

APPEALS UNDER THE INCOME TAX ACT, 1961

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Presented by

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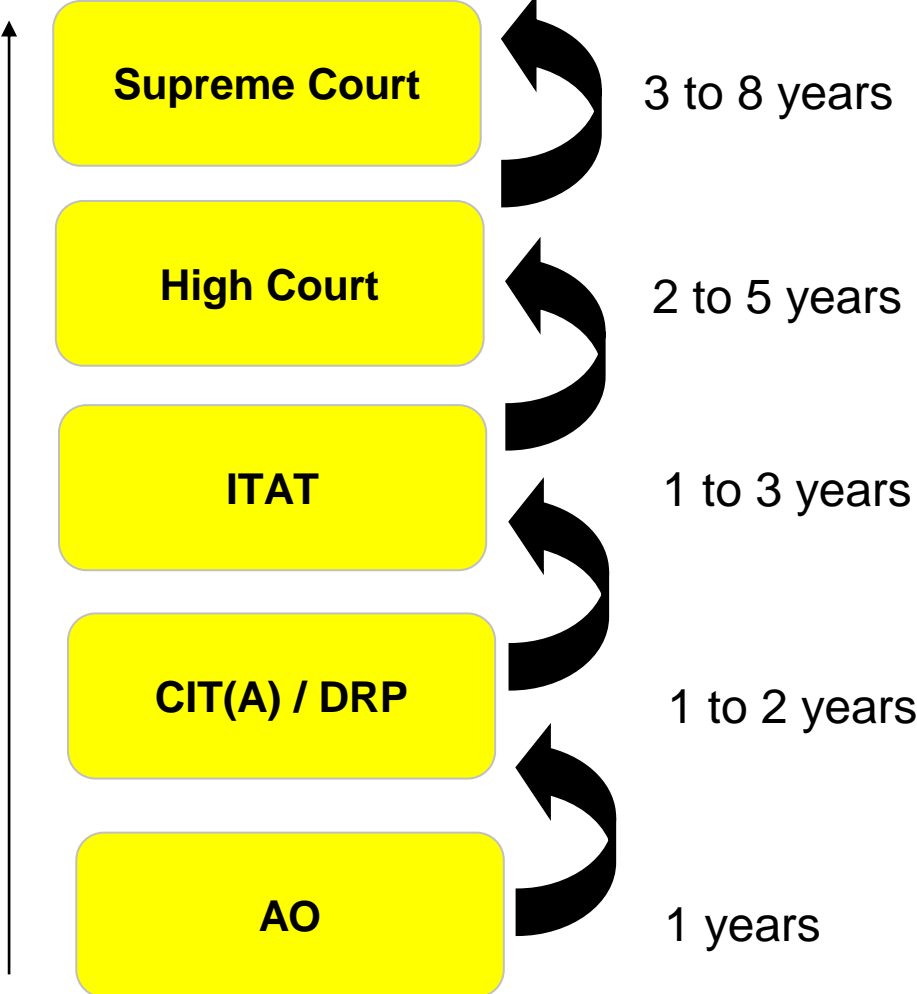
AGENDA FOR TODAY

- Appellate Structure under Income Tax Act
- CIT Appeals
- Income Tax Appellate Tribunals
- High Court
- Supreme Court
- Revisionary powers under section 264
- Writ Jurisdiction of High Court

Appeals

- **Dictionary Meaning** - an application to a higher court for a decision to be reversed.
- **Black's law dictionary** - "A proceeding undertaken to have decision reconsidered by a higher authority."
- Appeal is a **creature of statute**
- 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)*.
- A provision granting the right of appeal should be construed liberally and should be read in a reasonable or practical manner and, where there is any ambiguity, it will be construed in favour of the existence of such right. *CIT vs. Brahm Swarup Tandon & Co. [(2006) 283 ITR 320 (All)]*.

APPELLATE STRUCTURE FOR APEALS UNDER INCOME TAX





Appeal Before CIT (A)

Appeal before Commissioner of Income-tax (Appeals)

- Section 246A – Appealable orders
- Section 248 – Appeal by person denying liability to tax
- Section 249 – Form of appeal and limitation
- Section 250 - Procedure in appeal
- Section 251 – Powers of CIT(A)

Section 246A – Appealable Orders

- Intimation u/s. 143(1), 143(1B) – Intimation u/s 143(1)
- Order u/s. 200A(1) – Statements of TDS viz., Form 26Q, Form 24Q etc.
- Order u/s. 206CB(1) – Statements of TCS
- Order u/s 143(3) not including an order passed in pursuance of directions of the DRP
- Order u/s. 144BA(12) – Order passed without prior approval of PCIT/CIT, if any tax consequences have been determined (GAAR)
- Order u/s 143(3) r. w. s. 147 - Assessment order/Re-assessment order.
- Order u/s 144 – best judgement

Section 246A – Appealable Orders

- Order u/s. 153A –Assessment in case of search or requisition.
- Order u/s 154/155-Rectification of mistakes apparent from records.
- Order u/s 163- Assessee being treated as agent of Non-resident.
- Order u/s 170(2)/ 170(3)- Collection of demand from successor in case of succession to business/profession.
- Order u/s 171- Assessment after partition of HUF.
- Order u/s. 185- Assessment when a firm fails to comply with sec 184.
- Order u/s 201 – Order for failure to deduct/pay taxes.
- Order u/s. 206C(6A) – Order for failure to collect taxes.

