

RECOVERY AND STAY PROCEEDING

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I. INTRODUCTION:

1. Our Constitution by way of Article 265 proclaims that,
“NO TAX SHALL BE LEVIED OR COLLECTED EXCEPT BY
AUTHORITY OF LAW”

Recovery is a sequel as the tax is a price that we all pay for civilization. Recovery is not only a wholesome burden on the Department, it also has a cascading effect on the lives of assessee in many ways.

2. Under the 1922 Act, recovery was contemplated through the collector under the state law dealing with land revenue and provided for exercise of the powers of a civil court in those proceedings. The 1961 Act itself provides for the law of recovery and collection. Section 220 to 232 in part D of chapter XVII deals with collection and recovery of tax.

The Law of Recovery is based on Civil Procedure Code, 1908. Therefore knowledge of Civil Procedure Code relating to recovery will help us to make a better representation and to render correct advice, when an issue comes for consideration.

Important Issues which may be relevant in our day to day practice is dealt here under:

II. **Recovery proceedings before assessment-Provisional attachment to protect revenue in certain cases - S.281B of the Income-tax Act , Civil procedure Code,1908- S. 94(b), Order 38 Rule5- Attachment before judgment.**

3. **Circular no 179 dated 30-9-1975 (1976) 102 ITR (St.) 9 (20)**

It is stated in the circular that this new provision has been made in order to protect the interests of the revenue in cases where the raising of demand is likely to take time because of investigations and there is apprehension that the assessee, may thwart the ultimate collection of that demand .

4. The provisions of section 281B is akin to the section 94(b) of the Code of Civil Procedure Code, 1908 Order38, Rules5&6 of CPC. Section 281B can be invoked only **“During Pendency of any proceedings for assessment or reassessment”**.

5. **Case Laws**

- Raman Tech & Process Engg .Co v.Solanki Traders (2008) 2 SCC 302
- Gaurav Goel v.CIT (2000) 245 ITR 169 (Cal.)
- Raghu Ram Grah P. Ltd. v. ITO & Ors. (2006) 281 ITR 147 (All.)
- Majjo (Smt.) v. ACIT (1991) 187 ITR 642(All.)
- Tek Chand v. ITO (2001) 252 ITR 799 (P&H)
- Seshasayee Paper & Boards Ltd. v. CIT (2003) 261 ITR 63 (Mad.)

6. **Properties which can be attached.**

- S. Subramanian v.CIT (2004)186 CTR 286 /136 Taxman 653 (Mad)
- Satyabir Singh v. CIT (2001) 248 ITR 785 (P&H)
- Electro Zavod (India) Pvt .Ltd v.CIT (2005) 278 ITR 187 (Cal.)
- Gandhi Trading v. ACIT (1999) 239 ITR 337 (Bom.)
- Shaw Wallace & Co Ltd v. CTO (1996) 100 STC 270 (AP)

III. **Recovery proceedings after assessment .**

1. **Who can be declared as “ Assessee in default”**

- Recovery proceedings can be taken only in cases where an assessee is in default or is deemed to be in default (e.g. Provisions applicable: S. 2(7), 140A(3),156, 179,191, 220(5), 226(3)(x), 282, 283, 284 of Income Tax Act, 1961 and Order V Rules 15, 17, 18 and 19 of CPC.)

- When an assessee is served with notice of demand under section 156, if assessee does not pay the demand within 30 days he is treated as “assessee in default”. If the order is passed under section 179 against Director, the Director of Company can be treated assessee in default under section 220(4). Similarly under section 140A(3), when an assessee fails to pay the whole or any part of the self assessment tax or interest or both in accordance with section 140A(1), he shall be deemed to be an assessee in default. If the person mentioned in section 200 does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required under this Act, he shall be treated as assessee in default.

2. **Valid service of Notice.**

If an assessee does not pay the amount demanded under the notice issued u/s. 156 within 30 days then he will be treated as an assessee deemed to be in default. Once the assessee is treated as assessee deemed to be in default the recovery proceedings can be initiated against him.

- Mohan Wahi v.CIT (2001) 248 ITR 799(SC)
- **Demand Notice not received by assessee, recovery proceeding held to be not valid.**
- Saraswati Moulding Works v. CIT & Ors(2012) 347 ITR 161 (Guj.)
- CIT v. Sattandas Mohandas Sidhi (1982) 230 ITR 591 (MP)
- CIT v. Malchand Surana (1958) 28 ITR 684 (Cal.)
- Meghji Kanji Patel v. Kundanmal Chamanlal Mehtani AIR 1968 Bom. 387, affirmed in In Puwada Venkateshwara Rao v. Chidamana Venkata Ramana AIR 1976 SC 869, (871).
- Nirmal Products v CCE (2010) 254 E.L.T 538 (Delhi) (Trib.).

