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# FIRST APPEAL- COMMISIONER OF INCOME TAX- Basic Rules and Procedures (U/S 246 to 250)

## Relevant Sections

| Section | Brief |
|---|---|
| **246** | Appealable orders |
| **246A** | Appealable order before the Commissioner (Appeal) |
| **248** | Appeal by person denying liability to deduct tax |
| **249** | Form of Appeal and Limitation |
| **250** | Procedure in appeal |
| **251** | Power of the Commissioner (Appeals) |

## Meaning of Appeal and Background of Commissioner (Appeals)

One Law Dictionary defines 'appeal' as a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, or court of appeal. Right to appeal under income tax law is a creation of statute and not an inherent right. Appeal can be filed only against orders listed in the Income Tax Act and not any order. Income tax liability is determined at the level of Assessing Officer first.

A tax payer aggrieved by various actions of Assessing Officer can appeal before Commissioner of Income Tax (Appeals) having jurisdiction over the tax payer. Designation of the Commissioner (Appeals), with whom appeal is to be filed is also mentioned in the notice of demand issued by the Assessing Officer under section 156 of Income Tax Act.

## When appeal can be filed before commissioner (appeals) i.e. Appealable orders

Appeal can be filed before Commissioner (Appeals), when a tax payer is adversely affected by Orders as under passed by various Income tax authorities:

(a) Order against tax payer where the tax payer denies liability to be assessed under Income Tax Act;
(b) Intimation issued under Section 143(1) making adjustments to the returned income ;
(c) Scrutiny assessment order u/s 143(3) or an ex-parte assessment .order u/s 144, to object to income determined or loss assessed or tax determined or status under which assessed;
(d) Order u/s 115WE/115WF/115WG assessing fringe benefits;
(e) Re-assessment order passed after reopening the assessment u/s 147/150;
(f) Search assessment order u/s 153A or 158BC;
(g) Rectification Order u/s 154/155;
(h) Order u/ s 163 treating the taxpayer as agent of a nonresident;
(i) Order passed u/s 170(2)/(3) assessing the successor to the business in respect of income earned by the predecessor;
(j) Order u/s 171 recording finding about partition of Hindu undivided family(HUF);
(k) Order u/s 115VP(3) refusing approval to opt for tonnage-tax scheme by qualifying shipping companies;

(l) Order u/s 201(1)/206C(6A) deeming person responsible for deduction of tax at source as assessee in default on failure to deduct/ collect tax at source or to pay the same to the Government;
(m) Order determining refund u/s 237;
(n) Order imposing penalty u/s 221/ 271/ 271A/ 271AAA/ 271F/ 271FB/ 272A/ 272AA/ 272BB/ 275(1A)/ 158BFA(2)/ 271B/ 271BB/ 271C/ 271CA/ 271D/ 271E

**Time Limit for filing an appeal**

An appeal to the Commissioner (Appeals) should be filed within a period of 30 days of the service of the order against which the appeal is preferred. The period of limitation for filing an appeal to the Commissioner (Appeals) is to be computed from the date of the receipt of demand by the assessee and not from the date of receipt of assessment order by the assessee.
Where the assessment order was served on the person who was not an authorised agent of the assessee, and later on, the assessee applied for and obtained a copy of the assessment order for purpose of filing an appeal, it was held that the time limit for filing the appeal should be reckoned from the date on which the assessee obtained the copy of the assessment order and notice of demand and not from the earlier date of service of the assessment order.
Where postal acknowledgment in file of Assessing Officer did not bear signature of any person and so also it did not bear any date of service, it was reasonable to believe that the assessee was not served with the order of assessment and the demand notice and in such case appeal filed by the assessee on 10-8-1980 against the order of assessment for the assessment year 1981-82 could not be said to be barred by limitation *(Badri Singh Thakur vs. ITO (1995) 78 Taxman 206(Jab).*
*Condonation of delay in filing of appeal:*

- Reasons must be recorded for granting condonation of delay.
- Order refusing the condonation of delay must be a speaking order.
- Order condoning delay cannot be rectified by the first appellate authority.
- Appeal may be filed against order refusing to condone delay.
- Delay due to the change in address may be condoned.
- Delay due to illness may be condoned.

**Form of appeal and How to fill the same**

Every appeal to the Commissioner (Appeals) is to be filed in **Form No. 35**. In this form, details such as name and address of the tax payer, Permanent Account Number (PAN), assessment year, details of the order against which appeal is filed etc. are to be filled in.
Other relevant descriptions to be specified:

- Against the column "***Relief claimed in appeal***", amount of reductions sought in income or any other relief sought in appeal is to be mentioned.
- In the column "***Statement of Facts***", relevant facts in respect of each subject matter of appeal are to be mentioned in brief. Nature of business or profession, account books maintained etc. may also be mentioned in this column.
- Against column "***Grounds of appeal***", disputed issues on which relief is sought in appeal are to be mentioned in narrative form.

