

**APPEAL BEFORE CIT(APPEALS) –
APPEALABLE ORDERS, PROCEDURE IN
APPEAL, ADDITIONAL EVIDENCE,
POWERS OF CIT (APPEALS)**

Meaning of 'appeal'

The expression '**appeal**' has been defined in Mozley and Whitely's Law Dictionary as "a complaint to a superior court, of an injustice done by an inferior one." The party complaining is styled as the appellant & the other as the respondent.

Is an appeal a right ?

- The right of appeal is not inherent or a fundamental right but it is a creature of the Statute governing it. The right to appeal must be given by express enactment & cannot be implied – *Hariher Gir v. CIT (1941) 9 ITR 246 (Pat)*.
- Further, the statutory provision conferring the right of appeal have to be consulted to determine the nature & extent of that right – *Haji Gulam Husain & Sons v CIT (1957) 31 ITR 231 (All.)*.
- An appeal is a continuation of assessment proceedings. The right to appeal is a substantive right which gets crystallized when assessment proceedings are initiated – *CIT v Bengal Cardboard Industries & Printers Pvt. Ltd. (1989) 176 ITR 788 (Cal.)*.

Is an appeal a right ?

- An assessee cannot complain for not providing a right of appeal by the legislature against the tax imposed on him- *Kakati v CIT (1963) 14 STC 84 (Mys)*.
- Further, the Supreme Court in *Express Hotel Pvt. Ltd. v State of Gujarat (1989) 178 ITR 151* has held that the absence of the appeal provision doesn't make the provision per se unreasonable.
- The Court cannot change the language of a provision in order to infer a right of appeal, if no such right is provided by the Statute- *Vidyapat Singhania v CIT 107 ITR 533 (All)*.

Is an appeal a right ?

- *In R.B Jodha Mal Kuthiala v CIT.66 ITR 319 (Del.)* held that in case of ambiguity the relevant provision must be construed in favour of the existence of a right of appeal.

Appellate Hierarchy

Alternative 1 - Appeal

Nature of Action	To whom it should be filed	Against which order it can be preferred	Who can prefer?
First Appeal	Commissioner (Appeals)	Against the order of Assessing Officer	Assessee/ Tax-payer
Second Appeal	ITAT	Against the order of CIT (Appeals)	Tax-payer/ CIT
Appeals to High Courts	High Court	Substantial question of law arising out of ITAT orders.	Tax-payer/ CIT
Appeals to Supreme Court	Supreme Court	Judgment of High Court	Tax-payer/ CIT

Appellate Hierarchy

Alternative 2 – Revision u/s 263

Nature of Action	To whom it should be filed	Against which order it can be preferred	Who can prefer?
First Appeal	ITAT	Against the order of CIT	Tax-payer
Appeals to High Courts	High Court	Substantial question of law arising out of ITAT orders.	Tax-payer/ CIT
Appeals to Supreme Court	Supreme Court	Judgment of High Court	Tax-payer/ CIT

Appellate Hierarchy

- No appeal is provided against the order of CIT passed u/s 264 but a writ-petition under Article 226 of the Constitution to the High Court is maintainable.
- The order passed by Commissioner u/s 264 is not an appealable order u/s 246/246A – *Orissa Rural Housing Development Corpn. Ltd. v. ACIT 343 ITR 316 (Orissa)*.

Appellate Hierarchy

Alternative 3 – Directions by DRP u/s 144C

Nature of Action	To whom it should be filed	Against which order it can be preferred	Who can prefer?
First Appeal	ITAT	Order of the AO passed u/s 143(3) r.w.s. 144C	Tax-payer/ CIT
Appeals to High Courts	High Court	Substantial question of law arising out of ITAT orders.	Tax-payer/ CIT
Appeals to Supreme Court	Supreme Court	Judgment of High Court	Tax-payer/ CIT

Orders which can be appealed against before CIT (Appeals)

1. An order against the assessee who denies his liability to be assessed
2. Order u/s. 92CD(3)
3. Intimation u/s. 143(1), 143(1B)
4. Order u/s 143(3)
5. Order u/s 143(3) r. w. s. 147 or 150
6. Order u/s. 153A
7. Order u/s 154/155
8. Order u/s 163
9. Order u/s 170(2)/ 170(3)
10. Order u/s 171

Orders which can be appealed against before CIT (Appeals)

11. Order u/s 201

12. Order u/s. 206C(6A)

13. Order u/s 237

14. Penalty under Chapter XXI

15. As per sec. 248, where under an agreement or other arrangement, the tax deductible on any income, other than interest, u/s. 195 is to be borne by the payer who claims that no tax was required to be deducted on such income.

