STAY ON DEMAND

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Introduction

There has been always a tug-of-war between Assessing Officers and the assessee, where on one side, the Assessing Officers have the tendency to make huge additions and disallowances on various grounds and raise huge tax demands, while on the other hand, assessees want to pay minimum taxes on his hard-earned income by adopting various measures of tax plannings. Whenever taxpayers file the income returns, the Income-tax Department processes it and the return of an assessee gets picked for an assessment on the basis of set parameters by the Central Board of Direct Taxes. However it has been observed from time to time that income-tax assessments were often arbitrarily pitched at higher figures and huge demands are created against the assessee and coercive measures are adopted by the revenue authorities for the collection of disputed demand. This leads to the miscarriage of justice and immense hardships to the taxpayers.

Assessee-in-default under Income-tax Act

Section 220 deems an assessee-in-default under certain circumstances. Section essentially provides that an assessee may be deemed in default if any amount, other than by way of advance tax, specified in a notice of demand issued under section 156 is not paid within 30 days of the service of the notice unless the time limit of 30 days is shortened by the Assessing Officer after complying with certain formalities.

However, section 220(6) says that "Where an assessee has presented an appeal under section 246, the Income-tax Officer may, in his discretion, and subject to such conditions as he may think fit, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of". Thus, section 220(6) empowers the assessing authority to treat an assessee as not being in default and in his discretion keep the collection of demand in abeyance in respect of the amount in dispute in the appeal as long as the appeal remains not disposed of or the appeal is pending before the first appellate authority.

Consequences of being an assessee-in-default

(a) *Interest* : As per section 220(2), if the taxpayer fails to pay the amount specified in any notice of demand issued under section 156 within the period as allowed in this regard, then he shall be liable to pay simple

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interest at 1 per cent. for every month or part of a month from the service of the demand notice.

(b) *Imposition of penalties* : As per section 221 of the Income-tax Act "When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may direct him to pay from time to time".

(c) *Seizure and attachment* : As per section 281B of the Act "Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the Revenue it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, by order in writing, attach provisionally any property belonging to the assessee".

(d) *Prosecution* : The consequences do not stop at mere imposition of penalties and steps to recover arrears but include the risk of being prosecuted under Chapter XXII of the Income-tax Act, 1961 depending upon the nature and gravity of the default.

High pitched assessments

One of the points that came up for consideration in the 8th meeting of the Informal Consultative Committee was that income-tax assessments were often arbitrarily pitched at higher figures and that the collection of disputed demand as a result thereof was also not stayed in spite of the specific provision in section 220(6) of the Income-tax Act, 1961.

Thus, to address the above Central Board of Direct Taxes issues Instruction No. 96 (F. No. 1/6/69-ITCC) dated August 21, 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 appeal provided there were no lapses on the part of the assessee".

The revenue maintains that these instructions stand withdrawn in view of the later instruction issued on the same subject of stay of recovery. However, the courts follow the spirit of these instructions as the same is referred in their judgments from time to time. Some of the cases are as follows :

In the case of *Valvoline Cummins Ltd.* v. *Deputy CIT* [2008] 307 ITR 103 (Delhi) the High Court had granted an absolute stay of demand

because the assessment made was eight times of the returned income holding that a perusal of para 2 of the Central Board of Direct Taxes Instruction No. 96, dated August 21, 1969 shows that where the income determined is substantially higher than the returned income, i.e., twice the latter amount or more, then the collection of tax in dispute should be held in abeyance till the decision on the appeal is taken. In this case, the assessment was almost 8 times the returned income. Clearly, Instruction No. 96, dated August 21, 1969 would be applicable to the facts of the case. Under the circumstances, the assessee would, in normal course, be entitled to an absolute stay of the demand on the basis of the above instruction.

In the case of *Maheshwari Agro Industries* v. *Union of India* [2012] 346 ITR 375 (Raj), the Rajasthan High Court held that the tendency of making high-pitched assessments by the Assessing Officers is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice and sometimes even in insolvency or closure of the business, if such power was to be exercised only in a pro-Revenue manner. It may be akin to execution of a death sentence whereas the accused may get even acquittal from higher appellate forums or courts. Therefore, this court is of the opinion that such powers under sub-section (6) of section 220 of the Act also have to be exercised in accordance with the letter and spirit of Instruction No. 96 dated August 21, 1969, which states that where the income determined on assessment was substantially higher than the returned income, twice the later amount or more, the collection of the taxes in dispute is to be held in abeyance till the decision of the appeals provided there was no fault on the part of the assessee.

