Drafting of Appeals

Chetan A. Karia

Chartered Accountant

1. Introduction

Appeal is a mechanism provided by the law to challenge order of lower authorities before higher authority. Though drafting is more akin to art then science, certain basic provisions of law relating to appeals do act as rules that guide drafting of appeals.

2. No inherent right of appeal

There is no inherent right of appeal. Except where right of appeal is specifically granted, appeal cannot be filed. Absence of necessary redressal mechanism by way of appeal may, in appropriate circumstance, be reason to hold a piece of legislation as oppressive, however, right of appeal cannot be read into a legislation. {*Sri Mahant Harihar Gir v. CIT (1941) 9 ITR 246 (Pat)*}.

2.1. Provisions relating to right of appeal to be liberally construed

However, once right of appeal is granted, it has to liberally construed and the same cannot be restricted. In *CIT v. Ashoka Engineering Co. (1992) 194 ITR 645 (SC)* it was held that "*It is true that there is no inherent right of appeal to any assessee and that it has to be spelt from the words of the statute, if any, providing for an appeal. But it is an equally well-settled proposition of law that, if there is a provision conferring a right of appeal, it should be read in a reasonable, practical and liberal manner.*"

Further, right of appeal includes right to challenge the very jurisdiction of the authority passing the order appealed against. Assessee can even challenge the jurisdiction of the assessing officer to make the order. Such a right cannot be denied on the ground that appeal lies only against order of the assessing officer and if assessing officer did not have jurisdiction to make the order, appeal too would not lie. In *CIT v. Bhikaji Dadabhai & Co. (1961) 42 ITR 123 (SC)* it has been held as follows: *"Even if the Income-tax Officer committed an error in passing the order imposing penalty because the conditions necessary for invoking that jurisdiction were absent, an appeal against his order on the ground that he was not competent to pass the order did lie to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner is under the Act constituted an appellate authority against certain orders of the Income-tax Officer, and exercise of that jurisdiction is not made conditional upon the competence of the Income-tax Officer to pass the orders made appealable. The Appellate Assistant Commissioner had as a court of appeal jurisdiction to determine the soundness of the conclusions of the Income-tax Officer both on questions of fact and law and even as to his jurisdiction to pass the order appealed from."*

3. Withdrawal of appeal

Appeal once filed cannot be withdrawn by appellant as a matter of right, though the appellate authority in its discretion may allow withdrawal of appeal and dismiss the same as not pressed. In *CIT v. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC)* it has been held that: *"It is also well-established that an assessee having once filed an appeal cannot withdraw it. In other words, the assessee having filed an appeal and brought the machinery of the Act into working cannot prevent the Appellate Assistant Commissioner from ascertaining and settling the real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuses to appear at the hearing, the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there has been an under-assessment, he can enhance the assessment"*

4. Law applicable to appeal provisions

In deciding the issue in dispute in appeal, obviously law as applicable to the relevant assessment year would be applicable. Right of appeal is a substantive right and in respect of right of appeal and the provisions of appeal itself, law applicable would be the law when the dispute first arose. It is law, as existing when proceedings for original order in appeal were initiated, would be applicable except where specifically provided otherwise. {*CIT v. Bengal Card Board Industries And Printers (P.) Ltd. (1989) 176 ITR 193 (Cal), CIT v. Kerala Transport Co. (2000) 242 ITR 263 (Ker)*}. In *Hoosein Kasam Dada (India) Ltd. vs. The State of Madhya Pradesh & Ors. (1953) 4 STC 114 (SC) : AIR 1953 SC 221* it has been held that *"A right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior Tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given, by the inferior Court. A pre-existing right of appeal is not destroyed by an amendment, if the amendment is not made retrospective by express words or necessary intendment. … … A provision, which is calculated to deprive an assessee of the unfettered right of appeal, cannot be regarded as a mere alteration in procedure. For the purposes of the accrual of the right of appeal the critical and relevant date is the date of initiation of the proceedings and not the decision itself."*

