

CHAPTER 3

Processing, Execution and Impact of Provisional Attachment orders

This chapter discusses the detailed audit findings on the outcome of provisional attachment as well as the processes envisaged for Assessing Officers (AOs) regarding forming an opinion to provisionally attach property of an assessee, issuance of the provisional attachment order and notification of the attached property to the concerned Authorities⁹ with whom the assessee's property is registered.

Audit of the provisional attachment cases involved an evaluation from both an outcome and a process perspective. While the outcome was determined by the extent of recovery of tax dues, the process rigour was evaluated by the extent of adherence to envisaged provisions and further by the extent of its documentation on record. While the extent of adherence to processes partly influenced the ultimate outcome, Audit also observed cases where tax dues were recovered even without full adherence to envisaged processes.

Audit observed that there was no prescribed format for the Provisional Attachment orders. Due to absence of a prescribed format, the Provisional Attachment orders varied widely both in their format and extent of information. Out of the 350 audited cases, in 47 cases (14.3 *per cent*), there was no reference to prior approval of Pr.CIT (Central). The validity period was not mentioned in 128 cases (36.6 *per cent*); in none of the audited cases, estimated tax liability was recorded. Also, the assessees were not provided with the option of furnishing Bank Guarantee in *lieu* of the attached property in any of the cases, which was not in conformity with the rules.

Audit analysed records¹⁰ relating to 350 provisional attachment cases and observed that in only 23 cases (6.6 *per cent*), there was adequate documentation to provide assurance that the respective AOs had formed their opinion in accordance with the conditions prescribed by the Board *viz.*, 'reasonable likelihood of the recovery becoming difficult due to 'inadequacy of assets' or 'under exceptional circumstances'. In 208 cases (59.4 *per cent*), standard reasons *viz.*, 'substantial tax demands likely' and 'protection of interests of revenue' were used to invoke provisions of Section 281B. As pointed out in the Bombay High Court order of September 2019, such powers (under Section 281B) can not be exercised merely by repeating the phraseology used in the Section and recording the opinion of the officer

⁹ Authorities empowered under the respective Acts to allow the assessee to dispose of the registered property by way of sale/transfer/gift or to mortgage the same for availing loans there against.

¹⁰ AO's Proposals under Section 281B, Order of approval from Pr.CIT(Central) and order under Section 281B issued by the AO & any file notings.

passing such order that he was satisfied for the purpose of protecting the interest of revenue, it was necessary to do so. In the remaining 119 cases (34 per cent), various other reasons were attributed which were not prescribed by the Board. As such, the basis for forming an opinion to invoke the provisions of provisional attachment was not being adequately established, since sufficient documentation was not brought on record to establish such an opinion, as prescribed.

We observed that in 346 out of 350 audited cases, the order issued under Section 281B was duly notified to the concerned Registering Authorities. However, the notification was inadequate in 189 cases. As a result, the objective of protecting the interests of revenue through provisional attachment remained under achieved. We further observed that in none of the 350 audited cases, the orders under Section 281B were notified to CERSAI. Since the provisional attachment has the potential to get converted into regular attachment *post*-assessment, in cases where the assessee actually defaults in payment of tax demand, notifying the order under Section 281B with CERSAI would ensure securing the interests of revenue at an early stage of the assessment proceeding. Failure on the part of AOs to notify the order under Section 281B to CERSAI had the risk of non-prioritisation of recovery of ITD tax arrears in cases where the attached property(ies) are to be liquidated for clearance of the assessee's secured and unsecured dues.

Audit findings both on the outcome of provisional attachment and on the processes followed are elaborated in the subsequent paragraphs and chapters of this report.

3.1 Outcome of Provisional Attachment

The process of provisional attachment is intended to serve as one of the tools for the AOs to ensure that the tax demands raised *post*-assessment are recovered from the concerned assessee. According to Section 156 of the Act, consequent upon passing of any order¹¹ under the Act, the AO shall serve a notice of demand on the assessee in the prescribed form specifying the sum payable. The assessee is required to pay the amount of tax/ interest/ penalty demand raised in the said notice within the time limit specified therein.

From an outcome perspective, Audit examined the post-assessment status of the audited sample of 350 provisional attachment cases. Scrutiny assessments were completed in 291 cases as of July 2022 and a net cumulative tax demand of ₹ 12,621.23 crore was raised after considering the effect of rectification orders due to enhancements/ reductions/appeals etc. Of these, based on information furnished to Audit, recoveries of tax have been effected either

¹¹ Order/s passed under Sections 143(3), 147, 153A, 153C, 154, 155, etc. of the Act.

fully/partially in only 103 cases amounting to ₹ 407.09 crore¹² (July 2022), which represented 3.22 per cent of the net tax demand and the balance tax (₹ 12,214.14 crore) was outstanding for various reasons viz. stay of demand, appeals etc. Further, five assesseees accounted for 82.4 per cent (₹ 335.67 crore) of the recoveries from these 103 assesseees. The Commissionerate-wise post assessment details of these 291 cases are given in Table No. 03 below:

Table No. 03: Details of 281B cases where assessments were completed, and tax demand raised and recovery thereagainst					
Pr.CIT jurisdiction (No. of AOs)	No. of scrutiny- completed 281B cases	Cumulative Tax demands raised for all AYs combined (₹ in crore)	Regular taxes paid		Balance tax outstanding (₹ in crore) (As of March 2022)
			No. of cases	Amount (₹ in crore)	
Pr.CIT (Central)-1 Delhi (03)	7	10.08	1	0.5	9.58
Pr.CIT (Central)-2 Delhi (04)	30	3,442.35	10	204.75	3,237.6
Pr.CIT (Central)-3 Delhi (06)	27	429.54	3	1	428.54
Pr.CIT (Central), Bhopal (02)	24	45.8	13	5.83	39.97
Pr.CIT (Central)-1, Kolkata (03)	7	150.3	2	0.13	150.17
Pr.CIT (Central)-2, Kolkata (01)	6	37.14	0	0	37.14
Pr.CIT (Central)-1, Mumbai (04)	9	171.66	1	86.85	84.81
Pr.CIT (Central)-3, Mumbai (05)	11	322.25	4	23.32	298.92
Pr.CIT (Central)-4, Mumbai (04)	16	278.16	3	19.23	258.93
Pr.CIT (Central)-1, Chennai (06)	31	2,158.78	12	3.79	2,155.00
Pr.CIT (Central)-2, Chennai (04)	25	2,353.89	9	11.05	2,342.84
Pr.CIT (Central). Kochi (02)	5	23.7	2	4.31	19.39
Pr.CIT (Central), Bengaluru (10)	27	475.46	15	19.59	455.87
Pr.CIT (Central), Hyderabad (06)	25	756.29	12	8.04	748.25
Pr.CIT (Central), Visakhapatnam (01)	5	51.93	5	13.38	38.55
Pr.CIT (Central), Ahmedabad (05)	25	1,572.80	8	4.36	1,568.44
Pr.CIT (Central), Rajasthan (01)	3	239.7	3	0.96	238.74
Pr.CIT (Central), Chandigarh (02)	8	101.4	0	0	101.4
Total (18 Pr.CsIT – 70 AOs)	291	12,621.23	103	407.09	12,214.14

¹² In 103 cases having cumulative tax demand at ₹ 6,531.33 crore & balance outstanding after this payment was ₹ 6124.24 crore.

