



**The Law Of Tax Recovery: Recent Important Case Laws**

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All tax payers and to a large extent their advisors too, generally face anxiety and stress more so in the months of January to March on account of the recovery spree that the tax department gets into.

The department generally goes overboard and tries to collect even demands which are incorrectly raised and / or can easily be rectified. This is inspite of there being specific guidelines laid down by the CBDT<sup>2</sup> (in Circular No. 1914) or the guidelines laid down by various High Courts/Tribunal decisions on the subject. This year, the position was compounded by a communication dated 07 February 2012 issued by the Chairman of the CBDT to all CCITs, DGITs, CITs and DIT(IT)<sup>3</sup>s *inter-alia* linking revenue collections to the performance parameters of the tax officers and also giving importance to the same while considering future placements.

Both the guidelines and the principles laid down by Courts are generally given a bypass by the tax officials while trying to enforce the demands raised and this is where the taxpayer needs to stand-up and take appropriate action.

The months of February and March 2012 witnessed a very positive trend since more and more tax payers had either the guts and the gumption to challenge the tax department's action of enforcing recovery proceedings contrary to the settled judicial position or if one may say so, they were forced to do so. The result of this is a series of decisions of the High Courts which once again reiterate the position and the manner in which the tax officials are expected to deal with while disposing of the stay petitions filed by the tax payers.

Tabulated hereunder are a few of such decisions and the ratios laid down by the courts therein:

Sr. No.	Name of the decision and citation where reported	Circumstances in which the Writ Petition was filed	Direction / decision of the Court
1.	Urban Improvement Trust [2012] 20 taxmann.com 192 (Rajasthan)	Assessed income was twice the returned income. While disposing of the stay application, the AO <sup>4</sup> did not consider the CBDT Instruction No. 96 and various other decisions cited by the assessee.	AO to consider the stay application afresh after taking into consideration the various judgments and the circulars cited by the tax payer.

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<sup>2</sup> Central Board of Direct Taxes

<sup>3</sup> Chief-Commissioners of Income-tax, Directors General of Income-tax, Commissioners of Income-tax and Directors of Income-tax (International Taxation)

<sup>4</sup> Assessing Officer



2.	Genpact India [2012] 205 Taxman 51 (Delhi)(Mag.)	The AO adjusted the refund due to the assessee against the demands raised in respect of issues already decided in favour of assessee by ITAT and the HC without issuing the mandatory intimation under section 245 of the Act <sup>5</sup> .	AO directed to release the amount of refund due to the assessee which was adjusted without following the mandatory procedure under section 245 of the Act viz., issuing of a notice to the assessee and granting a personal hearing.  The Court also directed that demand could not be recovered on the issues which had been decided in favour of the assessee by the ITAT <sup>6</sup> and the HC <sup>7</sup> in the earlier years.
3.	L. G. Electronics India Pvt. Ltd. v/s. CIT & Ors. (Writ Tax No. 367 of 2012) (Allahabad)	The AO raised a demand under section 201 of the Act on the ground that the assessee ought to have deducted tax under section 194-I instead of section 194C. The assessee had filed a stay application before the CIT(A) <sup>8</sup> who observed that there was enough strength in the plea for stay of demand, but directed that 30% of the demand be deposited.	The Court held that while it is true that on merely establishing a <i>prima facie</i> case, interim order of protection should not be passed, if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand.  As the CIT(A) had himself expressed opinion in his order that there is enough strength in the plea of the assessee for stay of the demand, there was no occasion to direct for deposit of 30 percent. Hence, the assessee was entitled to stay on furnishing adequate security.
4.	Nishith Madanlal Desai [2012] 20 taxmann.com 145 (Bombay)	The assessee had filed a stay application to the CIT(A) in relation to the demand raised. The CIT(A) directed that the refund which had been determined to be payable	The Court held that the submissions which had been made on behalf of the assessee in regard to these issues were required to be considered in appeal and the CIT(A) ought to have devoted a more careful

<sup>5</sup> Income-tax Act, 1961

<sup>6</sup> Income-tax Appellate Tribunal

<sup>7</sup> High Court

<sup>8</sup> Commissioner of Income-tax (Appeals)



		<p>for a subsequent assessment year should be adjusted against the outstanding demand for year in question and that the balance demand be paid. The assessee argued that the CIT(A) had failed to take due note of submissions which had been made regarding additions made by the AO.</p>	<p>consideration to the issue as to whether a stay of demand was warranted.</p> <p>The Court observed that the power which is vested in the AO under section 220(6) and on the CIT(A) to grant a stay of demand is a judicial power. <b><u>It is necessary for both the AO as well as the appellate authorities constituted under the Act to have due regard to the fact that their function is not merely to act as tax gatherers, but equally as quasi-judicial authorities, they owe a duty of fairness to the assessee.</u></b></p>
5.	<p>Maheshwari Agro Industries [2012] 17 taxmann.com 68 (Rajasthan)</p>	<p>Stay application filed by the assessee was rejected by the AO.</p>	<p>The CIT(A) has inherent, implied and ancillary powers to grant stay against recovery of disputed demand of tax while seized of an appeal filed before him. The relevant factors to be considered are prima facie case, balance of convenience, irreparable injury, nature of demand and hardship likely to be caused to the assessee, liquidity available to the assessee, etc.</p> <p>Under section 220(6) the AO has the discretion not to treat the assessee as being in default during the pendency of the appeal. The AO has to normally use this discretion in favour of the assessee particularly when high pitched assessments are made and the demand of tax is several times the declared tax liability in the spirit of Instruction No. 95 dated 21 August 1969 which holds the field and is binding on the AO.</p>
6.	<p>Firoz Tin Factory and another (Writ</p>	<p>The AO had directed the assessee to make payment</p>	<p>The proviso to section 220(1) which empowers the AO to</p>



