

APPEAL PROCEDURE UNDER THE INCOME TAX ACT, 1961 BEFORE CIT (APPEALS) & TRIBUNAL

1.1. Every law that provides for some form of adjudication also usually provides for appeal in one form or the other against orders passed by the lower authorities. This is based on the concept of equity and a recognition that every authority is fallible. The mechanism of appeal provides safeguard against erroneous, unjust or invalid orders. The appeal proceedings ordinarily embrace all proceedings whereby an appellate authority is called upon to review, revise, affirm, reverse or modify the decisions of the lower or subordinate authority.

1.2. Under the scheme of the Income Tax Act, appeal can be preferred only against orders specified under the relevant act. It is pertinent to note that the right to appeal is conferred by the statute and that right to appeal cannot be assumed to be an inherent right. Therefore appeal against non-appealable orders can be dismissed as not maintainable. Being a privilege and not a right, every person seeking to fight an appeal must take care to make sure that he fulfils every condition, procedure and restrictions provided under the law in order that his appeal be considered by the appropriate authority.

1.3. Though right of appeal is not inherent but a statutory right, it is a substantive right. Thus once the law provides for an appeal, a person who complies with the prescribed conditions gets a vested right to have the appeal dealt with under the law. Therefore the appellate authorities while construing right of appeal opt for liberal interpretation. It is for this reason that the courts have held appeal against levy of interest valid under the board category of denial of liability to be assessed. Similarly appeal against non-granting of interest on refund is also held to be valid. Reference may be made to 160 ITR 961 (SC), 171 ITR 344 (AP), 137 ITR 287 (Bom) etc.

1.4. Issues :

When does the right to appeal get vested –

- *When the order appeal against is passed?*
- *When the appeal is filed*
- *when the appeal is listed on is considered admitted*

Can right to appeal be retrospectively withdrawn? Can an appeal be treated under the law to be infructuous without disposition

1.5 Appellate proceedings are treated as a continuation of the proceedings initiated by the subordinate authority. Therefore, the law applicable to the proceedings before the subordinate or original authority is continued to be played before the appellate authority. The exception to this rule is of course that the law is amended by a retrospective amendment. A more ticklish issue arises when subsequent to the disposal of the original proceeding; the law of the land is differently interpreted and propounded by the apex court. It would appear that the impact of such a situation would be the same as that of a retrospective amendment.

ELIGIBILITY TO FILE APPEAL:

2.1. The next question to be considered is who can file appeal? Only a person aggrieved by an order would have a right to file an appeal. Thus for instance, an assessee who has been allowed an additional deduction / allowance such as depreciation or has been permitted a set off of loss which was not claimed by him would have to establish that he is aggrieved by such an order granting him a benefit not claimed. An assessee can be said to be aggrieved when he is required to bear tax, legal burden or is denied some benefit to which he claims to be entitled.

2.2. Any partner of a firm or any member of AOP can file appeal against adverse order in case of firm or AOP as aggrieved persons.

2.3. In case of adverse order passed in the matter of deceased person, his legal heirs can file appeal. In case of HUF, Karta can file appeal. However, after the partition if any adverse order is passed in respect of pre partition HUF, erstwhile co-parceners can prefer an appeal.

2.4. The representative assessee as defined u/s 160 is eligible to file an appeal. Similarly a beneficiary though assessment is made on representative assessee is also eligible to file an appeal.

2.5. Issue: Can a person be aggrieved by

- ***an addition made with his consent (agreed addition)***
- ***observations in an order not resulting in an addition to the income***
- ***change in status of assessing or head of income***
- ***A protective assessment***
- ***Wrongful deduction of tax***

FIRST APPEAL:

