kishan Lal Vs. Union of India & Anr. (1998) 230 ITR 85 (SC)]

Interest u/s. 220(2)

The power must be exercised judiciously by authority based on relevant facts.

If the circumstances specially provided for by the statute are shown to exist, and the person demonstrates that waiver is warranted, Relief must be granted.

[Auro Foods Ltd. Vs CIT (1999) 239 ITR 548 (Mad)]

- 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

Shorter notice for payment

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

Shorter notice for payment

- If no reasons recorded – Notice Invalid
[M. Reddanna vs. Revenue (1980) 46 STC 232 (AP)]
- Shortening of the period is to be considered judiciously.

Higher authorities could interfere and set aside the order of the lower authorities passed in abuse of their discretionary power.

[Smt Achmma vs. State (1988) 171 ITR 494 (Ker)]

Service notice of demand

- Service of notice of demand is necessary to hold the assessee to be in default.

[ITO vs. Seghu Buchiah Setty (1964) 52 ITR 538 (SC).]

- Recovery proceedings was quashed by Supreme Court in absence of proper service of notice.

[Mohan Wahi vs. CIT (2001) 248 ITR 799(SC).]

Service notice of demand (Contd...)

- Notice of Demand was not served on the legal heirs. Recovery proceedings were held invalid.

[Bai Chandanben Jivanlal vs. L. D. Joshi (1969) 74 ITR 448(Guj).]

- Refund to the taxpayer could also not be withheld for adjustment against demand unless there is a valid notice of demand which has been served.

[J. R. Malhotra vs. Addl. Sessions Judge (1976) TaxLR 30 (SC)]

Service notice of demand (Contd...)

An order of assessment is considered as having been made only

- when the income / loss is properly quantified
- Computation of tax paid / payable and the refund due as the case may be is provided,
- Both the assessment order and the computation sheet for tax worked are duly signed and
- served with Notice of Demand on the assessee
- within a reasonable time

[Kalyan Kumar Ray vs. CIT (1992) 191 ITR 634 (SC).]

- If Asst. order not signed. Notice of demand having been served could not be presumed.

[Kalasho Devi Burman vs. CIT (1996) 219 ITR 214 (SC)]

Service notice of demand

- If the communication is sent by Registered Post, the service is proper
(section 27 of the General Clauses Act 1897)
CIT vs. Malchand Surana (1958) 28 ITR 684 (Cal).

Extension of Time and/or grant of installments for payments 220(3)

- With a view not to be held as an assessee in default :
 - an application made by the assessee.
 - before the expiry of the due date under sub-section (1) of section 220.
 - the AO may extend the time for payment or allow payment by installments u/s 220(3).
 - subject to such conditions as he may think fit to impose and
 - Without prejudice to the provisions contained in sub-section(2) for payment of interest on outstanding amount.

Pending Application for rectification or effect of the appellant order

The application must draw the attention of the AO to

- Any mistake apparent in the order of assessment or in computation of tax payable determined in notice of demand.
- Any credits if not been granted or
- Effect to the order of the appellate authority is not provided

AO must dispose the pending application for rectification. It is obligatory for him to determine correct / net demand and only then, proceed with recovery.

[Sultan Leather Finishers Pvt. Ltd vs. ACIT 191 ITR 179 (All)]

As per Citizens' charter: An application for order giving effect/rectification of mistakes is scheduled to be disposed within 15 days.

Where an assessee has presented an appeal under section 246 or 246A

- the AO 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
- For the amount in dispute in the appeal,
- even though the time for payment has expired,
- as long as such appeal remains undisposed off.

- Mere filing of an appeal does not justify a stay of recovery automatically.
- Application must justify the reason for which it needs to be decided in favour of the applicant.
- The AO has discretion and for good reasons, may not grant any stay at all.
- Discretion is necessary to be used by him judiciously.

- The discretion is coupled with duty to be exercised judiciously and reasonably based on the relevant grounds.
- The power could not be exercised arbitrarily and capriciously based on matters irrelevant.
- Assessing officer should not act merely as tax gatherer but be a quasi judicial authority vested with power of resolving hardship to the assessee.

