

DRAFTING OF SUBMISSION/REPRESENTATION

(ASSESSMENT/APPEAL PROCEEDINGS IN NEW REGIME OF E-PROCEEDINGS)

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I. INTRODUCTION :

Representation before the Assessing officer and First appellate authorities are foundation to the appeal. For making a good representation we should know the facts, law and procedure. One has to understand the concept such as legal principles , doctrines , interpretation of statutes and one should be update with latest development in law on the subject matter .

Assessment as it is understood is a process of determination of any liability under the provision of the tax laws (sec 2(8) of the Act). The term "assessment" is used in the Income tax Act at different places with different connotations -

Kailash Nath Bhargava v CIT 46 ITR 928, 945 (Pat)

Keshardeo Shrinivas Morarka v CIT 48 ITR 404, 416 (Bom)-

It is used as meaning sometimes " the computation of income" . Sometimes " the whole procedure laid down in the Act for imposing liability upon the taxpayer"

II. THE E-ASSESSMENT SCHEME:

The **The E-assessment Scheme, 2019** (also called Faceless / team base assessment), will change the manner in which cases are assessed . In the new regime, the manner in which proceedings were conducted will undergo a sea change namely manner in which show cause notices are issued , reply

/submission are filed , documentary evidence are produce etc , also manner in which cases shall be reopened u/s. 147/148 , revision u/s. 263 and rectification u/s. 154 of the Act . The new scheme shall face new challenges on law and procedure .

III. SOME IMPORTANT FEATURE OF E ASSESSMENT AND E- APPEAL ARE AS UNDER :

1. E-assessment scheme is a code by itself with respect to assessment specified in the scheme,
2. Instruction No.01/2018 dated 12.02.2018 issued to cover all the pending scrutiny assessment under the e-proceeding scheme with the exception of some cases like search and seizure, survey International tax
3. The objective of faceless assessment is to completely eliminate physical contact between the taxpayer and the taxman to make tax administration objective, transparent and corruption-free.
4. The system will work under the National E-Assessment Centre (NeAC) headquartered in Delhi and eight Regional E-Assessment Centres (ReACs) located in Delhi, Mumbai, Chennai, Kolkata, Ahmedabad, Pune, Bengaluru and Hyderabad.
5. Notices without Document Identification Number(DIN) will be invalid.
6. The “ **Faceless Appeal Scheme, 2020** ”is notified vide Notification No.76/2020 dated : 25/09/2020.
7. All Commissioner (Appeals) right from allocation of appeal, communication of notice / questionnaire , verification/enquiry to hearing and final communication of the order will be done online. The system will run on similar lines of Faceless Assessment.

8. This will introduce an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more CIT(Appeals).

For the purpose of faceless assessment, the CBDT would set up the below 'centres' and units' and specify their respective jurisdiction:

A. '**National Faceless Assessment Centre**' To facilitate the conduct of E-Assessment proceedings in a **centralized manner**

B. '**Regional Faceless Assessment Centres**' To facilitate the conduct of E-Assessment proceedings in the **cadre controlling region** of Principal Commissioner

C. '**Assessment units**' for identifying points or issues, material for the determination of any liability (including refund) , seeking information or clarifications, analysis of material furnished by the assessee etc.

D. '**Verification units**' for enquiry, cross verification, examination of books of accounts, witness and recording of statements, and such other functions.

E. '**Technical units**' for technical assistance including any assistance or advice on legal, accounting, forensic, information technology, valuation, transfer pricing, data analytics, management or any other technical matter.

F. '**Review units**' for reviewing the draft assessment order to check whether the facts, relevant evidence and law and judicial decisions have been considered in the draft order ,checking the arithmetical correctness of modification proposed etc . All the communications between all the units mentioned above, for the purpose of making an assessment under this scheme would be through the National Faceless Assessment Centre.