Thus, from an outcome perspective, the provisional attachment of properties envisaged to protect the interests of revenue remained largely unfulfilled as the rate of recovery of tax demands was low. Audit, of course, notes that the reasons for non recovery of tax demands would go beyond the use of provisional attachments alone.

Audit findings emerging from evaluation of the provisional attachment orders from a process perspective are discussed in the subsequent paragraphs.

3.2 Format of Provisional Attachment order

According to Section 281B (1) of the Act, the Provisional Attachment order under Section 281B is required to be issued in writing by the AO, during the pendency of the assessment proceedings, for provisionally attaching the property of the assessee, after obtaining prior approval from the prescribed authority¹³ of ITD. Though the provisions of the Act do not prescribe a format for the order under Section 281B, considering that the order under Section 281B serves as the only means of communication between the Income Tax Department and the assessee on the envisaged provisional attachment of property, in Audit's opinion, the order should ideally contain essential information such as reference to prior approval of the prescribed authority, validity period of the order, estimated tax liability and description of the property attached along with value thereof.

The audit findings relating to lack of consistency and absence of essential information in the Provisional Attachment orders are elaborated in the subsequent paragraphs.

3.2.1 Lack of consistency in the orders issued under Section 281B

Audit observed from the 350 audited cases that in the absence of a prescribed format, the orders under Section 281B issued by AOs of different jurisdictions varied widely in their format and in terms of consistency with reference to the extent of information contained in them.

(i) Provisional Attachment orders not containing detailed information:

Out of 350 orders, 300 Provisional Attachment orders issued by all the 18 Central Commissionerates, provided reference to the order number and/or date of the previous approval of the prescribed authority (Commissionerate-wise details vide **Appendix 5**). In 47 cases (vide **Appendix 6A**) of the remaining 50 cases (constituting 14.3 *per cent* of 350 cases) from 10 Central Commissionerates, there was no specific reference to the order number and date of such approval and in three cases pertaining to Central Circle-2,

¹³ The Principal Chief Commissioner of Income Tax (Pr. CCIT), Principal Commissioner of Income Tax (Pr.CIT), Principal Director General of Income Tax (Pr. DGIT) or Principal Director of Income Tax (Pr. DIT).

Bhubaneshwar under Pr.CIT (Central), Visakhapatnam charge, there was no details of such approval found to be on record.

Audit noted that there was no consistency in the provisional attachment order under Section 281B in terms of recording of prior approval of the prescribed authority. Audit further noted that even the provisional attachment orders issued by the same AO were not uniform in terms of requisite information viz. date and order no. of Pr.CIT's approval (**Appendix 6B**). Further, non-recording of the above details in the provisional attachment order rendered these orders non transparent to the assessee and also made them susceptible to legal disputes.

(ii) Variation in content of orders under Section 281B

Audit also analysed orders under Section 281B pertaining to six Central Commissionerates with reference to the extent of variation, as indicated in Table No. 04 below.

Table No. 04: Statement showing variations in orders under Section 281B issued in different Central Commissionerates				
Central Commissionerate charge	Total No. of orders issued under Section 281B	Details recorded in orders under Section 281B		
		Reference to order number and / or date of the prior approval of prescribed Authority	Period of Validity	Value of attached property
Pr. CIT (Central), Ahmedabad	33	33	33	0
Pr. CIT (Central), Bengaluru	30	26	14	06
Pr. CIT (Central), Chandigarh	22	22	22	0
Pr. CIT (Central)-3, Mumbai	11	11	11	01
Pr. CIT (Central)-4, Mumbai	16	10	0	07
Pr. CIT (Central)-2, Kolkata	6	0	0	0
Pr. CIT (Central), Visakhapatnam	5	0	0	0
Sub Total	123	102	80	14

It could be seen from the above table that there was a high degree of variability in the format of the orders under Section 281B adopted by AOs. It is significant to note that in Central Commissionerate charges of Kolkata-2 and Visakhapatnam, none of the elements of essential information was recorded in any of the orders under Section 281B issued, whereas within the charges of Pr.CIT(Central), Bengaluru and Pr.CIT(Central)-4 Mumbai, recording of elements of essential information in the orders under Section 281B were widely varying between different assessment charges. Thus, in the absence of requisite details in the provisional attachment order, the Department as well as the notified authority (refer Para 3.4.1) would not be able to effectively monitor the attached property(ies) to achieve the intended objectives of protecting the interest of revenue.

(iii) Provisional Attachment orders issued without indicating estimated tax liability

Audit observed that out of 350 audited cases, only in seven cases, the AOs had included detailed information *viz.* reference to approval of prescribed authority, validity period, value of property attached etc. in the provisional attachment orders but did not record the estimated tax liability.

One case is illustrated below (the other six cases are detailed in **Appendix 7**):

In the search assessment case of M/s C4 Pvt. Ltd. assessed in Central Circle-2(2), Mumbai under Pr.CIT (Central)-1, Mumbai charge, the assessment proceedings for AY 2011-12 were reopened as the assessee had invested ₹ 2.15 crore in immovable properties and did not file the return of income for the relevant AY. As the assessee had not declared the said investment either in the returns or in the replies to the notices issued to the assessee under Section 142(1), the AO, considering the likelihood of a large demand of tax liability and protection of revenue, issued an order under Section 281B recording the requisite details i.e. undisclosed income and possibility of large additions in the assessed income, the value of the property attached, reference to Pr.CIT (Central)'s approval and the validity date up to which the attachment shall remain in force.

Audit observed that though the AO had mentioned most of the elements of essential information, he did not mention the estimated tax liability in the provisional attachment order, which indicated some lack of transparency in the order from the assessee's view point. Eventually, the re-assessment was completed in December 2018 with no additions to the returned income, and no demand was outstanding. The revocation order for the removal of the provisional attachment of properties was issued in April 2019.