[N Rajan Nair vs. ITO (1987) 165 ITR 650, (Ker.),]

- AO must apply his mind to various aspects in the facts and circumstances, like
 - The issues involved in the appeal,
 - possibilities of the appeal being allowed,
 - the assessee's co-operation during the course of assessment,
 - chances of recovery in case if appeal is dismissed,
 - the hardship to the assessee in making the payment in the time etc.

Tax in Dispute/ Stay Proceedings (Contd...)

- If the AO refuses to exercise his discretion or exercises it in a capricious or arbitrary manner or by taking in to consideration irrelevant or extraneous considerations, the court can interfere and compel him to discharge his duty and use his discretion honestly and objectively.
- Before approaching the court, an assessee should approach the Commissioner of Income Tax and seek intervention in the matter.
- He has inherent powers conferred up on him to discharge his function as an administrative head.

Tax in Dispute/Appeal filed (Contd...)

The first appellate authority, CIT (Appeals) also has independent power u/s 251 (1) (c) apart from section 220(6) and can stay the recovery of demand of dues which are subject matter of appeal pending before him.

Assessee may directly approach the CIT(A) u/s 251 without approaching AO. Hence rejection of any application by AO is not necessary.

[Maheshwari Agro industries vs Union of India (2012) 346 ITR 375 (Rajasthan).]

Circulars & Notifications

- Few Circulars and Notifications are issued by CBDT dealing with the recovery proceedings.
- It would reduce hardship to both the parties. Since this rule of game is known to both.

Instructions : No 96 [F. No. 1/6/69-ITCC] dt. 21-8-1969

- The circular specifically takes care when assessed income is substantially higher than returned income – say twice the latter amount or more. The event is described as case of high pitched assessment.
- It directs that 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.

Circulars & Notifications (contd...)

- Instruction : 96 (cont...)
- The instructions indicate the departmental thinking on the subject which is also relevant in the context of exercising the discretion under sec. 220(6).
[N Rajan Nair Vs. ITO [1987] 165 ITR 650 (ker.)]
- The circulars issued by Central Board of Direct Taxes are binding on the authorities exercising the powers under taxing statute, and have sufficient force of law.

[Maharana Shri Bhagwat Singhji Vs. ITAT[1997] 223 ITR 192 (Raj.)

Maheshwari Agro industries in 346 ITR also held the applicability of the doubt.]

Circulars & Notifications

- Instruction No 1914 dated 2-12-1993
(F.No. 404/72/93 ITCC)
 - Comprehensive instruction.
 - In supersession of all earlier instructions no. 530 dt 6-3-1987 & no. 589 dt 16-1-1991
 - Reiterates the existing circulars on the subject.
 - In principle, every demand is desired to be recovered as soon as it is due.
 - Demand is allowed to be stayed only in accordance with guidelines here.

Circulars & Notifications

Instruction no: 1914 (Contd...)

Circular is divided in 4 paragraphs

A) Responsibilities

- Every demand is directed to be collected except :
 - Demand not due for payment.
 - Demand stayed by court or ITAT or Settlement Commission.
 - Where proposal for write off is submitted.
 - Demand is stayed as per para B and C.
- Where certificate is drawn, TRO is responsible for collection.
- Supervisory authorities also to ensure collection of dues

Circulars & Notifications

Instruction no: 1914 (Contd...)

B) Stay Petitions

- Must be disposed within two weeks from filing.
- Decision also to be informed without delay.
- Higher authorities are to dispose off petition without any delay not later than two weeks.
- Decision also to be communicated immediately.
- Decision to be taken by AO/TRO with immediate superior.
- Higher authorities to interfere only by exception.
- Reviews of the decision are to be discouraged.

Circulars & Notifications

Instruction no: 1914 (Contd...)

C) Guidelines for staying demand

- Grant of stay only for valid reasons.
- Filing of appeal is not a sufficient ground to get the stay.
- Situations for grant of stay
 - Demand in dispute relates to issues decided in favour by appellate authority or court.
 - Demand is due to the view adopted by AO amidst conflicting decisions of one or more High Courts other than jurisdictional.
 - High Court having jurisdiction has taken contrary view but not accepted by department.
- Stay to be granted for disputed amount only.
- Assessee is to co-operate in early disposal of appeal.
- If higher appellate authority alters the view in the issue, AO/TRO may review or modify decision.

