

Executive Summary

Provisional Attachment of properties prior to the completion of assessment is a critical tool with the Income Tax Department to facilitate recovery of tax demands from those assessees who attempt to evade tax and thwarting collection of tax demand by using unfair means and to prevent accumulation of arrears of tax demand. The provision of Provisional Attachment under Section 281B of the Income Tax Act 1961 (Act) was introduced in the Taxation Laws (Amendment) Act, 1975 with a view to protecting the interest of revenue. If the Assessing Officer (AO) of the Income Tax Department during the pendency of assessment proceedings is of the opinion that the concerned assessees may *thwart the ultimate collection of tax demand*, he invokes this provision to protect the interest of revenue.

There has been a steady increase (₹ 5,75,340 crore in FY 2013-14 to ₹ 11,14,182 crore in FY 2017-18) in the accumulation of arrears of tax demand during the past several years and the percentage of tax demand termed as 'difficult to recover' (categorised by the Department) over total arrear tax demands continued to be abnormally high ranging from 96 *per cent* in FY 2013-14 to 98.2 *per cent* in FY 2017-18. Hence, this topic was selected to assess the robustness and effectiveness of the procedures in place in the ITD with regard to provisional attachment.

A Subject Specific Compliance Audit (SSCA) on the subject was undertaken with a view to examining whether there are any policy or procedural gaps in the extant provisions of Section 281B of the Act and examining the extant of compliance or consistent application of the provisions of Section 281B in individual cases.

The SSCA covered 350 Provisional Attachment orders issued during the Financial Years 2017-18 to 2019-20 by 72 Assessing Officers having assessment charges under the jurisdiction of the 18 Principal Commissioners of Income Tax (Central). Out of the above 350 cases, the scrutiny assessments had been completed in 291 cases as of July 2022, raising a net tax demand aggregating to ₹ 12,621.23 crore (comprising tax, interest and penalty). Out of this, in 103 cases, an amount of ₹ 407.09 crore (3.22 *per cent*) had been recovered (July 2022). The balance tax amounting to ₹ 12,214.14 crore was outstanding for various reasons viz. stay of demand, appeals etc.

We observed several issues viz. there was no prescribed format for issuing Provisional Attachment orders resulting in missing essential information such as estimated tax liability, validity period and not providing assessees with the option of furnishing Bank Guarantee in *lieu* of the attached property etc. from the Provisional Attachment orders which were not in conformity with the

provisions/rules. The AOs were not adequately establishing and documenting the basis/grounds for invoking these provisions and in the absence of documentation, Audit could not draw assurance whether the applicability of the provisions was justified in those cases. Notification of Provisional Attachment orders to Registering Authorities was found to be inadequate, which eventually defeated the purpose of such notification in a few cases. As per available records, the AOs did not comply with the Board's instructions of ascertaining details of all assets in the possession of assesseees that could be considered for provisional attachment. In the majority of the cases for which records were made available, the list of assets prepared by the Investigation Wing as reflected in the Appraisal Report was not shared with Audit. Therefore, Audit could not verify the role of the Investigation Wing in supplementing the efforts of the AO in selection of appropriate property for provisional attachment. Audit also noticed deficiencies in respect of list of assets provided in the Appraisal Report which resulted in incorrect attachment of a property. The process of identification of assets was found to be deficient, thereby reducing the effectiveness of the provisional attachment. In certain cases, the savings/current bank accounts of assesseees were provisionally attached by the jurisdictional AOs without establishing that they were attached only as a last resort. The AOs did not establish evaluation of property of assesseees for their ownership requirements as well as for their non-encumbrance status before considering them for provisional attachment in majority of cases. Sufficiency of properties attached could be analysed only in certain cases, as proposals for Provisional Attachment under Section 281B did not indicate either estimated tax liability or value of the attached property or both. Audit also observed that the validity period of several orders under Section 281B lapsed either before the tax demands raised were fully recovered or even before completion of assessments, which was in violation of the prescribed provisions. We further observed that in certain cases, the orders under Section 281B were extended with a time gap ranging between two and 166 days from the date of expiry of previous order under Section 281B; Audit could not ascertain whether the concerned assessee had disposed off the attached property in the intervening period when there was no provisional attachment.

We also observed that absence of enabling provisions under Section 281B to exclude periods of pendency of assessee's application before the Settlement Commission or during a Court stay against an assessment while reckoning the validity period of order under Section 281B (as available prior to 01/10/2014) or during the assessee's appeal, has led to a situation where the interest of revenue remain unprotected during the periods of appeal and injunction/stay

granted by the Courts or when cases are pending before the Settlement Commission.