Thus, on account of non-recording of estimated tax liability in the order under Section 281B, while detailed information was included in the order, it was not ascertainable whether the properties those were attached were sufficient for protecting the interests of revenue in the instant case. This did not fulfil one of the basic requirements of the Board's instructions of September 2004.

In the remaining 343 audited cases, however, the information contained in the orders under Section 281B not only varied from order to order but also lacked complete details including estimated tax liability.

In the absence of the complete details in the order under Section 281B, the assessee would not be able to fully comply with the requirements of the Department, especially regarding recovery of tax demands, that would be raised on completion of assessments.

Reply of the Ministry was awaited (October 2022).

In respect of two cases¹⁴ in Central Circle-1(3), Bengaluru under Pr.CIT (Central), Bengaluru charge, a specific audit query (December 2020) was raised that on account of absence of essential information, order(s) under Section 281B were vague and did not adhere to the rule of law. The AO replied (December 2020) that a standard format of Provisional Attachment order was used without, however, elaborating as to how the order that was issued conformed to a standard format of order under Section 281B.

3.2.2 Non-recording of essential information in Section 281B order

From an assessee's perspective, the essential information in a Provisional Attachment order (order under Section 281B) comprising the validity period of the order, estimated tax liability, value of property being attached and the option to execute bank guarantee in *lieu* of the attached property needs to be mentioned.

(i) Non-recording of validity period: Recording of validity period in the order not only serves as vital information to the assessee but also sensitises the concerned authority(ies) to whom the order is notified¹⁵ of the period for which the restriction applies. Audit observed that the validity period of the order was recorded in 222 out of 350 cases and stipulating that the assessee was prohibited from disposing off the attached property during the period. However, out of the remaining 128 cases (36.6 *per cent*), Audit noted that the validity period was not mentioned in 78 cases, and in 50 cases, it was mentioned that the order shall remain valid until further orders, appearing to be open ended and arbitrary, contrary to the legal provisions. One such case is illustrated below:

In the search assessment case of Shri C1 for AY 2012-13 to 2018-19, assessed in Central Circle-2(4), Chennai under Pr.CIT (Central) – 2, Chennai charge, the initial order under Section 281B issued in August 2019, indicated only the name of the assessee and the brief description of the attached property without recording the other essential information including the validity period. While notifying the initial order under Section 281B, the AO had ordered the Bank Managers not to allow the transfer or withdrawal of the money available in the provisionally attached bank accounts, until further direction by the AO.

However, in the absence of recording of validity period of the said order under Section 281B, the direction to the notified authority appeared to be for an indefinite period which was in contravention of the extant provisions of the Act. The order under Section 281B lapsed in February 2020 as per the provisions of the Act and no further extension order was issued, which

¹⁴ M/s. A41 Ltd. and Shri T1

¹⁵ Sub registrar in case of immovable property and Bank authorities, etc. in case of movable properties.

indicated inadequate monitoring of provisional attachment. As a result, the demand of ₹ 3.62 crore raised on completion of scrutiny assessment in December 2019 still outstanding (July 2022) remained unprotected. Reply and the current status of balance tax recovery was awaited from the Ministry/CBDT (October 2022).

Thus, in the absence of specific mention of the validity period of order under Section 281B, there is a risk of inadequate monitoring of the provisional attachment, which may eventually result in defeating the purpose of such provisional attachment.

(ii) Non-recording of estimated tax liability and value of property attached: The Board's instructions of September 2004 specify that the AO shall attach the property of an assessee that would be sufficient to cover the estimated tax liability likely to arise on completion of assessment(s). From an assessee's perspective, it is important to record both the estimated tax liability and value of attached property in the order under Section 281B to demonstrate that the value of property attached is fairly comparable with the value of the tax liability likely to arise on conclusion of scrutiny assessment.

Audit observed that in none of the 350 cases, the estimated tax liability was recorded in the order under Section 281B that was communicated to the concerned assessee. However, in 176 cases, the AOs had indicated either the estimated tax liability or the quantum of undisclosed/unaccounted income in their proposals of provisional attachment under Section 281B to Pr.CsIT/other documents on record *viz.*, office order notings. Further, in cases where only the quantum of undisclosed/unaccounted income had been recorded in the proposals/office notings pertaining to provisional attachment/scrutiny assessments, Audit worked out the estimated tax liability at the basic tax rate of 30 *per cent* (excluding surcharge/cess/interest/penalty) to facilitate comparison of the same with the value of provisionally attached property(ies), wherever available. In cases where the value of the property and /or the estimate tax liability (or at least the quantum of undisclosed income) are not available in the notings, the basis on which the competent authority approved the proposal for provisional attachment is not at all clear.

The value of the property attached was not indicated in 318 cases (91 *per cent*) in the orders under Section 281B. In 32 cases (vide **Appendix 8**) constituting nine *per cent* of 350 audited cases, the value of the property was mentioned, but without recording the estimated tax liability in the related orders under Section 281B. As a result, comparison of the estimated tax liability with the value of property attached was not feasible, including from an assessee's perspective. One case is illustrated below.

In the search assessment case of Shri R20 for AYs 2007-08 to 2013-14, assessed in Central Circle-1(1), Ahmedabad under Pr.CIT (Central), Ahmedabad charge, the order under Section 281B (June 2018) did not record the estimated tax liability and the value of attached property (viz., ₹ 5.83 crore that was indicated in the 281B proposal submitted for Pr.CIT (Central)'s approval). In his submission (July 2018), the assessee contended inter alia, that the AO had failed to estimate the possible demand which may arise out of assessment. The AO replied (July 2018) to the assessee that "as per provisions of Section 281B of the Act, it is not a pre-requisite that the demand should be estimated before making provisional attachment." In reply (June 2021) to an audit query (Feb 2021) on the issue of non-recording of estimated tax liability and the value of the property attached, the AO stated that the tax liability cannot be estimated and that there is no procedure to do so before the completion of the assessment. Further, since provisional attachment is done only on protective basis, fair market value of the attached properties is not required to be established.

The AO's contention is not tenable as the Board's instructions of September 2004 prescribe that 'the assets sufficient to cover the demand in question' which implies estimation of the possible demand that may arise out of assessment for comparison with the value of the attached property to ensure sufficiency thereof. Further, Section 281B(4) provides an option to the AO for referring the provisionally attached property to a Valuation Officer for determining its fair market value. As of February 2021, the assessment proceedings were stayed in this case by the Hon'ble Supreme Court and in the meantime, the provisional attachment lapsed (December 2018) without recovery of tax. The current status of the assessment proceedings was awaited from the CBDT (October 2022).

While the AO may have done due diligence to ensure that property with sufficient value was being attached, absence of sufficient details rendered the order under Section 281B opaque to the assessee as well as to the notified authorities, especially with reference to sufficiency or otherwise of the property attached.

