



THE CHAMBER OF TAX CONSULTANTS

APPEAL BEFORE CIT(A)

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WEBINAR

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BACKDROP

- CIT(A) is the First Appellate Authority under the Income Tax Act.
- Best opportunity to regularize various lacunae pointed out in the assessment order.
- Conduct of proceedings before CIT(A) (not ultimate outcome) have massive impact on outcome of the matter before superior appellate authority.
- E-Filing requires meticulous preparation of the matter before filing appeal to CIT(A).

BACKDROP

- Sections covered - 246A, 248 to 251.
- Rules 45, 46 and 46A
- After an assessment - an assessee has two options either to file an appeal before CIT(A) or revision petition to CIT u/s. 264
- No right of appeal to Revenue or Department

BACKDROP

- Generally cases before CIT(A) involve assessment order passed under section 143(3), 143(3) r.w S 147, 144, 154, 271(1)(c), 201.
- Assessment order comes with demand notice and penalty notice.
- Particularly in high pitched assessments where pressure of recovery will be there, assessee requires to file appeal, stay petition before AO, application for early hearing before CCIT and reply to penalty notice.
- Ascertain the date of receipt of order.
- Read the assessment order twice.

STEPS TO BE TAKEN

- Call for all notices particularly notice u/s 143(2),142(1) and Show cause notices issued during assessment proceedings and replies thereto. In case of reassessment call for notice u/s 148, reply thereto, recorded reasons, objections to reopening and order disposing objections. Copy of sanction. Take necessary action if assessee doesn't have the same.
- Where statement during survey, search or assessment proceedings are relied upon by AO or statement of third parties are relied upon or third party evidences are relied upon call for the same. Take necessary action if assessee doesn't have the same.
- Also apply for order sheet notings where AO has relied on the same. CBDT letter dated 30/11/2017 [minutes of hearing, posting hearing and adj, nobody attends or adj letter received next date]CBDT
- Find out if AO has recorded that assessee has agreed for addition.
- Hair-split the various reasons on which a particular addition/disallowance is made.

Continued...

- Ascertain whether the reasons were explicitly or impliedly covered by the Show Cause Notice.
- Ascertain whether any reasons for addition / disallowance not covered by the Show Cause Notice require production of additional evidence.
- Ascertain whether additional evidences are required, to meet the objections of the AO. If yes then ascertain cogent reasons for not filing the same before AO.
- Ascertain whether it is possible to arrange additional evidence before expiry of period of limitation.

Continued...

- Ascertain the correct addressee of the Assessee where Notices are required to be served.
- Where-ever additional evidence are required to be filed , ground of improper opportunity of hearing must be taken.
- In case of reopening always take a general ground of reopening.
- Research the case laws

Continued...

- ▶ Determine whether to file appeal or not on a particular ground. If appeal is not filed due to smallness of amount and issue is recurring intimation about same may be given to AO.
- ▶ Ground should mention Section, amount in dispute and prayer. It should be concise and precise. What aspect of a ground is challenged must be stated. Ground should not contain case laws. It should in one or two lines explain the argument of the Assessee. Ground should be exhaustive so that additional ground is not required to be taken subsequently as same would be time consuming. Don't use words like “grossly erred”. Alternative plea should be taken.
- ▶ Drafting of Statement of facts is very crucial as there are no statement of facts to be filed before ITAT. Also, it is the first opportunity in appeal to state correct facts and a possible strong defence against any additional evidence being alleged as an after- thought.

CONTINUED...

- State all facts even if not covered in the assessment order. State all notices and replies. State submissions with case laws to the point. A detailed statement of facts helps to contest ex-parte order of CIT(A). State all factual mistakes/errors and incorrect observations.
- If additional evidence are ready before due date of filing of appeal, then make an application for admission of additional evidence under rule 46A. Application must state the additional evidence and the reason for not filing the same before the lower authority. Application must also state how the additional evidence will change the colour of the entire case.

CONTINUED...

- Where filing of appeal is delayed, prepare **Application for Condonation of Delay**. First try to justify each day of delay from last day of filing appeal till date of filing appeal. Keep calendar in front of you and check it again and again. Ascertain whether assessee has documentary evidence to back the reasons for delay.
- Make an affidavit supporting application for condonation of delay.
- Kindly check that there are no errors in the verification clause.
- File the appeal.
- Prepare a letter to AO to keep penalty proceedings in abeyance as appeal is filed or to be filed. Also mention if AO wants to proceed then opportunity may be given to file detailed reply. Check the penalty notice to find out nature of penalty sought to be levied. Reply should be to drop penalty proceedings. File all details filed in assessment proceedings as well as additional evidences if any.

CONTINUED...

- File letter with CCIT to direct CIT(A) to expedite the matter.
- Ascertain whether there is provisional attachment order passed u/s 281B
- Motorola Solutions India (P.) Ltd. vs. Commissioner of Income-tax, Faridabad [2012] 27 taxmann.com 327 (Punjab & Haryana)/[2013] 212 Taxman 35 (Punjab & Haryana)/[2012] 254 CTR 569 (Punjab & Haryana) wherein it is held that provisional attachment comes to an end on passing of assessment order.
- Decide whether to file **Stay Petition** before AO or CIT(A).
- Draft Stay petition. It should contain, facts and submission of the case ie merits, stress on violations of principles of natural justice by AO if any, past record of the assessee with the income tax department, plea that appeal is pending and application for early hearing is made, ratio between returned income and assessed income and hardship that will be faced by the assessee.
- “In view of the above submissions, it is respectfully submitted that assessee has a good chance to succeed on merits. Further, if stay of demand is not granted great prejudice and injury will be caused to the assessee.” [mandatory clause].