IV. REPRESENTATION IN FACELESS ASSESSMENT :

The Government has introduced E – proceeding for conduct of assessment and appeal proceeding electronically . It is a laudable steps taken by the government to pave way for an objective assessment without human interaction. At the same time such proceedings can lead to erroneous assessment if revenue authorities are not able to understand the transactions and the statement of accounts of an assessee without a personal hearing . Right to hearing is one of the basic principle of natural justice however right to personal hearing cannot be claimed as a matter of right .The assessee should therefore first understand the query of the officer properly and thereafter reply to the same . If the query raised by officer is cryptic or not clearly assessee should ask for clarification before furnishing any reply . This will avoid distorted conclusion on facts . Following are few points one needs to keep in mind during the E -assessment proceedings before the Assessing officer.

A. Notice for scrutiny : In the new regime human interaction has been done away, therefore it is important the we reply to each notice in timely manner, our reply should be precise and to the point . The efforts should be to bring out the clearly facts on record .

On receipt of the Notice for scrutiny , it is important to see that the same is issued within the time limit provided in the Act and service of notice is as per the procedure to the correct assessee for the specific Assessment year . In this context one should note the provision of Section 292BB of the Act . In case of defective notice same should be objected in timely manner .

B. **Compliance of notices** – It is important that the notice is replied in timely manner therefore if sufficient time is not granted as per the notice assessee should seek adjournments by stating proper reasons . Representative appearing for the assessee should file their authority before making any communication on behalf of the assessee. Thereafter details called for as per notice should be complied and uploaded with proper indexing and numbering with brief note

C. **Show cause notice on any issue** – Reply should contain every aspect of the point in issue. Facts should be clearly stated in reference to the documentary evidence filed. One should read the show cause notice carefully and reply to the same point wise. After the facts are narrated the legal provision should be brought to notice of the officer concerned. In support of the contention raised / interpretation, supporting judgments should be cited.

D. **Instructions of the client :**

Before making any submission it is important that proper instruction should be taken from the assessee on facts . It will be preferable if the submission or details are filed after perusal/confirmation of the assessee . This is more important for the professionals in view of Section 278 of the Act.

E. **Notice containing reliance on third party evidences/statements:**

Where ever notice of the Officer refers to some third party evidence statement etc; one should call for the documents immediately before

filing any reply. The department cannot use third party evidence without providing the copy of the same to assessee for rebuttal.

F. **Production of certain third party evidences/documents : Notice 131 and 133(6) of the Act:**

Where ever assessee is required to produce third party evidence and it is not possible for assessee to obtain the same , request should be made in writing to issue notice u/ss. 133(6) or 131 of the Act . If assessee wants cross examination of any party the same should be demanded in writing .

G. **New claim before the Assessing officer :** If any new claim is required to be raised before the AO the assessee should be very specific about the same . It is advisable to raise a new claim in separate correspondence alongwith all the supporting documentary evidences and stating reasons why same was not claimed in return earlier . It time permit assessee may file revise return under sec 139(5) of the Act . Where ever there will be any change in facts or figures same should be brought out in clear terms in the reply .

H. **Use of charts /tables etc :**

Where ever necessary one should use charts and table to explanation the computation or figures etc . Summary of facts or contention raised should be highlighted . One should always give reference to the previous correspondence made or notice issued by department .

Any alternate contention raised should be clearly highlighted. Endeavour should be made to bring out the correct facts on record . In new regime emphasis should be on proper drafting of reply .

Conclusion:

One should try to use simple language and avoid jargon in one's reply/ submission. Before uploading any documents the same should be doubly checked . As per the scheme one assessment will be scrutinised by various units of department therefore it is essential that the language used or terminology used is universally understood and accepted . Avoid abbreviation and short forms to avoid unwanted confusion . Avoid sentence which have two different meaning . Negative statement should be cautiously used . If you are relying on any decision kindly see that you refer proper citation preferably attach a copy . I understand, that the above may not be an exhaustive list as there are other diverse facets of the e - assessment proceedings, which may differ from case to case.