Circulars & Notifications

Instruction no: 1914 (Contd...)

- Condition imposable by AO
 - To offer proper security.
 - Undisputed tax to be paid off even in installments.
 - Undertake to co-operate in early disposal of appeal.
 - Right to review the order periodically may be reserved.
 - Reserve a right to adjust refunds against the demand.
- Payment of installments to be liberally considered.
- To avoid use of the words “stay of demand” and use “assessee not being in default”.
- AO to consider all relevant factors and make speaking order.

Circulars & Notifications

Instruction no: 1914 (Contd...)

D) Miscellaneous

- AO to review and ensure fulfillment of conditions imposed.
- Stay of demand from Tribunal to be strongly opposed.
- If assessee persists, DR to request for posting of appeal within one month to know the results within two months.
- Appeal effects to be given within two weeks from receipt of appellate order.
- Rectification application should be decided within two weeks of the receipt thereof.
- CCIT and CIT to deal very strictly with the default in giving effect or rectification of orders.
- AO/TRO and their superiors are responsible for ensuring compliance of these instructions.
- This procedure would apply mutatis mutandis to demands under other direct taxes.

Circulars & Notifications

- Instruction No. 1936 dated 21-3-1996
(F.No. 404/62/95-ITCC)
- Part payment received from assessee should be first adjusted towards the tax due and not the interest calculated U/s. 220(2) of the Income Tax Act.

Stay of Recovery Before ITAT

- An application for grant of stay from recovery could be made u/s. 254 to the Income Tax Appellate Tribunal if an appeal is filed before it against the first appellate authority' order.
- ITAT has wide powers while dealing with the appeal before it to grant stay
- Rule 35A of Income Tax (Appellate Tribunal) Rules, 1963 lays the procedure for filing and disposal of stay petition.
- Application has to be in the prescribed form being Appendix X and
- is to be filed in triplicate along with
- Payment of fees of Rs. 500/- as per the provision of section 253 (7).

Recent Guidelines on Stay Petition before ITAT

- Guidelines dated 3-4-2007:
 - Stay Petitions filed upto Wednesday of the week will be listed on Friday of the same week.
 - Registry or the Bench will not insist for letter of AO/CIT.
 - Assessee to inform AO of the petition and draw attention to the decision of Bombay High Court in Mahendra & Mahendra (1992) 59 ELT 505 and request not to enforce recovery till stay petition is pending.
 - AO is bound to follow the decision aforesaid.

Recent Guidelines on Stay Petition before ITAT

- If coercive steps of recovery have already been taken by AO/TRO, ITAT be approached – appropriate orders will be made. DR is to be informed in advance by assessee.
- DR will inform AO/TRO to follow the directions. They will be taken as written orders of the Bench.
- No recovery should be made by AO/TRO in violation of interim orders till disposal of stay petition.
- DR to mention if the interest of the Revenue is jeopardized.
- Guidelines will be strictly followed at Mumbai Benches.

Stay of Recovery before ITAT

- The application has to be neatly typed on one side of the paper and shall be in English.

It must set forth the following:

- Short facts regarding the demand of the tax, interest, penalty, fine, estate duty or any other sum, recovery of which is sought to be stayed.
- The result of the appeal filed before the Appellate Assistant Commissioner if any.
- The exact amount of tax, interest, penalty, fine, estate duty or other sum demanded as the case may be and the amount undisputed there from and the amount outstanding.

Stay of Recovery before ITAT

- The date of filing the appeal before the Tribunal and its number if known.
- Whether any application for stay was made to the revenue authorities concerned and if so, the result thereof (Copies of correspondence, if any, with the revenue authorities to be attached.)
- Reasons in brief for seeking stay
- Whether the applicant is prepared to offer security, and if so, in what form
- Prayers to be mentioned clearly and concisely (stating exact amount sought to be stayed)
- The contents of the application shall be supported by an affidavit sworn by the applicant or his duly authorized agent.

An application, which does not conform with the above requirements, is liable to be summarily rejected.