3. **Shortening the period**

Assessing Officer cannot curtail the period of 30 days without valid reasons recorded in writing.

- M.Redanna v. Revenue Divisional Officer (1980) 46 STC (232) (FB)(AP)
- Mahindra and Mahindra v UOI (1992) 59 E.L.T. 505 (Bom.)
- Mahindra and Mahindra Ltd v Assessing Officer (2007) 295 ITR 43(Bom)

- *S. 220(1) proviso to reduce period for payment of tax to be exercised after application of mind and recording reasons.(S.281B)*
- *Firoz Tin Factory v. ACIT(2012) 71 DTR 185/209 Taxman 458 (Bom.)*

4. **Consequences of being assessee in default.**

- Charge of mandatory interest under section 220(2)
- Penalty under section 221
- Attachment /Auction of moveable /Immoveable properties
- Appointment of receiver for managing of properties
- Prosecution/arrest / detention (Second Schedule Part 1, R 4)

IV. **Reply of assessee to keep Demand in Abeyance:**

1. It should be borne in mind, that mere filing of an appeal does not operate as a stay or suspension of the order appealed against **[see Collector of Customs vs. Krishna Slaes (P) Ltd. AIR 1994 SC 1239, 1241, and Golam Momen vs. DCIT 256 ITR 754(Cal)].**
An application for stay of disputed demand must be made before the Assessing Officer before the expiry of time prescribed in notice of demand. The Madras High Court in Paulsons Litho Works vs. ITO (1994) 208 ITR 676, 690 (Mad) has observed that mere filing or pendency of an appeal does not constitute an automatic stay of the order under challenge or recovery of the tax or penalty under dispute in such appeal. This is so because the mere fact that an order is subject matter of appeal can furnish no ground for not

following it unless its operation is suspended by a competent court [see, Union of India vs. Kamlakshi Finance Corpn Ltd. AIR 1992 SC 711, 712 and Pankaj Guljarilal Gupta vs. Collector of Customs (1995) 75 ELT 47, 50 (Cal)].

2. It is the right of the assessee to make an application for stay if the appeal is filed u/s. 246A of the Act. If no appeal is filed and demand raised against the assessee is accepted but the assessee does not have means to make the full payment then also he has a right to make an application for stay of the demand and make out a case based on the facts. The obligation of the assessee is to make the payment within the stipulated time u/s. 220(1) or make an application for stay within the stipulated time u/s. 220(1) or make an application for stay within the stipulated time u/s. 220(3). The stay application u/s. 220(3) must be made before the amount stated in the notice of demand becomes due for payment.

DRAFTING OF APPLICATION

3. Section 220(6) enacts that where an assessee has preferred an appeal to the first appellate authority disputing any part or whole of the demanded amount, the assessee may make an application to the Assessing Officer that the latter may not treat the former as an assessee in default in respect of such disputed amount even though the time for its payment has expired. The Assessing Officer may in his discretion and with or without imposing any conditions, make an order not treating the assessee as in default in respect of such

amount till such time as the appeal may remain pending before the first appellate authority.

4. While making an application for stay of demand, an assessee should give brief facts of the case, points raised in appeal, assessment history of the assessee, his conduct and co-operation with the department, the chances of recovery in case the appeal is dismissed and the hardship that would be caused to the assessee by insisting on immediate payment of the tax by the department.
5. The assessee has to bring out in a Stay application two issues. One being that he has a prima facie case for getting the relief at the appellate stage and secondly, the financial position is such that he is not in a position to make the full payment demanded against him. It is to be noted that the said petition for stay of recovery should be filed after filing of the appeal to the CIT(A) and a copy of acknowledgement thereof should also be filed alongwith the stay petition to the Assessing Officer
6. If the assessee has established that there is a prima facie case for relief at the appellate stage and also has established that his financial position does not permit him to make the full payment then the Assessing Officer will have to deal with both these issues judiciously. High pitched order will have to be reviewed and if it is established that the demand is not justified, then the Assessing Officer can consider the same for granting stay. While granting

stay the Assessing officer may impose such conditions as he may think fit.