3.1. Section 246A provides for appeal before the first appellate authority against the following orders:

- a) An order against assessee who denies his liability to be assessed
- b) Intimation u/s 143(1)/143(1b) .
- c) Order u/s 143(3) / 144, 154 or 155. Rectification of mistake
- d) Order u/s 143(3) r.w. an order of assessment, reassessment or recompilation under Section 147 or 150.
- e) Order u/s ,170(2) or 170(3).
- f) Order u/s 171.
- g) An order of assessment or reassessment u/s 185(1b)/ 185(2)/ 185(5).
- h) Order u/s 186(1)/ 186(2) –cancelling the registration.
- i) Order u/s 158BC/158BD/158BFA or u/s 237.
- j) Order u/s 163 – treating an assessee as representative assessee
- k) Order u/s 170(2) or (3),
- l) Order u/s 171,
- m) Order u/s 201, 271B/ 271BB.
- n) 271C ,271D or 271E.
- o) Order u/s 272A
- p) Order of penalty u/s 221, 271, 271A, 271AA, 271F, 271FB, 272, 272AA, 272B, 272BB 271C, 271D, 271E, 271 CA, 272A, 273, 275(1A)
- q) Penalty order under chapter XXI
- r) An order by the Assessing Officer other than Deputy Commissioner where so directed by the Board.

PROCEDURE FOR FILING AN APPEAL: (Rules 45 &46)

4.1. Appeal is required to be filed 30 days from the receipt of order to be appealed against. The appeal should be in form no. 35. It should be filed in duplicate. It should contain grounds of appeal and statement of facts. The statement of facts should clearly bring out the facts relating to disputed issue and the development in the course of assessment proceeding leading to its ultimate addition / disallowance in the impugned order. The certified copy of the impugned order should be filed with the memorandum of appeal. The appeal should be accompanied by a fee of:

1. Rs.250/- for total assessed income of Rs.1,00,000/- or less.
2. Rs.500/- for total assessed income exceeding Rs.1,00,000/- but not more than Rs.2,00,000/-
3. Rs.1,000/- for total assessed income over Rs.2,00,000/-
4. Rs.250/- where the subject matter in appeal is not covered by clause a, b or c above.

4.2. A letter of authority in favour of the Chartered Accountant representing the assessee should also be preferably filed with the appeal.

4.3. The appeal should be accompanied by original notice of demand issued u/s 156 of the Act.

4.4. The appeal should be signed by the appellant himself/herself. In case where the assessee is out of India appeal may be signed by any person authorised by him/her. The provision for signing of return of income as contained in section 140 is applicable for signing of appeal also.

4.5. Time Limits for filing Appeal: Sec 249 (2) prescribes this period which is generally a period of 30 days from the triggering event. Section 249 (3) empowers the **appellate** authority to admit belated appeal. In case where appeal is filed beyond 30 days from the date of receipt of the impugned order, a petition praying for condonation of delay should be filed along with appeal specifying therein circumstances which caused delay. As far as possible the petition should be accompanied by an affidavit declaring therein that the facts and circumstances described in the condonation petition are true. The appellate authority ordinarily takes liberal view in the matter of condonation of delay unless the appellant is guilty of gross negligence in submitting the appeal.

4.6. Payment of tax on admitted / returned income is a pre condition for filling an appeal. [Section 249(4)]. The appellate authority can, on being satisfied of the good and sufficient cause for non payment, exempt an assessee who has not filed return of income from the fulfillment of condition of tax having been paid equal to the amount of advance tax payable by him. The order refusing to grant such exemption can be appealed against before the Tribunal. It is noted this relief is available only where the assessee has not filed a return, where the assessee has done so the appeal can be admitted only if the tax due as per the return has been paid by the assessee.

4.7. **Issues:**

- ***Would an appeal stand to be dismissed if***
- ***it is signed by the advocate or CA representing the assessee and not by the assessee himself***
- ***it is filed it without an accompanying application for condonation***
- ***it is filed without payment of tax demanded***

HEARING OF APPEAL:

5.1. The Commissioner of Income Tax (Appeal) – CIT (A) is required to give opportunity of hearing to the assessee and to the assessing officer. [S. 250(2)]. The statutory provision in regard to procedure to be followed in appeal is very brief. S. 250 refers to the right to be heard as mentioned hereinabove and also provides that the day and place for hearing shall be fixed by way of notice served to the parties. However, based on the well-established rule of equity namely AUDI ALTERAM PARTEM, certain healthy practices have evolved and have also got judicial recognition over the years. Thus to give an effective and meaningful hearing it has been established that:

