

# Practical Aspects of Litigation

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For JB Nagar Study Circle

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# “Meaning of Appeal”

In Wharton’s Law Lexicon-

- The word “appeal” is defined as the judicial examination of the decision by an higher court of the decision of an inferior court.
- Appeal means the removal of cause from an inferior to a superior court for the purpose of testing the soundness of the decision of the inferior court.
- It is a remedy provided by the law for getting a decree of lower court or authority corrected when a party to a litigation is aggrieved.

## An Overview:

- “ *Right to Appeal is a Statutory Right and not an Inherent Right*”, hence subject to the terms and conditions specified therein.
- The right to first appeal is available to the tax payer only.
- First Appeal in all cases shall lie with CIT(A) only.
- Revision by Commissioner of Income Tax u/s.264 on an application by the Assessee

The option for revision may be preferred if the appeal is not filed or it has become time barred for filing.

# APPELLATE FORUM

Authority	Under Section
Commissioner (Appeals) (First Appeal)	246A – 250
Income Tax Appellate Tribunal (ITAT) (Final Fact Finding Authority)	252 – 255
High Court (Only if substantial question of law is involved)	260A – 260B
Supreme Court of India	261 - 262



# Who can file the Appeal:

- Any assessee (or any Deductor w.e.f. 1.7.2012) aggrieved by an order.
- In case of Firm, by any partner of a firm
- In case of AOP, by any member of AOP
- Legal Heir in case of deceased person.
- Managing Director or any Director in case of Company
- Karta in case of HUF. However, after the partition if any adverse order is passed in respect of pre partition HUF, erstwhile co-parceners can prefer an appeal.
- The representative assessee as defined u/s 160.

# Appealable Order:

- An assessee aggrieved by any of the orders specified under section 246A eg.
- ❖ An order against assessee who denies his liability to be assessed under the Income Tax Act, 1961.
- ❖ Intimation u/s. 143(1)/ 143(1B)
- ❖ Order u/s. 143(3)/144, 154 or 155
- ❖ Order u/s.143(3) read with an order of reassessment or recompilation under section 147 or 150
- ❖ Order u/s.163 – treating an assessee as representative assessee.
- ❖ Order imposing penalties under various sections



# Non Appealable Order:

- Order which are not specified under section 246 A are non appealable orders. Eg.
  - ❖ Order of refusal to grant stay of demand
  - ❖ Order to levy interest u/s. 234A, 234B, 234C
  - ❖ Certificate granted u/s. 197(1)
  - ❖ Interest charged u/s. 220(2)
  - ❖ Order passed u/s.264 rejecting Revision Petition
  - ❖ Orders with agreed additions.





## Cases where appeal to be directly filed before the ITAT:

- Order passed by the Pr. CIT/ CIT u/s. 263
- Order passed by the Pr. CIT/ CIT u/s.12AA and 80G
- Order passed by the Pr. CIT/ CIT u/s.271
- Order passed by the CIT/ C.CIT/ Dir. General/ Directorate u/s.272A
- Order passed by AO u/s.143(3), 147, 153A, 153C in pursuant to the direction of the DRP or an order amending such order u/s.154
- Against the order of the CIT(A)

# Important points to be considered....

- Check whether appeal lies.
- Carefully study the appealable order and find out the differences.
- Avoid filing frivolous appeals
- Appeal against the penalty order can be filed even if the appeal against the assessment order has not been filed.
- Ascertain the authority before whom appeal lies.
- Ascertain the limitation period within which appeal is to be filed.
- File application for condonation, if there is any delay.
- Ensure whether authority passing the order had jurisdiction to pass the order.
- Ensure whether order was passed within limitation period.
- Check computation of income and tax and interest computed thereon.

# Important points to be considered....

- Note that where if any claim had remained to be raised, fresh plea can be raised.
- Widest possible grounds should be taken in appeal.
- Grounds should not be argumentative.
- Statement of facts ought to be framed with clarity.
- Person filing should be eligible to file and sign the appeal.
- Ensure as to who is the respondent.
- File application for stay as and where required.
- Reply to show cause notice should be made promptly.
- Ensure that fee for appeal is paid under appropriate head and sub head.
- Certified copy of challan evidencing payment of appeal fee to be filed.