V. **How the discretion has to be exercised by the tax authorities:**

1. The Assessing Officer must consider the observation of the Bombay High Court in the case of **KEC International Ltd. 251 ITR 158(160)**. **The Hon. High Court has given guidelines to the Income tax authorities which should be kept in mind while deciding the stay application which are as under:**

- (a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.
- (b) In case where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee 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 likely to defeat the demand, It may take recourse to coercive action for which brief reasons may be indicated in the order.
- (e) We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Dept. need not once pass given reasoned order.
2. The Hon'ble Bombay High Court in **Mahindra and Mahindra Ltd. vs. UOI 1992(59) ELT 505 (Bom) in para 6** has held that no coercive action shall be taken till the expiry of appeal period against the said order is over.
3. The Madras High Court in **R.P. David vs. Ag. ITO (1972) 86 ITR 699 (Mad)** held that the fact that the assessee is financially sound and in a position to pay is not in itself a ground for refusing to exercise the discretion in granting the stay.
4. The Calcutta High Court in **Hindustan Rubber Works vs. ITO (1971) 81 ITR 397 (Cal)** held that u/s. 220(6), the Assessing

Officer may keep a demand in abeyance “so long as the appeal remains undisposed of”. The Assessing officer has discretion, for good reasons not to grant any stay at all, he has also the power to impose condition (eg security, etc.) therefore, but arbitrarily to grant stay up to a certain day (and not as long as the appeal remains undisposed of) is not proper exercise of discretion.

5. **Coca Cola India (2006)285 ITR 419 (Bom) (High Court)**

Notice attaching the bank account was quashed .Attaching the bank accounts even before communicating the order passed on the stay application is totally high handed .Once again stated that the parameters laid down by this Court in case of KEC International Ltd has to be followed.

Other Case Law

- UTI Mutual Fund v. ITO (2012)345 ITR 71 (Bom.)
- Tata Toyo Radiators Pvt Ltd v. UOI(2012) 71 DTR 5/ 250 CTR 11 (Bom.)
- Nishith Madanlal Desai v. CIT (2012) 345 ITR 545 / 72 DTR 169 (Bom.)
- Rajasthani Sammelan Sarvoday v. ADIT (2013) 350 ITR 349 (Bom.)

VI. **POWER AND DUTY OF ASSESSING OFFICER / TRO:**

1. Once a Stay application is filed before an Assessing Officer or TRO, then he has a power to grant stay or has a power to stay the demand by asking the assessee to make certain payments within such time as he deems fit. **The exercise of powers should be**

based on reasons that are legal and justifiable. He has an obligation to give an opportunity to the assessee and has to consider the facts judiciously submitted before him. Arbitrary exercise of the powers or refusal to exercise powers is improper. The power vested in the Assessing officer are coupled with duty to act in a reasonable and impartial manner taking into account all the facts and circumstances of the case. He cannot summarily reject the stay application without giving reasons. Stay Petition must be disposed of within reasonable time. No recovery action can be taken against the assessee if valid stay application is pending for disposal. The Assessing Officer and TRO has power to stipulate such conditions as he deems fit which is reasonable for stay of demand or for permitting the assessee to make the payments in installments. Assessing Officer and TRO must consider the following Instructions and Circulars issued by CBDT:

- i. Circular 530 dated 6-3-1989 [176 ITR 240 (st.)]
 - ii. Circular 589 dated 16-1-1991 [187 ITR 79 (st)]
 - iii. Instruction No. 1914 dt. 27-8-1997
2. Under the section 220(6), the Assessing Officer can consider an application for stay of demand even if it is filed beyond 30 days from the date of receipt of the notice. As there is no time limit within which stay application is to be made u/s. 220(6), the question of extension of time limit does not arise. It may be noted that the Assessing officer has powers under s. 220(6) that are discretionary.

3. The TRO has power to stay the demand to grant instalments subject to such additions as he deems fit. These powers run concurrent with the powers of the Assessing Officer to grant stay for payment of demand.

However, once a certificate u/s. 222 is drawn by TRO, the Assessing Officer cannot adopt any of the measures stipulated in that section. TRO has exclusive jurisdiction in this regard. Once an Assessing Officer has issued tax recovery certificate to the TRO then the TRO will have jurisdiction and Assessing Officer will not be in a position to grant stay.

4. If an assessee's application u/s. 220(6) is not disposed off by the Assessing Officer, the assessee can always contend before the TRO that before taking any action against the assessee, his application for stay of demand should be disposed off. TRO can also independently consider the assessee's application u/s 225(1) and can grant time for payment of any tax in respect of both disputed and undisputed demand.
5. Even where an assessee is deemed to be in default, and the Tax Recovery officer has drawn up a statement specifying the amount of arrears due from the assessee under the provisions of sec. 222(1), the Tax Recovery Officer is still empowered to grant time for the payment of any tax till the disposal of the appeal under the

provisions of sec. 225(1) and the sec. further provides that when such power is exercised, the proceedings for the recovery of such tax shall be stayed until the expiry of time to granted.