- notice must give sufficient/ reasonable time for the assessee/his representative to attend to the same in a proper manner
- in order to enable the above, the notice must preferably mention the subject matter which is to be considered at the hearing
- the notice must be specific in regard to the year and the proceeding in regard to which response/attendance of the assessee is sought
- opportunity to be heard would ordinarily mean opportunity to represent in person or through representative. In rare case opportunity to make written representation without verbal arguments could also be considered to be part of “opportunity to be heard”
- in case the assessing officers / Commissioner of Income Tax (Appeals) relies on some external evidence against the assessee, he should be given full opportunity of a rebuttal.

5.2. The decision of the Supreme Court in CIT(A) V Electro House [1971] 82ITR 824 lays down the broad principles which need to be observed in this regard.

Powers of the CIT (A)

6.1. It is important to note that the proceedings under the Income Tax Act upto the first appeal level are not adversarial. The common objective of the assessee and the assessing officer/Commissioner of Income Tax (Appeals) is to ascertain the correct tax liability of the assessee under the Law. It is only because the interpretation of facts and law between the assessee and the department differs, that tax litigation occurs. Some important consequences that arise out of this fundamental concept are as under.

6.2. The proceedings before the Commissioner of Income Tax (Appeals) are considered to be an extension of the initial assessment proceedings. Therefore apart from the powers specifically vested in the Commissioner of Income Tax (Appeals), the CIT (A) is empowered to make further inquiry as he thinks fit or may direct the AO to make further inquiry and submit report thereof. In fact the power of the CIT (A) is co-extensive with the powers of the AO. He can do what the AO can do or could have done in the assessment proceedings. The CIT (A) can pursue further the investigation or cause further investigation to be done. All this can be done by CIT (A) on his own without their being any request by the parties.

6.3. The CIT (A) may confirm, reduce, enhance or annul the assessment. However CIT (A) does not have power to set aside the assessment or penalty orders. Where the enhancement is involved, once again certain rules of natural justice and equity come into play and therefore there are certain limitations and procedural requirements in effecting an enhancement. However, the power to make an enhancement where the situation warrants is clearly recognized in the Act.

6.4. The CIT(A) is also entitled to admit fresh evidence and the powers in this regard are given in Rule 46A.

6.5. The Act also provides that the CIT (A) can entertain additional grounds of appeal even though the same may not have been originally preferred. This is a discretionary power to be exercised based on the facts and circumstances of the case.

Culmination of the first appeal process.

1. Commissioner of Income Tax (Appeals) is required to make an order in writing disposing of the appeal. The order is required to state the points for determination the decision thereon as well as the reasoning underlying the decision. Thus he is in effect required to pass a speaking order. Such order as to be communicated to the assessee and to the Commissioner/Chief Commissioner.

Appeal before the Appellate Tribunal – Second Appeal

8.1. Either party aggrieved by an order of the Commissioner of Income Tax (Appeals) can prefer an appeal to the Income Tax Appellate Tribunal (referred to as ITAT or Tribunal). The appeal to the Tribunal can arise on points of law or of facts or a combination of both. The tribunal is the last fact-finding authority under the Income Tax Act and this fact needs to be kept in mind when presenting matters before it. No fresh facts would be considered by the higher appellate authorities, and this needs to be kept in mind in presenting appeals before the ITAT. The eligibility to file appeals is circumscribed by the Act only to the extent that Appeal by assessee is possible against any order of CIT (A) and against any order of CIT u/s 12AA, 263, 272A, 115VZC. The department is entitled to file an appeal against any order of the Commissioner of Income Tax (Appeals).

8.2. Points noted earlier in regard to the right of appeal etc. which are common at the first and second appeal stage are not repeated in regard to procedure relating to ITAT. It may however, be noted that the time limit for filing appeal to the ITAT is as under

8.3. Time limit: u/s 253(2) / 253(4)

1. 60 days from the date of receipt of order under appeal
1. 30 days for filing cross objection u/s 253 (4) from the date of receipt of intimation of department having filled appeal.