.....Continued.

- At the time of hearing compile paper book containing all details filed before AO.
- Prepare separate paper book of case laws.
- Draft written submissions giving reference to page nos in paper book.
- In case of additional ground prepare application for raising additional ground. Application must contain i) reason for not raising the ground earlier, averment that it's a legal ground and necessary factual details are on record and the ground is a legal ground.
- In case of additional evidence file application for additional evidence u/r 46A if not filed earlier. Prepare separate paper book for additional evidence.
- During remand proceedings write a letter to AO stating that assessee is willing and ready to submit any further evidence required by AO as well as ready to represent before AO.
- In reply to remand report give reply para-wise.
- Prepare final written submissions.



DRAFT GROUNDS OF APPEAL

- ▶ The learned Assessing Officer erred in not giving sufficient/proper opportunity of hearing and hence order of AO may be quashed.
- ▶ The Ld AO erred in making addition of Rs.....u/s 68 being unsecured loan received from.....without appreciating that assessee has proved identity, creditworthiness of the lender and genuineness of the transaction by producing.....and hence addition ofmay be deleted.
- ▶ The Appellant craves leave to add, amend, delete, alter, substitute, any or all the above grounds of appeal.

AFFIDAVIT

- ▶ Assessee must give due consideration to the manner of drafting and filing affidavits. The function of swearing on oath is different from the function of simple attestation of an instrument as held in the case of Kunal Surana v. ITO [2014] 144 ITD 195 (Mum). The following points regarding affidavits merit consideration as per this decision:
 - ▶ (i) The affidavit must not be vague and general in nature. It should be to the point sufficiently explaining the cause for delay and demonstrating the bona fides of the assessee;
 - ▶ (ii) It must be divided into paragraphs and each paragraph must be numbered consecutively, and as nearly as may be, shall be confined to a distinct portion of the subject;
 - ▶ (iii) Affidavit must state how much of it is based on knowledge and how much of it is based on belief and the grounds of belief must be stated – State of Bombay v. Purushottam Jog Naik AIR 1952 SC 317;
 - ▶ (iv) Affidavit must be properly endorsed by the notary regarding oath of affirmation before him by the executant of the affidavit;



AFFIDAVIT

- (v) The place and date of administration of oath must be mentioned;
- (vi) The words “sworn before me” must be mentioned by the notary on the affidavit;
- (vii) Executant must sign the affidavit before the notary;
- (viii) The notary must sign the affidavit, put official notary seal and stamp, mention his registration number and also the General Register Number (unique for each document executed before the Notary) on the affidavit.

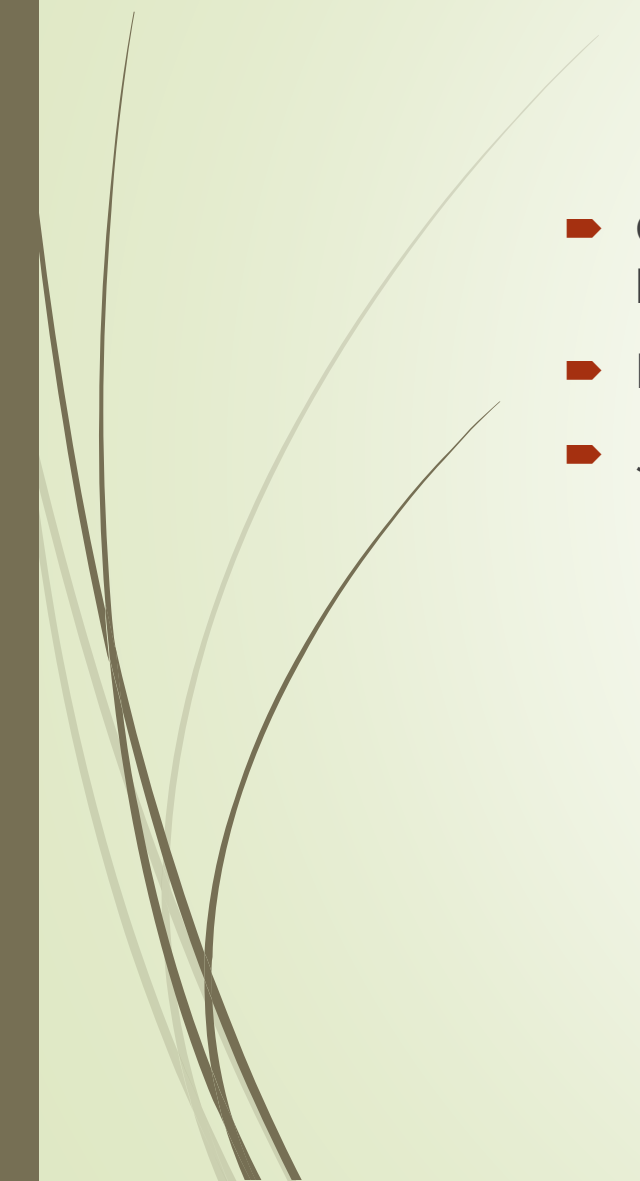


AFFIDAVIT

- ▶ While every effort must be made by the assessee to explain the delay with appropriate documentary evidence, the decision in the case of Vasu & Co. v. State of Kerala (2001) 10 KTR 30 (Ker.) may be referred to, wherein it has been held that if the court was satisfied that sufficient explanation had been given for condoning delay, then the affidavit could be accepted as evidence and insistence of proof of what had been stated in the affidavit would only prolong litigation.