V. E APPEAL PROCEEDING :

Drafting of grounds of appeal :

- A. An appeal should be filed within a period of 30 days of the service of the Assessment order alongwith notice of demand. Orders are uploaded on portal
- B. The grounds should be concise without any argumentative or narrative.
- C. The grounds should highlight the main controversy in issue.
- D. The grounds should not be vague, general or too lengthy.
- E. Specific ground to be taken for each and every issues involved. Proper figures involved in dispute should be available in the grounds.

F . Legal grounds relating to limitation, natural justice, jurisdictional issues etc should be raised and not left out

G. Language should not be very harsh .

H. The Statement of Facts should be filed before the Commissioner (Appeals) wherein facts can be narrate elaborately and factual errors in assessment order can be corrected at first available opportunity .

H. It is advisable to draft elaborate statement of facts covering all issues and wherever possible, alongwith details filed before Assessing Officer and the legal contentions . Filing of detailed statement of facts, along with supporting case laws will help the Assessee, especially when appeals are disposed off by the first appellate authority ex-parte. If certain factual errors are there in the asst order the same must be raised in the grounds of appeal and statement of facts. The detailed statement of facts can be uploaded as an attachment .

I. If there are clerical error or arithmetical error same should be explained and high lighted clearly in grounds and statement of facts . It is advisable to file separate rectification application for such mistake which are apparent on record.

DRAFTING OF CONDONATION APPLICATION :

DELAY IN FILING APPEAL: An application for condonation of delay alongwith affidavit stating the reasons for delay should be filed alongwith the appeal. The Hon'ble Calcutta High Court in ***Charki Mica Mining Co. Ltd. vs. CIT (1978) 111 ITR 193*** has held that the limitation

period commences from the date of receipt of notice of demand by the Assessee and not from the date of receipt of Assessment order.

Affidavit should be properly drafted and notarized. Vague reasons should be avoided .

In ***Collector of Land Acquisition v. Mrs. Katiji & Others 167 ITR 471 (SC)*** the Hon'ble Supreme Court has held that the Courts should have pragmatic & liberal approach in admitting the appeal beyond the period of limitation.

While drafting the application and the affidavit for condonation of delay the following Legal Principle culled out from various decision should be kept in mind .

- a. The expression 'sufficient cause' must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in interest of justice.
- b. The primary function of any quasi-judicial body is furtherance of administration of substantial justice.
- c. Pragmatic justice oriented approach is required and not the technical detection of explanation of every days delay.
- d. Length of delay is immaterial.
- e. A litigation does not stand to benefit by resorting to delay, therefore a justice oriented approach is required by courts.

- f. Since explanation of assessee did not smack mala fide or was not put forth as a dilatory strategy, delay in filing appeal was to be condoned.
- g. In every case of delay there can be same lapses on the part of the litigant concerned, but that alone is not enough to shut the door against him.
- h. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.
- i. In matters of condonation of delay a highly pedantic approach should be eschewed and a justice oriented approach should be adopted and a party should not be made to suffer on account of technicalities.

Hearing:

The Delhi High Court in the case of Lakshya Budhiraja v. UOI & Anr. W.P.(C) 8044/2020 has issued notice to CBDT on 16th October 2020, on the grounds that the mechanism where the approval of the Chief Commissioner or the Director General of Income-tax is required for video conference facility is discriminatory in nature as it gives them the discretion to deny the same and that no person should be judged without a fair hearing in which each party is given an opportunity to respond to the evidence against them.

The personal hearing through video conference is not a matter of right and seems to be an exception rather than the norm. Subject to the outcome of the above matter or some clarification from CBDT on the issue lets understand what is expected from a representative in such e - proceeding .

At the outset filing of written submission and paper book at time of hearing is mandatory as there will be no oral arguments . As now there would be e- appeal proceeding it is necessary that your paper book index should clearly demonstrate nature of documents enclosed . Documents should be in proper sequence and should be properly numbered .

