

Stay & Recovery of Demand under Income Tax Act 1961

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Abbreviations

- AO – Assessing Officer
- CIT(A) – Commissioner of Income Tax (Appeals)
- CIT – Commissioner of Income Tax
- ITAT – Income Tax Appellate Tribunal
- HC – High Court
- SC – Supreme Court
- CBDT – Central Board of Direct Taxes
- u/s – Under Section
- FM – Finance Minister
- PM – Prime Minister

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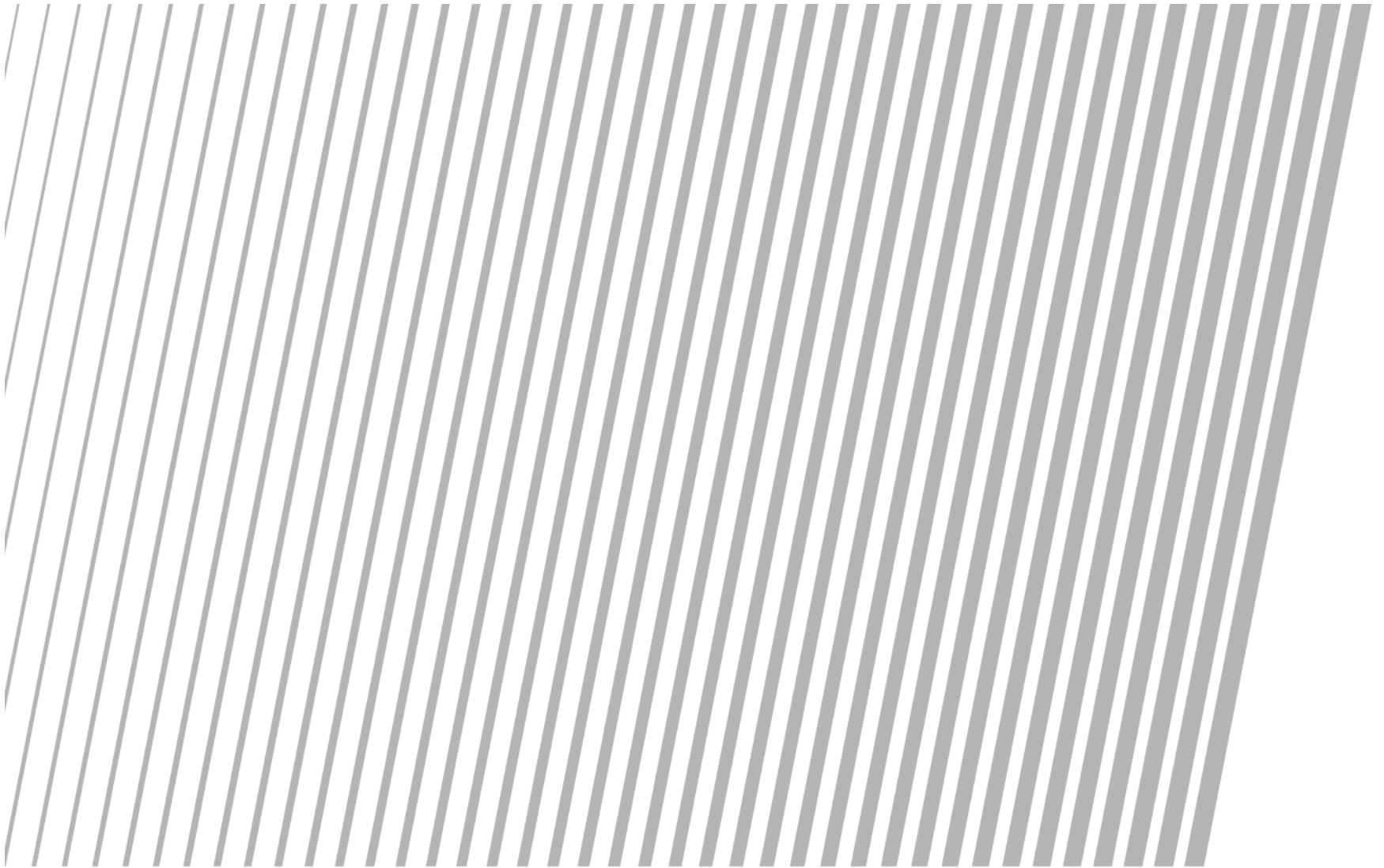
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Stay of Demand



General

- ▶ It is the right of the assessee to make an application for stay if the appeal is filed under section 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. (i.e. either for instalment or for stay upto certain period)
- ▶ The obligation of the assessee is to make the payment within the stipulated time under section 220(1) of the Act or make an application for stay within the stipulated time under section 220(1) or make an application for stay within the stipulated time under section 220(3) of the Act.
- ▶ The stay application u/s. 220(3) must be made before the amount stated in the notice of demand becomes due for payment.
- ▶ **No Automatic Stay** - The Madras High Court in **Paulsons Litho Works 208 ITR 676, (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

Stay of Demand – Macro Level Initiative

Sr.No	Date	Particulars	Remarks
1	30-Mar-15	PM Narendra Modi's statement in an article in Indian Express	In a meeting with Revenue Secretary and CBDT chairman, PM had expressed dissatisfaction about delays in responding to public grievances , in response to this CBDT had set deadlines for resolving public grievances and any breach of the timeline will be viewed seriously and accountability will be required to be fixed for such failure.
2	30-Mar-15	CBDT statement after PM's direction, Business Standard article	The CBDT has directed the IT department for speedy resolving the public grievances , within the stipulated time frame.
3	25-May-15	FM Arun Jaitley address in 31st Annual Conference of Pr. Commissioners	FM said the senior officers of the Income Tax Department to be prompt in redressing in the grievances of the tax payer , expand the tax base in a non-intrusive manner even as they strive to achieve the revenue generation targets.