LIMITED SCRUTINY

- ▶ CBDT letter dated 30/11/2017, Instruction No 5/2016, Instruction No 20/2015, Instruction No 7/2014.
 - ▶ Recorded reasons and sanction.
 - ▶ Jurisdictional issue.
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PROSECUTION

- ▶ SCN u/s 279
- ▶ See whether offence is covered by Section 278AA.
- ▶ File detailed reply. [Technical arguments, Mens rea, merits, premature]
- ▶ Order for prosecution – remedy.

RELEVANT INSTRUCTIONS FOR STAY

- ▶ As per Instruction No. 1914 dated 2-12-1993, AO's must pass speaking orders disposing off applications for stay of demand. This view is also reiterated by the Bombay High Court in *Tata Toyo Radiators (P.) Ltd. v. UoI* [2012] 209 Taxman 106 (Bom.) (MAG.) and *KEC International Limited v. B. R. Balakrishnan & Ors.* [2001] 251 ITR 158 (Bom.). *Mumbai Metropolitan Region Development Authority vs. DDIT* (2015) 273 CTR 317 (Bom.) (HC)
- ▶ As per Instruction No. 96 dated 21-8-1969, collection of the tax in dispute should be held in abeyance till the decision on the appeal in such a case. It is important to note that even though Instruction No. 1914 states that it has been issued in supersession of earlier instructions, Courts have taken a view that Instruction No. 96 has not been so superseded as held in *Soul v. DCIT* [2010] 323 ITR 305 (Del.) (HC) and *N. Jegatheesan v. DCIT* [2015] 64 taxmann.com 339 (Mad.).
- ▶ CBDT OM dtd 29-2-2016 [15% of demand]. Revised to 20% by OM[FNo404/72/93-ITCC] dtd 31/7/2017.



RELEVANT INSTRUCTIONS FOR STAY

- ▶ In the case of *N. Rajan Nair vs. ITO* 165 ITR 650 (Ker) it is held that recovery proceedings may be stayed where income determined on assessment is substantially, greater than returned income. Where income determined on assessment is more than twice the income returned, collection of tax should be stayed during appeal. The Assessee further relies on the decision of *Maharana Shri Bhagwat Singhji of Mewar vs. ITAT* (1997) 223 ITR 192 (Raj.) and *Mrs. R. Mani Goyal vs. CIT* (1996) 217 ITR 641 (All.)
- ▶ The Delhi High court in case of *Valvoline Cummins Ltd. vs. DCIT* (2008) 307 ITR 103 (Delhi) following the Kerala High Court held that the assessee is entitled to an absolute stay of demand on the basis of the Instruction no. 96, dt. 21st August, 1969 as its assessed income is almost 8 times the returned income. The Delhi High Court in *Soul vs. DCIT* (2010) 323 ITR 305 further held that Instruction No. 1914 of 1993 does not alter the position obtaining after the decision in *Valvoline Cummins Ltd.* (Supra)

APPEAL TO THE APPELLATE FORUM - STATUTORY RIGHT

- **No inherent right of appeal.** Right is given to assessee.
- To be construed liberally :
general proposition that Tax provisions should be strictly construed will not apply to right of appeal – such right should be granted rather than denied.
- Provisions conferring right of appeal should be construed in a liberal, reasonable and practical manner (CIT vs. Ashoka Engg. (1992) 194 ITR 645(SC))

APPEAL TO THE APPELLATE FORUM - STATUTORY RIGHT

- Appeal before CIT(A) – No inherent right of appeal. Statutory right created by statute.
- Subject to limitation and restriction imposed by the statute.
- No Appeal lies unless it is provided by the statute. (CIT vs. Garware Nylons Ltd. (1995) 212 ITR 242 – Bom) (order u/s 197(3))
- Right of appeal – A substantive right and not a procedural right.



APPEALABLE ORDER BEFORE CIT(A)


- ▶ Exhaustive list provided in section 246A
- ▶ Covers if any one denies his liability to be assessed e.g. below taxable limit, income not taxable u/s. 10 or deduction under chapter VIA.
- ▶ Partial denial is also covered.

APPEALABLE ORDER BEFORE CIT(A)

- ▶ The word “Any Assessee” is wide enough.
- ▶ Legal representatives of a deceased assessee *Rajah Manyam Meenakshamma vs. CIT (1956) 30 ITR 286 (AP)*
- ▶ A person who is beneficially entitled to the income in respect of which he is assessee through a trustee or agent or court of wards
Shrimant Govindrao Narayanrao Ghorpode vs. CIT (1963) 48 ITR 54 (Bom), Inder Singh Gill vs. CIT (1963) 47 ITR 284 (Bom)
- ▶ Karta and members of a HUF or the partners of the firm, whether in existence or disrupted or dissolved, in the case of assessments made on the family or firm or themselves as individuals or HUF. *Mahindra Kumar Mohanlal v. CEPT 33 ITR 360 (Bom); Tatawarthy Narayana Murty vs CIT 49 ITR 766 (AP), Roopchand Chandermal & Co. vs. CIT 59 ITR 624 (AP), Gadodia & Co. vs. CIT 34 ITR 416 (Pun), Chandmull Pannalal vs. CIT 58 ITR 711 (Cal)*

APPEALABLE ORDER BEFORE CIT(A)

- *Ambattur Clothing Co. Ltd. Vs. ACIT (2009) 221 CTR (Mad) 196* – The High court made an observation under the Stamp duty act, that the person had locus standi as even he was aggrieved.

