

Navigating 'Stay of Demand' Challenge & Intricacies of 'Depositing Tax' Pending Appeal

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Introduction

Over the past several years, India has witnessed strong and consistent economic growth. Such growth is also reflected in the net direct tax collections by the Government of India. For the financial year 2024-25, Government has collected a staggering amount of approximately INR 4.62 lakh crore rupees (as on 17 June 2024), marking a 20.99% year on year increase^[1]. As businesses prosper and earn ever increasing profits, it is often accompanied by tax disputes and high-stake tax demands as well.

Adverse tax assessments passed by the tax authorities typically results in creation of an additional tax liability ("**Tax Demand**") which is raised under Section 156 ("**Demand Notice**") of the Income-tax Act, 1961 ("IT Act"). Such Tax Demand needs to be paid within the timeline prescribed under Section 220 of the IT Act (generally 30 days from the date of receipt of Demand Notice), failing which a taxpayer is treated as an 'assessee in default' making him liable to pay interest @ 1% per month or part of the month for non-payment of Tax Demand in time. Such interest is leviable from the day immediately following the expiry of period mentioned in the Demand Notice until the date of payment of tax, unless a stay on such Tax Demand is obtained for the same.

Often, payment of such a Tax Demand can cause significant inconvenience / genuine hardship to a taxpayer. In this regard, a key issue which arises is whether a taxpayer is liable to pay such Tax Demand when additions / disallowances so made in tax assessment order may be prima facie illegal, lacks merit or otherwise not sustainable in law and are challenged under appeal.

Section 220(6) of the IT Act gives assessing officer ("**AO**") power to grant a taxpayer a stay on such Tax Demand (i.e., not treat the taxpayer as an 'assessee in default') until disposal of taxpayer's appeal before the Commissioner of Income-tax (Appeals) ("**CIT(A)**") provided a case has been made out by the taxpayer justifying such stay of Tax Demand.

Similarly, Section 254(2A) of the IT Act provides Income Tax Appellate Tribunal ("**ITAT**") power to grant stay on Tax Demand during the pendency of such appeal proceedings before ITAT subject to fulfilment of certain conditions.

This article explores section 220(6), highlighting judicial principles, key circulars / instructions issued by the Central Board of Direct Tax (“**CBDT**”), and practical strategies for taxpayers seeking relief. Despite amendment to section 254(2A) (discussed in subsequent part of this article), ITAT's ability to grant stay on Tax Demand continues to be a critical tool for ensuring fairness in the appellate process.

Relevant CBDT instructions:

Instruction No. 1914 dated 2 February 1993 (“**Instruction**”) issued by the CBDT lays down detailed guidelines for granting stays of Tax Demand in income tax cases. The Instruction aimed at ensuring fairness and equity for taxpayers while maintaining the integrity of tax assessments and appeals. The Instruction provided that a Tax Demand will be stayed only if there are valid reasons for doing so and mere filing of an appeal against assessment order will not be a sufficient reason to stay recovery of the Tax Demand. The Instruction also provided procedural aspects of filing stay applications before the AO (i.e. timelines for disposal of stay applications, passing of speaking order, etc) in terms of Section 220 of the IT Act.

The Instruction did not mandate unconditional stay of demand by AO. Instead, the AO could have also imposed conditions while granting stay on the Tax Demand such as requiring the taxpayer to offer suitable security, pay the taxes in a lump sum or instalments, or furnish an undertaking to cooperate in early appeal disposal, etc.

Subsequently, the Instruction was partially modified vide office memorandum [F.No. 404/72/93-ITCC] dated 29-2-2016 which directed AOs to grant a stay of Tax Demand until disposal of appeal before CIT(A) on payment of 15% of the disputed demand. For granting stay of Tax Demand at less than 15% payment, the AO is required to refer the matter to administrative Pr. CIT/CIT who after considering relevant facts will decide the quantum / proportion of demand to be paid for granting stay on balance demand. Further, if the taxpayer was dissatisfied with the AO's decision to stay the Tax Demand on payment of 15% of the disputed Tax Demand, he had an option to seek a review of the decision of the AO from the administrative Pr. CIT/CIT. The office memorandum also provided that the AO must dispose of the stay petition within two weeks, and any reference or review application to the Pr. CIT/CIT must also be resolved within two weeks.

Thereafter, the office memorandum F.No.404/72/93-ITCC dated 31.7.2017 issued by CBDT increased limit of 15% to 20% for granting stay of demand by AOs when appeal is pending before CIT(A).

Some factors to be kept in mind while considering stay application:

In *Ravi Gupta v. Commissioner of Sales Tax (2009)*, the Hon’ble Supreme Court outlined three factors for considering a stay application: (i) prima facie case, (ii) balance of convenience, and (iii) irreparable loss. If the Tax Demand appears unsustainable, stay should be granted.

In *UTI Mutual Fund v. ITO* [[TS-100-HC-2013\(BOM\)](#)], the Hon’ble Bombay High Court observed that “where a strong prima facie case has been made out calling upon the Petitioner to deposit, would itself occasion undue hardship. Where the issue has raised a strong prima face case which requires serious consideration as in the present case, a requirement of pre-deposit would itself be a matter of hardship”.

Similarly, the Hon’ble Gujarat High Court in the case of *Harsh Dipak Shah v. UOI* [[TS-76-HC-2022\(GUJ\)](#)] said that while granting stay of Tax Demand, the AO should consider four basic parameters, namely, (i) prima facie case (ii) balance of convenience (iii) irreparable injury that may be caused to the taxpayer which cannot be compensated in terms of money and (iv) whether the taxpayer has come before the authority with clean hands.