- When an assessee is in default or is deemed to be in default in making the payment of tax,
- the TRO may draw up under his signature a statement in the prescribed form (**form no 57 – Rule 117B**)
- specifying the amount of arrears due from the assessee (such statement being hereafter in this Chapter XVII and in the **Second Schedule** is 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 by:
 - (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.

- In whose jurisdiction the assessee carries on business or profession or within whose jurisdiction, the principal place of business or profession is situate or
- TRO within whose jurisdiction the assessee resides or any movable or immovable property of the assessee is situate.
- “Jurisdiction” is assigned by the Board/PCC/CC/PC/ Commissioner of Income Tax.
- If the property of the defaulter is situated in more than one jurisdiction of the TRO, and the TRO issuing the certificate is unable to recover the entire amount of sale of the property within his jurisdiction, he may send the certificate or a copy of the certified certificate specifying the amount to be recovered to a TRO within whose jurisdiction the assessee resides or has property.

- The right of the assessee to dispute the correctness of the certificate drawn up by TRO on any ground whatsoever is restricted.
- However TRO could cancel the certificate if for any reason, he thinks it necessary to do so or
- He may correct any clerical or arithmetical mistakes therein.

Stay of Proceedings in pursuance of certificate and cancellation or amendment thereof

Sec 225

- TRO has the power to grant time for payment of any tax and stay the proceedings for the recovery of tax until expiry of the time so granted.
- He also has the power to amend or cancel the certificate after considering effect to the appellate order.

Other modes of recovery sec 226(3)

- 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 section 226.
- where the certificate is drawn under sec 222, the Tax Recovery Officer is authorized to recover the tax without prejudice to the mode specified in sec 222 by any one or more modes provided in sec. 226.

Other modes of recovery sec 226(3) (Contd...)

- AO or TRO may require any person paying income from Salaries to any person in arrears of tax to collect by way of deduction from the payment to the assessee
- subsequent to the date of such requisition
- such person (the employer) shall comply with any such requisition
- pay the sum so deducted to the credit of the Central Government or as the Board may direct.
- such amount as is not liable for attachment in terms of Sec. 60 of the Code of Civil Procedure, 1908 (5 of 1908), shall be exempt from any requisition made under this sub-section.

- The AO and the TRO is empowered to recover the amount due from the assessee directly from a third person from whom the assessee may have the amount due or is recoverable subsequently.
- AO/TRO is obliged to issue notice in writing to the debtor of the assessee
- requiring the debtor at any time or
- from time to time to pay the money due or that may become due, to the assessee directly to the AO/TRO.
- They may require to pay the money either forthwith or upon the money becoming due or being held or at or within the specified time mentioned in the notice.

Other modes of recovery sec 226(3) (Contd...)

- Nothing could be required to be paid by the said debtor before money becoming due to the assessee from such debtor or is held by the debtor.
- AO/TRO could require only so much of the money to be paid as are sufficient to pay the amount due from the assessee in respect of the arrears or the whole of the money when it is equal or is less than the amount due from the assessee.

Other modes of recovery sec 226(3) (Contd...)

Clause (ii)

- a notice under sub-section (3) 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
- the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

clause (iii)

- a copy of the notice shall be forwarded to the assessee at his last address known to the AO/TRO
- In the case of a joint account, to all the joint holders at their last addresses known to the AO/TRO

Other modes of recovery sec 226(3) (Contd...)

Clause (iv)

- every person to whom a notice is issued under this sub-section shall be bound to comply with such notice,

Clause (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.

Other modes of recovery sec 226(3) (Contd...)

Clause (vi)

- If 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.
- However, if it is discovered subsequently that such statement was false in any material particular, such person shall be personally liable to the AO/ TRO 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.

Other modes of recovery sec 226 (3) (Contd...)

clause (vii)

- AO/TRO 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.

Clause (viii)

- AO/TRO 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.

Other modes of recovery sec 226(3) (Contd...)

clause (ix)

- any person discharging any liability to the assessee after receipt of a notice under this sub-section shall be personally liable to the AO/TRO to the extent of his own liability to the assessee so discharged or to the extent of the assessee's liability for any sum due under this Act, whichever is less.