Stay of Demand – Macro Level Initiative

Recent CBDT Notifications/Circulars/Press Releases

Sr. No	Date	Particulars	Remarks
1	07-Nov-14	Press Release by CBDT	In its endeavour towards a non-adversarial tax regime, CBDT had issued instructions to its field officers dated 7 November 2014, wherein instructions dealing with recovery/stay of demand and grant of instalments has been reiterated to ensure that no coercive action is undertaken without disposal of application of stay.
2	29-Feb-16	Office Memorandum by CBDT	CBDT has put in new rules for granting of stay. With payment of 15% of the tax demand the AO shall grant stay to the Assessee or in certain cases if he deems fit he may increase or decrease the payment of 15%. Also the application should be disposed off within 2 weeks and if reference is made to Pr CIT/CIT then same should be disposed with 2 weeks from the reference.
3	03-Mar-16	Press Release by CBDT	It confirms the issue of revised guidelines for stay of demand at the first appeal stage: <ol style="list-style-type: none">1. With payment of 15% of the Tax Demand, the AO shall grant stay to the assessee or in certain cases if he deems fit, he may increase or decrease the payment of 15%2. Also, the application should be disposed off within 2 weeks and if reference is made to Pr CIT/CIT then same should be disposed within 2 weeks from the reference

Stay Proceedings before AO

Power of the Assessing Officer to Stay Demand

▶ When can a stay be granted by AO?

As per the provisions of section 220(6) of the Act, stay of demand can be granted by the AO, only when the assessee has preferred an appeal before the CIT(A). The AO's power and discretion to keep the demand in abeyance till the disposal of the appeal are exercisable only until the appeal is disposed of by the CIT(A). The powers are generally terminated once the CIT(A) disposes of the appeal. ***(What will be the position pursuant to DRP Directions?)***

▶ When a rectification application under section 154 of the Act is pending before the AO, can the AO recover the tax in dispute?

- ▶ If an application under section 154 or a revision petition under section 264 is made, the AO cannot act under section 220(6) of the Act and grant a stay.
- ▶ However, the Hon'ble Allahabad High Court in case of **Sultan Leather Finishers Pvt Ltd (191 ITR 179) (All)** has taken a view that no recovery proceedings are possible during the pendency of rectification application filed under section 154 of the Act.

Stay Proceedings before AO

- ▶ **Is it possible to prefer an appeal against the stay rejection order passed by the AO?**

There is no provision in the Act in relation to assessee's right of appeal where the Assessing Officer refuses to grant a stay. However, the courts in the following cases have held that in such cases, an application for stay of demand could be made before the CIT(A):-

- **Mohammed Kunhi (1969) 71 ITR 815 (SC)**
- **Keshav Cashew Co v DCIT 210 ITR 1014 (Ker)**

Further, the assessee can also approach the High Court under Article 226 of the Constitution by filing a writ petition for redressal of grievance.

Stay Proceedings before AO

▶ How the discretion has to be exercised by the Tax Authorities?

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'ble 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:

- ▶ While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.
- ▶ 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.
- ▶ 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.
- ▶ 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.

Stay Proceedings before AO

Principles/Guidelines prescribed by Bombay High Court in case of UTI Mutual Fund (345 ITR 71) (Bom)

- ▶ No recovery of tax should be made pending:-
 - ▶ Expiry of the time limit for filing an appeal;
 - ▶ 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.
- ▶ The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and keeping in mind the guidelines in KEC International Ltd. v. B.R. Balakrishnan (2001) 251 ITR 158 (Bom)
- ▶ If the AO 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.

AO's power to curtail the period of payment of 30 days

- ▶ Though proviso to section 220(1) empowers AO to grant period shorter than 30 days in Notice of Demand for making payment, AO 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) (High Court)**

- ▶ In **Mahindra and Mahindra Ltd. v. Assessing Officer (2007) 295 ITR 43 (Bom) (High Court)**, the court held that, no coercive action should be taken till the expiry of the appeal period against the said order is over. Therefore the Assessing Officer is duty bound to wait for the expiry of time period of appeal before proceeding to recover the tax due. Contempt of court proceedings initiated against AO and Jt.CIT.