	Petition Lodging No. 765 of 2012 (Bombay)	<p>of demand within a period of one week from the order of assessment.</p> <p>This is against the normal practice of granting a period of 30 days to the tax payer under section 220(1) of the Act, which can be reduced by the AO with prior approval.</p>	<p>demand payment within a period lesser than 30 days with the prior approval of the JCIT<sup>9</sup> cannot be exercised casually and without due application of mind. The AO and 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 &amp; 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.</p>
7.	UTI Mutual Fund [2012] 19 taxmann.com 250 (Bombay)	<p>The communication dated 07 February 2012 addressed by the Chairman of the CBDT was put to test before the Court.</p> <p>The AO issued a garnishee notice to the bankers of the petitioner even before communicating the order passed on its stay application.</p>	<p>The Court held that administrative directions for fulfilling recovery targets for the collection of revenue should not be at the expense of foreclosing remedies which are available to assessee for challenging the correctness of a demand. The sanctity of the rule of law must be preserved. AOs and appellate authorities perform quasi-judicial functions under the Act. Applications for stay require judicial consideration. Rejecting such applications without hearing the assessee, considering submissions and indicating at least brief reasons is impermissible.</p> <p>The Court has laid down guidelines that should be borne in mind for effecting recovery.</p>

<sup>9</sup> Joint Commissioner of Income-tax



8.	Rajsthani Sammelan Sarvoday Balika Vidyalaya (Writ Petition No. 684 of 2012) (Bombay)	The assessee's applications for stay of demand were rejected without indicating reasons for doing so or prima facie evaluating the issues pending before the CIT(A).	The Court re-iterated the directions laid down by it and reported in the case of 'KEC International Ltd. v/s. B. R. Balakrishnan' reported in (2001) 251 ITR 158 (Bom). The Court further went on to hold that a complete stay of demand ought to be granted in a case where the assessee has serious issues to be urged in appeal before the CIT(A).
9.	Tata Toyo Radiators Pvt. Ltd. (Writ Petition Nos. 2401 and 2408 of 2012) (Bombay)	In this case too, the assessee's applications for stay of demand were rejected without indicating proper reasons for doing so.	The Court referred to its directions given in the case of 'KEC International Ltd.' – (supra) and further observed that AOs have been consistently refusing to follow the law laid down in the judgments of the Court vis-à-vis recovery of demand. It re-iterated that the AO and the appellate authorities are duty bound to act in accordance with binding precedent.
10.	Lopamudra Misra [2011] 337 ITR 92 (Orissa)	The assessee had won prize money on a TV show. On receipt of notice u/s. 208 of the Act for payment of advance tax she informed the AO that the said prize money was not taxable, however, due to threats from the AO (such as maximum levy of penalty and initiation of prosecution, etc.) paid advance-tax of Rs. 7.55 lakhs. Subsequently the issue was decided in her favour by the ITAT. While giving effect to the ITAT's Order, the AO still included the amount as taxable.	The order passed by the AO in which he ignored the verdict of the ITAT lacked judicial propriety and hence was erroneous in law.  The AO's action of threatening the assessee with penalty and prosecution and deputing his inspector to collect the advance-tax is certainly not a healthy practice. If any money is due to the Government, the Government should take appropriate steps, but it should not take extra legal steps or adopt the course of maneuvering.
11.	Maruti Suzuki India	The ITAT had passed an	If an order for stay of recovery is



	Ltd. [2011] 16 taxmann.com 40 (Delhi)	interim order directing <i>status quo</i> in respect of recovery of demand. However, the AO adjusted refunds of other years against the demand.	passed, the AO should not pass an order of adjustment under section 245 to recover the demand.
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As is evident from the above list, the Courts have had an occasion to deal with various aspects of the matters relating to the stay of demand and granted relief to various types of assessee's i.e. right from a big multinational company, to a charitable trust, to a public sector undertaking and also in the case of an individual assessee.

This trend should serve as an inspiration to tax payers who believe that if their matter is strong in merits and they are most likely to succeed in the appeal/s filed by them, one should not hesitate in knocking the door of the Tribunal / Courts to obtain a stay against the recovery of demand.

Two important points which one can make out from a reading of these decisions are:

- Drafting of the stay application/s at all levels is of prime importance and hence due care should be taken to ensure that all the factual points are covered in the stay applications filed; and
- Obtaining a stay of demand is also possible from the Commissioner of Income-tax (Appeals) who is seized with deciding the appeal filed by the assessee.

In stay applications filed to the higher authorities, the stay order passed by the lower authorities should be analysed and considered bearing in mind the following guidelines laid down by the Bombay High Court in the case of UTI Mutual Fund (*supra*):

1. No recovery of tax should be made pending
  - (a) Expiry of the time limit for filing an appeal;
  - (b) 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.
2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International Ltd. v. B.R. Balakrishnan (2001) 251 ITR 158 (Bom.);
3. 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;
4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;
5. In exercising the powers of stay, the AO should not act as a mere tax gatherer but as a quasi-judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the AO has made an assessment, he must objectively decide the



application for stay considering that an appeal lies against his order : the matter must be considered from all its facets, balancing the interests of the assessee alongwith the protection of the interest of Revenue.

Any deviation from the aforesaid guidelines should be specifically brought to the notice of the higher authorities, Tribunal and the High Courts.

While one may take utmost care in drafting the stay petitions one also hopes that the tax department respects and adheres to these guidelines while deciding stay matters in the coming months.

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