5. Limitation – time within which appeal to be filed – condonation of delay

Appeal has to be filed within time prescribed under the relevant provisions. An appeal filed beyond time prescribed under the law is liable to be dismissed. However, delay in filing appeal may be condoned and under section 249(3), the Commissioner of Income Tax (Appeals) and under section 253(5), the Income Tax Appellate Tribunal, have discretion to admit appeals filed beyond time, if satisfied that delay was due to "sufficient cause". What constitutes sufficient cause has been considered in *Collector, Land Acquisition V. Mst. Katiji And Others (1987) 167 ITR 471 (SC)* and it has been held that "*The Legislature has conferred the power to condone delay by enacting section 5 of the Limitation Act of 1963 in order to enable the court to do substantial justice to parties by disposing of matter on "merits". The expression "sufficient cause"* *employed by the Legislature is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose of the existence of the institution of courts. It is common knowledge that this court has been making a justifiably liberal approach in matter instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy.*

And such a liberal approach is adopted on principle as it is realised that:

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, common sense and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserve to be preferred, for the other side cannot claim to have vested right in injustice being done because of non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

In *Vedabai Alias Vaijayanatabai Baburao Patil V. Shantaram Baburao Patil And Others (2002) 253 ITR 798 (SC)* it was held that: *"The court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression "sufficient cause", the principle of advancing substantial justice is of prime importance."*

6. Nature of appeal proceedings under Income Tax Act

Appeal proceedings under the Income Tax Act are not adversary proceedings and appellate authorities discharge quasi-judicial functions. Assessment proceedings itself are quasi-judicial in nature and appeal proceedings before the Commissioner of Income Tax (Appeals) are continuation of assessment proceedings and the Commissioner of Income Tax (Appeals) has been specifically granted power of enhancement as well as power to levy penalty.

7. Fresh claim in appeal

As appeal proceedings are continuation of assessment proceedings, assessee can in appeal for the first time make a claim, which was not raised even before the assessing officer, if the facts relevant are on record. Such a claim is possible for the first time even before the Income Tax Appellate Tribunal. {*CIT v Kanpur Coal Syndicate (1964) 53 ITR 225 (SC); CIT v Jute Corporation, 187 ITR 688; National Thermal Power Co. Ltd. v CIT (1998) 229 ITR 383 (SC); Ahmedabad Electrecity Co. Ltd. v CIT 199 ITR 351 (Bom) (FB)*}.

8. Additional ground of appeal

Additional ground of appeal is a ground, which has remained to be raised in appeal memo filed. It is not the same as fresh claim in appeal in as much as fresh claim means a claim, which was not made before the assessing officer. Additional ground arises out of order appealed against but for any reason has remained to be raised in the appeal memo filed. Section 250(5) specifically provides that the Commissioner of Income Tax (Appeals) may allow appellant to go into any ground of appeal not raised in the appeal memo if omission of that ground in appeal memo was "not willful or unreasonable". Provisions relating to limitation apply only to filing of appeal in the first instance and once appeal has been filed within time, additional ground can be raised at any time before appeal is finally heard and disposed off. {*Shilpa Associates v. ITO (2003) 263 ITR 317 (Raj)*}. In *Baby Samuel v. ACIT (2003) 262 ITR 385 (Bom)* it was held that: "*There can be no dispute that it was obligatory on the part of the assessee to raise a specific ground in the memo of appeal while filing an appeal or to seek leave of the Tribunal to raise an additional ground at the time of the final hearing of the appeal. In the instant case, the assessee has raised the ground but vaguely. We are of the opinion that the assessee cannot be denied the right to claim adjudication of the issue on the merits when the said issue was specifically taken at the time of final hearing of the said appeal and the Revenue had occasion to deal with the submission made thereon.*"

9. Alternative plea / ground

Appellant has a right to make alternative claim or raise an alternative plea in appeal. For example, in an appeal against disallowance of claim for deduction of repair expenses on the ground that the said expenditure is capital in nature, the appellant can raise a plea that expenditure is revenue in nature and also raise an alternative plea that if expenditure is held to be capital, than depreciation be allowed on the same.

10. Right to relief not restricted to plea raised

Even if such alternative ground is not taken in appeal memo or before lower authorities, the appellate authority has jurisdiction to entertain an alternative plea raised during hearing of the appeal. In CIT v Mahalaxmi Textile Mill Ltd (1967) 66 ITR 710 (SC) it was held that: *"There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal: If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee,* *grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him."* In the said case, assessee's claim before the assessing officer for development rebate on certain items of machinery replaced was rejected and before the Income Tax Appellate Tribunal the assessee successfully raised an alternative plea that the said expense be allowed as current repairs.