Delegation of Power not permissible

6. Sub section (6) of sec. 220 empowers the Assessing Officer to allow the stay of recovery till the decision of appeal. The powers are conferred only on the Assessing Officer. The Hon'ble Delhi High Court in case of **Valvoline Cummins Ltd vs. DCIT (2008) 307 ITR 103 (Del)** held that the power to grant a stay under section 220(6) of the Act is vested with the Assessing Officer and since the exercise of the power is a discretionary, he alone is statutorily required to exercise his discretion and pass an order on the stay petition filed by the assessee. The power under section 220(6) of the Act being a statutory power, the Assessing Officer could not abdicate or relinquish it. He has no authority in law to delegate his power to other subordinate authority.

Scope of Sec. 281 and Rule 11 of second schedule

7. In the case of **Mrs. Farhana Sait vs. ACIT & ors (2009) 308 ITR 257 (Mad)** the Hon'ble Madras High Court held that the Tax Recovery Officer had no jurisdiction to declare the 'oral gift' void. The Hon'ble Court also considered the scope of section 281 and rule 11 of Second Schedule and observed that the powers of the Tax Recovery Officer under rule 11 of the Second Schedule to the Act are somewhat different. Under rule 11(1), where any claim was

preferred to, or any objection was made to the attachment or the sale of, any property in execution of a certificate on the ground that such property was not liable to such attachment or sale, the Tax Recovery officer shall proceed to investigate the claim or objection. The Tax Recovery Officer, therefore, has to examine as to who was in possession of the property and in what capacity and could only attach the property in the possession of the assessee in his own right or in the possession of a tenant or a third party on behalf of or for the benefit of the assessee. He cannot declare any transfer made by the assessee in favour of a third party, void. If the Department finds that a property of the assessee was transferred by him in favour of a third party with an intention to defraud the Revenue, it would have to file a suit under rule 11(6) to have the transfer declared “void” under section 281 of the Act.

VII. Extralegal steps- Assessing Officer should not adopt “extra legal steps” of threatening or inducing the assessee for tax recovery.

1. **Lopamudra Misra v. ACIT (2011) 337 ITR 92 (Orissa)(High Court)**
2. The Madras High Court in the case of **Dr. T.K. Shanmugasundaram vs. CIT & Ors (2008) 303 ITR 387** held that when assessee files an application for stay when the appeal is pending before CIT(A), unless the assessing officer rejects the

application, he cannot direct for attaching the assessee bank account.

3. In the case of **M. Shivanna and Anrs vs. Dy. CIT (2008) 301 ITR 233 (Karn)** the Hon'ble High Court observed that the Assessing Authority had committed a grave error in rejecting the stay application of the assessee and in issuing the directions to the Bank Manager for attachment of a debt u/s. 222 of the Act, unilaterally without affording reasonable opportunity to the assessee. The assessing authority being the statutory authority has to pass an order exercising the power as envisaged under the statute and in strict compliance with the relevant provisions of the Act and rules and after affording reasonable opportunity to the assessee.

4. The Hon'ble Calcutta High Court in case of **Debasish Moulik vs. Dy. CIT (1998) 231 ITR 737 (Cal)** set aside the order of the Assessing Authority by observing that on reading the order of the assessing authority showed that the assessee was asked to pay 50% of demand before his request for stay u/s. 220(6) is considered:

In other words, only if the assessee pays 50% of the demand the request for stay of demand would be considered. Thus the order was passed without application of mind and not in conformity with law.

VIII. **High Pitched Assessment. Instruction No. 96 dt. 21/8/1969**

1. Where the income determined on assessment is more than twice the income returned, collection of tax should be stayed during appeal. Demand raised in high pitched assessment need to be stayed, as its recovery would cause genuine hardship.

Maharana Shri Bhagwat Singahiji of Mewar v ITAT (1997) 223 ITR 192 (Raj).

Soul vs. Dy. CIT (2008) 173 Taxman 468 (Del.).

2. The Hon'ble Delhi High Court in the case of **Valvoline Cummins Ltd. vs. Dy. CIT (2008) 307 ITR 103 (Del)** has considered the Instruction No. 96 dated 21/8/1969 issued by the CBDT and held that where the income determined is substantially higher than the returned income, that is, twice the latter amount or more, than the collection of tax indispute should be held in abeyance till the decision on the appeal is taken.