Section 246A – Appealable Orders

- Order u/s 237 – Order for refunds.
- An order against the assessee who denies his liability to be assessed
- Order of Joint Commissioner u/s 115VP(3)(ii) – Refusal order for tonnage taxation scheme.
- Order imposing Penalty under Chapter XXI

Section 248 – Appeal by person denying liability to tax

- Where under an agreement or other arrangement, the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and
- such person having paid such tax to the credit of the Central Government,
- claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.

Order u/s 139(9) - Defective return - Appealable ?

➤ CIT vs Tata Cummins Ltd.[2002]82 ITD798 (Kol Trib)

- AO while declaring return defective u/s 139(9), also stated that "*The assessee is not entitled for carry forward loss for the period under consideration.*"
- ITAT held that "*The above part of his order, made it an order of determination of the loss and refusal to carry forward the same. Therefore, it was to be held that the communication to the effect that the assessee was not entitled to carry forward the loss for the period under consideration amounted to an order of an assessment appealable under section 246 and the Commissioner (Appeals) was justified in so adopting and deciding the same on merits.*"

Non-Appealable Orders

- Order to levy interest under sections 234 A, 234 B, 234C. (except where levy is itself challenged)
- Certificate granted under section 197(1).
- Interest charged under section 220(2) –
***ANZ Grindlays Bank PLC v. CIT (241 ITR 269)(Cal.)** - The order charging interest under section 220(2) is neither a part of the assessment order nor there is any appeal provided under section 246. Therefore, the order charging interest under section 220(2) is not an appealable order.*
- Orders passed under section 264 rejecting Revision Petition.
- Orders with agreed additions

Practical Aspects of Appeal

Form of appeal:

- **Form No. 35**
- e-filing of Form has been made mandatory for persons for whom e-filing of return of income is mandatory w.e.f 1/3/2016.

Signature to the appeal:

- Person authorized to sign the return of income under section 140 of the Act.

Documents to be submitted for appeal : (OLD WHEN MANUAL APPEALS WERE FILED)

- Form No. 35 (including statement of facts and grounds of Appeal) – in duplicate.
- One certified copy of order, appealed against.
- Notice of demand in original.
- Copy of challans of fees the details of the challan are required to be furnished in case of e-filing of form of appeal.

Practical Aspects of Appeal

Documents to be submitted for appeal : (UNDER E-APPEAL)

- Form No. 35 (including statement of facts and grounds of Appeal) in e-form
- Scanned copy of 'Order appeal appealed against.'
- Scanned copy of 'Notice of demand'
- Any other attachment

Practical Aspects of Appeal

Electronic Hearing (Amendment by Finance Act, 2020)

(6B) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of disposal of appeal by Commissioner (Appeals), so as to impart greater efficiency, transparency and accountability by—

- (a) eliminating the interface between the Commissioner (Appeals) and the appellant in the course of appellate proceedings to the extent technologically feasible;
- (b) optimising utilisation of the resources through economies of scale and functional specialisation;
- (c) introducing an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more Commissioner (Appeals).

Practical Aspects of Appeal

Fees:

- Fees to be paid for filing of appeal to CIT(A) depends on the **total income determined by the Assessing Officer:**

SN	Income determined by AO	Appeal Fee
1.	Less than Rs 1,00,000/-	Rs 250
2.	More than Rs 1,00,000/- but less than Rs 2,00,000/-	Rs 500
3.	More than Rs 2,00,000/-	Rs 1000
4.	Where the subject matter of an appeal is not covered under above clauses	Rs 250

- In cases of Penalty, or TDS appeals, no income is determined – Fee – Rs. 250
- Total income determined at negative figure – “Minimum Fees” [*Gilbs Computer Ltd. Vs ITAT – 317 ITR 159(Bom)*]
- Challan to be paid under the columns : Self Assessment Tax – > Others

Practical Aspects of Appeal

Time Limit for filing Appeal:

- Appeal to CIT(A) **within 30 days** of –
 - Date of service of notice of demand relating to assessment or penalty
 - Date on which intimation of order sought to be appealed against is served
 - Date of payment of tax, where appeal is in respect of TDS u/s 195
- 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. – **Charki Mica Mining Co. Ltd. vs CIT [1978] 111 ITR 193 (Calcutta)**

How to count 30 days time limit? -Whether to include or excluded these days -

- Day of receipt of notice of demand along with order.
- Day of filing of appeal.
- If last day of filing appeal is public holiday, can Appeal be filed on subsequent working day? What will be the effect on limitation period? (Refer - section 4 of Limitation Act, 1963)