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- It has been held by High Courts that even a third party has a right of appeal if, as a result of an order he is saddled with a liability for any tax or other sum – (See Section 2(7) of the Act)

- Kikabhai Abdulali Vs. ITAT Bombay 32 ITR 762 (Bom); CIT v. N. Ch. R. Row & Co. 144 ITR 557 (Cal), CIT vs. Ambala Flour Mills. (1970) 78 ITR 256 (SC).

APPEALABLE ORDER BEFORE CIT(A)

Can the appeal be filed against the following orders?

- ▶ Any assessee “aggrieved” by an order
- ▶ Aggrieved - Not agreed upon – Dissatisfied
- ▶ "Every Assessee aggrieved" by any of the orders mentioned in Section 246 of the I.T. Act, 1961 has a right to prefer an appeal. In *Rameshchandra & Co. v. CIT 168 ITR 375 (380) (Bom)*, it has been held that where an assessee has made a statement on facts, there can be no grievance if he is taxed on the basis of that statement. As there is no grievance, there can be no appeal. When an Assessing Officer states in the Order that the Assessee agreed for addition, he cannot file an appeal unless he challenges the observation of the Assessing Officer by filing Affidavit - *Western India Automobiles v. CIT 112 ITR 1048 (Bom)*.
- ▶ *Kanshi Ram v CIT (1982) 138 ITR 830 (P&H), Anil Kumar v ITO (2008) 26 SOT 17(Asr)(URO)*

APPEALABLE ORDER BEFORE CIT(A)

- ▶ Assessee should make application u/s.154 of the Act, challenging the observation of the Assessing Officer and should also file an appeal specifically urging that he has not agreed for additions and the same should be supported by an Affidavit.
- ▶ The Hon'ble Bombay High Court in case of **Nirmala L. Mehta vs. A. Balasubramanin CIT 92004) 269 ITR 1 (Bom)** held that there cannot be any estoppel against statute. Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law.
- ▶ Agreed addition/ consent –
Chhotmal Mull Agarwal 116 ITR 694 – P & H [No provision barring filing of appeal. CIT(A) can dismiss appeal on grounds of admission by assessee].

APPEALABLE ORDER BEFORE CIT(A)

- Denies his liability to be assessed - can be claimed for the first time before CIT(A).
Denial can be claimed at any stage.

CIT Vs. M. Pyngrope [200 ITR 106 (Gauh)]

CIT Vs. Orissa Cement Ltd. [215 ITR 409 (Del)]

- Even if the amount is included by the assessee in ROI - he can claim before CIT(A) that the said amount is not taxable or chargeable

i) Pt Sheo Nath Prasad Sharma Vs. CIT [66 ITR 647(All)]

ii) Champa Properties (P) Ltd. Vs. CIT [166 ITR 367(Cal)]

iii) CIT v Mitesh Infra (2014) 367 ITR 85(Guj)(HC)

APPEALABLE ORDER BEFORE CIT(A)

- Levy of interest u/s. 234B/234C is appealable on the ground that assessee denies his liability to be assessed.

Jalgaon Dist. Central Co-op Bank Ltd. Vs. ITO [70 ITD 290 (Pune)]

(Central Province Manganese Ore Co. 160 ITR 961 (SC))

- The assessee objects to making of adjustments or any order u/s. 143(3) or u/s. 144 or the amount of tax determined or the loss computed or to the status under which he is assessed; except an order passed in pursuance of direction of Dispute Resolution Panel (DRP) w.e.f. 01.10.2009 i.e. u/s. 144C.

- On failure of revision petition u/s. 264 - An assessee can file appeal an appeal u/s. 246A after explaining delay in filing the appeal.

a) CIT Vs. D. Lakhminnarayana Pathi [250 ITR 187 (Mad)] contrary view in (2012) 343 ITR 316(Ori).

- A person on whom liability to tax has been fastened has a right to appeal

Amin Chand & Sons vs. CIT 133 ITR 439 (P&H)

APPEALABLE ORDER BEFORE CIT(A)

- Certificate granted u/s 197 ?

Section 248 provides for appeal by a person denying liability to deduct tax i.e. for orders u/s 195

The Bombay High Court held that no appeal lies from the order u/s 197 u/s 248 – CIT vs. Garware Nylons Ltd. 212 ITR 242 (Bom)

But a writ lies on other grounds as natural justice etc. Sanghi Brothers Ltd. vs. ACIT (1994) 122 CTR 19 (MP)

- **Order Giving effect to Appellate order : Appealable :**

CIT vs. Industrial Machinery manufacturing P. Ltd. (2006) 282 ITR 595 (Guj.)

Bakelite Hylam Ltd. vs. CIT 171 ITR 344(AP)

CIT v S.C. Shah 137 ITR 281(Bom)

Against

ANZ Grindlays Bank PLC vs. CIT 241 ITR 269 (Cal.)

APPEALABLE ORDER BEFORE CIT(A)

➤ Denial of interest u/s 244A?

Where the Department denies its liability to pay interest on refund of self assessment tax, the issue is appealable : Sec. 244A

Dy. CIT vs. BSES Ltd. (2008) 113 TTJ 227 (Mum)(para 19.6)

➤ Protective assessment?

In following cases, it has been held that even against Protective Assessment, Appeal can be filed. **54 ITD 471 (Delhi) (SB) Eastern Bulk Services v. ITO**
166 ITR 367 (Cal) Champa Properties (P). Ltd. v. CIT.