Audit further observed that the time gap from the date of search to the date of initial order under Section 281B ranged between 208 days and 1220 days. Absence of a prescribed time limit for issuing order of provisional attachment has an inherent risk of the assessee alienating property(ies), which are being considered for attachment, in the intervening period in case of abnormal delay in issuance of orders under Section 281B. Further, provisional attachment orders not being issued within a reasonable time after the date of search proceedings could result in a perennial but indefinite risk hanging over the assessee, which is susceptible to misuse. Audit also noticed certain cases wherein the assessee was able to dispose off the attached property inspite of notification of the order under Section 281B to the concerned Registering authority.

Audit noticed that Notification of Provisional Attachment orders to Registering Authorities was found to be inadequate, which eventually defeated the purpose of such notification in a few cases.

Overall, the tax demands raised on completion of assessments continued to be in arrears and the provisional attachment of the assessee's property did not have a significant impact on actual recovery of tax *post*-assessment.

Thus, the primary objective of provisional attachment of properties of protecting the interest of revenue and to prevent further accumulation of tax arrears largely remained unfulfilled. Therefore, there is a need to revisit the provisions/rules relating to provisional attachment under Section 281B and strengthen the extant procedures/mechanism so that the intent of the legislation does not get defeated.

Based on the audit findings, we recommend that:

Recommendation No. 1:

The CBDT may prescribe a format for the order under Section 281B to include all the elements of essential information required for Provisional Attachment to ensure consistency and legal sustainability. A sample format suggested by Audit is enclosed (Appendix 9) for consideration by the CBDT.

In response, the Ministry stated (July 2022), "The provisions of Section 281B of the Income Tax Act, 1961 do not give any power to prescribe a form or format of the order. Therefore, any such proforma would only be a non-statutory proforma. However, the suggestion of the audit is noted and the proforma suggested by audit will be considered."

The provisions of Section 119(1) of the Act provide that the Board may, from time to time, issue orders, instructions and directions to other income tax authorities as it may deem fit for the proper administration of this Act. Thus, the CBDT may consider prescribing a suitable format of the provisional attachment order under Section 281B, so as to ensure uniformity in the application of the extant provisions, reducing arbitrariness, increasing transparency and facilitating the Assessing Officer (AO) as well as assessee for proper compliance to the orders. Audit will await the final outcome of action taken in this regard.

Recommendation No. 2:

The CBDT may frame specific criteria for opinion formation, perhaps with illustrative examples, and clarify “Exceptional circumstances” to facilitate the AOs in initiating Provisional Attachment proceedings in an effective, transparent and legally sustainable manner.

In response, the Ministry stated (July 2022) inter alia, that Provisional attachments are made as per the provisions of Section 281B of the Income-tax Act which is as under: "281B (1) – [or for imposition of penalty under Section 271AAD where the amount or aggregate of amounts of penalty likely to be imposed under the said section exceeds two crore rupees]¹". Hence, whenever the Assessing Officer, being a quasi-judicial authority is of the opinion that to protect the interests of revenue provisional attachment is needed, such attachment is made with the prior approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner. Principal Director General or Director General or Principal Director or Director, as the case may be. The legislative intent of the provision is that by provisionally attaching the assets for the specified time in suitable cases, the assessee is prevented from thwarting the ultimate collection of tax demand. As there are elaborate checks and balances embedded in the provisions itself, any further restriction on the action of AO is likely to defeat the legislative intent. Further, determining the exact tax liability at the stage of provisional attachment may not be possible and also may result in unnecessary litigation.

Audit noted that Section 281B was amended by the Finance Act, 2021 with effect from 01/04/2021 to include a specific circumstance with reference to penalty provisions under Section 271AAD. Through this amendment, the Act has facilitated the AOs to invoke the provisions of Section 281B in one of the defined circumstances, which is partially in line with the Audit recommendation. However, the fact remains that the term ‘Exceptional

¹ Sub-Section (1) of Section 281B was amended by the Finance Act, 2021 with effect from 01/04/2021.

circumstances' referred to in the Board's Instructions No.08 dated 02/09/2004 is yet to be defined or clarified, e.g. through examples, so as to fully achieve the intended objectives of the extant provisions. As a result, the provisions of Sections 281B were invoked in the majority of audited cases on the basis of standard reasons viz., 'protecting the interests of revenue' and 'likelihood of substantial tax demands after assessments' by the AO which were not in consonance with the Board's instructions and were also not consistent with the Bombay High Court's order of September 2019 that such powers cannot be exercised merely by repeating the phraseology used in the Section and recording the opinion of the officers passing such orders that he was satisfied for the purpose of protecting the interest of revenue, it was necessary to do so. Audit is of the opinion that broadly clarifying or illustrating the exceptional circumstances (as suggested by Audit in Appendix 14 of the Report) would facilitate the AOs in forming the opinion for invoking the provisions of provisional attachment and it would also be consistent and legally sustainable. The Ministry may reconsider its reply.