Practical Aspects of Appeal

Condonation of Delay in Filing of Appeal:

- Section 249(3) gives power to the CIT (A) to admit a belated appeal, if there is **sufficient cause for the delay.**
- In case of delay in filing the appeal, the appeal should be filed along with an application for condonation of delay **explaining delay day-by-day** [refer: *Soorajmull Nagarmal v. Golden Fibre and Products AIR 1969 Cal 381*] along with supporting evidence, if any, such as affidavit, doctor's certificate, etc.
- The CIT should have a pragmatic and liberal approach.- *Mst. Katiji vs Collector Land Acquisition [167 ITR 471(SC)]*
- **Sufficient Cause Meaning**
 - Means a cause which is beyond the control of the party
 - any cause that prevents a person approaching the Court within time is sufficient

Practical Aspects of Appeal

Sufficient Cause – Some Cases

- Wrong advice given to the appellant – *R.Ranganayaki Ammal 38 ITR 20 (Mad.)*
- Appeal filed at wrong forum – eg: Delay due to the mistake of the income tax officer stating in the demand notice that the appeal lies with the Appellant Assistant Commissioner (AAC) instead of the Tribunal- *Avtar Kishan Dass 133 ITR 338 (Del.)*
- Conflicting legal advices - *Smt. Laxmi Devi AIR (1988) (All.) 133*
- Where the managing partner of the assessee's firm was hospitalised and so couldn't contact the concerned auditors in time for filing appeals.

Section 249(4) - Payment of Admitted Tax

- No appeal can be filed, if at the time of filing of Appeal, unless assessee has paid:
 - a) If ROI filed = Tax on Returned Income
 - b) If ROI not filed = Advance tax Payable
- CIT(A) for good and sufficient cause and upon recording reasons in writing exempt appellant from operation of cl.(b)
- **Whether the word 'tax' includes interest?**
No, Expression "tax" does not include interest for the purpose of section 249(4). Refer [*CIT vs. Manojkumar Beriwal [(2008) 217 CTR (Bom) 407]* ; *Jagdish Rai Chandran, Sohagwant Gurbachan Singh (AOP) vs. ITO[(2006) 100 ITD 525 (Asr)]*].
- Only liable to pay UNDISPUTED tax (***T. Govindappa Setty [231 ITR 892 (Kar. HC)]***)
- Payment condition is also applicable in case of penalty appeal ***CIT vs. Samanthakamani (2003) 259 ITR 215 (Mad HC)***

Section 251 – Powers of CIT(A)

In cases of assessment

- He may confirm, reduce, **enhance** or annul the assessment.

In cases of penalty

- He may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty.

Any other Case

- In any other case, he may pass such orders in the appeal as he thinks fit.

Powers coterminous with that of AO

- The scope of his powers is co-terminous with that of AO. He can do what AO can do and can also direct him to do what he has failed to do. [*CIT Vs. Kanpur Coal Syndicate 53 ITR 225(SC)*]

Section 251 – Powers of CIT(A)

Enhancement Powers

- No enhancement – unless reasonable opportunity of being heard
- The CIT(A) can 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.
- CIT A has no power to enhance by discovering new source of income, not mentioned in return, or considered in asstt, or considered by AO. **[CIT v Shapoorji Pallonji Mistry (1962) 44 ITR 862 (SC)]**

Section 251 – Powers of CIT(A)

Enhancement Powers

➤ CIT vs Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC)

- Power of enhancement is restricted to the sources of income which have been the subject-matter of **consideration** by the ITO from the point of view of taxability.
- In this context '**consideration**' does not mean 'incidental' or 'collateral' examination of any matter by the ITO in the process of assessment.
- There must be something in the assessment order to show that the ITO applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection.

Withdrawal of Appeal

- No provision in the Income tax Act for withdrawal
- 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. - ***CIT v Rai Bahadur Hardutoy Motilal Chamaria(1967) 66 ITR 443(SC)***.
- 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”*.

Deficiency in Appeal Memo

- The assessee should be given reasonable opportunity of being heard to rectify the errors and the appeal shall be heard on merits. – ***Harilelas vs ITO 16 ITD 356 (MUM)***
- The CIT(A) shall intimate the defects to the assessee and give reasonable time to cure such defects. – ***Malani Trading Co. vs CIT 252 ITR 670 (BOM)***
- Appeal cannot be dismissed for defect in form without giving opportunity to the assessee. – ***Haryana State Roads and Development Corporation Ltd vs DCIT (ITAT Chandiagrh) [ITA No. 582/Chd/2016]***

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, and report the result to him.

Additional Evidence

Rule 46A

- The CIT(A) 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) Where the AO has refused to admit evidence which ought to have been admitted;
 - b) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to be produced by the AO; or
 - c) Where the appellant was prevented by sufficient cause from producing any evidence before the AO which is relevant to any ground of appeal; or
 - d) Where the AO has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

Additional Evidence

Rule 46A

- Under sub rule (3) to rule 46A, a condition was imposed that such evidence shall not be taken into account by the CIT(A) unless the AO was confronted with the same.