## Time limit for filing an Appeal:

- The appeal is to be file within 30 days of the following date, that is to say:
  - Where the appeal relates to any assessment or penalty; “*the date of service of the notice of demand.*”
  - Where the appeal relates to any TDS U/S 195(1), “*from the date of payment of tax.*”
  - In other cases; “*the date on which such intimation of the order is served.*”

## Condonation of Delay:

- Application for condonation of delay must be made specifying that there was a Sufficient Cause for delay.
- The CIT(A) can condone delay in filing of appeal under section 249(3) if satisfied that delay was due to “sufficient cause”.
- The CIT has discretionary powers of condonation which should be exercised judiciously.
- The CIT should have a pragmatic and liberal approach.  
[Collector Land Acquisition Vs Mst. Katiji 167 ITR 471 SC]

## Mode of Filing an Appeal:

- In person in the office of CIT (A)
- By an agent
- Can be sent by registered post to the office of CIT(A).

# Appeal Fee:

Particulars	Amount (Rs.)
<b>Total income computed by AO</b>	
<b>Upto Rs. 1,00,000/-</b>	<b>250/-</b>
<b>Between Rs. 1,00,001/- to Rs. 2,00,000/-</b>	<b>500/-</b>
<b>Above Rs. 2,00,001/-</b>	<b>1,000/-</b>
<b>Cases not covered above</b>	<b>250/-</b>

Total income determined at negative figure  
“Minimum fees”

*[Gilbs Computer Ltd. Vs. ITAT - 317 ITR 159(Bom)]*

Challan details while making payment through Net-banking:

Type of Payment : Self Assessment Tax –  
Code – 300

Details of Payment : Others



# Admission of Appeal:

- **Section 249(4) - Appeal shall not be admitted unless:**
  - ❖ Where ROI is filed by the “A”: *He/She/It has paid the tax due on the returned income on or before the filing of appeal [Mandatory].*
  - ❖ Where **no** ROI is filed (b): *The assessee has paid an amount equal to the amount of advance tax payable by him.*
  - ❖ *The CIT(A) has discretion to exempt the “A” from (b) above for any good and sufficient reason to be recorded in writing.*

# Documents to be filed with the Appeal:

The Memorandum of appeal should be filed along with the following documents:

- Form – 35 (In duplicate)
- Statement of Facts (In duplicate)
- Grounds of Appeal (In duplicate)
- Copy of order against which appeal is preferred (In duplicate)
- Original notice of demand (u/s 156)
- Copy of challan for payment of fees
- Power of Attorney
- Court fees stamp.
- Covering letter addressed to the CIT (A)



Non enclosure of notice of demand – technical irregularities but not fatal.

[Chelamala Setti Adeyya Vs. CIT - 54 ITR 339(AP)]

The form of verification shall be signed by a person in accordance with the provisions of Rule 45(2) i. e. by the person who is authorized to sign the ROI u/s. 140 of the Act, as applicable to the assessee.

# Procedure in Appeal—Section 250:

- Notice to AO and Assessee fixing a day and place of hearing.
- Following shall have right to be heard:
  - a) the appellant in person or through his AR
  - b) the AO or his AR.
- CIT (A) has powers to adjourn the hearing from time to time.
- Before disposing of the appeal, the CIT (A) has power to make further inquiry or may direct the AO to further inquire and report i.e. remand report.
- Additional ground may be allowed, at the time hearing of an appeal, if satisfied that the omission was not willful or unreasonable.

The order of the CIT(A) shall be in writing stating the point for determination, the decision thereon and the reason for the decision.

The CIT(A) may, as far as possible, **may** hear and decide the appeal **within a period of one year** from the end of the financial year in which appeal is filed.