Recommendation No.3:

(i) The CBDT may consider issuing a comprehensive SOP for provisional attachment, including notification of Provisional Attachment order under Section 281B to the concerned authorities to ensure uniformity in implementation of relevant provisions of the Act and to protect the revenue of the Government.

In response, the Ministry stated (July 2022) that the CBDT has issued various instructions e.g., Instruction No. 1884 dated 07/06/1991, Instruction No. 8 dated 02/09/2004 and Instruction in F. No.404/22/2004-ITCC dated 05/11/2004. The legislative intent of the provision is that by provisionally attaching the assets for the specified time in suitable cases, the assessee is prevented from thwarting the ultimate collection of tax demand. As there are elaborate checks and balances embedded in the provisions itself, any further restriction on the action of AO is likely to defeat the legislative intent.

The Ministry reply is not in line with the audit recommendation, since it never intended putting restrictions on the AO. Rather, issuing an SOP would facilitate the AO in adequately complying with the provisional attachment order adequately. As could be seen in more than 50 per cent of audited cases (refer para 3.4.1), the notification to the concerned Authorities was either made without specific directions for making note of the provisional attachment in their records or varying directions were given to the notified authorities in respect of provisionally attached property resulting in non fulfilment of the objective of protecting the interests of revenue to that extent. Further, the

CBDT may consider reiterating instructions and monitor compliance to the provisions and instructions. The Ministry may reconsider its reply.

(ii) The CBDT may make it mandatory to notify the provisional attachment orders under Section 281B to the concerned Authorities, including CERSAI, with specific directions to the Authorities for making note of the provisional attachment and to monitor the assessee's compliance to the directions issued therein.

In response, the Ministry stated (July 2022) that in this regard, instruction in F. No. I (380)/DIT(R)/SARFAESI/17-18/669 dated 06/09/2017 has already been issued by DIT (Recovery & TDS).

Audit noted that though the instruction was issued by the Board in September 2017, it was not complied with by the AOs, particularly in the case of notifying CERSAI. Audit further noted that where the AOs notified the other concerned Authorities, complete details and action proposed to be taken by those Authorities were often not communicated in a timely manner. Furthermore, one of the AOs replied that the said Board's instructions were not applicable to provisional attachment. Thus, the CBDT may reiterate the extant instructions, clarifying the applicability to provisional attachments and also ensure that the extant instructions are being complied with.

Recommendation No.4:

The CBDT may enforce the extant instructions for enquiry into all assets of the assessee during search and seizure by devising or suggesting appropriate guidelines for selecting the appropriate assets for provisional attachment to ensure maximum coverage of likely tax demand and thereby achieve optimum protection of revenue, as intended. Further, such enquiry should be appropriately documented.

In response, the Ministry stated (July 2022) that the Departmental officers are bound by the instructions of the Board.

The Ministry's reply was not specific to the audit recommendation. Audit observed that as seen from the documents, the AOs are not complying with the Board's instructions of September 2004 for ascertaining the details of all assets in the possession of assessees that could be considered for provisional attachment. Further, the Investigation Wing also did not identify details of assets that were in the possession of the assessee at the time of search, thereby failing to supplement the efforts of the AO in selection of appropriate property for provisional attachment. Further, the CBDT may reiterate the relevant instructions for better compliance. The Ministry may reconsider its reply.

Recommendation No.5:

The CBDT may bring out specific guidelines to facilitate AOs in ascertaining details of and record all the property(ies) available with the assessee to facilitate selection of appropriate and sufficient property for the purpose of maximising the interest of revenue.

In response, the Ministry stated (July 2022) that the CBDT has already issued Instruction No.8 of 02/09/2004. However, the suggestion of the Audit is noted and will be examined further.

Audit will await the final outcome of action taken in this regard.