Interplay between Section 250(4) and rule 46A [Manish Build Well (P) Ltd - High Court Of Delhi [(2012) 204 Taxman 106]

- Under section 250(4), the CIT(A) has the power to direct enquiry and call for evidence from the assessee.
- Under Rule 46A, the assessee asks for the admission of additional evidence.
- If the CIT (A) exercises his powers u/s 250(4) to call for evidence, the AO need not be given an opportunity to show-cause.
- However, if the CIT (A) acts on an application under Rule 46A, then the requirement of giving the AO an opportunity as per Rule 46A(3) is mandatory.

Additional Ground Before CIT(A)

- Sub-section 5 of Section 250 gives power to the CIT(A) to allow the appellant to raise additional ground if he is satisfied that the omission of that ground was not willful or unreasonable.
- Additional grounds means grounds which are not specified in Form no. 35.
- Letter in writing giving reasons why grounds not taken in Memo to Appeal
-
- Opportunity to the AO to give his comments on the additional ground.

Additional Ground Before CIT(A)

- **Jute Corporation of India [187 ITR 688 (SC)]** - CIT(A) has ample power to admit additional ground not raised before the ITO if he is satisfied that ground raised was bona fide and the same could not be raised earlier for good reasons.
- Also, National Thermal Power Co. Ltd. v CIT 229 ITR 383(SC)
- A claim for a deduction can only be made by an assessee before an Assessing Officer and by way of filing a revised return **Goetze (India) Ltd. vs. CIT (2006) 284 ITR 323 (SC)**.
- The SC however only limited the power of an Assessing Authority to entertain a claim for a deduction otherwise than by filing a revised return. It did not impinge on the power of an Appellate Tribunal.
- The Tribunal therefore would be correct in confirming the action of a CIT(A) who entertained a claim not made before the AO
 - Jai Parabolic Springs [306 ITR 42 (Delhi HC)]
 - Pruthvi Brokers and Shareholders (P) Ltd [349 ITR 336 (Bombay HC)]

Whether a fresh/ new claim can be made before the Appellate Authorities, without filing a revised return?

- Yes, **Chicago Pneumatic vs. DCIT [(2007) 15 SOT 252 (Mum Trib)]** -*Even the Apex Court has not barred an assessee from raising a legal claim before Appellate Authorities. An AO is bound to assess correct income and for this purpose may grant relief even when a revised return is not filed. Since powers of the CIT(A) are coterminous with those of an AO and the fact that appellate proceedings are the continuation of original proceedings, the CIT(A) can also entertain a claim made by the assessee.*

G.V.K. Industries Ltd. v. ACIT [(2013) 56 SOT 73 (Hyd.)(Trib.)]

- The Tribunal held that while making a new claim if any before Assessing Officer it is required to file revised return of income and not by way of letters or by way of filing revised computation, etc.
- But when comes to the Tribunal or for that matter CIT(A), who is the appellate authority, assessee does not have to initiate a new claim before them by way of filing the revised return of income. As such the returns or revised returns are filed under the provisions of section 139 and it is to be done before the Assessing Officer and not before the first and second appellate authority i.e., CIT(A), Tribunal or higher judiciary.
- Therefore CIT(A) was justified in entertaining and adjudicating the grounds raised.

Whether an appeal lies against the order charging interest under section 234A, 234B etc.?

- No
- However, in **Anjum M.H. Ghaswala & Ors.[252 ITR 001 (SC)]**, SC said they are appealable only if disputes liability to pay Advance tax i.e. to the very levy of the same.
- In **Central Provinces Manganese Ore Co. Ltd. vs. CIT [(1986) 160 ITR 961 (SC)]**, it was held that “an appeal lies against an order charging interest, if the assessee limits itself to the ground that it is not liable to pay the levy at all”
- Also refer
 - CIT vs. Veppalodai Salt Corporation [(1988) 171 ITR 366 (Mad)]
 - Express Newspapers Ltd [(2006) 103 TTJ (Chennai) 122]

Time limit for passing of Order

➤ **Subsection 6A of Section 250**

In every appeal, the Commissioner (Appeals), where it is possible, may hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed before him under sub-section (1) of section 246A.

➤ Not mandatory, only directory

➤ As per CBDT's Instruction no.20/2003 dated December, 2003 reiterated in F No. 279/ Misc 53/2003 dated 19/06/2015 , the Appellate Authorities **should pass an Appellate Order in all cases within 15 days after the final hearing.**

Stay of Recovery by CIT(A)

- Mere filing/ pendency of an appeal does not constitute an automatic stay.
Paulsons Litho Works vs. ITO (1994) 208 ITR 676 (Mad.)

- **Tin Mfg. Co. of India vs. CIT (1995) 212 ITR 451 (All.)**
 - Power to grant stay of the recovery of the demand disputed in appeal is **incidental or ancillary** to the appellate jurisdiction.

