
Appeal to ITAT

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Right to appeal – is it a statutory right or inherent right?

1	The right of appeal is not a natural or inherent right attached to litigation.
2	It is a statutory right. Such right has to be clearly spelt out in the statute. Otherwise it is not available. CIT Vs Ashoka Engineering Co 194 ITR 645 (SC) .
3	If no right of appeal has been expressly provided in the statute in respect of any order or direction or any other action, no appeal can be preferred against such order, direction or action.
4	Example: The order of CIT u/s 264 is not appealable. No right is explicitly conferred on the assessee to challenge it in appeal.
5	However, in these cases, the aggrieved persons can resort to constitutional remedies by way of filing writ petitions before the HC.

Background about the ITAT

- (a) quasi-judicial institution set up in January, 1941 and specializes in dealing with appeals under the Direct Taxes Acts.
- (b) orders passed by the ITAT are final (last fact finding authority), an appeal lies to the High Court only if a substantial question of law arises for determination.
- (c) Chapter XX-B of the Income-tax Act, deals with the appeals to the Tribunal (Section 252-255)
- (d) Relevant Rules – Rule 47 of the Income-tax Rules, 1962
- (e) Income-tax (Appellate Tribunal) Rules, 1963.

Constitution of Appellate Tribunal [Section 252]

- (1) The Central Government shall constitute an Appellate Tribunal consisting of as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal.
- (2) A judicial member shall be a person -
 - (i) who has held a judicial office in the territory of India at least for ten year; or
 - (ii) who has been a member of the Indian Legal Service and has held a post in Grade II of that service or any equivalent or higher post for at least three years; or
 - (iii) who has been an advocate for at least ten years.
- (3) An accountant member shall be a person -
 - (i) who has been in the practice of accountancy as a Chartered Accountant at least for ten years; or
 - (ii) who has been a member of the Indian Income Tax Service, Group A and has held the post of Additional Commissioner of Income Tax or any equivalent or higher post for at least three years.

Procedures of Appellate Tribunal [Section 255]

- (1) Normally, a Bench of the Appellate Tribunal shall consist of one Judicial Member and one Accountant Member (**Division Bench**)
- (2) The President or a member of the Appellate Tribunal may be empowered by the Central Government, sitting singly, to dispose of any case where total income assessed does not exceed Rs. 50 lakhs. (**SMC Bench**)
- (3) The President may constitute a Special Bench consisting of three or more members, one of whom shall be a judicial member and one an accountant member - (**Special Bench**)
- (4) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority. If the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing by one or more of the other members of the Appellate Tribunal. Such point shall thereafter be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it. - (**Third Member**)
- (5) Dress Regulation (rule 17A)

Types of Applications/ Appeals that can be filed

- a. Tax Appeal
- b. Cross Objection
- c. Stay Application
- d. Miscellaneous Application (Rectification Application)

Appealable Orders [Section 253]

1. Examples of orders appealable by Assessee: [Section 253(1)]

Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- (a) an order passed by a Commissioner (Appeals) under Sections 154, 250, 270A, 271A, 272A.
- (b) an order passed by a Commissioner under Sections 12AA/80G(5).
- (c) an order passed by a Commissioner u/s. 263, 270A.
- (d) An order passed by an assessing officer u/s 143(3) or 147 or 153A or 153C, in pursuance of the directions of the Dispute Resolution Panel or an order passed u/s 154 in respect of such order.
- (e) An order passed by an assessing officer u/s 143(3) or 147 or 153A or 153C, with the approval of Pr. Commissioner or Commissioner as referred to in section 144BA(12) or an order passed u/s 154 in respect of such order. (GAAR)

2. Orders appealable by department:

- (a) If the Commissioner objects to any order passed by CIT (Appeals), he may direct the Assessing Officer to appeal to the Appellate Tribunal against the order. [Section 253(2)]

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- (c) However, such direction shall be given only in those cases where revenue effect exceeds Rs. 10,00,000 (excluding interest). **CBDT Circular No. 21/2015 [379 ITR (ST) 107]. Further, such Circular is retrospective in nature and shall also apply to pending appeals. (Also see DIT vs. S.R.M.B. Dairy Farming (P) Ltd. - Civil Appeal Nos. 19650 of 2017)**

PS: No appeal to ITAT by the Department from the order of AO in pursuance of the directions of Dispute Resolution Panel (Finance Act, 2016)

Procedure for appeal to Appellate Tribunal (Section 253)

Time limit for filing appeal : The appeal to the Appellate Tribunal shall be filed **within 60 days** of the date on which the order sought to be appealed against, is communicated to the assessee or to the CIT, as the case may be. [Section 253(3)]