8.4. Fees payable for appeal before ITAT u/s 253 (6)

- No fee payable for appeal by CIT
- No fee for cross objection by assessee
- Rs.500/- where assessed income is less than Rs.1,00,000/-
- Rs.1,500/- where assessed income is over Rs.1,00,000/- but less than Rs.2,00,000/-
- **1% of assessed income of more than Rs.2,00,000/- maximum fee – Rs.10,000/-**
- Rs.500/- any other matter

8.4. The appeal should be filed in Form 36 as prescribed by Rule 47(1).

8.5. No statement of facts is required to be given to the ITAT as the statement of facts filed before the CIT (Appeals) is annexed to the appeal memo. If the facts are voluminous, it is advisable to file a paper book. According to Rule 18 of the ITAT Rules, a paper book has to be filed at least 7 days before the date of hearing. A paper book has to be filed in triplicate – two copies for the Honorable members and one copy for the departmental representative. A paper book has to be accompanied by a certificate stating as to whether the papers / documents in the paper book were available to the lower authorities.

Grounds of Appeal

9.1. It is important to remember that the purpose of filing an appeal is to get redressal in regard to the perceived injustice. If this objective is to be achieved it is necessary to ensure that the grievance is properly communicated to the appellate authority. Making dramatic claims and bringing in irrelevant factors such as the social or economic status of the assessee, or the benefits society derives from his actions may serve no purpose. This is on account of the fact that the appellate proceedings under the tax laws are well structured. Therefore, if the cause of grievance i.e. the grounds are not stated properly at the time of filing of appeal, the arguing counsel would face substantial difficulty. More importantly the issue to be decided by the appellate authority is specifically the grounds of appeal raised by the appellant. If the grounds are not clear and precise it is difficult for the appellate authority to formulate and thereafter to adjudicate upon a proposition of law. One must keep in mind that even though oral representation is made before the CIT (Appeals) and the tribunal, what remains as a matter of record is the written representation, and therefore, it is necessary that due care is taken in drafting.

9.2. It may be noted that the Tribunal is entitled to reject the memo of appeal, if the grounds are not clearly and specifically stated. One must take care to ensure that the grounds are not argumentative or repetitive. Some of the points to be noted in presentation of grounds are as under.

9.3. All the causes for grievance need to be included in the grounds. E.g. Even if an assessee is aggrieved by the addition and the chances of success are limited on account of factual weaknesses or legal interpretation, the assessee should take that ground. A common example is reopening of assessment. The power of assessing authority to reopen the assessment are now substantially wide. However, the law on the subject is continuously evolving and it may so happen that at the time that the appeal is fixed, an interpretation of law in favor of the assessee may be available. It is therefore advisable to include all the grounds on which the assessee is aggrieved.

9.4. **Grounds should be brief and concise** – In the grounds of appeal, the assessee **must only state the cause of grievance**. E.g. “The learned Assessing Officer has erred in treating expenditure on repairs of Rs. _____ as a capital expenditure.” The grounds are not arguments and they should not be argumentative. One has strike the right balance between grounds being adequately clear without any significant matter being omitted and yet concise.

9.5. Grounds must be **serially numbered** and if an assessee is aggrieved by the addition for 2 or 3 reasons, the ground should be **divided into sub-clauses**. E.g. a particular disallowance may be erroneous for 2 of 3 different reasons, and those 2 or 3 different reasons may be stated by way of sub-clauses.

9.6. **Alternative grounds:** – All issues to be raised should be mentioned in the grounds of appeal. Thus if there is a technical infirmity in the order this should be raised even if one is separately arguing on merits of the case. It is possible that the assessee may want to prefer an alternate plea. E.g. Assessing Officer may have treated revenue expenditure as a capital expenditure and not allowed depreciation on the same. The assessee's alternate plea would therefore be as follows

- i) The learned Assessing Officer has erred in treating the expenditure of Rs. ____ as capital expenditure.
- ii) In the alternate and without prejudice to the above, the learned Assessing Officer has erred in not allowing depreciation of Rs. ____ on the said expenditure of Rs. _____ treated by him as capital expenditure.