Orders which are non-appealable

1. *Assessment made on an agreed basis* - Sterling Machine Tools v. CIT (123 ITR 181)(All.)
2. *The assessee had agreed to disallowance* - ITO v. Chunnilal Ramjas Rai
3. *No objection by the assessee to the rectification of assessment order* - Ramanlal Kamdar v. CIT (108 ITR 73)(Mad.)
4. *Rectification u/s. 154 on assessee's consent* - CIT v. Cochin Malabar Estate and Industries Ltd. (180 ITR 152)(Ker.)
5. *Appeal against interest* – ANZ Grindlays Bank PLC v. CIT (241 ITR 269)(Cal.)

Check list for filing a CIT appeal

1. On receipt of order and notice of demand, note the date of service of order and notice of demand.
2. Find the point of grievance. Prepare a reconciliation of return income and assessed income.
3. List out the additions made, disallowances, whether a notice was issued u/s. 143(2) for assessment and the order passed are within the prescribed time limit. Section 292BB to be taken into consideration.
4. Check sec.246A to ensure that the order is appealable and under which clause.

Check list for filing a CIT appeal

5. Prepare application for rectification in respect of mistakes, which are apparent from record.
6. Fill Form No. 35. Prepare a statement of facts and the grounds of appeal.
7. Ensure compliance of sec. 249 (4). Payment of taxes and interest.
8. Pay appropriate appeal-filing fees.
9. Grounds of appeal should be simple, concise, aptly worded, and serially numbered issue-wise.
10. Statement of facts should highlight each and every fact, since there is only one opportunity for filing the statement of facts.

Check list for filing a CIT appeal

11. Ensure to incorporate all additions, disallowances made in the assessment order from different angles i.e. put alternative claims with the words “Without prejudice to above”.
12. After raising all the grounds of appeal, crave leave to add, to amend, alter, modify, delete, etc. any of the grounds of appeal without which the CIT(A) may not allow to take some additional grounds or even withdraw the appeal.
13. Ensure that the audit memo, grounds of appeal, statement of facts, etc. are signed and verified by the person who is authorised to sign the return of income u/s 140 of the Income-Tax Act.

Check list for filing a CIT appeal

14. Court fee stamp of Re. 5 be affixed in the first copy of the appeal memo.
15. File Form No.35 in duplicate within 30 days along with the following documents:
 - a. Statement of facts in duplicate.
 - b. Grounds of appeal in duplicate.
 - c. Two copies of the order appealed against (1 certified copy)
 - d. Two copies of the assessment order, in case the appeal is against penalty order.
 - e. Condonation petition, if there is delay.

Check list for filing a CIT appeal

- 15. f. Original notice of demand.
 - g. Original challan for appeal-filing fees, with signature of appellant.
- 16. Ensure that the appeal is filed with the jurisdictional CIT (A) as mentioned on the rear side of the demand notice.
- 17. File a stay-petition with the Assessing Officer in respect of demand within 30 days of the date of service of the order.

Time Limit

- The appeal shall be presented within 30 days of the following date:
 1. Where the appeal is made u/s. 248, the date of payment of tax, or
 2. Where the appeal relates to any assessment or penalty, the date of service of the notice of demand relating to the assessment or penalty, or
 3. In any other case, the date on which order sought to be appealed against is served.

Time Limit

- In computing the aforesaid time limit of 30 days, the day on which an order was served shall be excluded. Moreover, if the assessee was not furnished with the copy of the order when the notice of demand was served upon him, the time requisite for obtaining a copy of such order shall be excluded – *CIT v Prem Kumar Rastogi (1980) 124 ITR 381 (All.)*.