The CIT(A) has to pass a speaking order dealing with each grounds of appeals. The CIT(A) should pass the order on merits even though heard ex parte / or assessee did not appear. Therefore once detailed paper book and written submission is filed the Appellate authority will have to consider the same and cannot ignore to consider the same.

Therefore the written submission should be drafted in such a manner that the facts and issue involved should be clearly brought out in the submission . Reference to documents and the relevant pages should be mentioned at relevant place. The grievance of the assessee should be clearly explained . The relief the assessee is seeking should be very specifically brought out in the submission . If there are various grounds submission for each ground should be separately drafted with proper paragraph numbers . The submission should not be confusing or vague .

The following points should be noted :

a. the facts of the case should be clearly explained

- b. Sequence of events transpired during assessment proceeding should be explained alongwith show cause notice issued and reply /documents filed
 - c. Various contention of assessee should be brought out clearly in submission.
 - d. legal arguments or interpretation of any provision of law all should come in proper sequence .
 - e. lastly the decisions if any relied upon should be referred . Also if any decision is relied upon by AO in the assessment order, assessee should distinguish the same or there has to be a explanation why same is not applicable to facts of the case .
 - f. The submission should highlight the main controversy in the matter and relief prayed for .
 - g. The submission should not be vague, repetition of facts or arguments should be avoided .
 - h. Specific submission to be taken for each and every issues involved. Proper figures involved in dispute should be available in the submission and reference to documents where ever required should be made .
 - i . Legal grounds relating to limitation, natural justice, jurisdictional issues etc should be raised at the beginning of the submission
- G. Language should not be very harsh . Use of simple English would be preferably

The CIT(A) has power to make such further inquiry as he thinks fit or may direct the A.O. to make further inquiry and report to him. Assessee is

entitled to reply to the remand report. Reply should be in form of rejoinder , each paragraph of remand report should be replied .

APPLICATION FOR PRODUCING ADDITIONAL EVIDENCE

If the assessee is been prevented by good, sufficient or reasonable cause or adequate time is not allowed during assessment proceeding , assessee is entitled to produce such fresh evidence before the appellate authority by making a Application U/R. 46A. The CIT(A) entitled to send one copy to the Assessing officer and obtains a remand report. The assessee should draft application for producing additional evidence separately alongwith the said documents and should be separately indexed and filed. The assessee should state in the application what prevented him by good, sufficient or reasonable cause or adequate time is not allowed to produce such fresh evidence before AO . The application must state what is the relevance of the documents in the matter . Opportunity to Assessing officer to examine document and evidence should be given by appellate authority. Rule embodies provision of natural justice:

Under Rule 46A(4) the CIT(A) on its own discretion can ask the assessee to produce documents or evidence. Additional evidence gathered by the CIT(A) on his own is not required to be produced before Assessing Officer for his comments. Where ever documents are in vernacular language assessee should file Translated copy of document .

RAISING ADDITIONAL GROUNDS:

Sub-section 5 of Section 250 gives power to the Commissioner (A) to allow the appellant to raise additional ground if he is satisfied that the omission of that ground was not wilful or unreasonable. Assessee should separately raise the additional ground of appeal . It should be accompanied by a application stating reasons why the additional ground was required to be raised in the matter and why the additional grounds should be admitted and adjudicated . The Assessee can raise the jurisdiction point at any time. As it is a question of law which goes to the root of the matter.

- a) Jute Corp. of India Ltd. vs. CIT 187 ITR 688 (SC) (FB)
- b) Heinrichde Frics GMBH vs. Jt. CIT 281 ITR 18 (Mum)(AT)

MAKING A CLAIM FOR THE FIRST TIME BEFORE APPELLATE AUTHORITY

If there was evidence or material on record, then only a claim made for the first time be entertained by the Appellate Authority. The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assessees in matters affecting their interests and convenience. ***Circular No.14(XL-35) of 1955, C.No.13(207)-IT/50, dated 11th April, 1955***, states that the Officers of the Department must not take advantage of ignorance of an assessee as to his rights.

