

APPEALS BEFORE CIT(A) and ITAT



**By Dhaval Shah,
B.Com(FM), ACA.**



Background

- Dispute Resolution Process
- Who can file an appeal
- Remedies available to the assessee against the order of the Assessing Officer

Dispute Resolution Process

Assessing Officer

Commissioner(Appeals)

Appellate Tribunal

High Court

Supreme Court

Remedies available to assessee against order of the Assessing Officer-

Appeal to Commissioner of Income Tax(Appeal)

- o First Appeal in all cases shall lie with CIT (A)

Revision by Commissioner of Income Tax u/s. 264

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

However, appeal cannot be preferred to both the authorities. Further, application for revision u/s. 264 cannot be made until the time for filing appeal has been expired or waived.

Who can file an appeal?

An Appeal can be filed by any assessee or a representative assessee as defined under Section 160 (or any Deductor/collector w.e.f. 1.7.2012/01.06.2015) aggrieved by an order of the assessing officer.

- o In case of Firm, it can be filed by managing partner or any partner of the firm.
- o In case of Association of Persons (“AOP”), by any member of AOP.
- o In case of a deceased person, by any legal Heir (Section 159(1))
- o Managing Director or if any Director in case of Company
- o In case of a HUF, by a Karta.

Right of appeal is not a procedural right it is substantive right. It is vested right in Litigant.



Appeal before CIT(A)

- Order which can be appealed before CIT(A)
- Order which cannot be appealed before CIT(A)
- Online appeal filing before CIT(A)
- Appeal filing fees
- Time limit for filing appeal
- Powers, Limitations and Duties of CIT(A)
- Condonation of Delay - S. 249(3)
- Tax payment on return of income mandatory for filing appeal? – S. 249(4)
- Defect Memo
- Additional Ground of Appeal
- Additional Evidence (Rule 46A)
- Withdrawal of Appeal

Orders which can be appealed before CIT (Appeals) – S. 246A of the Act

- o Quantum assessment order u/s 143(3)
- o Re-assessment order passed u/s 147
- o Order imposing penalty under Chapter XXI like order u/s 221, 271C, 271(1)(c), 271B, 271D, 271E, etc
- o Rectification Order u/s 154/155
- o Search assessment order u/s 153A/153C
- o Order u/s 163
- o Order u/s 170(2)/ 170(3)
- o Order u/s 201
- o Order u/s 144BA(12) [w.e.f. 01.04.2016]

Orders which cannot be appealed before CIT (Appeals)

Orders which are not specified under section 246-A are non appealable orders

- o Order of refusal to grant stay of demand.
- o Order to levy interest u/s 234 A, 234 B, 234C. - However, order appealable where the assessee has completely denied its liability for the same – *Ref : Jalgaon Distt. Central Co-op Bank Ltd. v. ITO [70 ITD 290 (Pune)], Vikshara Trading & Investment (P.) Ltd. v. Dy. CIT [61 TTJ 6(Ahd)]*
- o Interest charged u/s. 220(2). – *Ref : ACIT v. Hemendra M. Kothari [5 ITR(T) 646 (Mum)].*
- o Orders passed u/s 264 rejecting Revision Petition.
- o Orders with agreed additions (No one can be aggrieved by own admission) – However, if addition made under mistaken belief then appeal can be filed – *Ref : Rameshchandra & Co v CIT (1987) 168 ITR 375(Bom)*

....Orders which cannot be appealed against before CIT (Appeals)

Appeals can be filed only with the Authorities superior to those passing the Order. As such, appeals in the following cases can be filed only with the ITAT:

- o An Order passed by the CIT u/s 12 AA, or 80 G (5) (vi)
- o An Order passed by the CIT u/s 263 or u/s. 271 or an order passed by him u/s 154 amending his order u/s 263.
- o Order passed by Chief Commissioner or Director General or a Director u/s 272 A

Online Appeal filing before CIT(A)...

Background :

- o The Income Tax department on 1st March, 2016 has amended Rule 45 consequent to changes notified on 30.12.2015 regarding digitization of various functions and making Electronic filing of appeal before CIT(Appeals) **mandatory from 01.03.2016** for persons who are required to file the return of income electronically.