The CIT(A) on disposal; communicate a copy of order to the assessee and to the Chief Commissioner or Commissioner “**but not to the AO**”

**CBDT has issue an Instruction dated 19-06-2015 the CIT(A) should pass appellate in all cases order within 15 days after the final hearing and in all duly heard cases before relinquishing charge on transfer/proceedings on leave.**

# Powers of CIT (Appeals)-Section 251:

- To confirm, reduce, enhance or annul the assessment;  
or
- To rectify the mistake apparent from record.
- In Penalty matters, to confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;
- In any other case – he may pass such orders in the appeal as he thinks fit.
- Power to consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised by the appellant.

## **“Any matter arising out of the proceedings”**

It extends to all matters arising out of the proceedings which might have been considered and determined by the AO in the course of the assessment although such matters might not have been raised by the assessee. The competence of the appellate authority ranges over the whole assessment proceedings without restrictions on him. His jurisdiction is therefore, not confined to the subject matter of the appeal but extends to the subject matter of assessment.

Powers of CIT (A) are very wide. He has the powers to direct the appellant to produce any document or to produce any witness for examination.

Entertain new ground of appeal – the Commissioner (Appeals) may at the time of hearing, allow the appellant to go into Additional Ground of appeal not specified in the ground of appeal, if he is satisfied that the omission was not willful or unreasonable.

Inherent power to stay the recovery.

*[ITO Vs. Mohammed Kunhi - 71 ITR 815 (SC)]*



# Production of additional evidence (Rule 46A):

**Appellant is not entitled to produce additional evidence except in the following 4 circumstances:**

- Where the AO refused to admit the said evidence which ought to have been admitted.
- Where appellant was prevented by sufficient cause from producing evidence called upon by the AO.
- Where the appellant was prevented by sufficient cause from producing before the AO any evidence which is relevant to any ground of appeal.
- Where AO passed the impugned order without giving sufficient opportunity to appellant to adduce evidence relevant to any ground of appeal.

The CIT (A) must record in writing the reasons for admission of additional evidence.

Before considering the additional evidence, the CIT(A) must :

Allow the AO a reasonable opportunity to examine the evidence or document or to cross examine the witness produced by the appellant, or

To produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

## Death of an assessee:

- Where an assessee to an appeal dies or is adjudicated insolvent or in the case of the company wound up, the appeal will not abate and will continue against the executor, administrator or other legal representatives of the assessee or by or against the assignee, receiver or liquidator as the case may be.
- In case of a death of assessee, the legal heirs of the assessee must file copy of death certificate and an affidavit of they being the legal heirs.
- A fresh memorandum of appeal signed by the legal heirs must be filed before the Commissioner (Appeals) or the Tribunal as the case may be where the assessee is the appellant so that the legal heirs are brought on record.

# Withdrawal of Appeal:

- Appeal once filed cannot be withdrawn by the appellant.
- However the appellate authority in its discretion may allow withdrawal of appeal and dismiss the same as not pressed.
- In CIT v. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC) it has been held that: “It is also well-established that an assessee having once filed an appeal cannot withdraw it. In other words, the assessee having filed an appeal and brought the machinery of the Act into working cannot prevent the AAC from ascertaining and settling the real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuses to appear at the hearing, the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there has been an under-assessment, he can enhance the assessment”.

Although the assessee has no power to withdraw the appeal filed before the CIT(A) as per 66 ITR 443(SC) (supra) **but the CIT(A) or Appellate Authority is satisfied that there will be no prejudice to revenue may allow to withdraw.**

*[Bhartia Steel & Engineering Co. P. Ltd. Vs. ITO 97 ITR 154(Cal)]*

## Appeal Order and appeal effect:

- After conclusion of hearing the CIT (A) will issue an order of the appeal.
- If it is in favour of the Assessee, either in full or partial, he has to file a request with AO for appeal effect.
- In case of against the Assessee, he has to decide to file second appeal file an appeal before jurisdictional ITAT within 60 days.
- If the appeal order is against the AO, then he has a right to go in appeal with ITAT.