 - Power of CIT(A) to stay the recovery of the demand, subject-matter of which is in appeal pending before him, is independent of the provisions of sec. 220(6)

 - Not necessary that before invoking the power of CIT(A), an assessee should approach AO u/s 220(6) or that AO must reject the assessee's prayer for stay of the demand.

- **No coercive action/recovery during pending of Stay Application**
 - Pradeep Ratanshi vs. Asst. CIT (1996) 221 ITR 502 (Ker.)
 - Mahindra & Mahindra (59 ELT 505) (Bom)
 - Maruti Udyog Ltd. vs Addl. CIT (264 ITR 487) (Del HC)



आयकर अपीलीय अधिकरण INCOME TAX APPELLATE TRIBUNAL

Appeal Before Income Tax Appellate
Tribunal

Background

- Constituted under the Ministry of Law, Justice and Company Affairs
- Tribunal - **highest fact finding body**
- Total no. of Benches in India – 63 in 27 Cities divided into 10 Zones
- Jurisdiction of Tribunal ordinarily determined neither by place of business nor by place of residence but by the location of the office of the AO
- Benches of the Tribunal
 - ❑ Single Member Constitution (SMC)
 - ❑ Division Bench (Comprises of Accountant Member and Judicial Member)
 - ❑ Third Member Bench (TM)
 - ❑ Special Bench (SB) – consisting of 3 or 5 Members

Background

- Appeal to be filed within 60 days from receipt of order – Section 253(3)
- **Memorandum of cross objections** may be filed, where the other party has preferred an appeal to be filed within 30 days from receipt of intimation of filing of appeal (No appeal fees)
- Appeals normally fixed within 2-3 years from date of filing the appeal
- Appeal against orders under section 263, Stay Petitions/ stay granted matters fixed on priority basis

Pre-conditions for filing of valid appeal before ITAT

- The person filing the appeal must be 'aggrieved' [section 253(1)]
- The impugned order must be appealable u/s 253 (1)
- The appeal is prepared in Form no. 36, along with grounds of appeal And is duly signed and verified.
- Memorandum of cross-objections – Form 36A
- **Fee**

Total Income As per AO	Filing Fees in Rs.
Less than Rs. 1 lakh	500
Between Rs. 1 - 2 lakhs	1,500
Above Rs. 2 lakhs	1% of assessed income or 10,000 whichever in lower
Any other matter (Eg. Section 263 or TDS Appeal) / Stay application	500
Rectification application	50

Appeal by Department

- 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.
- Department is NOT vested with right to file an appeal against the directions given by Dispute Resolution Panel (DRP)
- **Monetary Limit for filing of appeal by Department** – No appeal shall be filed in case ‘tax effect’ does not exceed the monetary limits given hereunder:

S. No.	Appeals/SLPs in Income-tax matters	Monetary Limit (Rs.)
1.	Before Appellate Tribunal	50,00,000
2.	Before High Court	1,00,00,000
3.	Before Supreme Court	2,00,00,000

Appeal by Department

Exception to Monetary Limit for filing of appeal by Department –

- Circular No. 23 of 2019 dated September 6, 2019
 - Notwithstanding anything contained in any circular specifying monetary limits for filing of departmental appeals, appeals may be filed on merits as an exception to said circular, where Board, by way of **special order direct filing of appeal on merit in cases involved in organized tax evasion activity.**

- OFFICE MEMORANDUM dated: September 16, 2019
 - Monetary limits fixed for filing appeals **shall not** apply in case of assesses claiming bogus LTCG/STCL through penny stocks and appeals/SLPs in such cases shall be filed on merits.

Appeal Procedure

- Governed by Income-tax (Appellate Tribunal) Rules, 1963

- **Date of filing an Appeal [Rule 6]**
 - Date of presentation of appeal at office of Tribunal
 - When through registered post – date on which appeal received by office of Tribunal
 - When last day of limitation period –
 - Appeal may be presented at residence of Assistant Register
 - Appeal may be filed at Mumbai (Head Quarters) – Registration of other jurisdiction as well

- **Condonation of delay**
 - 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.

Appeal Procedure

- **Documents to be filed during Appeal before ITAT(A) (in triplicate)**
 - Form 36 along with SOF and GOA
 - Certified copy of the order appealed against
 - Certified copy of the order of AO
 - Copy of challan
 - In case of penalty – order of Substantial assessment order of AO must also be filed

- **Preparation of Paper book [Rule 18]**
 - File with CIT – DR : At least a week before hearing
 - File in duplicate with ITAT : At least a day before the date of hearing
 - Documents to be serially numbered, properly indexed
 - Certification of documents by assessee or AR
 - Additional evidence shall not form part of the same paper book

Revision of Form 36

Form 36 needs to be revised in following cases

➤ Change of address

- Revise Form No. 36 giving new address, otherwise no cognizance of change of address shall be taken.
- In case of department appeal, file a letter

➤ Sucession / death / winding up or change in name of company

- Rule 26 provides that proceedings will continue even after death / insolvency / winding up of appellant or respondent
- Proceeding to be carried against the executor, administrator or other legal representative of the assessee or by or against the assignee, receiver or liquidator, as the case may be.
- Revise Form 36 duly filled in giving revised name of the party.
- In case of department appeal, file a letter

Miscellaneous Procedures

➤ Application for consolidation

- Where there is similar issue involving in different assessment year(s) under appeal for the same assessee or group company, a letter requesting for consolidation of appeals can be filed, so as to save on the time and cost involved.