APPEALABLE ORDER BEFORE CIT(A)

- ▶ Order giving effect granting refund but not interest is appealable
 - CIT v Biswanath Pasari (2014) 364 ITR 404(Cal)(HC)
- ▶ Intimation u/s 200A is appealable
 - Gajanan Construction v DCIT (2016) 161 ITD 313 (Pune)(Trib).
- ▶ Issue of jurisdiction of ITO based on the place of assessment cannot be validly raised.
 - Roopnarain Ramchandra v CIT(1970)78 ITR 171 (All)
- ▶ Order refusing to consider delayed return of loss and not allowing c/f of loss is appealable.
 - Bihar State elec Board v CIT 101 ITR 740(Patna).



Appealable order before CIT(A)

- Non appealable order
 - Order passed u/s 273A
 - Order passed u/s 264
 - Certificate u/s 197

FORM OF APPEAL AND LIMITATION (S. 249)

- As per Rule 45, an appeal to CIT(A) shall be in Form No. 35.
- Form no. 35 requires (i) Grounds of appeal and (ii) Statement of facts
- Memorandum of appeal (F.35), Statement of facts and grounds of appeal should be submitted in duplicate to CIT(A) alongwith copy of the order appealed with notice of demand in original
- Non enclosure of notice of demand - technical irregularities but not fatal
[Chelamala Setti Adeyya Vs. CIT - 54 ITR 339(AP)]

FORM OF APPEAL AND LIMITATION (S. 249)

- 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.

Sr. no.	Total income computed by AO	Amount (Rs.)
1	upto Rs. 1,00,000/-	250
2	Bet. Rs. 1,00,000/-and Rs. 2,00,000/-	500
3	Above Rs. 2,00,000/-	1000
4	Not covered above	250

- Total income determined at negative figure- Minimum fees [Gilbs Computer Ltd. Vs. ITAT - 317 ITR 159(Bom)]
- Separate appeals for each year if order passed is consolidated one.

TIME LIMIT FOR PRESENTATION OF APPEAL

- Appeal should be presented within 30 days from:
 - a) Appeal u/s. 248 - the date of payment of tax
 - b) Appeal relates to assessment or penalty - date of services of notice of demand
 - c) In any other case - the date on which intimation of the order is served
 - d) Second proviso- S.270AA wef 1/4/2017

CAN AN APPEAL BE SIGNED BY AN ADVOCATE / CHARTERED ACCOUNTANT / AUTHORISED REPRESENTATIVE

- As per Rule 45 of the Income Tax Rules, 1961, the form of appeal i.e. Form No. 35, the Grounds of Appeal & the form of Verification appended thereto shall be signed & verified by the person who is authorised to sign the return of income under section 140 of the I.T. Act, 1961. Thus it can be inferred that only in the case of an individual or a company which is not resident in India, the return can be signed by a person who holds a valid power of attorney, which shall be attached to the return.

CAN AN APPEAL BE SIGNED BY AN ADVOCATE / CHARTERED ACCOUNTANT / AUTHORISED REPRESENTATIVE

- ▶ There are divergent views on the issue as to whether a defect in signature would render the appeal a nullity. The *Hon'ble Calcutta High Court in Sheonath Singh v. CIT 33 ITR 591* has held that the absence of or defect in the signature of the appellant is not fatal so as to render the appeal a nullity and it is an irregularity which can be rectified and will be treated as having being rectified retrospectively whereas the *Hon'ble Allahabad High Court in Special Manager, Court of Wards, Naraindas Narsinghdas v. CIT reported in 18 ITR 204* has taken a contrary view and held that where the signature on the appeal was that of an agent, the appeal filed was invalid.

CAN AN APPEAL BE SIGNED BY AN ADVOCATE / CHARTERED ACCOUNTANT / AUTHORISED REPRESENTATIVE

- ▶ In the following cases, it has been held that an appeal signed by an Advocate/C.A. is valid -*Mrs. Leezo Salidan v. CIT 16 TTJ 243 (Bom)*
Pyrkashim Stores v. CIT 9 ITD 93 (Bom) *Hariledge v. ITO 29 Taxman 122 (Bom) (Tribunal)* *RajendraKumar Maneklal Sheth (HUF) v. CIT 213 ITR 715 (Guj).*

DELAY IN FILING APPEAL

- U/s. 249(3), the CIT(A) has power to admit belated appeal, if sufficient cause for not presenting the same in time is shown.
- **An application for condonation of delay alongwith affidavit stating the reasons for delay should be filed alongwith the appeal.** The Hon'ble Calcutta High Court in *Charki Mica Mining Co. Ltd. vs. CIT* 111 ITR 193 has held that 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.
- In *Collector of Land Acquisition v. Mrs. Katiji & Others* 167 ITR 471 (SC) the Hon'ble Supreme Court has held that the Courts should have pragmatic & liberal approach in admitting the appeal beyond the period of limitation. Also see *N. Balkrishnan Vs. M. Krishnamurthy* (1998) 7 SCC 123 and *State of Nagaland vs. Lipuk* A.O. 2005 (183) E.L.T. 337 (SC)



Legal Principle culled out from various decision on condonation of delay

- ▶ a. The expression 'sufficient cause' must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in interest of justice.
- ▶ b. The primary function of any quasi-judicial body is furtherance of administration of substantial justice.
- ▶ c. Pragmatic justice oriented approach is required and not the technical detection of explanation of every days delay.
- ▶ d. Length of delay is immaterial.