- ▶ **No coercive action/recovery during pending of Stay Application before ITAT**
 - ▶ Mahindra & Mahindra (59 ELT 505) (Bom)
 - ▶ Maruti Udyog Ltd. vs Addl. CIT (264 ITR 487) (Del HC)
 - ▶ Western Agencies Ltd v. ACIT (86 ITD 462) (Mad)
 - ▶ RPG Enterprises Ltd. (251 ITR 20) (Mum)
 - ▶ Tata Communications Ltd. vs ACIT (138 TTJ 257) (Mum)
 - ▶ MSEB vs. Joint CIT (81 ITD 299) (Mum)

AO's power to curtail the period of payment of 30 days

Section 220(1) proviso to reduce period for payment of tax to be exercised after application of mind and recording reasons - Firoz Tin Factory (71 DTR 185) (Bom)

- ▶ The assessing Officer has passed an order under section 143(3) on 9/3/2012 raising huge demand and directed the assessee to pay the entire demand within 7 days even though the period specified in 220(1) is 30 days.
- ▶ The assessee filed a stay application u/s 220(3) on 12/3/2012 which was rejected on the ground that it did not fall within the guidelines framed in the CBDT's instruction No. 1914
- ▶ The CIT also rejected stay application, Assessee filed Writ Petition where court observed that the proviso to s. 220(1) which empowers the AO to demand payment within a period lesser than 30 days with the prior approval of the JCIT cannot be exercised casually and without due application of mind.
- ▶ The AO & JCIT must apply their mind on how it would be detrimental to the interests of the Revenue to allow the full period of 30 days and record reasons. The reasons & approval must be made available to the assessee if he seeks them.
- ▶ Merely because the end of the financial year is approaching that cannot constitute a detriment to the Revenue. The detriment to the Revenue must be akin to a situation where the demand of the Revenue is liable to be defeated by an abuse of process by the assessee. There is absolutely no justification for the AO to demand payment in 7 days and his action is highhanded and contrary to law.

Valid Service of Notice under section 156

▶ **Mohan Wahi v. CIT(2001) 248 ITR 799(SC)**

The court held that valid service is mandatory; in case of failure to serve the notice, recovery proceedings are held to be not valid. Service of demand notice constitutes foundation for subsequent proceedings.

Demand Notice not received by assessee, recovery proceeding held to be not valid.

▶ **CIT v. Sattandas Mohandas Sidhi (1982) 230 ITR 591 (MP) (High Court)**

It was held that, it is mandatory that notice must be served only in the manner provided in section 282 of the Income Tax Act, hence notice by telegram could not be said to be a substitute for notice by post. However, now even Electronic mode is prescribed u/s 282(2) as acceptable mode of communication of notice. At the relevant time only service by post or by way of summons issued by court under CPC were available.

▶ **CIT v. Malchand Surana (1958) 28 ITR 684 (Cal.) (High Court)**

General Clauses Act, 1897, Section 27 deals with meaning of service by post. If it is sent by registered post and acknowledgement is produced the presumption is that it is a proper service.

Stay Proceedings before CIT(A)

Powers of CIT(A) to grant stay of demand

▶ Is it necessary to approach the AO before the CIT(A)?

Based on certain judicial precedents like **Tin Manufacturing Co of India (212 ITR 451) (All)** and **Kesav Cashew Co (210 ITR 1014) (Ker)**, it is possible to contend that the assessee need not approach the AO before applying to CIT(A) for stay of recovery of tax.

However, practically it is advisable to approach the AO before filing a stay petition with the CIT(A). In case the AO rejects the stay petition, then an assessee may approach the CIT(A).

▶ When an appeal is pending before the CIT(A), does he have the power to stay demand?

- ▶ The CIT(A) is empowered to stay the recovery of tax against an application filed by the assessee.
- ▶ The assessee has to first file the appeal before filing the stay application. It is his discretion either to stay the recovery proceedings or to reject the same, depending upon the facts and circumstances of each case.
- ▶ The power of the appellate authority to stay the recovery of the demand of dues which are the subject matter of appeal pending before him is independent of the provisions of sub-section(6) of section 220 of the Act.

Stay Proceedings before CIT(A) (Contd..)

- ▶ In practice, it is advisable to make application to the Assessing Officer & CIT(A) simultaneously to stay the recovery proceedings. In following cases it has been held that the CIT(A) has the power to Stay the Recovery Proceedings.

Though, there is no specific provision in the Act, it is judicially accepted that the CIT(A) has the inherent powers to stay the recovery of taxes in appropriate cases, while deciding the appeal pending before it. The same has been held in the following cases:-

- ▶ **MK Mohammed Kunhi 71 ITR 815 (SC)**
- ▶ **TIN Manufacturing Co of India 212 ITR 451 (All)**
- ▶ **Debasish Moulik 231 ITR 737 (Cal)**
- ▶ **Keshav Cashew Co v DCIT 210 ITR 1014 (Ker)**
- ▶ **Prem Prakash Tripathi v. CIT(1994) 208 ITR 461 (All) (High Court)**
- ▶ **Paulsons Litho Works v. ITO(1994) 208 ITR 676 (Mad) (High Court)**
- ▶ **Agricultural Produce Market Committee vs. CIT (2005) 279 ITR 371 (Pat.)(High Court)**
- ▶ **Debasish Moulik vs. Dy. CIT (1998) 231 ITR 737 (Cal.)(High Court)**
- ▶ **LG Electronics India Pvt. Ltd. v. CIT (2012) 209 Taxman 536 (All)(High Court)**
- ▶ **CITY ad Industrial Development Corporation of Maharashtra Ltd. v. ACIT (2012) 343 ITR 102 (Bom) (High Court)**
- ▶ **Idea Cellular Ltd. v. CIT (2012) 75 DTR 105 (MP) (High Court)**
- ▶ **Balaji Universal Tradelink (P) Ltd. v. UOI (2012) 76 DTR 132 (Bom) (High Court)**

Stay Proceedings before CIT(A)

Whether appeal to Tribunal against stay rejection order of CIT(A) is maintainable?