➤ Application for early hearing

- In case President, Vice-President or Senior member is satisfied may grant out of turn hearing of the appeal.
- Rule 22 of new Rules (yet to be made applicable) specifically provides for categorization of appeals and also for fixation of appeals for hearing out of turn on the request of appellate and respondent in specified cases, such as appeal of a charitable institution, senior citizen, salaried employee, non resident, passed away assessee, covered matters, appeal against order of CIT u/s 263 and hardship cases.

Restrictions on powers of ITAT

- **Tribunal has no power of enhancement [Hukumchand Mills Ltd. v. CIT: 63 ITR 232 (SC)]**

The words 'pass such orders as the Tribunal thinks fit' include all the powers (except possibly the power of enhancement) which are conferred upon the AAC [now CIT(A)]

- **Tribunal cannot take back the benefit granted by the AO [MCorp Global (P.) Ltd. v. CIT: 309 ITR 434 (SC)]**

It is well-settled that the Tribunal is not authorized to take back the benefit granted to the assessee by the Assessing Officer. It has no power to enhance the assessment.

Additional Grounds/ Claims before Tribunal

- **Power of Tribunal to admit additional grounds [National Thermal Power Co. Ltd. v. CIT: 229 ITR 383 (SC)]**

View that the Tribunal is confined only to issues arising out of the appeal before the CIT(A) takes too narrow a view of the powers of the Tribunal. The Tribunal will have the discretion to allow or not allow a new ground to be raised.

- **Right of Respondent to raise additional ground/ point [CIT v. Hazarimal Nagji & Co.: 46 ITR 1168 (Bom)] and [Assam Co. (India) Ltd. v. CIT: 256 ITR 423 (Gau)]**

Within the jurisdiction of the appellate powers of the Tribunal to permit the assessee-respondent to raise the question, which it sought to raise, for the first time before the Tribunal,

Additional Grounds/ Claims before Tribunal

- **There is no estoppel in law- Tribunal must entertain legitimate claim**
 - **CIT v. Bharat General Reinsurance Co. Ltd: 81 ITR 303 (Del)** - Assessee can anytime resile from an incorrect position already taken in return of income.
 - **HCL Technologies v. ACIT: 377 ITR 483 (Del)** - If, on an application of the statutory provision, the party is entitled to the benefits under the Act, the mere circumstance that for the past 5 to 7 years, or even 10 years, it did not claim such benefit would not preclude it from availing it in the assessment year in question
 - **Goetze (India) Ltd. v. CIT: 284 ITR 323 (SC)** - Does not restrict power of Tribunal but only assessing officer.

Scope of Cross Objection

➤ PCIT v. Silver Line: 383 ITR 455 (Del.)

- Assessee raised ground of non-service of notice for first time before ITAT.
- Hadn't raised this ground in assessment proceeding also.
- ITAT held - *does not find merit in the objection of the Revenue that the Assessee was precluded from raising the point concerning the non-issuance of notice under Section 143 (2) of the Act*

Additional Evidences before ITAT [Rule 29 & 30]

- During the assessment proceedings before the AO, where the opportunity was not given to assessee to furnish or where the evidence was not available at any time during the course of hearing (i.e. later in point of time)
- It should be filed in covering letter alongwith the plea to admit additional evidence.
- **CIT v. Text Hundred India (P.) Ltd: 351 ITR 57 (Del)**

*Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that said evidence would have material bearing on the issue which needed to be decided by the Tribunal and **ends of justice demand admission of such an evidence ends of justice demand admission of such an evidence**, the Tribunal can pass an order to that effect.*

Miscellaneous Application

Section 254(2) of the Act

The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer.

Used for

- For rectification of orders passed by ITAT.
- For restoration of ex-parte orders.
- For other miscellaneous matters.