11. Cross objection to Income Tax Appellate Tribunal

Aggrieved by an order of Commissioner of Income Tax (Appeals) appeal can be filed both by the assessee as well as the department. On receiving information that other party has preferred appeal to Income Tax Appellate Tribunal, the assessee or the department can file cross objections within thirty days of such intimation under section 253(4). Cross objections so filed will be treated as appeal filed and will be disposed off accordingly. Cross objections can be filed, not only be grounds on which assessee seeks to support order of Commissioner of Income Tax (Appeals), but also on other grounds.

12. Rules and forms

Section 249 of the Act read with Rule 45 & 46 provides for form in which appeal is to be filed with Commissioner of Income Tax (Appeals). Accordingly,

a) Appeal in Form No. 35 is required to be filed in duplicate to the Commissioner of Income Tax (Appeals) exercising appellate jurisdiction over the orders passed by the Assessing Officer.
b) The appeal should be accompanied by a fee as specified in section 249(1).
c) The appellant appeal should be filed within 30 days of the date(s) specified in section 249(2).
d) The appeal will be admitted only if the admitted tax, where returns have been filed, or the advance tax payable, where no return has been

filed, has been paid prior to filing of the appeal. However, in a later situation, the appellant can apply to the Commissioner of Income Tax (Appeals) for exemption of prepayment of advance tax.

e) The 'Statement of Facts' should briefly highlight the facts of the case and discuss the issues emanating from the grounds of appeals.

f) The 'Grounds of Appeals' should be concise and should not be argumentative. The relief sought in appeal should be clearly specified.

For appeal to Income tax Appellate Tribunal relevant provisions are in section 253 read with Rule 47. Also, Appellate Tribunal Rules, 1963 are relevant for the purpose. Accordingly,

a) Appeal in Form No. 36 is required to be filed in triplicate with the Assistant Registrar, Income Tax Appellate Tribunal.

b) The appeal should be filed within a period of 60 days of the date of communication of the order to the assessee or to the Commissioner, as the case may be.

c) The appeal should be accompanied by a fee as specified in section 253(6).

d) Memorandum of Cross Objections is to be filed in Form No. 36A by the respondent within thirty days of the receipt of notice from the Tribunal intimating that an appeal against the order of the Commissioner of Income Tax (Appeals) has been filed by the assessee or the Assessing Officer. No fee is required to be paid.

12.1. Irregularity in appeal – opportunity to rectify

Even if there is an error or irregularity in appeal memo, appeal cannot be dismissed in limine and appellant has to be given an opportunity to rectify the defect. {O. A. O. K. Rm. Arunachalam Chettiar And Another v. CIT (1962) 45 ITR 407 (Mad), Maharani Gyan Manjari Kuari v. CIT (1944) 12 ITR 59 (Pat)}. In Malani Trading Co. and another v. CIT And Another (2001) 252 ITR 670 (Bom) it was held that: *"... rules of procedure are intended to be a handmaid to the administration of justice. A party cannot* *be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure."*

12.2. Procedural irregularity should not come in way of granting relief

In CIT v. Calcutta Discount Co. Ltd. (1973) 91 ITR 8 (SC) the department raised the plea before the Income Tax Appellate Tribunal that order of the Appellate Assistant Commissioner was incorrect in law and, therefore, should be set aside, which was objected to by the assessee on the ground that there is no specific ground in the appeal memo. The department sought leave to amend appeal memo, which was rejected and appeal of the department was dismissed on the ground that necessary pleas have not been taken. Allowing the claim of the department, the Hon'ble Supreme Court held that: "*The procedure adopted by the Tribunal appears to us to be somewhat strange. The Tribunal, instead of dealing with the substance of the matter, appears to have been unduly influenced by procedural technicalities. We are also not impressed with the conclusion of the Tribunal that the appeal memo was not in accordance with law. No specific formula is necessary for seeking relief at the hands of any court or Tribunal if the necessary grounds are taken in the appeal memo."*

Drafting of appeals

Check List

1. Whether appeal lies

2. Whether appeal is called for – do not file frivolous appeals – even if appeal has not been filed against assessment order, appeal can be filed against penalty.