▶ Favourable Judgements

- ▶ Bharat Heavy Electricals Ltd (ITA No. 4675/Del/2015) dated 31 July 2015
- ▶ Employees Provident Fund (ITA No. 1766/Del/2015) dated 10 April 2015

▶ Against Judgements

- ▶ Rajya Krishi Utpadan Mandi Parishad (ITA No. 141/LKW/2009) dated 22 April 2014 (TM) – Question of Law admitted by Allahabad High Court

Note: The said issue has been referred to the Hon'ble Panaji Tribunal for constitution of Special Bench in case of Oriental Bank of Commerce and Special Bench has been constituted and matter is fixed for hearing on 2 January 2017

Stay Proceedings before ITAT

Procedure for Stay Petition – Rule 35A of the ITAT Rules 1963

- ▶ Every Stay Application shall be presented in Triplicate
- ▶ Application to set forth concisely the following:-
 - ▶ Short Facts
 - ▶ Results of Appeal
 - ▶ Tax, interest, penalty etc demanded, amount undisputed therefrom and amount outstanding
 - ▶ Date of Filing Appeal
 - ▶ Result of any Stay Application to the lower Revenue Authorities
 - ▶ Reasons for seeking stay
 - ▶ Whether Applicant is prepared to offer security, and if so, in what form
 - ▶ Clear and Concise prayers
 - ▶ Affidavit
- ▶ An application which does not confirm with the above, liable to be summarily rejected

Stay Proceedings before ITAT

What documents to be accompanied when filing Stay Petition to Hon'ble Tribunal?

- ▶ Covering Letter
- ▶ Stay Application
- ▶ Correspondences before lower authorities
- ▶ Documents highlighting financial position
- ▶ Any other relevant documents for stay
- ▶ Duly notarised affidavit on Stamp Paper of Rs. 500
- ▶ Challan of Rs. 500

Stay Proceedings before ITAT

Powers of Tribunal to grant stay of demand

- ▶ Assessee can approach to stay the recovery only when a valid appeal is pending before the Tribunal.
- ▶ Power of the Tribunal to grant stay of recovery is toward tax, interest and even penalty. The same has been held by High Courts in cases of **Bhoja Reddy (231 ITR 47) (AP)** and **Shiv Shakti Rubber & Chemical Works (213 ITR 299) (All)**
- ▶ Stay application maintainable despite non filing of stay application before lower authorities- **DHL Express (India) Pvt. Ltd. (140 TTJ 38) (Mum)** and **Honeywell Automation India Ltd (138 TTJ 373) (Pune)**
- ▶ Tribunal has the power to grant stay for a period of 180 days which can be further extended for a period of 180 days
- ▶ **Penalty proceedings can be stayed to await decision on quantum appeal so as to avoid multiplicity of proceedings & harassment to assessee**
 - ▶ **Wander Pvt Ltd (358 ITR 408) (Bom)**
 - ▶ **GE India Industrial Pvt Ltd (148 ITD 70) (Ahd)**

Stay Proceedings before ITAT

Powers of Tribunal to Stay Proceedings

- ▶ **Section 220: Collection and recovery – assessee deemed in default-stay of recovery-adjustment of refund against current demand – ITAT has power to stay recovery and not permit adjustment of refund (section 245)**
 - ▶ If the appeal before the Tribunal is against order of the Commissioner under section 263 which is pending and the Assessing Officer is proposing to pass an order in pursuance of an order under section 263, the Tribunal can stay the assessment proceeding. **ITO vs. Khalid Khan (1997) 110 ITR 79 (A)(High Court), Puranmal v. ITO (1975) 98 ITR 39 (Pat. High Court), Ritz Ltd. v. Vyas (1990) 185 ITR 311 (Bom) (High Court).**
 - ▶ Failure to fulfill conditions attached to a stay order, the stay automatically get vacated. This is because in such a case, what is granted is only a conditional stay, that is, subject to fulfillment of the conditions. The Tribunal, in such a case, may refuse to stay, or extend the stay of the recovery proceedings upon non fulfillment of the conditions imposed by it.
- ▶ **Whether stay of demand can be granted if appeal before Tribunal pertains to section 263 and 143(3) read with 263 proceedings is pending before CIT(A)**
 - ▶ Sudershan Prasad Bajaria (ITA No. 121/Kol/2016) dated 1 June 2016
 - ▶ Narendra Kumar Mehta (SP No. 31/Kol/2013) dated 24 August 2013

Stay Proceedings before ITAT

Various Courts have taken different views on the power of Tribunal to Grant Stay beyond period of 365 days