The Hon'ble Court also observed that it was unfortunate that the Dept. wants to enforce the demand when the application u/s. 220(6) of the Act was still pending.

3. Income assessed by the Assessing Officer was 47 times of income declared by assessee. Therefore instruction No. 95 dated 21st August, 1969 holds the field. Therefore assessee cannot be treated as assessee in default. (A.Y. 2008-09)

Maheswari Agro Industries v. UOI (2012)346 ITR 375 (Raj.)

IX. Rectification Proceeding Pending

1. The Assessing Officer is bound to decide the rectification application made u/s. 154 before dealing with recovery proceedings. The correct demand should be determined before an assessee can be treated as assessee in default. In the case of **Sultan Leather Finishers P. Ltd. Vs. ACIT 191 ITR 179 (All)**, it has been held that no recovery proceedings are possible during pendency of a rectification application.

X. Can there be recovery on the basis of protective assessment.

1. Protective assessment is permissible, recovery in pursuance of such precautionary assessment is not permitted.

CASE LAWS:

Sunil Kumar v. CIT (1983) 139 ITR 880 (Bom)

Lalji Haridas v. ITO (1961) 43 ITR 387 (SC)

Jagannath Bawri v.CIT (1998) 234 ITR 464 (471)(Gau.)

Jagannath Hanumanbux v .ITO (1957) 31 ITR 603 (Cal)

R. Rajbabu v. TRO (2004) 270 ITR 256 (Mad.)

XI. Garnishee proceedings –Recovery from third parties –S.226(3)

A Garnishee Notice is a prohibitory order directing the debtors of the assessee to refuse the payment of the same, as the same is attached by the department for the recovery of its tax dues payable by the assessee.

Under Income-tax Act garnishee proceedings can be initiated after the expiry of time limits prescribed i.e. 30 days as provided under

section 220(1) provided for paying demand as mentioned in the notice of demand under section 156.

Case Laws:

- Administrator, UTI v. B.M. Malani (2008) 296 ITR 31(SC)
- Gopal Das Khandewal & others v. UOI (2012) 340 ITR 235 (All.)
- Central Coal Fields Ltd v. CIT (2012) 249 CTR 523 (Jharkhand)
- Nickunj Eximp Enterprises P. Ltd v. Addl.CIT (2012) 346 ITR 78 (Bom.)
- Bank of Rajasthan Ltd. v. UOI (2003) 259 ITR 586 (Bom)

XII. Properties which can be attached. (Garnishee proceedings)

- Vysya Bank Ltd v. JCIT (2000) 241 ITR 178(Kar)(High Court) and Global Trust Bank Ltd . JCIT (2000) 241 ITR 178 (Kar)(High Court)
- V.N.Vasudev v. Kiroi Mal Luhariwala AIR 1965 SC 440
- J. Jermons v. Aliammal & Ors (1999) 156 CTR 31 (SC)
- Sri Ram Lakhan v.CIT (1962) 46 ITR 613 (All.)(High Court)

XIII. Properties which cannot be attached.

- Stock Exchange, Mumbai v. V.S. Kandalgaonkar (2003) 261 ITR 577 (Bom)(High Court).
- Stock Exchange v. ACIT (2001) 248 ITR 209 (SC) & Vinay Bubna v Stock Exchange (1999) 97(Comp)(Cas) 874 (SC) ITO v. Tippala China Appa Rao & Ors. (2011) 331 ITR 248 (AP)(High Court)
- Belrex India Ltd v.Singhal Electric Co and Others AIR 1983 (Delhi) 430 (High Court)

• **Tangerine Electronic Systems Pvt. Ltd. v. Indian Chemicals AIR (2000) Bom (198, 210) (FB) – Right in Commercial property (tenanted) can be attached.**

• Tejal R. Amin (Smt) v.Asst. CIT(1994) 208 ITR 103 (Guj.)(High Court)

• K.M.Adam v. ITO (1958) 33 ITR 26 (Mad.)(High Court) (31, 32)

XIV. Joint and several liability - Assessee in default.

1. **Recovery from Directors –Joint and several-S.179.**

Where a private company is would up on or after 1st April, 1962, and it is found that any tax assessed on the company, or in the course of or after liquidation, cannot be recovered from the company then, every person who was a director of the company at any time during the relevant previous year is held jointly and severally responsible for the payment of tax that cannot be so recovered.

2. Provision can be made applicable only when the Assessing Officer cannot recover the tax from the Company .The Assessing Officer has to give a finding that he is not in a position to recover the tax from the Company. In the absence of such finding the Assessing Officer does not get jurisdiction to invoke section 179 of the Act.