Filing Fees

- With effect from 1st October 1998:
 - Assessed Income of Rs. 1 lakh or less Rs. 250
 - Assessed Income of more than Rs. 1 lakh and less than Rs. 2 lakhs Rs. 500
 - Assessed Income of more than Rs. 2 lakhs Rs. 1000
 - Any other subject matter (From 1/6/99) Rs. 250

Filing Fees

- The issue arises whether in respect of an appeal against the penalty order, the filing fees would depend upon assessed income or not. The Hon'ble Mumbai Tribunal in *Amruta Enterprises v Dy. CIT 84 ITD* has held that in case of appeal to the tribunal against levy of concealment penalty u/s 271(1)(c), since the quantum of penalty is not linked to assessed income but tax sought to be evaded, a proper filing fee is Rs. 500 in ITAT. Same analogy can also be applied for CIT (A) and thus, proper filing fee before CIT(A) would be Rs. 250.
- Similarly, in case of appeals made against the order u/s. 201 in connection with the TDS matters, proper filing fee before CIT(A) would be Rs. 250 irrespective of the amount involved.

Signature on Form

- The rule 47(1) of the Income-Tax Rules, 1962 requires that where an appeal by the assessee, the form of appeal, the grounds of appeal and the form of verification shall be signed by the person specified in the sub-rule 2 of rule 45 which in turn reads that the forms, etc. shall be signed and verified by the person whose is authorised to sign the return of income u/s. 140 of the Income-Tax Act.
- The Calcutta High Court in the case of *Sheonath Singh v CIT 33 ITR 591* has held that the absence or defect in the signature of the appellate is not so fatal, as to render an appeal a nullity. It is an irregularity which can be rectified and will be treated as rectified retrospectively.

Condonation of Delay

- The appeal has to be filed within the time limit of 30 days from the receipt of impugned order. The Commissioner of Appeals may admit an appeal after the expiry of the said period, if he is satisfied that the appellant has sufficient cause for not presenting it within the time period. Courts have taken the view that the condonation of delay should be viewed broadly and this power be exercised liberally. In this regards, following decisions of the Supreme Court are worth noted:
 - a. Ram Nath Sao alias Ram Nath Sahu and others, reported in AIR 2002 SC 201
 - b. Mst. Katiji & Others reported in 167 ITR 471

Sufficient reasons for condoning the delay

1. Wrong advice given to the appellant – *R.Ranganayaki Ammal 38 ITR 20 (Mad.)*
2. Delay due to the mistake of the income tax officer stating in the demand notice that the appeal lies with the Appellant Assistant Commissioner instead of the Tribunal- *Avtarkishandass 133 ITR 338 (Del.)*
3. Conflicting legal advices - *Smt.Laxmi Devi AIR (1988) (All.) 133*
4. If the mistake was committed by the Counsel in filing the appeal before a wrong forum –*Ajib Singh AIR (1989) (Punj.) 153*
5. Where the managing partner of the assessee's firm was hospitalised and so couldn't contact the concerned auditors in time for filing appeals.*74 TTJ 458 Coch*

Payment of Admitted tax

Sec 249(4)(a) provides that no appeal shall be admitted unless at the time of filing of the appeal, the assessee has paid the tax due on the income returned by him. As per the sec.249 (4)(b), where no return is filed, amount equal to the amount of advance tax which was payable by him has been paid. The proviso to sec. 249(4) provides for exemption of payment if the case is covered by sec. 249(b) and the CIT (Appeals) is satisfied as to good sufficient cause. The provision of sec. 249(4) is mandatory.