▶ **Favourable Judgements**

- ▶ M/s Sap Labs India Pvt Ltd (SP No. 58/Bang/2014) dated 8 January 2016
- ▶ Vodafone Essar Gujrat Ltd (93 CCH 96) (Guj)
- ▶ Pepsi Foods Pvt Ltd (376 ITR 87) (Del HC)
- ▶ M/s Tata Teleservices (Maharashtra) Ltd (WP No. 3437 of 2015) (Bom)
- ▶ Ronuk Industries Ltd (333 ITR 99 (Bombay HC)
- ▶ Commissioner v. SIBDI (Gujarat High Court dated 09/07/2014)
- ▶ Tata Communications Ltd. vs ACIT (2011) 130 ITD 19 (SB) (Mum)
- ▶ Van Oord India Pvt Ltd (S A No. 156/Mum/2014) (Arising out of ITA No.6960/Mum/2012) dated 30 May 2014 (Mumbai Tribunal)
- ▶ Skoda Auto India Private Ltd (S.A. No.79/PN/2014 Arising out of ITA No.2344/PN/2012) dated 18 July 2014 (Pune Tribunal)
- ▶ LG Electronics India Pvt. Ltd (WRIT TAX No. - 420 of 2014) dated 7 July 2014 (Allahabad HC)

▶ **Against Judgements**

- ▶ Ecom Gill Coffee Trading Pvt. Ltd (252 CTR (Kar) 281) (Karnataka High Court)
- ▶ CCE v. Kumar Cotton Mills 180 ELT 434 (SC)
- ▶ M/s Maruti Suzuki (India) Limited (Writ Petition (Civil) No 5086/2013) (Delhi HC) dated 21 February 2014
- ▶ Seacor Offshore Dubai LLC (Income Tax Appeal No. 31 & 32 of 2013) dated 20 March 2014 (Uttarakhand HC)

Stay of Demand – Micro Level

S. N	Judgement	Held
1	UTI Mutual Fund (WP No. 523/2013) dated 6 March 2013	High Court expressed serious disapproval of the manner in which the Revenue has sought to brush aside a binding decision of the Court in the case of the assessee on the issue of stay on enforcement for the previous year
2	Johnson & Johnson Ltd (ITA No. 829/M/2014) dated 21 March 2014 (Mum)	Adjusting of the refund amount due to assessee against the demand is not valid when the Tribunal has granted a stay and the matter is pending for disposal, even though no objection is raised by the assessee
3	Society of the Franciscan (Hospitaller) Sisters (WP No. 155/2013) dated 23 January 2013 (Bom)	Stay Applications are not a “Meaningless Formality”. No recovery during pendency of a stay application. Section 226(3) notice must ordinarily be pre-served on assessee.
4	L’oreal India Pvt Ltd (SP No. 333/Mum/2016) dated 14 October 2016	Mere issuance of notices u/s 143(2) for subsequent year will not tantamount to creation of demand against the assessee, unless and until assessment orders for the said assessment years are passed and demand is crystallized.

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9	Andrew Telecommunications India Pvt Ltd (WP 1021/2016) dated 13 December 2016	Bombay HC has set aside aside CIT’s order refusing to grant stay of demand to assessee while the CIT(A) proceedings were pending. Hon’ble HC observed that in view of Office Memorandum (‘O.M’) dated Feb 29, 2016, AO is obliged to grant stay on payment of 15% of disputed amount where outstanding demand is disputed before the CIT(A); Further, HC noted that AO can adjust the refund to the extent of demand required for granting stay; Accordingly, HC granted interim stay of demand pending appeal disposal by CIT(A) subject to a condition that 15% of disputed demand is adjusted against the refund due.

CBDT's Instruction No. 96 (F.No. 1/6/69-ITCC) dated 21 August 1969

- ▶ Where the income determined on assessment was substantially higher than the returned income, say, twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeals, provided there were no lapse on the part of the assessee.

- ▶ Instruction Followed in the following cases:-
 - ▶ **M.G.M. Transports (Madras) (P) Ltd. vs. ITO & Anr. (303 ITR 15) (MP)**
 - ▶ **Jain Cycle Spares and Co. vs. CIT (267 ITR 60) (MP)**
 - ▶ **Soul vs. DCIT (323 ITR 305) (Del HC)**

Circular No. 530 dated 6 March 1989

Circular No. 589 dated 16 January 1991

- ▶ The Board has clarified that the AO will exercise his discretion u/s 220(6) where demand:
 - ▶ arises because AO had adopted an interpretation of law in respect of which, there exist conflicting decisions of one or more High Courts or, the High Court has adopted a contrary interpretation but the Department has not accepted that judgment, or
 - ▶ relates to issue that have been decided in favour of the assessee in an earlier order by an appellate authority or Court in assessee's own case.