K.V.Reddy v.Asst CIT (1998) 232 ITR 306 (AP) (High Court)

Bhagwandas J.Patel v.Dy.CIT (1999) 238 ITR 127 (Guj.)

C.Rajendran and another v.ITO (2000) 253 ITR 139 (Mad.)

Dipik Dutta & Anr v.UOI (2004) 268 ITR 302 (Cal.)

Indubhai T. Vasa (HUF) v. ITO (2006) 282 ITR 120 (Guj)

3. Before recovery from Directors, the revenue must prove that the said directors were responsible for the conduct of the business in the said previous year in relation to which liability exists.

Amit Suresh Bhatnagar v. ITO (2009) 15 DTR 29 (Guj.)

4. The Assessing Officer has to hear the director before passing an order under section 179.

Jagdish Jagmohandas Kapadia v. CIT (1990) 183 ITR 143 (Bom.)

5. Recovery is possible from the Director if the director unable to prove that non-recovery is not attributable to the director's gross neglect, misfeasance and breach of duty.

Khaders International Construction v.CIT (1998) 229 ITR 450 (Ker.)

Jatinder Bhalla and another v. ITO (2004) 268 ITR 266 (Delhi)

6. Where company was agitating against the assessment order and disputing the liability to pay the amount assessed , it could not be held that the non recovery of tax was not due to negligence or breach of duty on the part of the directors

When the Assessment for the relevant years of the company was complete and final and it was not open to a director to challenge those proceedings in a proceeding under section 179.

UOI and Others v. Manik Dattatreya Lotlikar (1998) 172 ITR 1 (Bom.)

- Liability of the Director can be only in respect of the arrears of tax during the period in which the person was director.

Darshan Kumar v. CIT (1996) 222 ITR 608(P& H)

- Salary earned by the Director from another company can also be attached .
- When a Private company converted in to Public limited company . The Directors cannot be held liable from the date of conversion.

M. Rajamoni Amma & Anr. v. Dy.CIT (1992) 195 ITR 873 (SC)

7. **Remedy against 179 order.**

- The Assessee can file an revision application under section 264 against said order. If commissioner rejects the assessee has to file the writ petition against the said order.
- Bhupatlal J. Shah v. ITO (2012) 210 Taxman 481 (Bom.)

Recovery of tax – Director of a company not personally liable for sales tax dues of company: Gujarat Value Added Tax Act 2003:

C.V. Cherian vs. C.A. Patel (2012) 51 VST 71 (Guj.)

8. **Firm and partners-Partners liability to pay the firm tax.**

- Section 25 of the Partnership Act and section 188A of the Income–tax Act. All partners including legal heirs of the deceased partners are jointly and severally liable for the dues of partnership, if they were partners of firm at the relevant time.

ITO v. Arunagiri Chettiar (1996) 220 ITR 232 (SC)

Iqtida Khan v ITO (1941) 41 ITR 165 (All.)

- Arrears of tax of firm can be recovered from erstwhile partner.

Kethmal Parekh v. TRO (1973) 87 ITR 101 (AP)

9. **Limited liability partnership.**

- Section 167C of the Income tax act, where the tax is due from the limited liability partnership, such tax cannot be recovered then every partner of the LLP at any time during relevant previous year shall be jointly and severally liable unless he proves that non–recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of LLP

XVI. **Reasoned / Speaking Order.**

1. It is normally seen that the stay application are rejected by the Assessing Officer without giving reasons. The Dept. should pass a speaking order stating reasons for rejecting the stay petition as failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taken to the controversy in question and the decision or conclusion arrived. Right to reason

is an indispensable part of a sound judicial system, reasons at least is sufficient to indicate an application of mind to the matter.

2. The Hon'ble Delhi High Court in the case of **Subhash Chander Sehgal vs. Dy. CIT (2008) 173 Taxman 312** held that stay application must be disposed of by a speaking order after consideration of all relevant factors having bearing on demand raise as well as having regard to the **Instruction No. 1914 dt. 2.12.1993** (i.e. Demand raised in high pitched assessment).

XVII **REMEDIES:**

1. The assessee can file an appeal before CIT(A) u/s. 246A against order passed under certain sections which are enumerated u/s. 246A. The rejection of the stay application made u/s. 220(6) is not covered by provisions of sec. 246A and hence no appeal can be filed before CIT(A). However, under Rule 86 of the second Schedule (Procedure for Recovery of tax) an appeal from any original order passed by the Tax Recovery Officer under this Schedule, not being an order which is conclusive, shall lie to the Chief Commissioner or Commissioner within 30 days from the date of the order.
2. An assessee can request the Assessing Officer to stay the recovery proceedings till the disposal of the stay application by CIT (Administration). The Hon'ble Courts in various cases have held that pending the stay application before higher authorities the lower

authority cannot proceed with the recovery proceedings. However, if the Assessing Officer refuses to stay the demand till the disposal of the stay application by CIT (Administration), then only recourse available is to file writ petition before the High Court.

