

Provisional Attachment of Refund Under Section 281B



The residents doing business with the non-resident is required to withhold tax under Section 195 of the Income-tax Act. The non-resident files its Indian income tax return to claim the refund of excess tax withheld. However, the Assessing Officer provisionally attached the refund by applying the provisions of Section 281B of the Act, with the presumption that demand would arise or reduction in refund after assessment under Section 143(3) of the Act. This article analyses the legal framework of provisional attachment of refund under Section 281B of the Act.

Presently business opportunity in India is more than any other country in the world. Hence, many multinationals have invested in India. The incidence of carrying business in India, attract income tax implications, making the non-resident liable to follow the provisions of advance tax and withholding tax. Hence, the residents doing business with the non-resident is required to withhold tax under Section 195 of the Income-tax Act (the Act). It so happens that the tax withheld on the income of non-resident is much more than the actual tax liability of the non-resident. Hence, the non-resident files its Indian income tax return to claim the refund of excess tax

withheld. However, the Assessing Officer after processing the return under Section 143(1) of the Act, do not issues refund; but provisionally attached the refund by applying the provisions of Section 281B of the Act, with the presumption that demand would arise or reduction in refund after assessment under Section 143(3) of the Act. This action by the Assessing Officer has raised concern amongst the non-residents. This article analyses the legal framework of provisional attachment of refund under Section 281B of the Act.

Legal Analysis

Section 241 of the Act: The omitted Section 241 of the Act, enabled the



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Assessing Officer to withhold refund with the prior approval of Chief Commissioner or Commissioner. Before its omission Section 241 of the Act reads as under:

“Power to withhold refund in certain cases

Where refund of any amount becomes due to the assessee as a result of an order under this Act or under the provisions of sub-section (1) of Section 143 after a return has been made under Section 139 or in response to a notice under sub-section (1) of Section 142 and the Assessing Officer is of the opinion, having regard to the fact that—

- (i) a notice has been issued, or is likely to be issued, under sub-section (2) of Section 143 in respect of the said return; or*
- (ii) the order is the subject-matter of an appeal or further proceeding; or*
- (iii) any other proceeding under this Act is pending, that the grant of the refund is likely to adversely affect the revenue, the Assessing Officer may, with the previous approval of the Chief Commissioner or Commissioner, withhold the refund till such time as the Chief Commissioner or Commissioner may determine.”*

Section 241 of the Act, was omitted by the Finance Act, 2001 with effect from 01 June, 2001

Refund determined under Section 143(1) of the Act, cannot be termed as “property” within the meaning of Section 281B of the Act. ☺

merely by saying that *“It is proposed to omit the said section to withdraw the powers conferred upon the Assessing Officer to withhold the refund”*.

Section 281B of the Act: Section 281B of the Act was inserted by the Taxation Laws (Amendment) Act, 1975, with effect from October 01, 1975. Provisions of Section 281B read as under:

“Provisional attachment to protect revenue in certain cases

- (1) 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, Commissioner, Director General or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.*

Explanation.— For the purposes of this sub-section, proceedings under sub-section (5) of Section 132 shall be deemed to be proceedings for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment.

- (2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):*

Provided that the Chief Commissioner, Commissioner, Director General or

Rule 26 shows that the Assessing Officer, who himself is in possession/custody/control of a “property” cannot issue an attachment order, prohibiting himself from making payment to the assessee because it is not possible to do so following the procedure laid down in the Rule. ☺

Director may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years:

.....
.....”

[Emphasis supplied]

From the perusal of the aforesaid provisions of Section 281B of the Act, it is important to note the following factors:

- (i) There must be existence of opinion of the Assessing Officer that for the purpose of protecting the interest of the revenue, it is necessary to provisionally attach any property belonging to the assessee in the manner provided in the second schedule.
- (ii) Previous approval of the Chief Commissioner, Commissioner, Director General or Director (i.e. the prescribed authority) has to be obtained by an order in writing to attach provisionally any property belonging to the assessee.

In this regard it is important to note that in the year 2001 and earlier years, the Act contains both Section 241 and Section 281B of the Act. Attachment of refund was specifically being dealt in Section

241 and Section 281B of the Act, provides for attachment of other movable and immovable properties. As stated earlier, Section 241 of the Act was omitted with effect from 1st June, 2001 and after its omission there was no such amendment to Section 281B to cover the provisions of Section 241 of the Act. Hence, after omission of Section 241 of the Act, refund cannot be withheld by taking recourse to Section 281B of the Act, which does not provide for provisional attachment of refunds.