Recommendation No.6:

The CBDT may devise an appropriate mechanism for ensuring the verification of ownership status of the property to be attached. If enquiries have been made from the concerned registering or other authorities for confirmation of ownership/ non-encumbrance, in such cases where properties are sold or transferred shortly before the issue of the attachment order, necessary penal action against the assessee may need to be considered.

Recommendation No.7:

The CBDT may ensure compliance to the provisions of Section 281B of the IT Act and the CBDT's Instruction of September 2004 regarding adequacy of provisional attachment of a property by determining its Fair Market Value (FMV), where found necessary, for ensuring appropriate protection of interests of revenue.

In response, the Ministry stated (July 2022) that the Departmental officers are bound by the Provisions of Income-tax Act. 1961 and instructions of the Board.

Though there are clear provisions in the Act and instructions of the Board, the AOs are not implementing the relevant provisions and following the instructions of the Board. Thus, Audit is of the opinion that there is a need for the CBDT to reiterate the instructions and also strengthen the monitoring mechanism to ensure compliance to the provisions of the Act/Board's instructions effectively with regard to adequacy of provisional attachment of a property.

Recommendation No.8:

The CBDT may:

- (i) Enforce implementation of extant provisions relating to validity period of order under Section 281B to ensure that the cases remain**

continuously protected till the tax demand(s) on assessment is fully recovered.

In response, the Ministry stated (July 2022) that the Departmental officers are bound by the provisions of the Income-tax Act, 1961. However, the suggestion of the Audit is noted and will be examined further.

Audit will await the final outcome of action taken in this regard.

(ii) Consider initiating measures for excluding the validity period of order under Section 281B during the period of pendency of cases on account of Settlement Commission/Court stay or injunction against assessments or appeals against assessments.

In response, the Ministry stated (July 2022) stated that it is important to consider that the order under Section 281B of the Act is a preemptive measure to safeguard the interest of Revenue during the pendency of assessment or re-assessment proceedings. Since the measure is harsh on the taxpayers, the validity of an order under Section 281B of the Act is only 6 months (extendable to a maximum of two years). Therefore, excluding the periods as mentioned in the suggestion from the validity of order under Section 281B of the Act will cause severe grievances to the taxpayers as the tax demand against which a property has been provisionally attached is pending finalization. Therefore, this suggestion is not feasible.

The Ministry's primary objective is to protect the interest of revenue as stated in the Board's Instruction No. 1884/1991 dated 07/06/1991. Further, the aforesaid provisions were already in place before October 2014. There is a need to address the issue judiciously so as to protect the interest of revenue without being unduly harsh on the tax payers. The Ministry may reconsider its reply.

(iii) Consider prescribing a reasonable time limit within which provisional attachment order is issued, especially in search-related cases.

In response, the Ministry stated (July 2022) that it is pertinent to note here that provisional attachment under Section 281B of the Act is intended to be resorted to for tax collection in some cases to safeguard the interest of Revenue. It cannot be prescribed as the general method of tax recovery. Whether a provisional attachment under Section 281B of the Act is required has to be ascertained by the Assessing Officer after due approval from the authorities. Since the demand against which a property has to be provisionally attached is pending finalization, prescribing time limits for such attachment will be detrimental to the taxpayers and result in grievances.

Audit is of the view that timely action in initiating the process of provisional attachment, especially in search related cases, is necessary to prevent the assessee from thwarting the ultimate collection of demand by attempting to dispose of the property and ensure protection to the interest of revenue. Instances were noticed in Audit that due to considerable gap between the date of search and date of initial provisional attachment order, the concerned assesseees were able to dispose of their property(ies). Audit also noted that in 43.3 per cent of the cases, where assessments were completed, initial orders under Section 281B were issued within two months before the completion of assessments with the resultant risk of assessee(s) disposing of the property(ies) and thwarting the tax recovery process. Further, not prescribing a time limit results in a perennial, but indefinite risk hanging over the assessee, which is susceptible to misuse.

Therefore, the CBDT may consider prescribing judiciously a reasonable time limit for initiating the process of provisional attachment from the date of search to ensure maximum protection of interest of revenue, as intended by Section 281B of the Act, and also to reduce the possibility of misuse.

Recommendation No.9:

The CBDT may ensure compliance of extant instructions of the CBDT in this regard so as to monitor the quality of assessment done by the AO.

Recommendation No. 10:

The CBDT may consider investigating from a penal perspective, changes in ownership after the issue of the attachment order, to evade the consequences thereof including any role of the registering authorities.