Legal Principle culled out from various decision on condonation of delay

- ▶ e. A litigation does not stand to benefit by resorting to delay, therefore a justice oriented approach is required by courts.
- ▶ f. Since explanation of assessee did not smack mala fide or was not put forth as a dilatory strategy, delay in filing appeal was to be condoned.
- ▶ g. In every case of delay there can be some lapses on the part of the litigant concerned, but that alone is not enough to shut the door against him.
- ▶ h. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.
- ▶ i. In matters of condonation of delay a highly pedantic approach should be eschewed and a justice oriented approach should be adopted and a party should not be made to suffer on account of technicalities.

CONDITION PRECEDENT – PAYMENT OF TAX

- Appeal shall not be admitted unless
 - A) Tax is paid, as per Return of income.
 - B) Where no ROI is filed, paid an amount equal to the amount of Advance tax payable.
- The CIT(A) may for any good and sufficient reason recorded in writing exempt from payment of Advance tax.
- Assessee having paid the unpaid amount of admitted tax before issuance of show – cause notice, the requirement of section 249(4) stood fulfilled.

CIT vs. Rama Body Builders (2001) 250 ITR 825 (Del)

- Section 249(4) cannot be read down to restrict to appeals against assessment only and it will apply to penalty appeals also.

[S. Alagarwamy Vs. ITO - 296 ITR 43 (Mad)]

[CIT Vs. Smt. G.A.Samanthakamani - 259 ITR 245 (Mad)]

CONDITION PRECEDENT – PAYMENT OF TAX

- Provisions of s.249(4) are relevant only in the context of an appeal which is relatable to the assessment of income, i.e. appeals against the assessment orders and against the orders imposing penalties in connection with the assessment of income and therefore provisions of s.249(4) will not apply in case of appeal against penalty s.221

Satyan Enterprises vs. JCIT 93 ITD 606

- Tax does not include interest

CIT Vs. Manojkumar Beriwal - 217 CTR 407 (Bom).

- Jagdish Raj Chauhan vs. CIT 161 Taxman 291 (P&H), CIT v Pramod Kumar Dang(2014) 361 ITR 137(Del)(HC) – adjustment of tax is valid.

CONDITION PRECEDENT – PAYMENT OF TAX

- J.R. Chauhan vs. CIT (2009) 311 ITR 303 (P&H) – Appeal against assessment of AOP without adjustment of tax paid by members in their individual assessments not entertained by CIT(A) for non-compliance with s.249(4), fresh appeal filed after adjustment of tax should have been considered as an application for revival of earlier appeal; order dismissing fresh appeal as time-barred set aside and CIT(A) directed to decide the appeal on merits.

PROCEDURE: GROUNDS OF APPEAL & STATEMENT OF FACTS

- The same should be concise without any argumentative or narrative. The grounds should highlight the main controversy in issue. The grounds should not be vague, general or too lengthy.
- They should be comprehensive and complete.
- The Statement of Facts should be filed before the Commissioner (Appeals) wherein facts can be narrate.
- The statement of facts may address the grievances
- Both Grounds of appeal and statements have to be separately drafted. One should not mix grounds and facts together.
- Seek prayer for relief for each ground.

PROCEDURE: GROUNDS OF APPEAL & STATEMENT OF FACTS

- Include ground for levy of interest u/s 234A/B/C
- Include a prayer for leave to add/alter/withdraw any grounds.
- One should not wait for order u/s 154 to be passed.
- Assessment order and penalty order separate hence one should keep the issue alive and file appeal even the penalty order.

DEFECT IN APPEAL

- **Defect in Appeal can be rectified by an amendment. The Assessee should be given an opportunity to rectify the defect:**
 - a) Malani Trading Co. vs. CIT (2001) 252 ITR 670 (Bom)
 - b) BDA Ltd. vs. ITO (TDS) 281 ITR 99 (Bom) (Aurangabad Bench)
- **Procedural defect must be intimated to the appellant**
 - c) CIT vs. Calcutta Discount 91 ITR 8 (SC)
- **Dismissal of appeal as not filed electronically.**

PROCEDURE IN APPEAL (S. 250)

- Notice to AO and Assessee fixing a day and place of hearing
- Following shall have right to be heard:
 - the appellant in person or through his AR
 - the AO or his AR.
- CIT(A) has power to adjourn the hearing.
- 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.
- The CIT(A) may allow to raise additional ground at the time of hearing if he is satisfied that the omission of the ground was not wilful or unreasonable.

PROCEDURE IN APPEAL (S. 250)

- There are special exceptional attributes of jurisdiction of a tax appellate authorities. These attributes underline the truth that appellate authority is no different, functionally and substantially from the assessing authority itself.
- The order of the CIT(A) should be in writing and shall state 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 AO and the assessee.

HEARING

- Assessee should file written submission and paper book at time of hearing
- The CIT(A) has power to make such further inquiry as he thinks fit or may direct the A.O. to make further inquiry and report to him. Assessee is entitled to reply to the remand report.
- The CIT(A) has to pass a speaking order dealing with each ground of appeals. The CIT(A) should pass the order on merits even though heard ex parte / or assessee did not appear - CIT vs. Chennaippa 74 ITR 41 (SC)
- The CIT(A) cannot apply Multiplan (India) Ltd. 38 ITD 320, decision and dismiss the assessee's appeal ex parte for non appearance. Gujarat Themis Biosyn Ltd v/s. Jt CIT 74 ITD 339 (Ahd). CIT v Premkumar Luthra(HUF) (2016) 240 taxman 133(Bom)(HC).