9.6. Often, the assessee and their Chartered Accountants tend to confuse between the grounds of appeals, and statement of facts. In the statement of facts, the assessee states the facts related to the grievance and gives factual narration of the actions of the Assessing Officer. It is on the basis of this statement of facts that grounds of appeals are prepared.

9.7. If a fact is incorrectly stated by the assessing authority that should be specifically challenged in the grounds of appeal. This is so, because if the factual inaccuracy is not controverted at the later stages of appeal, the appellate authorities are inclined to accept the proposition as stated in the assessment order.

9.8. At the conclusion of grounds of appeal, it is advisable to include a prayer for permission to present alternate and additional grounds.

Additional evidence

10.1. Since proceedings before the appellate tribunal are in the nature of adversarial proceedings and held in open court, the procedure to be followed is much more rigid and formal. Therefore, it is very necessary that the rules and procedures in regard to the appellate tribunal are rigorously followed. If additional evidence is to be filed before the Income Tax Appellate Tribunal, Rule 29 has to be complied with and in that case, specific application has to be preferred before the ITAT seeking leave to the Tribunal for production of additional evidence. These documents have to be filed separately by way of a separate paper book.

10.2. It is often seen that a good case can be marred by lack of attention to these details. Therefore, for the sake of ready reference, some of the significant features of ITAT Rules are given hereunder.

INCOME TAX APPELLATE TRIBUNAL RULES:

U/s 255(5) Central Government is empowered to make rules

Rules	Description
5, 5A & 5B	Language of the tribunal is English unless the President notifies Hindi as additional language in respect of benches functioning in a particular state – state of Goa is not notified and therefore English is the only language for ITAT at Goa. State of Maharashtra is notified for additional language of Hindi.
8	Memorandum of appeal – ground of appeal to be serially numbered and set for the in English concisely and under distinct heads and not to be argumentative or narrative.
9	Requirements as regards enclosures with memorandum of appeal Two copies of order under appeal Two copies of order of the ITO Two copies of grounds of appeal before the first appellate authority Two copies of statement of acts filed before the first appellate authority
Rules	Description
10	Affidavit to be filed in support of act not borne out by or is contrary to records
11	Appellant to argue only on grounds of appeal mentioned in the memorandum of appeal however, ITAT may admit additional ground open to tribunal to deal with any ground not set forth in memorandum or not taken by leave of ITAT
13	ITO to be respondent in all appeals by the assessee
14	The appellant before the first appellate authority shall be respondent in all appeals by the department
16 & 17	Letter of authority to be filed on or before hearing
17A	Dress regulations: For members: White pant with black coat and black tie in winter striped or black pant with black coat and black tie in summer For authorised representatives: Suit with tie or buttoned up coat over a pant or national dress – in case of female, black coat over white or any other sober coloured saree. For others: Proper dress
18	Paper book to be filed by appellant or the respondent who proposes to refer / rely on any document, statement or paper may submit a paper book containing such paper duly indexed and page to be filed one day before the date of hearing to the tribunal and seven days before the date of hearing to the other side it should be legible and should have been filed before the lower authority. Additional evidence if any to be filed separately with an application stating reasons for filing such additional evidence.
25	ITAT to dispose on merits after hearing the appellant if respondent does not appear
27	Respondent may support the order under appeal on any ground decided against him
29	Tribunal may at its discretion order production of additional evidence
33	Hearing before ITAT to be open to the public however ITAT may take hearing in camera at its discretion

11.1. Apart from the above Rules, Tribunal has from time to time issued guidelines to enable smooth functioning. These guidelines have been published in various professional journals. Some of the salient features contained therein are as under.

11.2. In all communications addressed to the Tribunal by the parties with regard to appeals or applications or cross-objections the number thereof, or, if the number is not known, the date of filing thereof, should invariably be given. Failure to furnish this information will cause avoidable correspondence and needless delay in correspondence.