- a. *CIT v Rama Bodybuilders (2001) 117 Taxman 68 (Del.)*
- b. *Filmistan Ltd. 42 ITR 163 (SC)*
- c. *T Gopindappa Setty v ITO 231 ITR 892 (Kar.)*

Withdrawal of appeal

1. The assessee, having filed an appeal and brought the machinery of the Act into operation, can't prevent the first appellate authority from asserting and settling the real sum to be assessed, by intimation for his withdrawal of appeal. Even if the assessee refuses to appear at the hearing, the first appellant authority can proceed with the inquiry and if he finds that there has been an under-assessment, he can enhance the assessment- *CIT v Rai Bahadur Hardutoy Motilal Chamaria(1967) 68 ITR 443(SC)*.
2. However, the Bombay High Court in case of *Jagmondas Gokaldas v CWT (1963) 50 ITR 578* has held that true, an appellant can't as a matter of right claim to withdraw an appeal but there is nothing illegal in doing so with the permission of Appellate Authority.

Additional Grounds

Section 250 (5) says that the First Appellate Authority may at the hearing of an appeal allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if he is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

1. Jute Corporation of India Ltd. v CIT (1991) 187 ITR 688(SC)
2. National Thermal Power Co. Ltd. v CIT 229 ITR 383(SC)
3. Ahmedabad Electricity Co. Ltd. v CIT 199 ITR 351(Bom.)
4. Jaora Sugar Mills Pvt. Ltd v CIT (1980) 124 ITR 482 (M.P.)
5. CIT v Western Rolling Mills Pvt. Ltd. (1985) 156 ITR 54 (Bom.)

Additional Evidence

Sec. 250(4) confers jurisdiction to the First Appellate Authority to make such inquiry as he deems fit. The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry or may direct the Assessing Officer to make further inquiries, report the result of the same to him.

Additional Evidence

The Commissioner (Appeals) has a discretionary power to admit fresh or additional evidence subject to rule 46A. The rule 46A requires the appellant to fit his case within the conditions specified therein for additional evidence which are as under:

- a. The AO has refused to admit evidence which ought to have been admitted.
- b. The assessee was prevented by sufficient cause from submitting the evidence in the assessment proceedings.
- c. The AO has made assessment order without giving sufficient opportunity to the assessee.

Additional Evidence

- The Appellate Authority has all the powers which the original authority may have in deciding the question before it prescribed by the Statutory provisions. Rule 46A is regulatory in the matter of admission of additional evidence and not a fetter on the powers of the First Appellate Authority.
- Further, the Commissioner (Appeals) shall allow the additional evidence of the recording the reasons in writing and giving reasonable opportunity to the AO.
 - a. *Smt. Mohindar Kaur v. Central Government 104 ITR 120 (All.)*
 - b. *Smt. Prabhavati S. Shah v. CIT [1998] 231 ITR 1 (Bom.)*
 - c. *Unnikrishnan v CIT 233 ITR 485 (Ker.)*

Power of Enhancement

- The CIT(A) could enhance assessment in respect of matters which could be considered by ITO, but which he failed to consider. However, the CIT(A) has to restrict himself to the material before the ITO.
- Where the A.O. on the basis of material before him had failed to make due enquiry, the CIT(A) has powers to cause such enquiry, and make the enhancement.
- Conversely where there is no material whatsoever before the AO for making the enquiry for the purpose of making addition, then the CIT (A) would not be with in his competence to make the enhancement.

Time limit for passing the order

- Subsection (6A) to the section 250 has been introduced w.e.f. 1st June, 1999 which puts condition where it is possible, the CIT (A) may hear and decide such appeal within a period of 1 year from the end of a financial year, in which such appeal is filed before him under subsection (1) of section 246A. The language employed in the sub-section is of directory nature and is not mandatory.
- As per CBDT's instruction no.1089 dated 20th August, 1987 and instruction no.1411 dated 15th September, 1981, the Appellate Authorities should pass an Appellate Order in all cases within 10 days after the final hearing and in all duly heard cases before relinquishing charge on transfer or proceedings on leave.

Power of stay

The power of the Appellate Authority to stay recovery of demand of dues, which are the subject-matter of the appeal pending before him, is independent of the provisions of sec.220(6) and it is not necessary that before invoking the power of the first Appellate Authority, an assessee should approach the Assessing Officer u/s. 220(6) or that the AO must reject the assessee's prayer for stay of demand.

CA Sanjeev Lalan