ADDITIONAL EVIDENCE RULE 46A

The Rule provides that the appellant shall not be entitled to produce before CIT(A) any evidence oral or documentary, other than evidence produced before him during the course of proceedings before AO except in the following circumstances viz:

- a) AO has refused to admit evidence which ought to have been admitted, or
- b) The appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the AO, or
- c) The appellant was prevented by sufficient cause from producing before the AO any evidence which is relevant to any ground of appeal or
- d) The AO has made the order without giving sufficient opportunity.

ADDITIONAL EVIDENCE RULE 46A

- No evidence shall be admitted unless CIT(A) records in writing the reason for its admission.
- The CIT(A) shall not take into account any evidence unless the AO has been allowed a reasonable opportunity to examine the evidence or for rebuttal of the additional evidence.
- Notwithstanding above, the CIT(A) has a power to direct the production of any document or the examination of any witness

ADDITIONAL EVIDENCE RULE 46A

- ▶ Additional evidence has to be filed in duplicate. Ensure that CIT(A) serves one copy to the Assessing officer and obtains a remand report.
- ▶ The CIT(A) has to give a copy of remand report and further an opportunity to reply to the remand report
- ▶ If the assessee is been prevented by good, sufficient or reasonable cause or adequate time is not allowed such fresh evidence can be placed before the appellate authority by making a Application U/R. 46A.
- ▶ The Commissioner (Appeals) would not justified in rejecting additional evidence produced before him – *Smt. Prabhavati S. Shah v. CIT 231 ITR 1 (Bom)*; *Dwarka Prasad v. ITO 63 ITD 1 (Patna)(TM)*.

ADDITIONAL EVIDENCE RULE 46A

- Under Rule 46A(4) the CIT(A) on its own discretion can ask the assessee to produce documents or evidence. Additional evidence gathered by the CIT(A) on his own is not required to be produced before A.O. for his comments.
- a) Dy. CIT vs. Thoresen Chartery Singapore (2009) 118 ITD 416 (Mum)
- b) ITO vs. Jitender Mehra 53 ITD 396 (Del.)
- c) CIT vs. K. Ravindranathan Nair (2004) 265 ITR 217 (Ker.)
- d) ITO vs. Indl. Roadways (2008) 305 ITR 219 (Mum(AT)).
- e) ACIT vs. Prime Telesystems Ltd. (2007) 11 SOT 361 (Del.)

ADDITIONAL EVIDENCE RULE 46A

- ▶ This Rule does not specifically exclude principles of natural justice and therefore these principles are necessarily to be read into provisions of Rules.

[CIT Vs. United Towers (I) (P) Ltd. -296 ITR 106 (Del)]

- ▶ In CIT Vs. Poddar Swadeshi Udyog P. Ltd. [295 ITR 252 (Gauh)] has held that the Tribunal observed that the books of account were produced before the AO and the new details filed before the CIT (A) were in continuation of the original evidence, so it was not necessary to give an opportunity to AO.

RAISING ADDITIONAL GROUNDS

- ▶ Sub-section 5 of Section 250 gives power to the Commissioner (A) to allow the appellant to raise additional ground if he is satisfied that the omission of that ground was not wilful or unreasonable.
- a) Jute Corp. of India Ltd. vs. CIT 187 ITR 688 (SC) (FB)
- b) Heinrichde Frics GMBH vs. Jt. CIT 281 ITR 18 (Mum)(AT)

JURISDICTION POINT

- The Assessee can raise the jurisdiction point at any time. - **Union of India v. Rai Singh Dal Singh 88 ITR 200 (SC), CIT v. Dumravan Cold Storage & Refrigerators Services 97 ITR 137 (Pat)**, The Assessee can raise the jurisdictional point before the Tribunal also in respect of reassessment proceedings. As it is a question of law which goes to the root of the matter. **Inventors Industrial Corporation Ltd. vs. CIT 194 ITR 548 (Bom)**. Invalid jurisdiction cannot be corrected by Sec. 292B - **Saraf Gramodyog Sanshtan 108 ITD 115 (Agr.)**]
- **CIT VS. SMT. MADHU PATANI (2009) 18 DTR 110 (KER)** - Additional Ground challenging the assessment on the ground of limitation can be raised first time before the CIT(A) in appeal against the fresh assessment order passed on remand, even though it was not raised either before the assessing authority or the CIT(A) in the first round of proceedings.

MAKING A CLAIM FOR THE FIRST TIME BEFORE APPELLATE AUTHORITY

- If there was evidence or material on record, then only a claim made for the first time be entertained by the Appellate Authority. **CIT v. Western Rolling Mills Pvt. Ltd. 154 ITR 54 (Bom).**
- The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assessees in matters affecting their interests and convenience. **Circular No. 14(XL-35) of 1955, C.No. 13(207)-IT/50, dated 11th April, 1955,** states that the Officers of the Department must not take advantage of ignorance of an assessee as to his rights.

MAKING A CLAIM FOR THE FIRST TIME BEFORE APPELLATE AUTHORITY

- However the decision of S.C. in the case Goetze (India) Ltd vs. CIT 284 ITR 323 (SC) has held that it was open to the assessee to raise new points of law before the Tribunal. The Tribunal has such powers u/s. 254 of the Act.
- A.O. is bound to assess the correct income and for this purpose the Assessing officer may grant relief's / refund sou motu or can do so on being pointed out by the assessee in the case of assessment proceedings for which assessee has not filed a revised return.
- CIT(A) can entertain new claim in absence of revised return.
 - APL India (P) Ltd v Adln CIT (2013) 58 SOT 41(URO) (Mum)(Trib).