Miscellaneous Application

Time limit of 6 months

- Section 254(2) provides limitation of six months from the end of the month in which order was passed, is for passing the order by ITAT.
- If application is filed within specific period, Tribunal can pass the rectification order after the expiry of specified period of four years - ***Sree Ayyanar Spinning and Weaving Mills Ltd. v. CIT (2008) 301 ITR 434 (SC)***
- ITAT has no power to condone delay.
- Since the order dated 04.08.2006 was not communicated to the assessee prior to 17.02.2012, the application filed on 01.03.2012 was within the limitation period - ***Pawan Kumar Jain v. Dy. CIT (2013) 155 TTJ 14 (Mum)***

Power to rectify not to review

- **CIT v. Maruti Insurance Distribution Services Ltd. (2013) 212 Taxman 123 (Del) (Mag.)**
Power is extremely limited- does not extend to correcting error of law or re-appreciating factual findings but it is not confined to clerical or arithmetical mistake
- **Perfetti Van Melle India (P) Ltd. v. CIT (2011) 334 ITR 259 (SC)**
Deciding appeal without considering alternate grounds amounts to mistake apparent on record-
- **ACIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC)**
Not considering decision of jurisdictional High Court or Supreme Court is mistake apparent from the record
- **Honda Siel Power products Ltd. v. CIT (2007) 295 ITR 466 (SC)**
Not considering decision of coordinate bench placed on record is a mistake and it was the duty of the Tribunal set right its mistake even if it result in recalling of its order

APPLICATION FOR RESTORATION OF EX-PARTE ORDERS

- **Rule 24** empowers the ITAT to decide the appeal on merit *ex-parte* after hearing the respondent if appellant is not present. The Tribunal, however, as a matter of practice is dismissing appeals if the appellant is not present.
- Proviso to rule 24 provides for restoration of ex-pate orders passed if the appellant or respondent as the case may be satisfy the bench that there was sufficient cause for non appearance.

STAY BEFORE ITAT

- Direct Stay Application to Tribunal is maintainable, not necessary that lower authorities must be approached first (if appeal pending before Tribunal) ***Honeywell Automation India Ltd vs DCIT (2011) 138 TTJ 373***
- AO should be appropriately intimated regarding stay application filed with ITAT
- Not possible in respect of appeal pending before CIT(A)
- However, can stay rejection order of CIT(A) can be challenged before ITAT ?

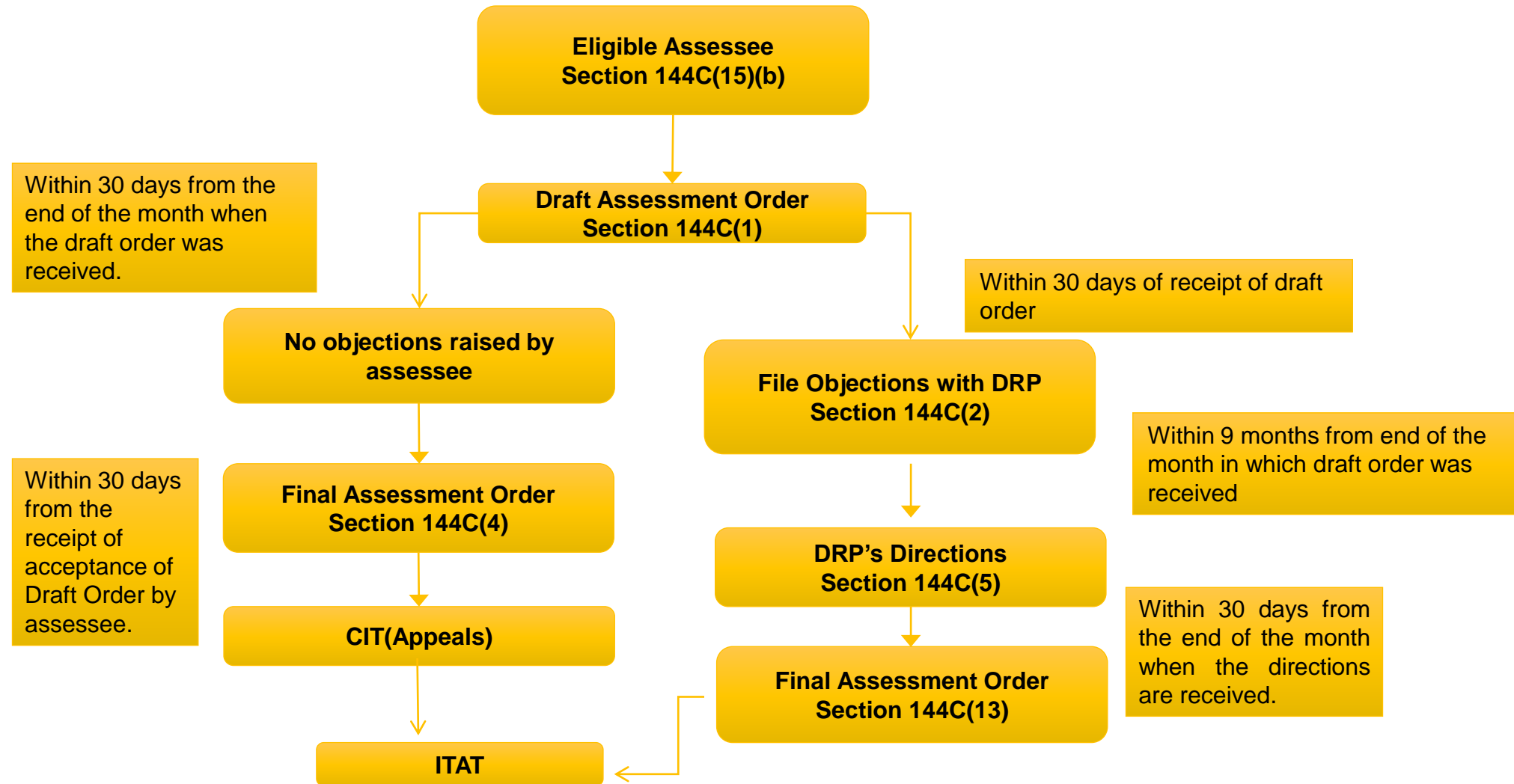


Filing Objection before Dispute Resolution Panel (DRP)