- o Form 35 shall be furnished in the following manner [Rule 12(3)]
 - If ROI filed electronically by DSC, then by DSC
 - If ROI filed through EVC, then by EVC
 - If assessee can file ROI in physical form, then either physically or electronically through DSC or EVC

[Ref : Notification No. 11/2016 dated 01.03.2016]

...Online Appeal filing before CIT(A)

Appeal filing procedure :

- o Login to the user account in Income Tax e-filing website.
- o Go to menu -> efile -> prepare and submit online form (other than ITR).
- o Fill PAN, select Form 35 and relevant Assessment Year for which appeal has to be filed.
- o Create a Digital Signature (DSC) file with the help of DSC utility. Attach DSC signature file on the website to verify the form. Alternatively, verify through Electronic Verification Code (EVC).
- o Fill up Form 35 online.
- o Attach necessary documents
- o Submit the form or save the draft for filing later.

Online Appeal filing before CIT(A)

Documents to filed for e-filing :

- o Copy of challan for appeal fees paid
- o Copy of order appealed against.
- o Notice of demand
- o Application for condonation of delay, if any
- o Grounds of appeal and Statement of Facts as optional attachments.

...Online Appeal filing before CIT(A)

Other aspects in respect of Efiling :

- o Grounds of appeal to be not more than 100 words per ground and Statement of Facts not to be more than 1000 words.
- o Each attachment not to exceed 5 mb and all the attachments should not exceed 50 Mb in total. To be uploaded either in ZIP or PDF format.
- o To mention any additional evidence relied upon which was not submitted before the Assessing Officer .

Appeal Filing Fees

Particulars	Amount (Rs.)
Total income computed by AO	
Upto Rs. 1,00,000/-	250/-
Between Rs. 1,00,001/- to Rs. 2,00,000/-	500/-
Above Rs. 2,00,001/-	1,000/-
Cases not covered above [like order u/s 201, penalty orders etc]	250/-

Total income determined at negative figure - Minimum fees to be paid. Ref : *[Gilbs Computer Ltd. Vs. ITAT - 317 ITR 159(Bom)]*

Time Limit for filing appeal

The appeal shall be presented within 30 days of the following dates, that is to say:

- o Where the appeal relates to any TDS (195(1)), “from the date of payment of tax.” – S. 248.
- o Where the appeal relates to any assessment or penalty; “the date of service of the notice of demand.”
- o In other cases; “the date on which such intimation of the order is served.”

Powers, Limitations and duties of CIT(A)....

Powers (S.251):

- o **Power to call for information as provided under section 133.**
- o **To confirm/reduce/enhance/annul either assessment/ penalty.**
CIT v Shapoorji Pallonji Mistry (1962) 44 ITR 862 (SC) – New source of income not mentioned in the return cannot be added by CIT (A).
- o **To consider whether the principles of natural justice have been violated by AO**
- o **Powers of CIT(A) extremely wide than Tribunal**
CIT v Kanpur Coal Syndicate (1964) 53 ITR 225 (SC)
- o **Power to call for remand report**
- o **Power to admit additional ground of appeal and additional evidence.** 16

....Powers, Limitations and duties of CIT(A)

Limitation on Powers :

- o Does not have power to review. There is only power to rectify the order under section 154
- o Commissioner (Appeals) has no power to set aside an order and refer the case back to AO for fresh adjudication. (w.e.f. 01.06.2001)
- o Commissioner (Appeals) cannot award cost to the parties

....Powers, Limitations and duties of CIT(A)

Duties :

- o Jurisdiction of CIT(A) is quasi-judicial – required to pass well reasoned and speaking order. From his order nexus between material considered in the facts of the case and conclusion reached by him should be visible.
- o To dispose within 1 year from the end of the Financial year in which appeal was filed (Directive).
- o To pass Appellate order within 15 days of last hearing (Directive) [CBDT instruction dated 19.06.2015]
- o Must follow decision of jurisdictional Tribunal/ High Court and Supreme Court

Condonation of delay – S. 249(3)....