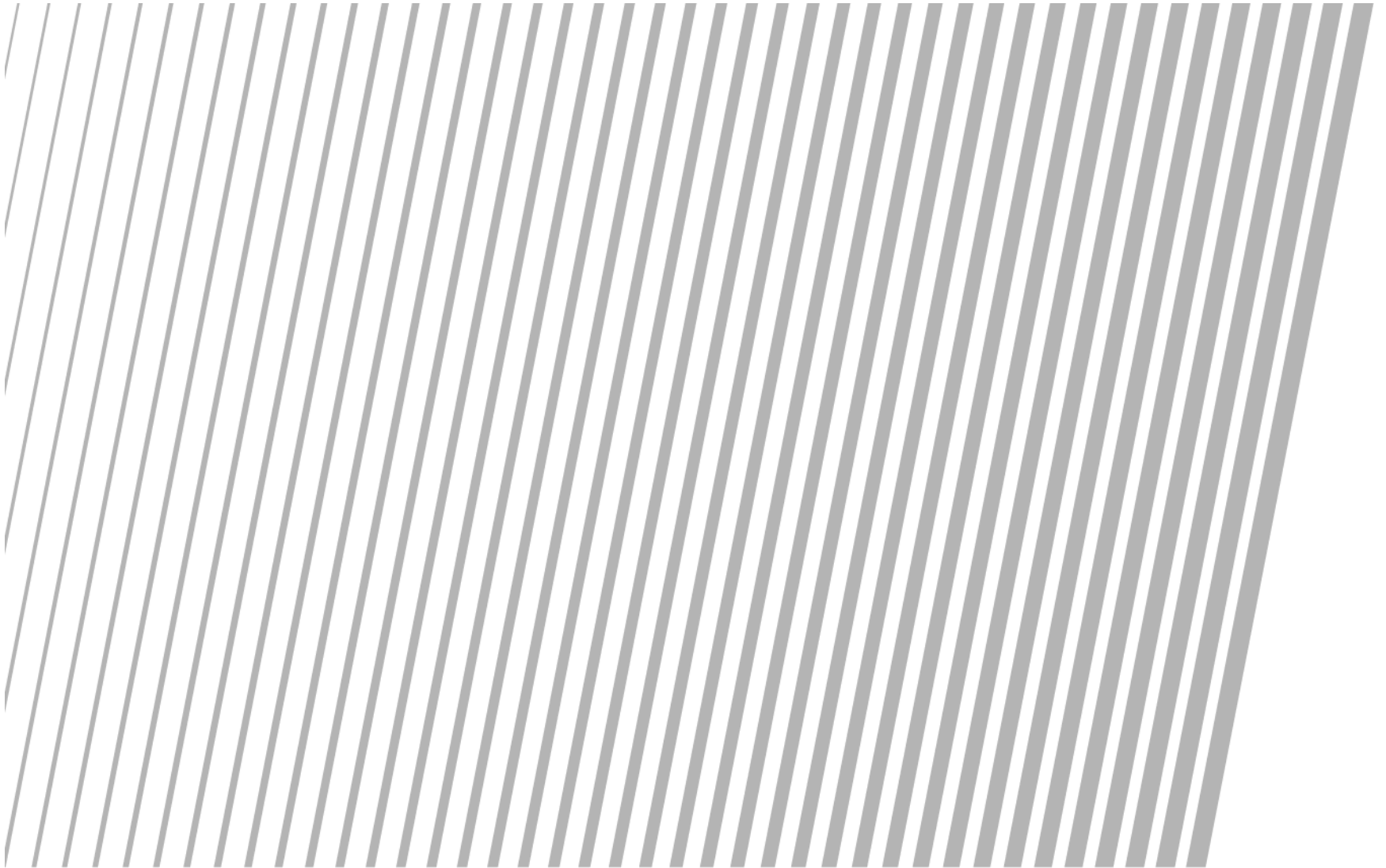
CBDT's Instruction No. 1914 dated 2 December 1993

- ▶ The Board has provided the following illustrative situations where a stay of demand could be granted:
 - ▶ If the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier;
 - ▶ If the demand in dispute has arisen because the AO had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts;
 - ▶ If the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgement.
- ▶ The instruction also specifically reiterates that the aforesaid illustrations are, of course, **not exhaustive**.
- ▶ The said instruction also clarifies that the AO should consider all relevant factors having bearing on the demand raised and communicates his decision in the form of a speaking order

Game Changing CBDT Instruction dated 29 February 2016

- Modifies previous instruction No. 1914 dated March 21, 1996 to lay down guidelines for stay of demand pending appeal before CIT(A)
- Cases where outstanding demand disputed, AO to grant stay of demand till disposal of appeal by CIT(A) on payment of 15% of disputed demand, lays down exceptions
- Illustrates that where addition on same issue confirmed by appellate authorities in earlier years or by SC or HC in favour of Revenue or where such addition based on credible evidence collected in search or survey, AO can refer matter to Pr CIT/CIT if AO feels that payment of lump sum amount higher than 15% is warranted
- Where addition on same issue deleted by appellate authorities in earlier years or SC or HC decided issue in favour of assessee. AO can refer matter to CIT if it feels that payment of lump sum lower than 15% is warranted
- CIT to hold power of review, all appeal, review and reference to be decided within 2 weeks, AO empowered to impose conditions

Recovery Proceedings



Recovery Proceedings after Assessment and “Assessee in Default”

- ▶ 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), it is not necessary that the Assessing Officer has to issue notice under section 156.
- ▶ 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 u/s 201(1).