Concept

- Dispute Resolution Panel (“DRP”) provisions introduced in section 144C by Finance (No. 2) Act 2009;
- Eligible Assessee:
 - Any Foreign company or Non-Resident
 - Any other person – If variation in pursuance to order issues by transfer pricing officer.
- Applicable on order proposed by the Assessing Officer (“AO”) on or after 01 October 2009;
- AO to issue ‘draft order’. No demand would be raised at the stage of ‘draft order’;
- The assessee has an option to file his objections against the proposed variation before the DRP or against final order to CIT(A).

Scheme



Comparative Advantage – CIT(A) vs DRP

DRP advantages:

- DRP to decide the matter within 9 months
- No demand till disposal of appeal
- The department cannot appeal against DRP's order

CIT(A) advantages:

- CIT(A) may give due cognizance to arguments/ data
- Likely to pass a speaking order
- Positive outcomes in many cases

DRP Disadvantages:

- Negative judgment in many cases
- Summary order passed without any cognizance to information submitted considering limited time frame

CIT(A) Disadvantages:

- Immediate demand pressure as soon as AO passes the order
- Prolonged litigation. CIT(A) may take 2 to 3 years to dispose the matter
- Department can file an appeal against CIT(A)'s order



Appeal Before High Court

Appeal to High Court

- Appeal shall lie before the High Court if it is satisfied that the case involves a **substantial question of law**.
- Time limit – 120 days
- If HC is satisfied that case involves a substantial question of law, it shall formulate that question.
- Case to be heard by division bench
- No admission of case on mere ‘question of facts’
- Can be admitted in case of mixed question of law and facts

Appeal to High Court

Meaning of substantial question of law.

➤ 5 tests laid by Supreme Court in **Chunilal Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd [1962] AIR 1962 SC 1314** .

- (1) whether directly or indirectly it affects substantial rights of the parties, or
- (2) the question is of general public importance, or
- (3) whether it is an open question in the sense that the issue is not settled by pronouncement of the Supreme Court or Privy Council or the Federal Court, or
- (4) the issue is not free from difficulty, and
- (5) it calls for a discussion for alternative view.

➤ Reiterated in **Santosh Hazari vs. Purushottam Tiwari (251 ITR 84)** and **M. Janardhana Rao vs. Jt. CIT (273 ITR 50)**



Appeal Before Supreme Court

Appeal to Supreme Court

- No statutory right to appeal before Supreme Court
- Appeal against High Court's order in respect of Appellate Tribunal's order lies with the Supreme Court in accordance with the provisions of section 261 of the Act, in those cases, which are certified to be fit one for appeal to the Supreme Court.
- **Special leave** can also be granted by the Supreme Court under **Article 136** of the Constitution of India against the order of the High Court.
- **Article 136 - Special leave to appeal by the Supreme Court**
- (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

Section 264 – Revision of Order

- The Principal Commissioner or Commissioner, on his own or on application made by the assessee, can **revise any order** (other than order passed U/s 263) **passed by his subordinate.**
- The order of revision can not be prejudicial to the assessee
- No *suo moto* revision after the 12 months of the original order
- Assessee should make application under this section within one year from the date of the receipt of original order
- No revisionary order under section 264 appeal filed before CIT(A)
- Order of CIT final. Can not appeal before ITAT.

Writ Petition before High Court

- **Writ meaning** - An order issued by a court requiring that something be done or giving authority to do a specified act.
- Even in situation where 'right to file appeal' is not provided under a statute, the Constitution of India has provided a remedy to approach HC and SC under Article 226 and 32 respectively.
- Writ jurisdiction of these courts extends not only to inferior courts and Tribunals but also to the State or any authority or person endowed with State Authority.
- The High Courts have wide powers as to compare to Supreme Court in issuing writs.
- The Supreme Court can issue writ only in case of violation of any of the fundamental rights.
- While the High Courts can issue writs only in case of violation of fundamental rights also in case of violation of any legal rights of the citizens.

Writ Petition before High Court

Situations in which Writ can be filed

- No other remedy under the law
- Order has been passed in denial or violation of principles of natural justice;
- Order has been passed in defiance of fundamental principles of justice;
- Authority has passed an order without jurisdiction or has purported to exceed its jurisdiction.
- Existence of alternate remedy which is not efficacious
- Vires of the law are to be challenged

Questions ???



THANK YOU



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