The revised limits for filing appeal by Department before Appellate Authorities are given hereunder:

Appeals in Income Tax Matters	Monetary Limit (In Rs.)
Before ITAT	Rs.10,00,000/-
Before High Court	Rs.20,00,000/-
Before Supreme Court	Rs.25,00,000/-

# Drafting of Appeal before the CIT (A): “USEFULL TIPS”

- Before drafting an appeal, prepare a Reconciliation Statement of “Income Declared” and “Income Assessed.”
- Read the assessment order thoroughly.
- Identify each addition and each disallowance.
- Identify the wrong facts stated by the AO in his Order and consider it in the grounds of appeal appropriately.
- Statement of facts should be given for each ground of appeal and these may be detailed depending upon case to case. Statement of facts can be given at the time of hearing also.
- Grounds of appeal must be in brief and avoid arguments while drafting grounds of appeal.





It is suggested that simple sentences be used in brief but the grievance to be raised must not be left out.


Always avoid mixing up the grounds of appeal with statement of facts.

Grounds of appeal should be drafted in logical sequences and be numbered properly.

The First Ground should be a General ground- Income assessed and income declared.

In the last Ground, crave leave for addition, modification, substitution or withdrawal of grounds of appeal.

- Do not wait for order of application u/s.154 moved against assessment order. File an appeal against assessment order.
- Keep the appeal alive for relief in future. Quantum appeal allowed by Tribunal but no appeal preferred against penalty. Nothing can be done for penalty at this stage.
- Appeal on minor issues having repetitive impact in future years viz., interest on unsecured loans @ 18%.
- Written reply be preferred instead of instant answer.
- Written submissions preferably be filed.



In case of more than one issue involved in appeal, draft one separate ground for one issue.

Avoid using long sentences.


Avoid referring case laws while drafting grounds, if any

In case opportunity of being heard is not granted to the assessee, the same should be clearly mentioned in grounds.

Nature of dispute and relief expected should be highlighted.

# **Presentation before the CIT(A): “USEFUL TIPS”**

- Study the assessment order in depth and carefully and understand the facts of the case and the background involved in each addition.
- Study all the replies filed before the AO during the assessment proceedings
- Identify the weak points in relation to each additions made.
- Examine whether any additional evidence is to be taken. If so, draft an appropriate application under Rule 46- A.


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- File the application under Rule 46-A alongwith documentary evidence in support of your claim as far as possible.
  - Prepare paper book with index containing all written submissions filed, evidences in support of assertions made in the written submissions.
  - Prepare exhaustive written submissions relevant to each ground of appeal. Highlight the important submissions in bold or italics.
  - Make special efforts in emphasizing as to how and why the AO was wrong based on actual facts and legal issues. Controvert the stand taken by the AO duly supported by documentary evidences, legal position and decided cases by the courts.

➤ Reliance be placed on the decisions of the Apex Courts, Jurisdiction High Court and ITAT.

➤ Revenue authorities have to follow decision of jurisdictional High Court.  
[CIT Vs. G. M. Mittal Stainless Steel (P) Ltd. (2003) 130 Tax man 67 / 263 ITR 255 (SC)]

➤ Care need to be taken while placing reliance on case laws. Examine the cases for and against. As far as possible, distinction be made between the cases which are against.

➤ Distinguish the cases relied upon by the AO.

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- Have proper knowledge of all facts of the case. Reply to the queries raised by the CIT (A) be offered promptly and to the point.
  - Past History- An Important evidence- but to be used carefully at this stage.
  - Representation of information based on information already filed is possible.
  - Details given in past assessment can be made part of Paper Book.

# The following portals may be referred:

- Income Tax Reports
- Taxmann
- Tax India Online
- Current Tax Reporter
- Direct Tax Reporter
- Income Tax India
- ITAT Online
- Lexsite



# Do's and Don'ts of Good Representation:

## Do's:

- ❖ Be Punctual and learn time management.
- ❖ Keep your mobile on the silent mode.
- ❖ File Original letter of authority in advance.
- ❖ Sincerity to work & Good preparation.
- ❖ Maintain calm and be peaceful and confident.
- ❖ Be Courteous. Keep Smile. Be cheerful and humble.
- ❖ Use simple language.
- ❖ Brevity & precision
- ❖ Listen all queries raised by the Bench/ CIT(A) carefully without interrupting and answer the same directly.
- ❖ In presenting the case, put forth the best points which cannot be disputed and carry the CIT(A)/ Judge with you by reason.