Consequences of being Assessee in Default

- ▶ Charge of mandatory interest under section 220(2). At present it is 1% p.m. or part of a month
- ▶ Penalty under section 221 of the Act
- ▶ Attachment / auction of moveable / immovable properties
- ▶ Prosecution /arrest / detention

Stay of Demand : Section 220(3), 220(4)

- ▶ Reply of assessee to keep the demand in abeyance
 - ▶ An application for stay of disputed demand must be made before the Assessing Officer before the expiry of time prescribed in notice of demand
 - ▶ Reply should be with reasons stating how the assessee is entitled for stay of recovery, how addition made was not proper, financial difficulties etc.
 - ▶ The assessee must request for stay of recovery till the appeal is disposed. If the issue is covered by jurisdictional High or Apex Court, refer the case laws.
 - ▶ Assessee may also refer the financial difficulties faced by the assessee. How the assessee is complying with the guidelines laid down by the courts may also be demonstrated. This will help the assessee, when they approach for stay of recovery before Commissioner or High Court.
 - ▶ One may also request that if the Assessing Officer decides to proceed further one more opportunity of personal hearing may be given.
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Recovery on the basis of protective assessment

- ▶ Protective assessment is permissible. But recovery in pursuance of such protective assessment is not permitted. However order of protective attachment can be made.
 - ▶ **Sunil Kumar v. CIT (1983) 139 ITR 880 (Bom) (High Court)**
 - ▶ **Lalji Haridas v. ITO (1961) 43 ITR 387 (SC)**
 - ▶ **Jagannath Bawri v. CIT (1998) 234 ITR 464 (Gau)(High Court)**
 - ▶ **Jagannath Hanumanbux v. ITO (1957) 31 ITR 603 (Cal) (High Court)**
 - ▶ **R. Rajbabu v. TRO (2004) 270 ITR 256 (Mad) (High Court)**

Vicarious Liabilities

Garnishee proceedings – Recovery from third parties – Section 226(3)

- ▶ A Garnishee order 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.
- ▶ Such garnishee proceedings can be initiated after the expiry of prescribed time limits i.e. 30 days as provided under section 220(1) provided for paying demand as mentioned in the notice of demand under section 156.
- ▶ If Garnishee fails to comply with the notice under section 226(3), the Assessing Officer/TRO can treat him to be an assessee in default in respect of the amount specified in the notice and further proceedings can be taken against him personally, in the manner provided under section 222 to 225. (226(3)(x))
- ▶ Section 226(3) is applicable only when money is due to the assessee-in-default from any person. When an amount is not payable, such person is not required to pay any such amount or part thereof - **Administrator, UTI v. B.M. Malani (2008) 296 ITR 31 (SC) affirming 270 ITR 515 (AP)**

Vicarious Liabilities

Properties which can be attached

Fixed Deposit

- ▶ Fixed deposit with bank yet to mature can be covered under section 226(3).
 - ▶ In **Vysya Bank Ltd. v. JCIT (2000) 241 ITR 178 (Kar.) (High Court)** and **Global Trust Bank Ltd. v. JCIT (2000) 241 ITR 178 (Kar) (High Court)**, the court held that the department can enforce premature encashment of the fixed deposit belonging to the assessee in terms of section 226(3).

Rent

- ▶ Rent payable by a tenant is a debt and can be subject matter of attachment under section 226(3)
- ▶ Tax due can be recovered by attachment of rents accruing after the death of deceased from property inherited by his legal representatives - **Sri Ram Lakhan v. CIT (1962) 46 ITR 613 (All. High Court)**

Vicarious Liabilities

Properties which cannot be attached

- ▶ As per Rule 10(1) of the second Schedule of the Income tax Act, all such property as is mentioned by the Code of Civil Procedure, 1908, (section-60 exemption from attachment and sale in execution of a decree of a Civil Court) shall be exempt from attachment and sale under the said schedule.
- ▶ It was held in **Stock Exchange v. ACIT (2001) 248 ITR 209(SC) & Vinay Bubna v. Stock Exchange (1999) 97 (Comp Cases) 874 (SC)**, that on plain and combined reading of rules relating to membership of the Ahmedabad Stock Exchange, **it is clear that the right of membership is merely a personal privilege granted to a member**, it is not transferable and incapable of being alienation by the member or his legal representatives and heirs except to the limited extent as provided in the rules on the fulfilment of conditions provided therein. Hence, the **garnishee notice against stock exchange was set aside**.

Vicarious Liabilities

▶ **Property of sons not be attached in case of liability of father**

Properties belonging to the joint family was attached by TRO for realization of tax arrears of firm in which the assessee karta was a partner. Father was a partner of the firm in his individual capacity investing his monies and not on behalf of HUF though he was a joint family manager. It was held that only share belonging to father was liable to be attached and not the rest belonging to the sons. - **ITO v. Tippala China Appa Rao & Ors.(2011) 331 ITR 248 (AP) (High Court)**

▶ **Salary of debtor cannot be attached – Tejal R. Amin (Smt.) v. Asst. CIT(1994) 208 ITR 103 (Guj.) (High Court)**

▶ **Overdraft bank accounts having certain limit cannot be attached. K.M. Adam v. ITO (1958) 33 ITR 26 (Mad)(High Court)**

Liability of Director

- ▶ 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 into 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)**
- ▶ **Remedy against proceedings u/s 179 - Bhupatlal J. Shah v. ITO (2012) 210 Taxman 481 (Bom HC)**
 - ▶ The assessee can file a revision application under section 264 against said order to the CIT.
 - ▶ **If Commissioner rejects, the assessee has to file a writ petition under 226 of the Constitution of India against the said order.**

Firm & 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. These dues include tax, interest and other sums payable under the Act. - **ITO v. Arunagiri Chettiar (1996) 220 ITR 232(SC)** and **Iqtida Khan v. ITO (1941) 41 ITR 165 (All High Court)**
- ▶ Arrears of tax of firm can be recovered from erstwhile partner. - **Kethmal Parekh v. TRO (1973) 87 ITR 101 (AP) (High Court)**

Limited liability partnership (Section 167 C)

- ▶ Section 167C of the income tax act, where the tax is due from the limited liability partnership and if 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.