3. Appeal lies before which authority

4. Limitation – time within which appeal is to be filed - application for condonation, if delay

5. Whether authority passing the order had jurisdiction to pass the order

6. Whether order was passed within limitation

7. Check computation of total income, tax and interest – rectification and appeal

8. Whether any claim had remained to be raised – fresh plea

9. Widest possible ground

10. Alternative plea, without prejudice grounds

11. Grounds should not be argumentative

12. Statement of facts

13. Who has to file and sign the appeal

14. Who will be the respondent

15. Application for stay

16. Reply to show cause notice

REPRESENTATION

- **Purpose –** communication of our clients case effectively
- **Facts**
- Marshalling of facts
- Paper book – exhaustive to cover the issue – concise to retain interest – Proper index with brief description of evidences filed
- Rules and procedure for admission of additional evidence – Rule 46A for appeal before CIT(A) and Rule 29 for appeal to ITAT
- **Case laws in support**
- Rules of precedence
- **Communications skills**
- Dress appropriately – dress code for appearance before ITAT – Rule 17A
- Body language – how you sit, stand, movement of arms, eye movements
- Belief in your clients case
- Ability to think on the feet
- Listen to other side – wait for your turn –
- Tone speech – should reflect respect for the authority – should reflect belief in clients case
- Speed of speech -
- Eye contact – but not intimidating

Additional Evidence

Note

1. Introduction

Evidences in support of the case has to be produced before the first authority, ie, the Assessing Officer. The issue is determined by the Assessing Officer and evidences in support have be furnished before the said authority.

At times, for various reasons, after the order is passed, it is realized that certain evidences in support of the case have not been brought on record before the Assessing Officer.

On appeal, neither party can as a matter of right produce additional evidence. For the purpose of bringing additional evidence on record, rules have been provided and are briefly discussed hereafter.

2. Additional Evidence before hon'ble Commissioner of Income Tax (Appeals)

Rule 46A of Income Tax Rules, 1962 deals with production of additional evidence before hon'ble Commissioner of Income Tax (Appeals). It provides for circumstance and manner in which additional evidence can be brought on record. It also provides that opportunity has to be given to Assessing Officer to examine the additional evidence.

Sub rule (4) clarifies that the Rule shall not affect power of appellate authority.

In Prabhavati S. Shah v. CIT, 231 ITR 1 (Bom) it has been held that rule intends to put fetters on right of assessee to produce additional evidence but does not deal with power of appellate authority in dealing with the appeal.

3. Additional Evidence before hon'ble Income Tax Appellate Tribunal

Rule 29 of Appellate Tribunal Rules, 1963 deals with production of Additional evidence before hon'ble Income Tax Appellate Tribunal. In following three circumstances, additional evidence may be admitted:

i) orders have been passed by lower authorities without giving sufficient opportunity;

ii) hon'ble ITAT requires the evidence to enable it to pass orders;

iii) for any other substantial cause.

In K. Venkataramiah v. A Seetharama Reddy AIR 1963 SC 1526 interpreting the words "any other substantial cause", it was held: "*There may well cases where even though the court finds that it is able to pronounce judgment on the state of record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence."* The above judgment was followed in ITO v. B N Bhattacharya, 112 ITR 423 (Cal).

Doctrine of Precedence
Brief Note

For the limited purpose of discussing representation before appellate authorities, principles of doctrine of precedence can be summarized as follows:

- It is not every finding in judgment, but the ***ratio decidendi*** which is relevant.
- ***Ratio decidendi*** of a judgment is important source of law – is binding on coordinate bench as well as all lower authorities.
- ***Ratio decidendi*** – is reasoning on which judgment is based.
- ***Obiter dicta*** is an observation or finding in a judgment which is not necessary in arriving at conclusion.
- A judgment is said to be ***per incuriam*** when certain relevant provision of law, etc is not brought to notice of Court and judgment is arrived at without referring to the same.
- A judgment of hon'ble Supreme Court is binding irrespective of whether it is obiter dicta, per incuriam, etc.
- If there are two contrary decisions of the hon'ble Supreme Court, than the judgment of larger Bench is binding. If strength of both the Benches of the hon'ble Court is same, than normally judgment later in time would be followed.
- If there is no decision of hon'ble Supreme Court, the judgment of hon'ble jurisdictional High Court would have same sanctity as the judgment of hon'ble Supreme Court.

- In absence of judgment of hon’ble Supreme Court and hon’ble jurisdictional High court, Ratio decidendi of Judgment of hon’ble High Court of any other State would be binding, if there are no contrary judgments. Obiter dicta in such a circumstance though not binding, would have persuasive value.

- In absence of above, ratio decidendi of judgment of hon’ble Special Bench of ITAT would be binding.

In absence of above, ratio decidendi of judgment of a hon’ble coordinate Bench of ITAT would be binding.