❖ To know the law/ sections is not enough to make a great lawyer. But you must know and apply it to the facts of your case to bring out results.

❖ During the arguments, be cool, calm and temperate. Remember that advocacy is not a business but a profession, not a trade but a duty of honour.

❖ Know when to step.


❖ Build the Reputation.

❖ Respect the seniors and be affectionate to the juniors.

❖ Body language should be controlled.

## Don'ts

- ❖ Do not get provoked with the seemingly irrelevant queries by the CIT(A).
- ❖ Avoid unnecessary arguments and altercations in case if the CIT(A) is not satisfied with your arguments.
- ❖ Don't under estimate other side
- ❖ Never be over confident
- ❖ Avoid repetition

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- ❖ Don't lose your temper whatever be the provocation
  - ❖ Don't get annoyed if interrupted by the bench/ CIT(A)
  - ❖ Don't mislead facts
  - ❖ Do not argue loudly
  - ❖ Do not cite case law first. First analyze facts and then law.

# Appeals before Tribunal:

- Should be filed within 60 days of the date on which the order sought to be appealed against is communicated
- Memorandum of Cross Objections – within 30 days of receipt of notice of demand that an appeal has been preferred to the ITAT
- Time extended if sufficient cause proven.
- To be filed in prescribed time [Form 36 along with Ground of Appeal] and manner
- Additional ground/ evidence can be raised for the first time before the ITAT. In such a case opportunity of being heard should be given to the assessing officer.

# Appeals before Tribunal:

- After hearing both the parties, the ITAT passes an order as it thinks fit and communicate the same to the assessee and the Commissioner
- Where possible, ITAT to dispose within 4 years from the end of the financial year in which appeal was filed.
- Mistakes apparent from record – Order of ITAT can be amended within 4 years from the date of ITAT order [Section 245(2)] if it is brought to the notice by the assessee or the assessing officer.

# Fees for filing an appeal before ITAT:

Particulars	Amount
Assessed total income Rs. 1,00,000 or less	Rs. 500/-
Assessed total income more than Rs. 1,00,000 but not more than Rs. 2,00,000	Rs. 1,500/-
Appeals involving total assessed income of more than Rs. 2,00,000	Rs. 10,000/- or 1% of income (whichever is lower)
Appeals not related to assessed income	Rs. 500/-

# Precaution to be taken in preparing paper book...

- Paper book should be prepared in prescribed format and filed in triplicate.
- Only relevant papers which are necessary to be referred to in the course of hearing should be enclosed.
- Assessee paper book may be filed in the case appeal is from departmental appeal
- Should be submitted in within the prescribed time.
- Should be properly indexed.
- Avoid preparing bulky paper book.



## Important points to be considered:

- No additional evidence is produced before the ITAT first time without proper application.
- In case of delay in filing paper book within prescribed time, condonation of delay should be file.
- File cross objection within prescribed time.
- Cross Objection is also filed in case appeal is already filed.

# Appeals before High Court:

- Right exercisable u/s.260A
- Preferred against ITAT's order
- Only if substantial question of law arising out of ITAT order.
- Should be filed within 120 days of receipt of relevant order. Delay for bonafide reasons may be condoned by the CIT(A).
- Appeal can be filed by assessee or Chief Commissioner/ Commissioner of Income Tax.
- Rules framed for court proceedings and conduct has to be observed.

# Appeals before High Court:

- The memorandum of appeal precisely stating the substantial question of law involved should accompany the court fee for filing appeals to High Court.
- Respondent shall be allowed to argue at the time of hearing that the case does not involve such question.
- The High Court may determine any issue which-
  - (a) Has not been determined by the Appellate Tribunal;  
or
  - (b) Has been wrongly determined by the Appellate Tribunal.

# Appeals before Supreme Court:

- Right exercisable u/s.261 of the Income Tax Act, 1961.
- Preferred against High Court's Order or decision of National Tax Tribunal.
- Only for a case involving a “substantial question of law”
- Should be filed within 60 days of receipt of High Court's order
- Can also be filed by the Tax department
- Rules framed for Court proceedings and conduct has to be observed.



**Thank You**