Filing of cross objections and time limit : The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of Commissioner (Appeals) has been filed by the other party, may, notwithstanding that he has not appealed against such order or any part thereof, file a memorandum of cross objections with the Appellate Tribunal. The memorandum of cross objections shall be in the prescribed form and shall be disposed of by the Appellate Tribunal as if it were an appeal before it. The memorandum of cross objections has to be filed within 30 days of the receipt of above said notice. [Section 253(4)]

Condonation of delay of time limit : The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross objections after the expiry of 60/30 days, if it is satisfied that there were sufficient cause for not presenting it within the specified period [Section 253(5)]

Judicial decisions: In the following cases, it was held that Court should adopt a pragmatic approach or a liberal approach in disposing of a condonation application.

1. 167 ITR 471(SC) Collector, Land Acquisition vs. Mst. Katji & Ors.
2. 253 ITR 798(SC) Vedabai Alias Vaijyanatabai Baburao Patil vs. Shantaram Baburao Patil & Ors.
3. 346 ITR 428(Gau) - CIT vs. Williamson Tea Assam Ltd
4. 102 TTJ 53(Mum) Sterlite Industries (India) Ltd. Vs. Addl. CIT

Appeal filing fees - Tribunal

1. The filing fees in case of appeal to the Tribunal is prescribed under Section 253 as follows:
 - (i) Total assessed income is Rs 1 lakh or less - Rs. 500/-
 - (ii) Above Rs 1 lakh and not more than Rs 2 lakhs - Rs 1,500/-
 - (iii) More than Rs 2 lakhs - 1% of the assessed income or Rs 10,000, whichever is less.
 - (iv) Where the subject matter of an appeal is not with reference to the income assessed the filing fee shall be Rs 500/-. For example, appeal against an order imposing

penalty for default in deducting tax at source or in filing certain returns will fall under this category.

5. No such filing fee is payable where the appeal is preferred by the Commissioner or where a memorandum of cross-objections is filed by assessee or by CIT.
6. An application of stay of demand shall be accompanied with a fee of ` 500/-
7. Any application filed by an assessee seeking rectification of any mistake apparent from the record by the Appellate Tribunal shall be accompanied by a fee of ` 50.
8. No fee for filing of cross objection.

Form of Appeal/ Cross Objection/ SA/ MA

1. Income-tax Appeal u/s 253(1) or (2) should be filed in Form 36 [**Rule 47(1)**]
Appeal to be filed in triplicate and shall be accompanied by:
 - 2 copies of the CIT(A) order (one should be certified);
 - 2 copies of the GOA / SOF filed before CIT(A);
 - 2 copies of the assessment order;
 - Original Challan evidencing payment of appeal fee
 - Form / GOA to be signed by the person who is authorized to sign the ROI u/s 140
 - In case of penalty appeal – two copies of assessment order u/s 143(3) or 144 (Rule 9).
2. Appeal against the order of AO in pursuance of the directions of the DRP to be filed in Form 36B.
Appeal to be filed in triplicate and shall be accompanied by:
 - 2 copies of the order appealed against (one should be certified);
 - 2 copies of the draft assessment order;
 - 2 copies of grounds of objection and statement of facts before the DRP
 - 2 copies of DRP direction;
 - Original Challan evidencing payment of appeal fee
 - Form / GOA to be signed by the person who is authorized to sign the ROI u/s 140
3. **Cross Objection** to be filed in Form 36A. Such form to be filed in triplicate and to be signed by person as specified u/s 140. [**Rule 47(2)**]
4. **Miscellaneous Application** – No specific form prescribed. The Application should clearly and concisely state the mistake apparent from the record of which the rectification is sought. Application to be made in triplicate. Order should be attached. Also the original challan of fee payment should be attached. Such an application can be filed within 6 months from the date of the receipt of the order. **No provision for condonation of delay.**

5. **Stay Application-** Rule 35A of the ITAT Rules, 1963

Every stay application shall be presented in triplicate. Every application shall be neatly typed on one side of the paper and shall be in English and shall set forth concisely the following:

- short facts regarding the demand of the tax, interest, penalty, fine, estate duty or any other sum, recovery of which is sought to be stayed ;
- the result of the appeal filed before the CIT (Appeals) , if any ;
- the exact amount of tax, interest, penalty, fine, estate duty or any other sum demanded, as the case may be, and the amount undisputed therefrom and the amount outstanding ;
- the date of filing the appeal before the Tribunal and its number, if known;
- whether any application for stay was made to the revenue authorities concerned, and if so the result thereof (copies of correspondence, if any, with the revenue authorities to be attached);
- reasons in brief for seeking stay ;
- whether the applicant is prepared to offer security, and if so, in what form;
- prayers to be mentioned clearly and concisely (stating exact amount sought to be stayed);
- the contents of the application shall be supported by an affidavit sworn by the applicant or his duly authorised agent ;