Clause (x)

- if the person fails to make payment in pursuance of the notice, 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

- the AO/TRO 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.
- The AO/TRO may, if so authorised by the PCC/CC/PC/C by general or special order, recover any arrears of tax due from an assessee by distraint (Seizure) and sale of his movable property in the manner laid down in the Third Schedule.

- The several modes of recovery specified in this Chapter XVII shall not affect in any way.
 - any other law relating to the recovery of debts due to Government; or
 - the right of the Government to institute a suit for the recovery of the arrears due from the assessee
 - Notwithstanding that the tax due is being recovered from the assessee by any mode specified in this Chapter.
- [Raja Jagdish Pratap Sahi vs. State of Uttar Pradesh (1973) 88 ITR 443 (SC)]

FAQs

- Can recovery in case of Protective Assessment be made?

Not allowed.

[CIT vs. Cochin Co. (P) Ltd. [1976] 104 ITR 655 (Ker).
Sunil Kumar vs. CIT [1983] 139 ITR 880 (Bom)]

- In case of property which is included on protective basis, corresponding tax element cannot be recovered. Wealth Tax Act 1957.

[CWT vs. Begam Brigees Zahoor Qasim [2001] 248 ITR 482
(Delhi)]

FAQs

- Can recovery be made from the Directors of a Company?

When Director of a Company is held liable U/s.179, recovery can be effected without issue of notice.

[S. Hardip Singh Sandhu vs. TRO [1987] 166 ITR 759
(P&H)]

Affirmed in : S. Basant Singh (Decd.) Through Legal
representative Rs. vs. TRO [1998] 233 ITR 508 (P&H)

MaganBhai Hansrajbhai Patel v/s ACIT 353 ITR 56
(Gujarat)]

FAQs

- Can an attachment and sale of property of the partner be made for recovery of tax due from firm?

As the firm is not legal person the dues can be recovered by attachment and sale of properties belonging to partners.

[Mohan Wahi vs CIT [2000] 246 ITR 144 (All)]

- Can a recovery certificate in case of a dissolved firm be enforced against the partner ?

Yes. provided his name is added to it.

[Union of India vs Satyanarayan Khan [1961] 42 ITR 42 (cal).

Sahu Rajeshkumar Nath v/s ITO 72 ITR 61 (SC).

Followed in: Union of India v/s Madar Bux 140 ITR 821 (cal).]

FAQs

- Can recovery from Personal property of a members of HUF towards the liability of HUF be made?

Personal property not liable for tax dues of HUF

[Kashiram Agarwalla vs. Collector of 24 Parganas [1958] 33 ITR 800 (cal)]

- Can HUF Property be attached towards a co- parceners liability?

Only his share in the in HUF property can be appropriated .

[Ulchala Illuru Hanumanthaiah vs. ITO [1961] 43 ITR 174 (AP).
Prakashchand Lunia v/s TRO 244 ITR 324 (Rajasthan).]

FAQs

- Can property of a spouse be attached towards income tax dues of the other spouse who is not a defaulter?

No.

[P.K. Kunjamma vs. TRO [1977] 227 ITR 852 (ker).
Smt. Darshana Aggrwal v/s TRO 302 ITR 82(HP)]

- Can a flat in a co-operative society be attached?

Yes

[Ramesh Himmatlal Shah vs. Harsukh Jadhavji Joshi [1975]
2 SCC 105, AIR 1975 SC 1470.]

FAQs

- Can penalty be recovered when appeal against the quantum is pending?

Recovery of penalty should be stayed till the disposal of appeal.

[Sat Pal vs. ITAT [1996] 217 ITR 317 (P & H)]

- Can recovery from third party u/s 226 (3) be made before assessment ? i.e. in anticiapation of demand.

No.

[All India Reporter Ltd. vs. Ramchandra D Datar
[1961] 41 ITR 446 (SC)]

FAQs

- Can recovery be initiated or continued in respect of demand of set aside assessment.

No.

[Ambaji Traders Pvt. Ltd. vs. ITO [1976] 105 ITR 273 (Bom)]

- Can recovery be made while stay application was pending before ITAT?

No.

[MSEB vs. JCIT 81 ITD 299 (Mum)]

See guidelines on stay petitions before ITAT

THANK YOU