(iii) Option of bank guarantee in lieu of provisional attachment not provided to the assessee: Section 281B (3) of the Act provides for revocation of the order under Section 281B and consequent release of the attached property, in cases where the assessee furnishes a bank guarantee for an amount of not less than the fair market value (FMV) of the property.

Audit noticed that the option of furnishing bank guarantee in lieu of the attached property for an amount equal to the fair market value of the property was not provided to the assessee in any of the 350 audited cases. In the

absence of providing such an option, the Department lost the opportunity of easily securing the interest of revenue without being forced into the cumbersome process of conversion of provisionally attached property for the purpose of adjustment of tax demand arrears. As can be seen in the subsequent findings, the fair market value of the property was not indicated at all in the vast majority of the audited orders, hence making it impossible for the assessee to offer a bank guarantee for a specific amount.

Reply of the Ministry was awaited (October 2022).

The procedure for issuing the said order does not have a provision for giving prior opportunity of hearing to the assessee. Since it is the only means of communication between the Department and the assessee regarding attachment of property in Audit's opinion, it is imperative that a self-contained order is issued by recording all the essential information so that the process of provisional attachment remains fair, objective and transparent. At the same time it would ensure that the primary objective of protecting the interests of revenue is achieved and avoid/minimising litigation for the Department.

Further, Audit compared the extant provisions of the Income Tax Act with the provisions of other Revenue Acts, particularly the recent Central Goods and Service Tax Act (CGST Act), 2017. Rule 159 of CGST Rules, 2017 has prescribed a format of Provisional Attachment order (Form No. DRC-22) containing details such as assessee's name, place of business, type/description of property owned, and restrictions placed on the attached property, whereas no such format is prescribed by the CBDT.

Therefore, a format for provisional attachment order could be devised considering the extant rule provisions of the Act to record all the essential details including the estimated tax liability and the value of the property attached which would not only demonstrate that the value of property attached is fairly comparable with the value of the tax liability likely to arise, but also facilitate the Department as well as the notified authority for effective monitoring of the provisional attachment. It would also enable the concerned assessee for a better and quick compliance. A sample format has been suggested by Audit (**Appendix 9**) for consideration by ITD.

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.

3.3 Formation of opinion to invoke provisional attachment

Section 281B (1) of the Act mandates that for the purpose of protecting the interests of revenue, the AO has to form an opinion as to whether it is necessary to issue a provisional attachment order for attaching any property of the assessee. The legislative intent behind inserting Section 281B in the Act in 1975 was explained (September 1975) by the Board¹⁶ by stating that these provisions shall be invoked in a case where the AO is of the opinion that the assessee may *thwart the ultimate collection of demand* in specified circumstances. The Board vide instructions¹⁷ of September 2004, also emphasised that the provisions of Section 281B are to be *sparingly applied* so as to prevent their indiscriminate use.

The provisions of Section 281B coupled with the instructions of the Board envisage two aspects (a) sparing application of the provisions of provisional attachment and (b) establishing the basis for formation of opinion by the AO. Audit observations on these two aspects of opinion formation are discussed in the following paragraphs:

3.3.1 Extent of use of provisions of provisional attachment

During FYs 2017-18 to 2019-20, 94,921 cases (including block assessments¹⁸) were selected for scrutiny assessments by 72 AOs under the jurisdiction of 18 Central Commissionerates. Further, Audit did not have data/information relating to number of assessees involved in above 94,921 assessment cases which were selected for scrutiny during these periods.

¹⁶ CBDT Circular No. 179 dated 30/09/1975.

¹⁷ CBDT Instruction No.8 dated 02/09/2004.

¹⁸ Section 153A (b), or Section 153C, prescribes that the AO shall assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which search under Section 132 is conducted and or the relevant assessment year or years.

In these 18 Central Commissionerates, Provisional Attachment orders under Section 281B were invoked in respect of 354 assessees¹⁹ during FYs 2017-18 to 2019-20 which were selected as a total sample for the SSCA. Commissionerate-wise details are given in **Appendix 10**.

Thus, in the absence of data relating to number of assessees which were selected for scrutiny assessments, Audit could not comment on whether the Department had sparingly invoked the provisions of Section 281B or not.

Reply of the Ministry was awaited (October 2022).

3.3.2 Establishment of the basis for opinion formation

To safeguard against indiscriminate use of the provisions of Section 281B, the Board instructed²⁰ (November 2004) that they should be resorted to only in cases *where there is a reasonable likelihood of the recovery becoming difficult due to 'inadequacy of assets' or 'under exceptional circumstances'*. It has also been judicially held in several cases²¹, that the AO's opinion should invariably be based on the apprehension that the assessee is likely to thwart the ultimate collection of demand.

Audit noted that in the case of Society for Integrated Development in Urban and Rural Areas vs Commissioner of Income Tax and Anr [2001] 252 ITR 642 (AP), the petitioner who is an income-tax assessee had filed a writ petition assailing the validity and legality of the order passed by the second respondent, viz. Deputy Commissioner of Income-tax, Circle 4(3), Hyderabad, dated May 29, 2001, made under Section 281B of the Income-tax Act, 1961. Hearing the petition, the Andhra High Court had noted (17/07/2001) that there must be *"reasonable apprehension that the assessee may default the ultimate collection of demand, i.e., likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution. It should not be exercised unless there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of the whole or any part of his property with a view to thwarting the ultimate collection of the demand."* This decision was reiterated in a recent judicial decision viz., Shri Abul Kalam vs ACIT, Circle 8(1), Kolkata & Ors (27 January 2020), in which the order under Section 281B was issued on 26/12/2019, attaching the bank account of the assessee and on 29/12/2019 the scrutiny assessment was concluded by the AO by raising a tax demand of ₹ 35.96 crore. In connection with the assessee's petition both against the provisional attachment order and the assessment

¹⁹ Includes 04 Non-production cases referred to in Para 2.5 (viz. Appendix 4A).

²⁰ CBDT Instructions F. No.404/22/2004-ITCC, dated 05/11/2004.