MAKING A CLAIM FOR THE FIRST TIME BEFORE APPELLATE AUTHORITY

► Case Laws After Considering Goetze (India) Ltd. (Supra)

- a) Chicago Pneumatic India Ltd. vs. Dy. CIT 15 SOT 252 (Mum) (273)
- b) In CIT v Jai Parabolic Springs Ltd (2008) 306 ITR 42 (Delhi), the court held that the Tribunal has the power to decide the issue.
- c) In CIT vs. Ramco International (2009) 221 CTR 491 (P & H) held that claim u/s. 80IB was admissible even without a revised return.
- d) CIT v Pruthvi brokers & shareholders Ltd (2012) 208 taxman 498(Bom)(HC).

MAKING A CLAIM FOR THE FIRST TIME BEFORE APPELLATE AUTHORITY

- However, the A.O. cannot entertain a claim for deduction otherwise than by filing a revise return.
- In case where assessment is not pending and the time available for filing a revised return is also expired, the only remedy is to seek extension of time u/s. 119(2) from the Board for filing a delayed return in case of genuine hardship. [Bombay Mercantile Co-op Bank Ltd v CBDT (2010)45 DTR 377(Bom)(HC).
- The assessee can also file rectification application u/s. 154 on facts of the case or make an application to CIT u/s 264.

POWER OF CIT (A) (SECTION 251)

Power of the CIT(A) are:

- He may confirm, reduce, enhance or annul the assessment
- If proceedings before the Settlement Commission u/s. 245HA has been abated, he may use the material and information produced before it.
- In an appeal against an order imposing a penalty ; to confirm cancel or vary either to reduce or enhance the penalty.
- In any other case, he may pass such orders in the appeal as he thinks fit.

POWER OF CIT (A) (Section 251)

- The filing of an appeal may lead to grave consequences of enhancement of assessment.
- However, he cannot enhance an assessment or a penalty or reduce the amount of refund unless a reasonable opportunity is given to an assessee.
- The Explanation provides that CIT(A) may consider and decide any matter arising out of the proceedings, notwithstanding that such matter was not raised before the CIT(A).
- Thus CIT(A) powers are very wide. The scope of his powers is conterminous 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)]

POWER OF CIT (A) (Section 251)

- ▶ However he has no jurisdiction to assess a source of income which is not disclosed either in the ROI or in the assessment order. Thus it is not open to him to travel outside the record for finding out new source of income. [CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria - 66 ITR 443(SC)]
- ▶ In CIT Vs. Nirbheram Daluram [224 ITR 610] the Supreme Court held that the CIT(A) can make addition in respect of new source of income if it is not considered by AO.
- ▶ The Full Bench of Delhi High Court in case of CIT vs. Sardarilal & Co. (2001) 251 ITR 864 (871) (Del)(FB) held that the first appellate authority has no power to enhance the assessment by discovering a new source of income not considered by the A.O. in the order appealed against. It confirmed the view taken in CIT vs. Union Tyres (1999) 240 ITR 556 (Del)
- ▶ An 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)]

POWER OF CIT (A) (Section 251)

- New claim before the CIT(A) or ITAT can be made if all facts are available on record, otherwise no.
[CIT Vs. Gujargnavures P. Ltd. [111 ITR 1(SC)]
- No power to review except power of rectification u/s. 154.
- No power to consider validity of Act or Rules [CIT Vs. Straw Products Ltd. 60 ITR 156 (SC)]
- "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.

[Ugar Sagar Works Ltd. Vs./ CIT -141 ITR 326 (Bom)]

POWER OF CIT (A) (Section 251)

- The CIT(A) powers u/s. 251 are wide enough to include the power to examine all matters covered by the assessment order and to correct the assessment. The Powers of CIT(A) are conterminous with those of the Assessing Officer.

166 ITR 494 (MP) Indermal Natwarlal vs. CIT

206 ITR 574 (Guj) CIT vs. Ahmedabad Crucible Co.

131 ITR 451 (SC) Kapoorchand Shrimal vs. CIT

305 ITR 310 (Chennai)AT Ansaldo Energia SPA vs Asst DIT

- However the jurisdiction of the appellate authority u/s. 251 is strictly confirmed to the Assessment order of the particular year under appeal as held in ITO vs. Murlidahr Bhagwan Das 52 ITR 335 (SC).
- CIT(A) cant give directions relating to third party.
 - Vijaykumar Sarada v Dy CIT (2014) 146 ITD 553(Mum)(Trib)

POWER OF CIT (A) (Section 251)

► Power to Stay the Recovery Proceedings

In following cases it has been held that the CIT(A) has the power to Stay the Recovery Proceedings.

i.) Prem Prakash Tripathi v. CIT 208 ITR 461 (All).

ii) Tin Mfg. Co. India Ltd. v. CIT 212 ITR 451 (All).

iii) Paulsons Litho Works v. ITO 208 ITR 676 (Mad);

iv) Agricultural Produce Market Committee vs. CIT (2005) 279 ITR 371 (Pat.),

v) Smita Agrawal (Ind.) vs. CIT 184 Taxman 59(All)

vi) GERA Realty Estates v CIT(A) (2015) 368 ITR 366 (Bom)[Stay of order as well]

THE CHAMBER OF TAX CONSULTANTS



THANK YOU.

RAHUL HAKANI, ADVOCATE,

LL.M., C.A.

WISH YOU ALL

A HAPPY NEW YEAR