
[2018] 253 Taxman 13 (Article)/[2018] 89 taxmann.com 167 (Article)

[2018] 89 taxmann.com 167 (Article)

Date of Publishing: December 30, 2017

Faced with a huge income tax demand? Stay Strong!



JEETAN NAGPAL

Partner, Hemant Arora & Co. LLP

Introduction

1. If a taxpayer's income-tax case has been under scrutiny assessment, in all probabilities the 31st December will be the limitation for conclusion of tax assessment. In that case the taxpayer must not lose sight of a communication from his Assessing Officer ['AO'] which may contain a notice demanding additional tax based on the AO's assessment of the income. If the taxpayer does get such a notice of demand he is under a legal obligation to pay the tax demand within thirty days.

There could be situations when the tax demand is so huge and disproportionate to his means, that a taxpayer may have a genuine hardship in discharging the liability. There could also be situations when the taxpayer feels that he should not be made to pay the tax demand because, in his opinion, the assessment of income is unreasonably high – which in legal parlance is called 'as a high pitched assessment'.

This article explains the grounds which an unenviable taxpayer could take while seeking stay of disputed tax demand. If the existence of such grounds can be established by the taxpayer, he can get relief against immediate payment of the entire tax demand till his appeal against the assessment is decided by the first appellate authority, i.e., the Commissioner of Income Tax (Appeals).

Remedy with taxpayer when faced with huge tax demand

2. Faced with an unmanageable tax demand, the taxpayer's recourse should be to approach the AO for redressal. The AO has the power under section [220\(3\)](#) of the Income Tax Act to extend the time for payment of tax demand or to allow payment by installments. The AO also has power under section 220(6) not to treat a taxpayer who has not paid the tax demand as a defaulter till such time his appeal is disposed off by the Commissioner (Appeals).

CBDT's Instructions and Circulars

3. The Central Board of Direct Taxes ['CBDT'] has from time-to-time issued Instructions and Circulars laying down the guidelines to be followed by the AO while exercising the aforesaid statutory powers.

Circular dated February 29, 2016

3.1 An Office Memorandum dated 29th February 2016 [*Circular dated 29.2.16.* or *the Circular*] issued by CBDT has standardized the quantum of lump sum payment required to be made by a taxpayer as a precondition of stay of tax demand which the taxpayer has disputed before the Commissioner of Income Tax (Appeals). The Circular envisages three situations which are discussed below.

1. *Payment of 20% of tax demand* - The Circular empowers the AO to grant stay of tax demand till disposal of the first appeal on payment of 15 percent of the disputed demand. Recently, vide Office Memorandum dated 31.7.2017, the lumpsum payment of 15% as provided in Circular dated 29.2.16. has been enhanced to 20%.
2. *Higher than 20% payment* - In the following three cases the AO can insist on a lumpsum payment which is higher than 20% of the tax demand – (a) if the taxpayer has a past history of tax litigation and the tax assessment on same issues in preceding years has been affirmed in appellate proceedings, or (b) where the Supreme Court or the jurisdictional High Court has decided same issue in tax department's favour, and (c) the tax demand is based on credible evidence collected in a search or survey operation carried out against the taxpayer.
3. *Lower than 20% payment* - Likewise, the Circular provides that in cases where the AO is of the view that a payment of less than 20% of the disputed tax demand is warranted for reasons like the taxpayer has a past history of tax litigation and the taxpayer's appeal on same issues in preceding years has been decided in his favour by the appellate proceedings, or (b) where the Supreme Court or the jurisdictional High Court has decided on same issue in taxpayers favour, in such cases the AO shall refer the matter to the Commissioner of Income Tax, who shall, based on the relevant facts, decide the quantum/proportion of the demand that the taxpayer should pay in lumpsum for granting stay of the balance.

The Circular further provides that in case where the AO directs the taxpayer to pay 20% of the tax demand and the taxpayer still feels aggrieved he can file a review petition before the Commissioner of Income Tax against such directions. Thus, it is possible to obtain a stay, subject to payment of lower than 20% of the total tax demand, if any of the above twin circumstances of past precedents exist.

Earlier Instruction No. 1914 dated 2-2-1993

3.2 Other circumstances for grant of stay by higher authorities (like CIT or CIT(A)) are prescribed in an earlier Instruction No. 1914 dated 2.2.1993. The said Instruction empowers the superior authorities to grant stay in cases where an unreasonably high pitched assessment order has been passed or the taxpayer would face genuine hardship if made to pay the tax demand.

A combined reading of the Circular dated 29.2.16. and Instruction No. 1914 brings out four circumstances under which a taxpayer may be granted a stay against payment of tax demand.

A question arises whether the Circular dated 29.2.16. has superseded the earlier Instruction no. 1914 dated 2.2.1993 *in toto* because of the reason that it was later in time and provides a new procedure for streamlining the procedure for granting of stay. The said question assumes significance because of the fact that the earlier Instruction No. 1914 envisaged broader circumstances under which a stay could be granted, whereas the Circular dated 29.2.2016 provides that a taxpayer would be entitled to deposit less than 20% of the disputed tax demand only where addition on the same issue has been deleted by the appellate authorities in the earlier years, or where the decision of the Hon'ble Supreme Court or the jurisdictional High Court was in favour of the taxpayer.

The above question has recently been dealt with by the Hon'ble Karnataka High Court in *Flipkart's case*. [247 Taxman 555 (2017)]. The Hon'ble Court has negated the tax department's stand that Instruction No. 1914 has been superseded by Circular dated 29 February 2017. Therefore, the superior authorities

continue to have power to grant stay in cases where unreasonably high pitched assessments have been made and also in cases where taxpayer would suffer genuine hardship, unless a stay is granted. Circular dated 29.2.16. itself states that the Circular is in partial modification of Instruction No. 1914. Accordingly, without a doubt Instruction No. 1914 holds good till date and so do the powers of the superior authorities to intervene in matters of stay of demand when the unreasonably high pitched assessment have been made or in cases where genuine financial hardship would be caused to taxpayer by payment of tax demand.

Conclusion

4. To conclude, a taxpayer who is unable to pay 20% of the tax demand for obtaining a stay against the balance till the dispute in question is resolved by the Commissioner Appeals he can make out a case for lesser or no payment, on all or any of the following grounds:

- (a) the addition on the same issue has been deleted by the appellate authorities in earlier years,
- (b) the decision of the Hon'ble Supreme Court or the jurisdictional High Court was in favour of the taxpayer,
- (c) the assessment order is high pitched
- (d) genuine financial hardship would be caused if he were to be made to pay taxes.

Lastly, and more importantly, a taxpayer who is faced with a mammoth tax demand must Stay Strong!

■ ■