²¹ (i) Abul Kalam vs ACIT, Circle 8(1), Kolkata & Ors – WP 25 of 2020(Calcutta) dated 27/01/2020; (ii) NDTV Ltd. vs DCIT WPC 9120 & 11638 of 2015(Delhi) dated 10/8/2017; (iii) VLS Finance vs Commissioner of Income Tax [2000] 246 ITR 707 (Delhi) dated 03/08/2000; (iv) Raghuram Grah Pvt. Ltd. and Another vs ITO [2006] 281 ITR 147 (All), the Allahabad High Court held (14/12/2005).

order passed by AO, the Calcutta High Court had rejected the Revenue's stand by holding that the *amount of tax being large, and therefore the provisional attachment was resorted to, is not a good enough reason and if this reason was accepted then in all cases of high demands, provisional attachment would become the norm.*

In another judgement²², the Bombay High Court held that the powers under Section 281B are *drastic powers permitting the AO to attach any property of an assessee even before the completion of assessment/ reassessment. Such powers must, therefore, be exercised in appropriate cases for proper reasons. Such powers cannot be exercised merely by repeating the phraseology used in the Section and recording the opinion of the officer passing such order that he was satisfied for the purpose of protecting the interest of revenue, it was necessary so to do.*

Detailed audit findings in this regard are discussed in the following paragraphs:

(i) Cases where opinion was established as prescribed by the Board:

Audit noticed that in 23 cases where the AOs had based their opinion in accordance with the prescribed conditions *viz.*, reasonable likelihood of the recovery becoming difficult due to 'inadequacy of assets' or 'under exceptional circumstances'. Two cases comprising of seven assessees are illustrated below and the remaining cases are shown in **Appendix 11**.

(a) In a group-related search cases of six related assessees *viz.*, Smt. S23, Shri A12, Shri S5, Shri M3, Smt. S26 and Shri M13 assessed for AYs 2010-11 to 2016-17 in Central Circle -1, Mangaluru under the jurisdiction of Pr.CIT (Central) Bengaluru, the AO had recorded his opinion in the proposal under Section 281B that the assessees had objected to the undisclosed income estimated in the Appraisal Report and it appeared that the prospects for recovery of tax may be difficult. As such, there was compliance to the Board's instructions on formation of opinion. In the proposal under Section 281B, the AO indicated the total undisclosed income at ₹ 20.25 crore (against which the estimated tax liability works out to ₹ 6.07 crore calculated at a minimum tax rate of 30 *per cent* excluding surcharge/ cess/ interest/ penalty). The AO issued provisional attachment orders in December 2017. The orders were further extended in June 2018 without indicating the validity period of extension orders. The assessments were completed in 2017 by raising a tax demand of ₹ 21.42 crore. Audit noted (July 2022) that the respective assessees' appeals against the scrutiny assessments were disposed off by CIT (Appeals) / ITAT in their favour resulting in significant reduction in tax demand (aggregating to

²² In the case of Vodafone Idea Limited vs DCIT WP 2036 of 2019 (Bombay) dated 03/09/2019.

₹ 7.01 crore). The current status of the recovery of outstanding tax demand was awaited from the CBDT (October 2022).

(b) In the case of Shri A20 assessed for AYs 2011-12 to 2017-18 in Central Circle-1(4), Chennai under the Pr.CIT (Central)-1, Chennai charge, the AO issued provisional attachment order under Section 281B in May 2018. The AO recorded, *inter alia*, in the proposal under Section 281B that “a proposal dated 21/03/2018 was sent to Pr.CIT (Central)-1, Chennai for launching of prosecution under Section 276C(2) of the Act against the assessee for wilful attempt to evade payment of taxes.” In the proposal under Section 281B, the AO indicated the total undisclosed income at ₹ 91.86 crore (against which the estimated tax liability works out to ₹ 27.56 crore calculated at a minimum tax rate of 30 per cent excluding surcharge/ cess/ interest/ penalty). Thus, the reasons attributed for forming an opinion in the instant case was as prescribed in the Board’s instructions of September 2004 *viz.*, the apprehension that the assessee is likely to thwart the ultimate collection of demand. The order under Section 281B was further extended thrice in October 2018, April 2019 and October 2019 without indicating the period of validity of the order. Audit noted (February 2021) that the search assessments were completed in December 2019 by raising a demand of ₹ 331.32 crore, which was fully outstanding. The current status of the recovery of outstanding tax demand was awaited from the CBDT (October 2022).

(ii) Cases where opinion was not established as prescribed by the Board:

In 206 cases, the concerned AOs had proposed provisional attachment of assessee’s property by recording the following two standard reasons:

- Substantial demand is likely to be raised on completion of search-related assessments.
- To protect the interest of revenue

Audit noted that in two other cases discussed below the AO also had recorded the reason as assessee not declaring the admitted income in their return of income filed in response to *post*-search notice.

While the first standard reason is usually prevalent in all search cases as it is an essential feature to carry out the search, the latter reason is the primary objective of the Income Tax provisions and is an intrinsic part of AOs’ responsibility towards any and all assessment proceedings. As such, the AOs attributing these standard reasons for provisional attachment was not in conformity with the Ministry/CBDT’s instructions²³. The Commissionerate-wise details of all these 350 cases are given in **Appendix 12**.

²³ No. 8 of 2004 dated 02/09/2004

In the search assessment cases of Shri V1 and M/s. C16 Ltd. for AYs 2011-12 to 2018-19 assessed in Central Circle-1(3), Bengaluru under Pr.CIT (Central), Bengaluru charge, provisional attachment orders were issued after approvals of Pr. CIT Central, Bengaluru, in January 2019 on the basis of only generic/standard reasons being recorded for opinion formation. On being pointed out by Audit, the AO replied (December 2020) that there were extraneous reasons viz., (a) assessee not declaring the admitted income in its return of income filed in response to *post*-search notice, (b) newspaper reports that the assessee was attempting to dispose of a high value property for which no prior permission of the Department was sought as prescribed²⁴ and (c) one of their group companies was a regular tax defaulter. The AO further stated that these were the *exceptional circumstances* that were considered for invoking the provisions of Section 281B. However, Audit observed that the reasons mentioned at (b) and (c) above were not found on the records provided to Audit.

(iii) In the remaining 119 cases, Audit noted that apart from standard reasons *ibid*, the AOs recorded certain additional reasons in the respective proposals of provisional attachment under Section 281B, as detailed in Table No. 05 below:

Description of additional reasons recorded (Opinion Formation)	Total number of 281B cases	Total estimated tax liability (₹ in crore)	Total value of property(ies) attached (₹ in crore)	Number of cases in different ranges of Estimated Tax Liability				
				Less than ₹ 10 crore	₹ 10 crore and upto ₹ 50 crore	More than ₹ 50 crore and upto ₹ 100 crore	More than ₹ 100	Not available
Assessee objecting to the estimated income quantified by the Investigation Wing during search and seizure proceedings.	08	0.57	Not available	01	--	--	--	07
For preventing assessee from parting with his/her property/s	29	72.81	36.39	12	02	--	--	15
Seized material insufficient to cover likely demand	06	80.26	Not available	02	04	--	--	--

²⁴ Under Section 281 of IT Act – After commencement of any proceedings under the Act, the assessee shall seek jurisdictional AO's permission for disposing off any owned property by way of transfer, sale, gift, mortgage, etc.