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

Tax payment on return of income mandatory for filing appeal? (S. 249(4))

Section 249(4) - Appeal shall not be admitted unless:

- o Where ROI is filed by the Assessee : Tax due on the returned income has been paid by him [*Mandatory*]
- o Where no ROI is filed : The assessee has paid an amount equal to the amount of advance tax payable by him.
- o The CIT(A) has discretion to exempt the Assessee from the second clause i.e. in case where no ROI is filed for any good and sufficient reason to be recorded in writing.
- o However, judicial authorities have held that if taxes paid before disposal of appeal – Appeal is valid.

Ref : T. Govindappa Setty v. ITO [231 ITR 892]

Bhumiraj Constructions v. Addl. CIT [131 ITD 406 (Mum)].

ITO v. Ankush Finstock Ltd [136 ITD 168 (Ahd)].

Defect Memo

Can defects in the Appeal memo be cured? : Yes, in following cases:

- o Unsigned or unverified appeal – [**Harilelas 16 ITD 356**]
- o Appeal signed or verified by wrong person.
- o Absence of notice of demand – [**Rajendrakumar – 213 ITR 715**]
- o Mere defect in appeal cannot be ground of dismissal of appeal without giving opportunity to cure said defect – [**Malani Trading Co. – 252 ITR 670 (Bom)**]

Additional Ground of Appeal

- o No express provisions in the Act.
- o Can be entertained if it is not willful or unreasonable
- o Application to be filed before CIT(A)
- o Notice to other party is necessary before admitting such ground.
- o No time limit prescribed for raising additional ground
- o Relevant decisions : National Thermal Power Corporation v. CIT [229 ITR 383 (SC)]; Jute Corporation of India Ltd. v. CIT [187 ITR 688 (SC)]; and Ahmedabad Electricity Co. Ltd. v. CIT [199 ITR 351 (Bom) (FB)]

Additional Evidence (Rule 46A)

Additional evidence can be admitted only in the following 4 circumstance :

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

Withdrawal of Appeal

- o Appeal once filed cannot be withdrawn by the appellant.
- o However the appellate authority in its discretion may allow withdrawal of appeal and dismiss the same as not pressed.
- o Application for withdrawal of appeal may be filed with sufficient reasons for withdrawal of appeal.

Ref : CIT v. ***Rai Bahadur Hardutroy Motilal Chamaria***
(1967) 66 ITR 443 (SC)



Appeal before ITAT

- Preconditions for filing valid appeal
- Appeal Filing Fees
- Departmental Appeal
- Procedure of Filing Form 36
- Documents to be filed
- Defect memo and revised Form 36
- Other Points

Pre-conditions for filing a valid appeal

- o The person filing the appeal must be 'aggrieved' [s. 253(1)]
- o The impugned order must be appealable u/s 253 (1)
- o The appeal is prepared in Form no. 36, duly signed and verified along with grounds of appeal against the order of CIT(A).
- o In case of appeal pursuant to s. 144C [DRP directions], appeal to be filed in Form 36B against the directions of the Assessing Officer.
- o Assessee to file appeal within 60 days from the date of receipt of order of the CIT(A)
- o Department has to file appeal within 60 days from the date of receipt of the order of the CIT(A) to the Assessing Officer.
- o Requisite fee to be paid as under :

Appeal Filing Fees

Particulars	Amount (Rs.)
Total income computed by AO	
Upto Rs. 1,00,000/-	500/-
Between Rs. 1,00,001/- to Rs. 2,00,000/-	1,500/-
Above Rs. 2,00,001/-	1% of the assessed income or 10,000/- whichever is lower
Cases not covered above [like order u/s 201,263, penalty orders, stay application]	500/-
Rectification application	50/-

Departmental Appeal

- o Section 253(2) provides that the Commissioner may, if he objects to any order passed by the Commissioner (Appeals) under section 154 or section 250, direct the Assessing Officer to appeal to the Appellate Tribunal against such order.
- o Department is also vested with right to file an appeal against the directions given by Dispute Resolution Panel ('DRP') [section 253(2A)] - **[Omitted by FA'16 – Department cannot file an appeal against the direction of DRP]**
- o Departmental appeals may be filed on merits before Appellate Tribunal, High Courts and Supreme Court keeping in view the following monetary limits of tax effect (Circular No. 21/2015 dated 10.12.2015):

Particulars	Revised Limit (Rs.)	Old Limit (Rs.)
ITAT	10,00,000	4,00,000
High Court	20,00,000	10,00,000
Supreme Court	25,00,000	25,00,000

The above limits are applicable to pending appeals also.