Thus, this court in view of Instruction No. 96 dated August 21, 1969, stayed the recovery of entire balance amount from the assessee, while directing the Commissioner of Income-tax (Appeals) to dispose of the pending appeal of the assessee within a period of six months from the date of order.

Urban Improvement Trust v. *Asst. CIT* : Assessee file a writ stating that the Commissioner, while passing the order, has not taken into consideration the law laid down by the hon'ble Supreme Court, this court and also the mandatory circulars issued by the Department of Income-tax itself – the view of the assessee is supported by the judgment of the hon'ble Delhi High Court in the case of *Soul* v. *Deputy CIT* [2010] 323 ITR 305 (Delhi) Held : when the assessed income is more than double of the returned income then the demand should be stayed till the decision of appeal – it is apparent that while deciding the stay application, the Assistant Collector has not taken into consideration the judgment and circulars cited by the

petitioner – quash the order remanding to the Assistant Collector of Income-tax to consider the stay application afresh by providing an opportunity of hearing to the petitioner and also by taking into consideration judgments and circulars cited by the petitioner in favour of assessee).

Thus, the above decisions clearly state that what has been approved by the "Informal Consultative Committee of Parliament" and the then deputy Prime Minister/Finance Minister in Instruction No. 96 is still valid and is not be superseded by the circulars issued by the Central Board of Direct Taxes from time to time by the discussion concerning stay of demands. Hence, where income assessed is twice the income returned or more, the demand raised in such high-pitched assessments, on applications made by the assessee, has to be stayed until the disposal of appeals by the Commissioner of Income-tax (Appeals). The Assessing Officers cannot escape from the above instruction and the Assessing Officers, who are not adhering to this Instruction and are compelling the assessee to pay the demand, which is substantially higher, on the basis of Instruction No. 96, could be held to be guilty of not following the decision of a Committee of Parliament and could be said to be committing contempt of Parliament.

Limit of 20 per cent. of demand is flexible

The Board has, while stating generally that the assessee shall be called upon to remit 20 per cent. of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on factors to be taken into consideration. The similar view has been held by various courts in many cases.

The hon'ble Supreme Court held as under while deciding the appeal titled as *Pr. CIT* v. *LG Electronics India Private Limited* [2018] 12 ITR-OL 334 (SC) "Having heard Shri Vikramjit Banerjee, learned ASG appearing on behalf of the appellant, and giving credence to the fact that he has argued before us that the administrative Circular will not operate as a fetter on the Commissioner since it is a quasi-judicial authority, we only need to clarify that in all cases like the present, it will be open to the authorities, on the facts of individual cases, to grant deposit orders of a lesser amount than 20 per cent., pending appeal".

The Bombay High Court, in the case of *Bhupendra Murji Shah* v. *Deputy CIT*, observed as under with regard to the instructions of Central Board of Direct Taxes, "We are not concerned here with the Circular of the Central Board of Direct Taxes. We are not concerned here also with the power conferred in the Assessing Officer of collection and recovery by coercive means. All that we are worried about is the understanding of this Deputy Commissioner of a demand, which is pending or an amount,

which is due and payable as tax. If that demand is under dispute and is subject to the appellate proceedings, then the right of appeal vested in the petitioner/assessee by virtue of the statute should not be rendered illusory and nugatory. That right can very well be defeated by such communication from the Revenue/Department as is impugned before us. That would mean that if the amount as directed by the impugned communication being not brought in, the petitioner may not have an opportunity to even argue his appeal on merits or that appeal will become infructuous, if the demand is enforced and executed during its pendency. In that event, the right to seek protection against collection and recovery, pending appeal, by making an application for stay would also be defeated and frustrated. Such can never be the mandate of law. In the circumstances, we dispose both these petitions with directions that the appellate authority shall conclude the hearing of the appeals as expeditiously as possible and during pendency of these appeals, the petitioner/appellant shall not be called upon to make payment of any sum, much less to the extent of 20 per cent. under the assessment order/confirmed demand or claim to be outstanding by the Revenue.