Proper submission should be filed along with supporting evidences and documents in respect of the new claim . It is advisable separate

submission should be filed alongwith the supporting documents . Reasons for not making the claim in return or assessment proceeding should be spelt out in the submission. Decisions in support of the claim should be brought to notice of the authorities. Submission should clearly specify why the claim should be allowed. If conditions are required to be fulfilled the same needs to be explained and brought to notice of the authorities that same is complied with.

Conclusion :

In my view assessment and appeal proceeding under the changed scenario would require proper determination of facts by proper exchange and flow of correspondence between the assessee and revenue authorities. Since the government has done away with human interaction during the assessment as well as appeal proceeding , it is expected that assessee will clearly explain its stand in writing so the revenue authority can come to an objective conclusion on facts based on the record alone .

ART OF REPRESENTATION

1.1 The art of representation is nothing but art of communication or rather the art of persuasion. You must be able to convince the deciding authority that it is so.

The art of representation is not confined only to court, but any where in life, in any forum. The art of representation involves some degree of advocacy.

Advocacy is about persuading people, you cannot go through life without, on occasion needing to persuade. Advocacy is often useful and vital, in

negotiation, in meetings and public lectures. If you do not practice law at all, principles of advocacy is still a valuable skill, a transferable skill, a life long skill.

1.2 **Elements of persuasion**

The task is threefold:

- a) to be heard; to be interesting; to engage the audience in the presentation;
- b) to get the message across; to select the right content and to emphasise the key points; and
- c) to persuade the audience to accept the view advocated.

Presentation skills are the key to persuasion because presentation carries the message.

1.3 **SOME IMPORTANT PRINCIPLE OF GOOD REPRESENTATION:**

- A. There is no substitute for hard work. One must master the facts and read the law on the subject.
- B. Adhere to dress code and file your letter authority in advance.
- C. Observe Decorum in the court/online .
- D. In the opening argument put forth the best points which cannot be disputed and carry the judge with you.
- E. While arguing one must narrate the fact chronologically before the authorities /ITAT/court, one may take assistance of the paper book which is filed. One must avoid unnecessary and irrelevant papers in the paper book. Thereafter

one should proceed to state the submissions and thereafter support the same with relevant case law.

- F. You must know the Judge mind while you are arguing and tactfully you must put your points.
- G. When the Judge is making a point it is always advisable to listen carefully understand his view point and then reply.
- H. One should keep a smile on his face and should have a good sense of humour. One must have common sense in a good measure.
- I. Do not interrupt the Judge repeatedly, his ego is hurt. It is not advisable to rub the Judge's psychology. One has to be fair to the Judge as well as other side. You must never be unfair to your opponent.
- J. You must remember that every man has his ego and when one is sitting on the judicial chair, the ego becomes still more important and that has to be respected.
- K. One must never lose the temper in the court;
- L. You cannot win all the cases and one should not get over identified with the client or the case.
- M. One should not insist on displaying one's oratorical skill or his knowledge, which would not be relevant for the court. One should know when to stop.
- N. Build the Reputation

1.4 Edward Abbott Parry, an eminent English Judge in his book captioned "Seven Lamps of Advocacy" published by T. Fisher Unwin Ltd., Fourth Impression 1926, has highlighted seven important attributes of a successful lawyer or seven lamps, which enlighten his future path as a professional for effectively

pursuing legal profession before courts. These seven lamps have been enumerated by the author as under:

1. The Lamp of Honesty;
2. The Lamp of Courage;
3. The Lamp of Industry;
4. The Lamp of Wit;
5. The Lamp of Eloquence;
6. The Lamp of Judgement; and
7. The Lamp of Fellowship.

Thank you
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