Rules of Evidence

Note

1. Introduction

Any fact has to be proved; a court is called upon to decide rights of parties. Even in Income tax, a Court is called upon decide whether a receipt is income or any other similar issues. Proceedings under Income Tax Act are quasi judicial in nature.

Rules of evidence assist in arriving at conclusions on the basis of evidence produced before the Court.

2. Applicability of The Evidence Act, 1872

Rules of evidence have been codified under Indian Evidence Act, 1872. That rigours of rules of evidence do not apply to income tax proceedings but they can be invoked is a well settled principle. (Dhakeshwari Cotton Mills v. CIT, 26 ITR 775 (SC), Kishinchand Chellaram, 125 ITR 713 (SC) and J S Parkar, 94 ITR 616 (Bom)).

In Dhakeshwari Cotton Mills v. CIT, 26 ITR 775 (SC), at page 780 it has been held that *"the income tax officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making assessment under sub-section (3) of section 23 of the Act, the income tax officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all."*

In Kishinchand Chellaram v. CIT, 125 ITR 713 (SC) it has been held at page 720 that *"It is true that the proceedings under the income tax law are not governed by the strict rules of evidence and therefore it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the IT authorities could rely upon it, they are bound to produce it before* *the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the bank with reference to statement made by him."*

In J S Parkar v. V B Palekar, 94 ITR 616 (Bom) it has been held at page 683 that "*It must however be remembered that the proceedings before the taxing authorities were not criminal proceedings but proceedings of a civil nature where the question about the ownership of gold in question was required to be decided not beyond the shadow of doubt but by adopting the test of preponderance of probabilities;"* At page 684 it was held that "*what is meant by saying that the Evidence Act is not applicable to the proceedings under the Income Tax Act is that the rigour of rules of evidence contained in the Evidence Act is not applicable but that does not mean that if the taxing authorities are desirous of invoking the provisions of that Act in proceedings before them they are prevented from doing so."* Judgment of J S Parkar was approved in Chuharmal v. CIT, 172 ITR 250 (SC)

3. Some instances of rules of evidence in context of Income Tax Act

- Loose sheets are not books of accounts and cannot be relied upon.
- Entries in books of accounts are not sufficient to charge liability on a person and some independent corroborating evidence in support of entries in books of accounts are required before fastening liability on assessee.

  The above propositions flow from S. 34 of Indian Evidence Act, and has been enshrined in Judgment of hon'ble Supreme Court in case of V C Shukla, (1988) 3 SCC 410. The said judgment has been followed in 82 ITD 85 (Mum)(TM).

- Statements recorded without granting opportunity to cross examination cannot be relied upon. (Kishinchan Chellaram, 125 ITR 713).

- Statement of witness who shift there stand and make contradictory and false statements have to be completely ignored as one does not know which part of his statement is true. (Amal Kumar Chakraborty, 207 ITR 376 (Cal), CIT v. Eastern Commercial Enterprises, 210 ITR 103 (Cal)).

- Statement of witness has to be direct as provided for in S. 60 of Indian Evidence Act and hearsay is not evidence. (Kishinchand Chellaram, 125 ITR 713 (SC)).

- Apparent must be proved to be real until shown otherwise. In CIT v. Durgaprasad More, 82 ITR 540 (SC), at page 545 it was held that *"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. …… a party who relies on a recital in a deed has to establish the truth of those recitals, ………..The taxing authorities were not required to put on blinkers while looking at the documents put before them. They were entitled to look into the surrounding circumstances to find out reality of the recitals made in those documents."* At page 546 it was further held that *"Science has yet not invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities."* The above judgment was relied on in Sumati Dayal v. CIT, 214 ITR 801 (SC).

- Indian Evidence Act provides in S. 114 about certain presumption that can be drawn. In Anil Bulk Carriers v. CIT, 276 ITR 625 (All) at page 629 it has been held that *"There is presumption of existence of certain facts under section 114 of the Evidence Act. The Court may presume under clause (e) of section 114 of the Evidence Act that judicial and official acts have been regularly performed. The* *said presumption although a presumption of fact, could be rebutted on production of some cogent and relevant material and not otherwise. ……….. There is presumption that judicial and official acts have been regularly performed. The said presumption should have been drawn by authorities below and, therefore, the case should have been examined as to whether the said presumption stands rebutted on the basis of material on record or not. The said presumption is available under law to the assessee-appellant."*