Other Central Board of Direct Taxes guidelines

Instruction No. 1914 dated December 2, 1993 states the guidelines for staying demand :

A demand will be stayed only if there are valid reasons for doing so. Also, while considering the application under section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order. A few illustrative situations where stay could be granted are—

• If the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier ; or

• If the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working) ; or

• If the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment.

The same view has also been conferred by the High Court, in the case of *Siemens India Ltd.* v. *K Subramanium, ITO* [1983] 143 ITR 120 (Bom) the Bombay High Court held that "The submission that an Income-tax Officer is not bound by the decision of a High Court within whose jurisdiction he is, if an appeal against that decision is pending in the Supreme Court, or a special leave application is pending in the Supreme Court against that

judgment, cannot be accepted. Merely because an appeal has been filed or a special leave application is pending against it, does not denude a decision of its binding effect, and until set aside that decision is binding on all upon whom it operates as a binding precedent, unless where the operation of that judgment has been stayed by the Supreme Court. Not to follow the decision of the High Court within whose jurisdiction the Income-tax Officer is, would be tantamount to committing contempt of that court".

Mere filing of an appeal against the assessment order will not automatically provide stay of recovery of demand. Generally, it is observed that the assessee files appeal with the Department and does not file stay application. Stay application is to be compulsorily filed with the Assessing Officer as the filing of an appeal does not amount to an automatic stay of proceedings. The power not to regard such assessee a defaulter, has been given to the Assessing Officer, and its exercise depends upon his discretion on the receipt of stay application by the assessee.

Instruction No. 1914 was partially modified by Office Memorandum dated February 29, 2016 taking into account the fact that Assessing Officers insisted on payment of significant portions of the disputed demand prior to grant of stay resulting in extreme hardship for taxpayers. Thus, in order to streamline the grant of stay and standardise the procedure, modified guidelines were issued, which are as follows :

(A) In a case where the outstanding demand is disputed before Commissioner of Income-tax (Appeals), the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15 per cent. of the disputed demand, unless the case falls in the category discussed in para (B) hereunder.

(B) In a situation where the Assessing Officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15 per cent. is warranted (e.g., in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.).

Instruction No. 1914 was further modified by Office Memorandum bearing number F. No. 404/72/93—ITCC dated July 31, 2017, where Central Board of Direct Taxes hikes standard rate of disputed tax payment from 15 per cent. to 20 per cent., to get stay of demand, where the demand is contested before the Commissioner of Income-tax (Appeals).

The Circulars and Instructions extracted above are in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stay and cannot substitute or override the basic tenets to be followed in the

consideration and disposal of stay petitions. The parameters to be taken into account in grant of stay of disputed demand are well settled—the existence of a prima facie case, financial stringency and the balance of convenience. "Financial stringency" would include within its ambit the question of "irreparable injury" and "undue hardship" as well. It is only upon an application of the three factors as aforesaid that the Assessing Officer can exercise discretion for the grant or rejection, wholly or in part, of a request for stay of disputed demand.

Conclusion

In spite of the above, it has been observed that orders are sometimes non-speaking, ignoring the Central Board of Direct Taxes circulars and various judicial precedents. In scrutiny assessments, often huge demands are created against the assessee by framing high-pitched assessments. This puts assessees to a great deal of hardship. The discretionary powers entrusted to Assessing Officers must be exercised judicially and reasonably and he should consider all the facts and circumstances of the case relevant to the exercise of the discretion, in all its aspects such as assessment history of the assessee, his conduct and co-operation in relation to the Department, points raised in the appeal, chances of recovery in case the appeal is dismissed, the hardship to the assessee by insistence on immediate payment and the like. Thus, the Assessing Officer should act in a reasonable manner to subserve the purpose of guidelines by various courts. Before exercising his discretionary powers, he should not act as a mere tax gatherer and should divorce himself from his position as the authority that made the assessment and consider the matter in all its facets, without, at the same time, sacrificing the interests of the Revenue.