Table No. 05: Statement showing analysis of additional reasons recorded for invoking 281B provisions								
Description of additional reasons recorded (Opinion Formation)	Total number of 281B cases	Total estimated tax liability (₹ in crore)	Total value of property(ies) attached (₹ in crore)	Number of cases in different ranges of Estimated Tax Liability				
				Less than ₹ 10 crore	₹ 10 crore and upto ₹ 50 crore	More than ₹ 50 crore and upto ₹ 100 crore	More than ₹ 100	Not available
Specific recommendation of provisional attachment received from Investigation Wing	06	16.50	77.23	06	--	--	--	--
Various indications of 'non-cooperation' by the assessee	68	599.79	290.77	43	08	03	--	14
Ongoing civil/criminal proceedings against the assessee.	02	2,105.01	Not available	--	--	01	01	--
Total	119	2,874.94		64	14	04	01	36

As could be seen from the table *ibid*, in the maximum number of cases (68 having a cumulative estimated tax liability of ₹ 599.79 crore), the additional reasons attributed for invoking provisions of Section 281B were non-cooperation of the respective assessee in completing the investigation/assessment proceedings such as assessee not responding to various notices issued by the AOs; assessee retracting from the statements made during the course of search investigations; assessee not declaring the undisclosed income that was admitted during search investigations and so on. Significantly, the highest value of estimated tax liability (₹ 2,105.01 crore which was 73.2 per cent of the total estimated tax liability of all 119 cases) was found in two cases where civil/criminal cases were pending against the assessee²⁵ and these reasons were attributed for invoking provisions of Section 281B against their cases.

In the absence of specific criteria being fixed by the Board, Audit could not comment whether the above reasons could be treated as exceptional circumstances attracting provisions of Section 281B and could stand legal scrutiny also.

²⁵ ₹ 2,042 crore in respect of Smt.V2 in Central Circle-2(2), Chennai [Pr.CIT(Central)-2, Chennai charge] and ₹ 63.01 crore in respect of Shri A44 in Central Circle-28, Delhi [Pr. CIT (Central)-3, Delhi charge].

Thus, in 327 cases²⁶ (93.4 per cent), neither the proposal for provisional attachment nor the consequential provisional attachment order gave a clear indication that the AOs had established their opinion in the manner prescribed by the Ministry/CBDT.

Audit also raised (December 2020 - March 2021) a specific query regarding the establishment of opinion based on reasonable likelihood of the recovery becoming difficult in all the audited cases. In 113 cases in six Central Commissionerate charges (**Appendix 13**), the concerned AOs reiterated (December 2020 – June 2021) that only the standard reasons formed the basis for invoking the provisions of Section 281B.

Audit, however, did not find the responses of AOs in consonance with the prescribed norms, which were also judicially upheld. The reasons stated by AOs were generic in nature and did not establish the basic premise of the 'likelihood of recovery becoming difficult'. Further, provisional attachment of a property/asset may result in the disruption of the business of a going concern, thereby making it difficult to recover the demand likely to be raised after completion of an assessment. The Bombay High Court also stated provisional attachment is a drastic power permitting the Assessing Officer to attach any property of an assessee even before the completion of assessment or reassessment. These powers are thus in the nature of attachment before judgment. They have provisional applicability and, in terms of sub-section (2) of Section 281B of the Act, a limited life. Such powers must, therefore, be exercised in appropriate cases for proper reasons. Such powers cannot be exercised merely by repeating the phraseology used in the section and recording the opinion of the officer passing such order that he was satisfied for the purpose of protecting the interest of revenue, it was necessary to do so. Therefore, powers under this provision must be exercised judiciously and after due application of mind.

Further, Audit compared provisions of the Income Tax Act with that of other Revenue Acts, particularly the recent Central Goods and Service Tax Act (CGST Act), 2017. Section 83 of the CGST Act prescribes that "*Opinion should be such that Taxable person shall not be available for recovery after the demand order has been issued*", by duly including a clear definition of the criteria, viz., if the assessee is a "*fly-by-night*" operator, habitual offender or does not have means to pay the dues that may arise upon assessment, or he is going to default.

²⁶ Excluding 23 cases discussed in the earlier part of the Paragraph, in which AO's opinion was as per prescribed norms.

Considering, the range of reasons cited in the audited orders, existing norms²⁷ for categorising outstanding demand cases and the provisions of CGST Act, a suggestive (but not all inclusive) list of exceptional circumstances which need to be established as giving rise to the 'reasonable likelihood of the recovery becoming difficult' is given in **Appendix 14**, which the Ministry/CBDT may suitably consider for adoption.

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]²⁸". 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 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

²⁷ Under Clause 9 of Central Action Plan -I (CAP-I) Statement detailing AO-level monthly outstanding Tax Demand & Collection for submission to higher authorities upto the Board.

²⁸ Sub-Section (1) of Section 281B was amended by the Finance Act, 2021 with effect from 01/04/2021.

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 was not in consonance with the Board’s instructions and was 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.

3.4 Notification of Provisional Attachment order to the concerned authorities

The Provisional Attachment order issued under Section 281B is notified to the concerned authorities, comprising of the registering authorities and CERSAI,²⁹ to secure the interest of revenue so as to restrain assesseees from attempting to dispose of the attached property and also to secure a confirmation that the title of the property is in the name of the assessee.

Audit analysed the extent to which the AOs adhered to the process of notifying the concerned authorities and the results are discussed in the following paragraphs.

3.4.1 Notification of Provisional Attachment order to Registering Authorities

Various authorities are empowered under the respective Acts to allow the assessee to dispose of the registered property by way of sale/transfer/gift or to mortgage the same for availing loans there against. For instance, immovable property belonging to an assessee is registered with the jurisdictional Sub-Registrar Office under the State Government’s Department of Stamps and Registration, movable property with the respective authorities e.g. fixed deposits and other financial instruments with the Banking Authorities, stocks and shares with the recognised Stock Exchange/registered brokers, vehicles with the Regional Transport Authority and insurance policies with Insurance Companies. Since the assessee’s property is provisionally attached for a specified period as prescribed under Section 281B, it is imperative that the concerned authorities are notified of the same

²⁹ Central Registry of Securitisation Asset Reconstruction and Security Interest of India

in a timely manner, so that the authorities can take note of the attachment and thwart any attempts of the assessee for disposing off the property during the period of attachment.