Remedies against recovery before various authorities

- Circular no 96 (F.NO 1/6/69 –ITC) DATED 21-8-1969
- Circular dated 11-12-1970 – Reg –Assurance Given by the Minister for Revenue and Expenditure on the floor of Lok sabha on 11-12-1970 . (Reproduced in Vikrambhai Punjabhai Plakhiwala v. S.M Ajbanji Recovery Officer and others (1990) 182 ITR 413 (Guj)(High Court) (at 420 , 421)
- Circular no 334 dated 3-4-1982 (1982) 135 ITR 10 (st)
- Circular no 530 dated 6-3-1989 (1989) 176 ITR 240 (st)
- Circular no 589 dated 16-1-1991 (1991) 187 ITR 79 (st)
- Instruction no 1914 –F No 404 /72/93 –ITCC dated 2-12-1993(Feb-04) Income tax Review P.78
- Instruction no 1944 – dt 27-8-1997 Feb 04 I. Tax Review Feb -04. P 78.

XVIII. Power of the CIT(A)

- Prem Prakash Tripathi v. CIT (1994) 208 ITR 461 (All.)
- Tin Mfg. Co. India Ltd. v. CIT (1995) 212 ITR 451 (All.)
- Paulsons Litho Works v. ITO (1994) 208 ITR 676 (Mad.)
- Agricultural Produce Market Committee vs. CIT (2005) 279 ITR 371 (Pat.)

- Debasish Moulik vs. Dy. CIT (1998) 231 ITR 737 (Cal.)
- Smita Agrawal (Ind.) vs. CIT (2009)184 Taxman 59(All)
- LG Electronics India Pvt. Ltd v. CIT (2012) 209 Taxman 536(All)
- CITY and Industrial Development Corporation of Maharashtra Ltd. v. ACIT (2012) 343 ITR 102 (Bom.)
- Idea Cellular Ltd v. CIT (2012) 75 DTR 105 (MP)
- Balaji Universal Tradelink (P) Ltd. v. UOI (2012) 76 DTR 132 (Bom.)

XIX. Tribunal - Power of Stay: - Rule 35A (Income Tax Appellate Tribunal Rules, 1963)

- Broswel Pharmaceuticals Inc. vs. ITO (2004) 83 TTJ 126 (All)(Trib.)
- Chiranjilal S. Goenka vs WTO (2000) 66 TTJ 728 (Mum).
- Bhoja Reddy vs. CIT (1998) 231 ITR 47 (AP) (48)
- Shiv Shakti Rubber & Chemcial Works vs. ITAT (1995) 213 ITR 299 (All)
- DHL Express (India) Pvt. Ltd. vs. ACIT (2011) 140 TTJ 38 (Mum)(Trib)
- B. Sudhadra vs. ITO (2005) 272 ITR 100 (AT)(Hyd.) (Trib)

XX. Tribunal - power to extend period of stay.

- Narang Overseas P. Ltd. vs. ITO (2007) 295 ITR 22 (Bom)
- CIT v. Ranuk Industries Ltd. (2011) 333 ITR 99 (Bom)
- CIT v. Ecom Gill Coffee Trading Pvt. Ltd(2012) 74 DTR 241(Karn.)(High Court) & CIT v B.Fouress (P) Ltd (2012) 74 DTR 241 (Karn.)

- Qualcomm Incorporated v. ADIT (Delhi) (Trib.)
www.itatonline.org
- Shri Jethmal Faujimal Soni (Mum)(Trib)(www.itatonline.org)
- Maruti Suzuki India Ltd v. Dy. CIT (2012) 347 ITR 43
(Delhi)(High Court)

XXI. Stay of proceedings-Tribunal has the power to stay the assessment proceedings

- ITO v. Khalid Khan (1997) 110 ITR 79(AP)
- Puranmal v.ITO (1975) 98 ITR 39 (Pat.)
- Ritz Ltd v. Vyas (1990) 185 ITR 311 (Bom.)
- CIT v. Income-tax Appellate Tribunal WPNO 4684 /2010 dated 3-8-2012 (NIIT Ltd) www.itatonline.org (Delhi) (High Court)