Hindu undivided family-Members of HUF, section 171 (6)

- ▶ **If Commissioner rejects, the assessee has to file a writ petition under 226 of the Constitution of India against the said order.**
 - ▶ As per section 171(4), the liability of the members of HUF is joint and several, however, if the demand pertains to the period after partition of the HUF, then the liability of the members is restricted to the portion of the joint family property allotted to each of them.
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Other Issues

Property located outside India - Recovery therefrom

- ▶ As per section 228A (2), if India has an agreement with the country, where the assets are located in the other country, the same can be attached through CBDT, if the tax is due in India from non-resident. For this purpose TRO has to draw a certificate u/s 222 and send to CBDT for further action.

Imposition of penalty u/s 221(1) during pendency of an appeal

- ▶ Pendency of appeal against an assessment or against validity of an assessment is no bar to the imposition of a penalty for non-payment of assessed tax. - **J.K. Iron & Steel Co. Ltd. vs. CIT 63 ITR 97 (All)**
- ▶ However, where an assessee has presented an appeal and has applied for stay of the disputed amount of tax u/s 220(6), the AO has to first dispose off the same without which levy of penalty u/s 221(1) is invalid. - **Omprakash Agarwal vs. ITO 66 ITR 175 (All) and M.L.M. Mahalingam Chettiar vs. ITO 66 ITR 287 (Madras)**

Other Issues

Penalty u/s 221(1) where assessment is merely reduced

G. Rajeswara Reddy vs. CIT 84 ITR 556 (AP)]

- ▶ Assessee arranged to pay full assessed tax by installments but disputed a part of the assessment in an appeal filed by him.
- ▶ On failure to pay some instalment, a penalty was imposed on him. The arrears of tax and penalty were later paid by him in instalments.
- ▶ The assessee finally succeeded in his appeal and then it was seen that tax paid till the date of imposition of penalty was more than what was found due after giving appellate effect.
- ▶ The assessee applied for refund of penalty amount. It was held that assessee not having kept alive the penalty order by preferring appeal etc. was not entitled to refund since penalty order became final and validated u/s 3 of the Taxation Laws Validation Act of 1964
- ▶ However, if complete assessment is set aside, penalty has no legs to stand. This is also as per provisions of section 221(2) which says that when demand is wholly reduced, the penalty levied would be cancelled. - **[T.R. Rajkumari vs. ITO 83 ITR 189 (Madras)]**

Other Issues

Priority of dues of Government

- ▶ Priority of dues to Government – secured creditor – Income tax department by way of attachment of assets cannot claim for priority over secured creditor for realization of Income-tax due. (S.13, 35, securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002). - **Asset Reconstruction Co.(India) Ltd. v. CIT AIT 2012 (NOC) 196 (Guj) (High Court)**)
- ▶ Pendency of income tax proceedings – Transfer can be held void only if transferee had notice of pendency of income tax proceedings. - **Tax Recovery Officer v. Industrial Finance Corporation of India and another (2012) 346 ITR 11 (Guj) (High Court)**
- ▶ Priority for tax revenue over secured creditors - **Dena Bank v. Bhiabai Prabhudas Parekh (2001) 247 ITR 165 (SC)**

Other Issues

Power of Arrest: Rule 73 – Second Schedule

- ▶ Revenue can resort to attachment as well as arrest-Simultaneous execution both against the property and person of judgment debtor is allowed. - **Padrauna Raj Krishna Sugar Works Ltd. v. Land Reforms Commissioner, UP and other (1970) 75 ITR 358 (SC), K.T. Thomas v. CIT (1990) 185 ITR 292 (Ker) (High Court) (SLP dismissed (1988) 173 ITR 1(SC).**
- ▶ For tax arrears of HUF, arrest and detention of members of HUF cannot be made; however, karta of HUF deemed to be defaulter. - **Kapurchand Shrimal v. TRO (1969) 72 ITR 623 (SC)**
- ▶ When a firm is in default, if partner of firm is treated as assessee in default, he can be arrested. Partner is not immune from arrest in the proceedings for recovery of income tax due. - **S.M. Ibrahim v. Dy. Collector Sales tax (1978) CTR 356(all) (High Court)**

Other Issues

Who cannot be arrested

- ▶ Legal representatives cannot be arrested for tax arrears of deceased.
- ▶ Prohibition against arrest of women or minor etc.

Rule 81 – Schedule-II of Income tax Act

- ▶ The Tax Recovery Officer shall not order the arrest and detention in the civil prison of:
 - ▶ A woman or
 - ▶ Any person who in his opinion is minor or of un-sound mind
- ▶ The object of Rule 73 is not to punish the defaulter but to recover the arrears of tax.
- ▶ On payment of due amount by defaulter, he can be entitled to be released from custody. - **Collector of Malbar and another v. Erimmal Ebrahim Hajee (1957) 32 ITR 124 (SC).**

Thank You