6. **Revision of form 36**

- On change of address (Rule 9A)
- On death of the assessee or insolvency (Rule 26)

7. Who may be joined as respondent in an appeal by assessee?

- Only the Assessing Officer concerned (Rule 13)

Grounds of Appeal

Rule 8 - Every memorandum of appeal shall be written in English and shall set forth, concisely and under distinct heads, the grounds of appeal without any argument or narrative; and such grounds shall be numbered consecutively.

Rule 11 - The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule.

Additional Grounds - Judicial Decisions

1. **(1991) 187 ITR 688 (SC) Jute Corpn. of India Ltd. v CIT**

In this case it was held that the appellate authority has the jurisdiction to permit the appellant to raise an additional ground if the ground so raised could not have been raised at the stage when the return was filed or when the assessment order was made and the ground became available on account of a change of circumstances or law.

2. **229 ITR 383(SC) NTPC vs. CIT**

In this case it was held that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing

on the tax liability of the assessee, notwithstanding the fact that same was not raised before the lower authorities.

3. **349 ITR 336(Bom)CIT vs. Pruthvi Brokers & Shareholders (P) Ltd.**

After dealing with the Supreme Court judgement in case of Goetze, the Hon'ble Court held that additional claim can be taken before the appellate authorities for the first time.

Additional Evidence

Rule 29

The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

Judicial Decisions favouring assessee

1. 231 ITR 1(Bom) - Smt. Prabhavati S. Shah vs. CIT
2. 293 ITR 53(Bom) – CIT vs. Suretech Hospital & Research Centre LTD.
3. 295 ITR 252(Gau) – CIT vs. Poddar Swadesh Udyog (P) Ltd.
4. 332 ITR 396(Del) – CIT vs. Virgin Securities & Credits (P) Ltd.

Orders of Appellate Tribunal [Section 254]

- (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, **pass such orders thereon as it thinks fit** [Section 254(1)]
- (2) The Appellate Tribunal may, **at any time within 6 months from the date of the order**, with a view to rectify any **mistake apparent from record**, amend any order passed by it under Section 254(1), and shall make such amendment if the mistake is brought to its notice by the assessee, or Assessing Officer.

An amendment, which has the effect of increasing the tax liability of the assessee, shall be made only after the assessee has been given a reasonable opportunity of being heard. [Section 254(2)].

- (3) In any appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed. [Section 254(2A)]

The Tribunal cannot:

- a. Enhance an assessment
- b. Review its order
- c. Test the constitutional validity of any provision/ circular/ notification.

The words pass such order thereon as it thinks fit' include all the powers (except the power of enhancement) which are conferred upon the CIT (Appeals) by section 251. [**Hukumchand Mills Ltd. v CIT (1967) 63 ITR 232 (SC)**].

Once the application for rectification is moved by the assessee within the period allowed i.e. 4 years, the Tribunal can pass the rectification order on merits even after the expiry of the period of 4 years. **However if the Tribunal suo moto makes the rectification of its order then the order has to be passed within 4 years from the date of the order to be rectified.** [CIT vs. Sree Ayyanar Spinning & Weaving Mills Ltd. 301 ITR 434(SC)].

Order of Stay of Demand: [Section 254(2A)]

- (1) Initially the Tribunal can pass an order of stay only for a period not exceeding 180 days from the date of the order staying the demand.
- (2) The Tribunal shall dispose of appeal within the aforesaid period.
- (3) If appeal is not disposed of within the aforesaid period, the period of stay may be extended, on an application made by the assessee. Extension is possible only if delay is not attributable to assessee.
- (4) The Act states that the total period of initial stay and extended period or periods cannot be more than 365 days. However, this provision has been rendered unconstitutional by the Hon'ble Delhi High Court in case of Pepsi Foods Pvt. Ltd vs. ACIT. Thus, the ITAT can now grant stay for period more than 365 days. This view is also taken by the Hon'ble Bombay High Court.
- (5) The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal. [Section 254(2B)]
- (6) The Appellate Tribunal shall send a copy of any orders passed by it to the assessee and to the Commissioner [Section 254(3)]
- (7) The order passed by Appellate Tribunal shall be final unless appeal is made under Section 260A.

Other issues:

1. Adjournments
2. LOA and POA
3. Paper Book

Thank You

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