XXII Stay of proceedings-Tribunal – Failure to fulfill conditions

- Sachdeva & Sons vs. UOI (2003) 264 ITR 695 (P&H)
- Endeavour Investments Ltd. vs. DCIT (1999) 70 ITD 17
(Chennai)(TM)(Trib)

XIII. Early hearing of appeals by the Tribunal (www.itatonline.org)

- As per the minutes with President , ITAT Mumbai on 18-4-2012 .
- The registry will not reject any stay applications , letters etc for being entertained except when appeal itself is defective.
- The following appeals will be taken up for hearing if an application is made by an assessee.
 - (1)Covered matters
 - (2)Appeals against orders under section 263,

(3) Appeals of senior Citizens aged above 70 years.

(4) Appeals against orders passed ex-parte by CIT (A) etc

XIV. **Other issues**

1. **Sick industrial Company.**

- Ezy Slide Fastners Ltd v. Jt CIT (2004) 269 ITR 548 (Guj)
- Dy CTO v. Coromandel Pharmaceutical & Ors (1997) 105 STC 327 (SC)
- The Gram Panchyat and another v. Shree Vallabh Glass Works Ltd and another AIR 1990 SC 1017
- Maharashtra Tube Ltd v. State Industrial & Investment Corporation of Maharashtra Ltd (1993) 2 SC C 144
- Catholic Centre v. Pilot Pen Co (India) (P) Ltd (In liquidation) (2003) 259 ITR 252 (Mad)

2. **Certain transfers to be void (S. 281)**

- Circular No. 179 dt. 30-09-1976 (1976) 102 ITR 9 (St)
- P.Kumar & Co v, UOI (1991) 190 ITR 672 (Bom)
- Karnail Singh v. UOI (2011) 63 DTR 336 (P&H)
- Ahuja Chaudhury v. UOI (1995) 214 ITR 326 (Cal)
- Shamim Bano G. Rathi & Anr v. OBC Ltd. (2011) 306 ITR 34 (Bom)
- B.A. Basith v. ITO (1981) 128 ITR 434 (Kar) (High Court)
- Asset Reconstruction Co (India) Ltd. v. CIT AIR 2012 (NOC) 196 (Guj.)
- Tax Recovery Officer v. Industrial Finance Corporation of India and another (2012) 346 ITR 11 (Guj.) (High Court)

XXV **Priority for tax revenue over secured creditors.**

- Bank of India v. Johan Bowman AIR 1955 (Bom.) 305
- Dena Bank v Bhiabhai Prabhudas Parekh (2001) 247 ITR 165 (SC)

In the case of **UTI Bank Ltd vs. The Dy. CCE & Anr. AIR 2007 Madras 118 (FB)** observed that generally, the debts to government, i.e. tax, dues, etc (crowns debts) get priority over ordinary debts; Only when there is a specific provision in the statute claiming `first charge` over the property, the crowns debt is entitled to have priority over the claim of others.

In respect of cases covered by the Special Court (Trial of Offences relating to transaction in securities) Act, 1992 the Hon'ble Supreme Court in the case of **Dy. CIT vs. SBI (2009) 308 ITR 1 (SC)** held that there is a difference between the debts due presently and the debts "as finally assessed" which may include results in appeal or scaling down. A demand in a best judgment assessment may be required to be examined by the Special Court, so that where demands are grossly disproportionate to the properties of the assessee in the hands of the custodian, the demand may well be scaled down. The right of recovery of income tax has to be matched and balanced with the rights of the other parties. The order of disbursement of the accepted liability would also require to be determined by the court. This decision of the Supreme Court is consistent with the view taken in **Harshad Shantilal Mehta vs. Custodian (1998) 231 ITR 871.**

XXVI. Power of arrest : Rule 73-Second schedule

- Padrauna Raj Krishna Sugar works Ltd v. Land Reforms Commissioner ,UP and others (1970) 75 ITR 358(SC)

- K.T.Thomas v.CIT (1990) 185 ITR 292 (Ker)(High Court)(SLP dismissed (1988) 173 ITR (ST)1(SC)s.
- Kapurchand Shrimal v.TRO (1969) 72 ITR 623 (SC)
- S.M.Ibrahim v.Dy Collector Sales tax (1978) CTR 356 (All.)
- Collector of Malbar and another v. Erimmal Ebrahim Hajee (1957) 32 ITR 124(132) (SC)

XXVII. **Accountability provision.**

Dr Raja Chellia in his report (1992) 197 ITR 177(St)(257)

Thank you

JAI HIND



Ajay R. Singh
Advocate