Furthermore, in *PCIT v. M/s LG Electronics India Private Limited* [Civil Appeal No. 6850 of 2018, order dated 20 July 2018], the Hon’ble Supreme Court clarified that the administrative circular would not operate as a fetter upon the power otherwise conferred on a quasi-judicial authority and that it would be open to the authorities on facts of individual cases, to grant stay on deposit of less than 20% of the disputed demand. Similarly, the Hon’ble Delhi High Court, in its recent ruling in *National Association of Software and Services Companies (NASSCOM) [TS-195-HC-2024(DEL)]* case, held that payment of 20% of disputed tax demand is not a prerequisite / precondition for putting in abeyance the recovery of demand

pending first appeal and that it cannot be viewed as being an inviolate or inflexible condition. The Court further held that the extent of the deposit which a taxpayer may be called upon to make, would have to be examined and answered bearing in mind factors such as prima facie case, undue hardship and likelihood of success.

Does amendment to Section 254(2A) necessitate ITAT to consider a deposit of 20% condition?

Earlier, ITAT had power to grant stay on entire Tax Demand. However, after the amendment to section 254(2A) vide Finance Act 2020, a stay on disputed Tax Demand can be granted by ITAT provided the taxpayer deposits at least 20% of such demand or furnishes security of equal amount. While third proviso to Section 254(2A) also provided that, such stay order is valid only until maximum 365 days and the order of stay stands vacated after the expiry of 365 days even if delay in disposing of appeal is not attributable to the taxpayer, Hon'ble Supreme Court in the case of DCIT v Pepsi Foods Ltd [2021] 433 ITR 295 (SC) held this provision to be arbitrary and discriminatory. Accordingly, Hon'ble Supreme Court held this provision to be violative of Article 14 of the Constitution of India and ruled that stay can be vacated after the expiry of 365 days period provided delay in disposing of the appeal is attributable to the taxpayer.

Requirement of depositing 20% of the disputed Tax Demand or furnishing security of equal amount to obtain a stay is intended to apply even if a taxpayer has a strong prima facie case on merits or it is a case of genuine hardship.

When the ITAT dismisses taxpayer's appeal, the next question is whether the taxpayer has to pay the disputed taxes when filing an appeal before the High Court. In such a situation on a case-to-case basis, one may consider filing stay petition before the High Court seeking grant of stay on disputed Tax Demand pending disposal of appeal before High Court, if the case or merits so warrant.

Power of CIT(A) to grant stay:

In the case of ITO v. M.K. Mohammed Kunhi [\[TS-5-SC-1968-O\]](#), the Hon'ble Supreme Court held that the authority to grant a stay on Tax Demand was an inherent power vested with ITAT, and that there need not be a specific statutory provision for the same. On similar lines, the Hon'ble Rajasthan High Court in the case of Maheshwari Agro Industries v. UOI [\[TS-5793-HC-2011\(RAJASTHAN\)-O\]](#) held that the CIT(A) also had inherent powers to grant a stay on Tax Demand even in absence of any specific statutory provision conferring such powers to grant stay under the IT Act. Similar view was also taken by the Hon'ble Allahabad High Court in the case of Prem Prakash Tripathi v. CIT [\[TS-5216-HC-1994\(ALLAHABAD\)-O\]](#). We have practically seen and obtained stay on disputed Tax Demand from the learned CIT(A) before whom the appeals were pending.

Adjustment of refund in excess of 20% of the disputed Tax Demand:

Often taxpayers have certain refunds pertaining to other years that are due to them from the tax authorities. A question arises whether entire refund amount may be adjusted by the tax authorities against outstanding Tax Demand or only 20% of the disputed tax demand can be adjusted against the refund when an appeal is pending before CIT(A). In this regard, the Hon'ble Gujarat High Court in Neo Structo Construction v. ACIT, [\[TS-5202-HC-2023\(GUJARAT\)-O\]](#) held that only 20% of the disputed Tax Demand can be adjusted against refund receivable. The Court in this case directed tax department to refund the excess amount adjusted (i.e., refund adjusted beyond 20% of Tax Demand).

Powers of High Courts to do justice:

Taxpayers aggrieved by a non-speaking stay order passed by the AO / Pr CIT / CIT can approach High Court under Article 226 of the Constitution of India for grant of due relief pending disposal of appeal. Courts have consistently held that the tax authorities are bound to objectively consider and decide stay applications by passing a 'reasoned order'. Similarly, if taxpayers are aggrieved by an adverse stay order of the ITAT, they may consider filing a writ petition before the High Court seeking to challenge the stay order if there is sufficient justification for the same (recently, in one case, Vodafone India Services Private Limited had approached Bombay High Court seeking stay of Tax Demand in Writ Petition No. 566 of

2022; High Court order dated 18 June 2024).

Concluding comments:

A smooth and efficient tax collection mechanism is essential for any growing economy. That said, a 'balance' must be found between the powers of tax authorities to recover due taxes on the one hand and principles of fairness and natural justice on the other. Factors such as a strong prima facie case, balance of convenience, undue hardship should continue to be considered while disposing stay applications. A detailed stay application demonstrating justification clearly setting out existence of a strong prima facie case / strong merits should be brought at the outset. Many a times, tax authorities have been pragmatic in dealing with taxpayers' stay application and have even granted complete stay on high pitched assessments in deserving cases. As a practice, AO generally reviews the stay order on a periodic basis (generally six months). However, such a review is not unilateral, and the AO should give taxpayer a chance to represent its case wherever such stay orders are being altered / modified.

All in all, an aggrieved taxpayer needs to take holistic view of the matter in relation to high stake tax matters so as to try and obtain due relief in terms of stay till disposal of its appeal and related aspects.

[\[1\]](#) Press release dated 18 June 2024 issued by the Government