The variations in the notifications are described below:

(i) In 157 cases of orders issued under Section 281B by AOs under 10 Central Commissionerates located in six³⁰ stations, the notified Authorities were informed of the provisional attachment of the assessee's property(ies) with a specific request to restrain the assessee from parting with the possession of the attached property during the validity period of the order. Significant cases are illustrated below:

(a) In the search case of Shri N11; for AYs 2011-12 to 2017-18 assessed in Central Circle 1(4), Chennai under Pr.CIT(Central)-1, Chennai charge, the order under Section 281B (22/11/2018) attaching immovable properties (value not indicated) of the assessee against an estimated tax liability of ₹ 232.51 crore, was notified (22/11/2018) to the Sub-Registrar, Sanarpatti, giving details of the survey numbers of the land attached. Audit noticed that the Sub-Registrar responded (22/11/2018) to the said notification by stating that the notification of the said attachment was not possible without knowing the extent of the area under the specified survey numbers. Audit further noticed that there was no response to the Sub Registrar's letter by the AO. The assessment in the case was completed in December 2019 by raising a demand of ₹ 279.04 crore, against which no amount has been recovered, leaving the complete balance outstanding (March 2021).

The Ministry, while partially accepting the observation stated (July 2022), that *"the total extent of the lands 8.62 acres of land under various survey numbers in the name of Shri N11 was clearly mentioned in the 281B attachment order. Moreover, in this case the 281B attachment was made in November 2018 and had expired by February 2019, due to completion of search assessments. Since the 281B attachments were no longer valid as of July 2019, no response was given to the Sub-Registrar's letter dated 25/07/2019. Further the demands were referred to the Tax Recovery Officer and all the above said properties were brought under attachment by the Tax Recovery Officer. The attachment of eight acres and 62 cents of lands covering various survey numbers by the Income tax Department is also reflected in the Encumbrance Certificate (EC) of the Registration Department."*

The reply of the Ministry is partly not tenable on the following grounds that (i) according to Section 281B(2), the validity period of the initial provisional attachment order is upto six months, whether or not it is specifically indicated

³⁰ Bhopal (Raipur Central Range), Chandigarh, Delhi, Jaipur, Visakhapatnam & Mumbai.

in the order. In the instant case, provisional attachment order under Section 281B was issued on 22/11/2018. Therefore, the validity period of initial order was upto 21/05/2019 and not February 2019 as stated by the Ministry; (ii) With regard to no response to the Sub-Registrar's letter dated 25/07/2019, the Ministry stated that the search assessments had been completed and as the provisional attachment were no longer valid as of July 2019, no response was given to the said letter. However, as per available documents, the search assessments were completed only in December 2019 (i.e., seven months after the expiry of the order under Section 281B). Thus, not extending the validity period of the attachment order till sixty days after the completion of assessments as prescribed by the AO was not in conformity with provisions of Section 281B and/or the CBDT's extant instruction.

(b) In the search assessment case of Smt. M11 for AYs 2011-12 to 2017-18 assessed in Central Circle-8(1), Mumbai under Pr.CIT (Central)-4 Mumbai charge, the order under Section 281B (30/08/2018) attaching immovable properties (valuing ₹ 6.35 crore) of the assessee against an estimated tax liability of ₹ 14.58 crore (calculated by Audit) was notified to the concerned Sub-Registrars³¹. The AO requested them via order under Section 281B *"not to allow to create charge on, or part with the possession by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever in respect of the above properties."* Audit noticed that the assessment was completed in December 2018 by raising a demand of ₹ 0.98 crore, against which no amount was recovered leaving the whole balance outstanding (December 2020). The current status of recovery of outstanding tax demand was awaited from the CBDT (October 2022).

Thus, even though the properties were attached and properly notified to the concerned authorities, the Department failed to make use of it and allowed the order under Section 281B to lapse without recovery of tax.

(c) In the search assessment case of Shri A44 for AYs 2009-10 to 2018-19 assessed in Central Circle-28, Delhi under Pr.CIT (Central)-3, New Delhi charge, the AO issued the order under Section 281B (27/11/2019) to the Joint/Sub-Registrar, Noida, UP & Sub-Registrar, Nuh, Mewat with a further direction that non-compliance of the said restraining order by AO would place the notified Authority with a personal liability to the extent of tax dues of the assessee and recovery proceedings initiated as per law. The response from the concerned authority was not found on record in the file produced to Audit. The assessment in the case was completed in December 2019 by raising a demand of ₹ 133.08 crore, against which no amount was recovered leaving the full

³¹ Ambavadi, Ahmedabad; Mumbai City-1; Mumbai City-2; and Lonawala and Secretaries (Kanchandeeep Apartment, Ambavadi, Ahmedabad; and Navshantinagar CHS Limited, Malabar Hill, Mumbai)

balance outstanding (March 2021). The current status of recovery of outstanding tax demand was awaited from the CBDT (October 2022).

Thus, even though the order under Section 281B was issued to the concerned authority, the Department did not recover the demand and allowed the order under Section 281B to lapse without recovery of tax.

(ii) In 189 cases of orders issued under Section 281B by AOs under nine Central Commissionerates in seven³² stations, the notification was merely for information without any specific directions for statutory enforcement and responsibility.

(iii) In three of the remaining four cases, the orders under Section 281B were not notified at all to the Registering Authorities i.e., the Sub-Registrar Officer (two cases) and the Bank Manager (one case) and consequently the Authorities were not statutorily bound to restrain the assessee from disposing off the attached property. In the remaining one case, the AO attached the Income Tax (IT) Refund due to the assessee, and as the IT refund is within the control of the Department, no notification of the order was issued by the AO. Three cases are illustrated below:

(a) In the search assessment case of M/s. P25 Pvt. Ltd. for AYs 2008-09 to 2011-12 assessed in Central Circle, Panaji under Pr.CIT (Central), Bengaluru charge, the AO issued provisional attachment order on 20/12/2017 in respect of movable property viz., Fixed Deposits (FD) (valuing ₹ 15.67 crore) but did not notify the same to the concerned Banking Authority. Audit noticed that the provisional attachment was first issued by AO on 27/12/2016 during regular assessment for the same FD and further extended on 23/06/2017 with a validity upto 31/12/2017. Audit further noticed that the order under Section 281B issued in December 2017 was further extended twice in June 2018 and December 2018 as the assessment proceedings were pending on account of stay granted thereagainst by the Hon'ble High Court of Mumbai in Goa. Audit also noticed that the said FD had matured on 13/12/2017. As a result of non-notification to the concerned authority as well as maturity of FD, the provisional attachment was not protecting the interests of revenue because of the risk of encashment of the same by the assessee. Audit noted (July 2022) that the assessment proceedings were subsequently quashed by the Hon'ble High Court and further an SLP has been filed before the Supreme Court by the Department, which was pending (July 2022).