11.3. An application for adjournment of the hearing should be made at the earliest possible time, if it could be presented personally, a stamped envelope, with the address of the assessee or his representative, should, as far as possible accompany the application.

11.4. Whenever an appeal or application or cross-objection is filed which is connected with an appeal or application or cross-objection relating to the same party filed earlier, reference thereto should invariably be given with the latter appeal or application or cross-objection so that the various connected appeals or applications or cross-objections could be linked up together.

11.5. An application for an early hearing of an appeal should invariably give detailed reasons why the assessee wants that his appeal should be given preference over the appeals made by other assesseees. The application should also state whether or not tax has been paid, and if so, to what extent.

11.6. An application for sending for the case of another assessee should also be made at the earliest possible opportunity. Cases will not ordinarily be sent for the purpose of making an assessment on the same basis as in other cases.

11.7. Documents to be furnished and invariably available to the Bench in triplicate and where documents are not in English, duly authenticated English translation may be simultaneously furnished.

Review & Miscellaneous Application

12.1. It is to be clearly understood that normally review of a decision is not permissible except where specifically provided under the statute. However, the absence of power to review cannot and should not lead to miscarriage of justice. Hence, when there is a patent or apparent mistake, there arises a power of rectification which is recognised by the law. Section 254(2) of the Income Tax Act provides a specific authority for rectification of mistake apparent from record. In doing so, Tribunal is careful not to extend this power so as to amount to a review. There are significant numbers of judicial precedents in this regard and any application for rectification must be carefully examined to see that it falls squarely within the powers prescribed U/s 254(2). There is a liberal time limit of 4 years from the date of the order within which the application for such rectification may be filed.

Revision

13.1. The power of revision is an exceptional power kept on the statute book to ensure that there is no miscarriage of justice on either side owing to certain technical requirements of appeal procedure. Being more in the nature of exceptional power, revisions are not as frequently resorted to as appeals. Since the power of revision is meant to protect the department as well as the assessee, there are two sections dealing with the scope and nature of this power of revision.

13.2. S. 263 empower the Commissioner to revise orders that he considers prejudicial to the interests of revenue. This authority is circumscribed by limitation of time within which such orders can be passed and the manner in which such power can be exercised. A very important safeguard that had been inserted in this regard is that matters which have been the subject matter of appeal are kept outside the revisionary jurisdiction of the Commissioner.

13.3. On the other hand assessee aggrieved by certain orders and who feel that the remedy is more of an administrative nature or where appeal (for certain technical reasons) is not possible, may invoke the provisions of S. 264 and seek revision of such orders by the Commissioner. The Commissioner can exercise such powers only in response to an application made by the assessee, after the applicant has paid the prescribed fee of Rs. 500.

Petitions

14.1. In extremely rare circumstances the assessee is given a right to petition the Commissioner for reduction/waiver of certain penalties imposed or impossible. This is provided in section 273A which also provides the parameters within which the Commissioner can exercise his discretion in favour of the assessee. One of the primary requirements for consideration of such petitioned for waiver/reduction of penalty is that

- the assessee concerned should have co-operated in regard to the enquiry relating to the assessment of his income,
- should have paid or made arrangements for the payment of tax on interest payable and
- Should have made a full and true disclosure of his income and particulars relating thereto.

14.2. A similar relief is provided by way of administrative circular to enable assessee who are liable to pay interest to petition for its waiver /reduction. Normally interest for delay in payment of tax is payable automatically, without any adjudication thereon or passing of any order. As such, appeal would not lie against such levy of interest (except where the levy of interest itself is denied by the assessee). Under such circumstances, it is possible that assessee may be subjected to interest in cases of genuine hardship / for reasons beyond his control. In such circumstances, the assessee can seek recourse to the powers conferred upon the Commissioner by virtue of circular which enables the Commissioner to waive interest wholly or in part. He can do so after being satisfied that the conditions prescribed in the circular complied with and that it is a fit case for grant of relief.