Procedure of Filing Form 36

Date of filing an Appeal [Rule 6]

- o Date of presentation of appeal at office of Tribunal
- o When through registered post – date on which appeal received by office of Tribunal

When last day of limitation period –

- o Appeal may be presented at residence of Assistant Register
- o Appeal may be filed at Mumbai (Head Quarters) – Registration of other jurisdiction as well

Condonation of Delay [S. 253(5)]

In case of delay in filing of appeal, petition to be filed mentioning the reason for delay and plea to condone the delay.

Affidavit stating the said facts to be executed on stamp paper, according to the State Stamp Act and to be duly notarised.

Documents to be filed

The following documents have to be filed in triplicate for filing appeal before ITAT :

- o Form No. 36 and Grounds of Appeal
- o Receipt for payment of fees
- o Certified copy of the impugned order and the entire appeal set filed before CIT(A)
- o Online filing of Form-36 has been proposed but the same has not been implemented till date.

Defect Memo and Revised Form 36

Revised Form 36 (along with grounds of appeal) to be filed in the following cases [*Rule 9A*]

- o Change of name, address and other details of the Assessee
- o Death of the Assessee in order to bring legal heir on the record.
- o Any other defects pointed out by the registrar at the time of filing appeal.

In case of department appeal,

- o when there is change of address, letter to be filed mentioning new address
- o where in case of death, a letter for being legal heir on record

Other Points...

Additional Evidence [Rule 29]

- o As per Rule 29 of ITAT Rules, the appellant or the department does not have a right to file additional evidence.
- o Additional evidence can be produced only if Tribunal deems fit.

Additional Ground of Appeal

- o It should be taken by way of separate petition along with request for its admission and should not be taken along with original appeal.

...Other Points

Condonation of delay

- o In case of delay in filing of appeal, petition to be filed mentioning the reason for delay and plea to condone the delay
- o Affidavit stating the said facts to be executed on stamp paper, according to the State Stamp Act and to be duly notarised.

Cross Objection [Rule 22]

- o Cross objections may be filed in Form 36A where the other party has preferred an appeal.
- o To be filed within 30 days from receipt of the appeal notice to either party.
- o No appeal fees
- o All the attributes of appeal filing will apply for cross objection

Other Points...

Miscellaneous Application [S. 254(2)]

- o Petition stating the mistake occurred in the order of the Tribunal. Mistake should be apparent from records.
- o Time limit to file Miscellaneous Application is 6 months from the end of the month in which the order is passed [**as amended by FA'16**]. Earlier the time limit was 4 years from the date of the order.
- o Separate MA to be filed for different assessment years.

...Other Points

Miscellaneous Application [S. 254(2)] – Certain Issues

- o Non consideration of binding decision not cited in hearing.
- *CIT vs. Jagabandhu Roul [145 ITR 153 (Orissa)]*

- o Decisions not cited but referred to in order
- *Laxmi Electronic Corporation Ltd. vs. CIT (1991) 188 ITR 398 (All)*

- o Erroneous order in the light of subsequent decision of jurisdictional High Court
- *Kishanchand J. Bhavnani HUF vs. WTO [29 ITD 383.]*

- o Order contrary to pronouncement in the open court.
- *CIT vs. G. Sagar Suri and Sons (1990) 185 ITR 484. (Del).*

- o Failure to consider preliminary objection or deal with a ground of appeal.
- *Laxmi Electronic Corporation Ltd. vs. CIT (1991) 188 ITR 398 (All)*



Dhaval Shah, B.Com(FM), ACA.
Contact details:
dhaval_shah92@hotmail.com