(b) In the search assessment case of Shri B2 for AYs 2012-13 to 2018-19 assessed in Central Circle-2(3), Bengaluru under Pr.CIT (Central), Bengaluru charge, the AO issued provisional attachment order on 10/12/2019, for

³² Ahmedabad, Bengaluru, Bhopal (Gwalior Central Range), Chennai, Hyderabad, Kochi and Kolkata

attaching the assessee's four immovable properties (valuing ₹ 2.88 crore) against the estimated tax liability of ₹ 5.26 crore (calculated at 30 *per cent* of the undisclosed income of ₹ 17.54 crore estimated by Investigation Wing), without notifying the concerned Sub- Registrar Officer. The assessment was completed in December 2019 raising a demand of ₹ 6.51 crore. There was no evidence relating to extension of provisional attachment order in the records provided to Audit after its expiry in May 2020. Audit noted that the entire demand was pending (December 2020). The assessee had filed an appeal before CIT(Appeals) against the assessment orders on 21/02/2020, which was pending (July 2022). As the provisional attachment order was not notified to the concerned authority, the purpose of the said attachment remained unfulfilled.

Reply of the Ministry was awaited (October 2022).

(c) In the search assessment case of Shri R19 assessed for AYs 2011-12 to 2017-18 in Central Circle-6(4), Mumbai under Pr.CIT (Central)-3, Mumbai charge, the order under Section 281B was issued (08/12/2017), with further extensions (08/05/2018 and 02/11/2018), for attaching the Income Tax (IT) Refund (₹ 15.07 crore) due to the assessee against the estimated tax liability of ₹ 47.64 crore (calculated at 30 *per cent* of the undisclosed income of ₹ 158.80 crore that was indicated in the order under Section 281B). Hence, no notification of the order was considered necessary or made by the AO. However, there was nothing on record to indicate that the AO had made efforts to ascertain the details of other assets in the possession of the assessee. Since, the IT refund was within the control of the AO, there was no apprehension that the assessee would attempt to dispose of the said "property" *viz.*, IT refund and as such there was no justification for attachment of the same. Audit observed from the details furnished by the assessee in his Income Tax Returns (ITR) filed (August 2016) for AY 2016-17, the assessee possessed other assets aggregating to around ₹ 10 crore (*viz.*, building worth ₹ 9 crore and movable assets such as jewellery and vehicles valuing about ₹ one crore) but there was nothing on record to suggest that the AO had considered these assets for attachment before selecting the IT refund for provisional attachment. As on the date of Audit (February 2021), the assessment was completed (28/12/2018) by raising a demand of ₹ 93.84 crore), against which ₹ 20.85 crore was recovered leaving a balance of ₹ 72.98 crore outstanding. However, in the absence of the source of tax recovery, reasons for pendency of balance tax and action taken by AO for its recovery, Audit could not ascertain the current status of the case (July 2022).

Reply of the Ministry was awaited (October 2022).

Thus, despite the fact that the AOs had notified the provisional attachment order to the concerned authority, in the majority of the audited cases, the contents of such notification were not uniform, consistent and adequate. In 56 *per cent* of the audited cases, no specific direction to the notified authority(ies) was given. In the absence of specific direction to the notified authority, the purpose of notification of the provisional attachment order was not fully addressed.

Audit noted that as per Rule 159 of the Central Goods and Services Tax (CGST) Rules 2017, where the Commissioner decides to attach any property, including bank account in accordance with the provisions of Section 83 of CGST Act, 2017, he shall pass an order in FORM GST DRC-22 to that effect mentioning therein, the details of property which is attached. Further, the Commissioner shall send a copy of the order of attachment to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be removed only on written instructions from the Commissioner to that effect.

Therefore, there is a need for a formal mechanism to be in place for notifying the provisional attachment order to the concerned authority(ies) on the lines of Rule 159 (Form GST DRC-22) under Section 83 of CGST Act, 2017.

Reply of the Ministry was awaited (October 2022).

3.4.2 Notification of order under Section 281B to CERSAI

According to Section 26-B (4) of the SARFAESI Act³³, it is mandatory for the secured creditors³⁴ and other creditors to file with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI), any order or attachment of any property issued by every authority or officer of Central/State Government or local authority entrusted with the function of recovery of tax or other Government dues. CERSAI is a central online security interest registry of India, created under the SARFAESI Act to check frauds in lending against equitable mortgages, in which people would take multiple loans on the same asset from different banks. Filing with CERSAI also enables the lender and revenue authorities to secure precedence over the asset, which is of interest to multiple lenders/ revenue authorities. In this connection, the Board instructed (September 2017)³⁵ all its field formations to notify CERSAI of any attachment order already issued by endorsing a copy of the same so that

³³ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

³⁴ Section 2 (zd) (i) of SARFAESI Act defines "Secured creditor" as any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in Section 2 (l) thereunder.

³⁵ Instructions from the Board's Directorate of Income Tax (Recovery & TDS) vide letter dated September 06, 2017.

not only the value of the attached property remains intact but also the rights of the Department over the attached property remains at the top.

Audit observed that in none of the 350 audited cases, the orders under Section 281B were notified to CERSAI which was a clear violation of CBDT's direction. Since the provisional attachment has the potential to get converted into regular attachment *post*-assessment, in cases where the assessee actually defaults in payment of tax demand, notifying the order under Section 281B with CERSAI would ensure security of the interests of revenue at an early stage of the assessment proceeding. Failure on the part of AOs to notify the order under Section 281B to CERSAI had the risk of non-prioritisation of recovery of ITD tax arrears in cases where the attached property(ies) are to be liquidated for clearance of the assessee's secured and unsecured dues.

In reply to a specific Audit query (February 2021) on the issue, the AOs in-charge of Central Circles-1(1) to 1(4), Chennai under the jurisdiction of Pr.CIT (Central)-1, Chennai stated (March 2021) that *"the attachment under Section 281B is only a provisional attachment to protect the interest of revenue, in the event of any demand made in future. In the real sense, it is not an attachment to recover the tax dues of the assessee. If any attachment is made by the Department to recover the dues, the same would be filed before the Central Registry (CERSAI)."* The reply of the AO is not tenable since this is not in conformity with the Board's instructions of September 2017, which envisages notification of attachment orders to CERSAI. In addition, non-notification to CERSAI prevented the Department from securing the priority of tax arrears recovery over other secured/unsecured creditors of the assessee.

Thus, due to non/inadequate notification to the concerned Authorities, the objective of protecting the interests of revenue through provisional attachment would remain unfulfilled.

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.