Moreover, as per the provisions of Section 281B of the Act, it is mandatory to obtain previous approval of the prescribed authority, by an order in writing, for provisionally attaching any property belonging to the assessee. In this regard, it has now become important to decide whether refund can be termed as “property” within the meaning of Section 281B.

In this regard, it is important to refer to Rule 4 (Mode of recovery) of Part I of the second schedule of the Act. Rule 4 of second schedule reads as under:

“4. If the amount mentioned in the notice is not paid within the time specified therein or within such further time as the Tax Recovery Officer may grant in his discretion, the Tax Recovery Officer shall proceed to realise the amount by one or more of the following modes :—

(a) by attachment and sale of the defaulter’s movable property;

Attachment permitted in terms of Section 281B of the Act, has to be one as provided in the Rules 20, 21, 22 and 26 of Part II of the second schedule of the Act. ☺

(b) by attachment and sale of the defaulter’s immovable property;

(c) by arrest of the defaulter and his detention in prison;

(d) by appointing a receiver for the management of the defaulter’s movable and immovable properties.”

[Emphasis supplied]

From the perusal of the above rule, it is important to note that movable property can be attached, only when amount mentioned in the demand notice is not paid within the specified time and movable property could be sold for the recovery of amount mentioned in the notice.

However, in the present case, the attachment is of refund amount due to the assessee and there is no ascertained demand by the Income Tax authorities. Further, attachment should be of the property which could be sold. However, in the present case it is not possible to sale the refund determined vide intimation under Section 143(1) of the Act. Hence, refund determined under Section 143(1) of the Act, cannot be termed as “property” within the meaning of Section 281B of the Act.

Moreover, Rule 26 (Attachment and sale of movable property – Debt and shares, etc.) of Part II of the second schedule provides for attachment of debts and shares, etc. Sub-rule (1) of Rule 26 of the second schedule of the Act, reads as under:

“(1) In the case of—

(a) a debt not secured by a negotiable instrument,

(b) a share in a corporation, or

(c) other movable property not in the possession of the defaulter except property deposited in, or in the custody of, any court,

the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt—the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Tax Recovery Officer;

(ii) in the case of the share—the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other movable property (except as aforesaid)—the person in possession of the same from giving it over to the defaulter.”

From the reading of Rule 26, the issue that arises is whether, the property, to be attached should be with someone else, other than the person exercising the power of attachment or whether such a person could attach something, which is in his own possession, command or custody. In this regard it has now become important to define the word “attachment”. The word “attachment” has been defined as “taking into custody of the law the person or property of one already before the court; a writ issued at the institution or during the progress of an action commanding the Sheriff or other proper officer to attach the property, right, credits or effects of the defendant to satisfy the demands of the plaintiff” [**Samta Construction Vs. Pawan Kumar Sharma & Ors. (1999) 155 CTR 405 (MP)**]. It postulates property, being in the possession of some person, other than the person, who makes the attachment.

The above analysis of Rule 26 shows that the Assessing Officer, who himself is in possession/

F or the purpose of attachment the property should be in the possession of the person other than the person exercising the power of attachment. ”

custody/control of a “property” cannot issue an attachment order, prohibiting himself from making payment to the assessee because it is not possible to do so following the procedure laid down in Rule 26.

Further, attachment permitted in terms of Section 281B of the Act, has to be one as provided in the Rules 20, 21, 22 and 26 of Part II of the second schedule of the Act. These rules speak as under:

- (i) The Tax Recovery Officer shall furnish a warrant to the person, authorised to make an attachment with necessary particulars (rule 20);
- (ii) The authorised office will serve the warrant to the defaulter (rule 21);
- (iii) The authorised officer shall proceed to attach the property of the defaulter if, after service of the copy of warrant, the amount is not paid (rule 22).

The statutory requirements, as provided in these rules, are apparently not compatible with the manner of self-imposed prohibition by the Assessing Officer. None of these requirements can be fulfilled when the refund due to an assessee is attached by the Assessing Officer himself if there is no demand in existence. And if the procedure laid down in Rule 26 cannot be complied with or is not complied with, attachment under Section 281B of the Act is not possible.

Conclusion:

The above analysis makes it ample clear that refund cannot be provisionally attached under Section 281B of the Act. Since, refund could have specifically been attached under Section 241 of the Act, after omission of which recourse could not be made to Section 281B of the Act, which was not amended in line with the provisions of erstwhile Section 241 of the Act. Further, for the purpose of attachment the property should be in the possession of the person other than the person exercising the power of attachment. However, the refund is already in the possession of the Assessing Officer, who himself is exercising the power of attachment. Moreover, the attachment should be of property which could be sold. However, it is not possible to sale the refund determined by the Assessing Officer. ■