(a) Ground of appeal should be simple, clear, precise, concise and without any ambiguity. In case of more than one issue involved in appeal, draft one separate ground for one issue.
(b) Nature of dispute and relief expected should be highlighted.
(c) Avoid referring case laws while drafting grounds, if any.
(d) In case opportunity of being heard is not granted to the assessee, the same should be clearly mentioned in grounds.
(e) *For example*, in an appeal against addition to the returned income by applying a gross profit rate on estimated turnover, the ground of appeal may be, “the Ld. Assessing Officer was not justified in rejecting the results as per regular books of account and in estimating the income by applying an adhoc rate of gross profit.”

**Who has to sign form no. 35?**

Rule 45 of Income Tax Rules, 1962 states that Form no. 35 is to be signed and verified by the individual tax payer himself or by a person duly authorised by him holding valid power of attorney. In other words, form of appeal is to be signed and verified by following:

- In case of a Hindu Undivided Family, by the Karta of the family or if Karta is absent from India or is not capable for signing, by any other adult member of such family.
- In case of a company, by the Managing Director or if Managing Director is not available or where there is no Managing Director by any director of the company.
- In case of foreign company, by a person who holds a valid power of attorney from such company.
- In case of a firm, by the Managing Partner or if Managing Partner is not available or where there is no Managing Partner by any partner (not being a minor).
- In case of a LLP, by the Designated Partner or if Designated Partner is not available or where there is no Designated Partner by any partner.
- In case of a Local Authority, by the Principal Officer thereof.
- In case of a Political Party, by the Chief Executive Officer of such party.
- In case of any other Association, by the Principal Officer thereof or by any member of the Association.
- In case of any other Person, by that Person or by some person competent to act on his behalf.

**Payment of accepted tax liability necessary before filing appeal**

An appeal will be admitted by Commissioner (Appeals) only if tax as per the returned income, where return of income is filed, or advance tax payable, where no return of income is filed has been paid prior to filing of appeal. In the latter situation i.e. where return of income is not filed, tax payer can apply to the Commissioner (Appeals) for exemption from such condition for good and sufficient reasons.

No appeal lies in the following cases:

- Where assessment made on agreed basis.
- No objection raised by the assessee to rectification of Assessment order.
- Rectification u/s 154 on consent of the assessee.
- Matter having become final at the time of original assessment.

**Appeal fees**

Fees is to be paid before filing appeal to the Commissioner (Appeals) depending upon total income determined by the Assessing Officer. Fees as under are to be paid and proof of payment of fee *(Challan)* is to be attached with Form No. 35:

| Particulars | Fees for filing appeal before CIT (A) |
|---|---|
| Assessed total income Rs. 1 lakh or less | Rs. 250/- |
| Assessed total income more than Rs. 1 lakh but not more than Rs. 2 lakhs | Rs. 500/- |
| Assessed total income more than Rs. 2 lakhs | Rs. 1000/- |
| Where subject matter is not covered under any of above | Rs. 250/- |

**Appeal Procedure**

On receipt of Form no. 35, Commissioner of Income-tax (Appeals) fixes date and place for hearing the appeal by issuing notice to the tax payer and the Assessing Officer, against whose order appeal is preferred. The tax payer has a right to be heard either personally or through an Authorized Representative. The Commissioner (Appeals) would hear the appeal and may adjourn it from time to time till the hearing is over. During hearing, Commissioner (Appeals) may allow the tax payer to go into additional grounds of appeal, i.e. grounds not specified in the appeal memo, i.e. Form no. 35, on being satisfied that omission of those grounds from the form of appeal was not willful or unreasonable.

Before disposing of any appeal, Commissioner (Appeals) may carry out further enquiry himself or through the Assessing Officer. If such proceedings are conducted through the Assessing officer, the same are generally referred to as remand proceedings.

**Appeal decision**

After the hearing is concluded, Commissioner (Appeals) passes order in writing, disposing of the appeal and stating the decision on each ground of appeal with reasons. In case of assessment and penalty, Commissioner (Appeals) may confirm, reduce or enhance it. Before enhancing any assessment or penalty, Commissioner of Income-tax (Appeals) has to provide reasonable opportunity to the tax payer for showing cause against such enhancement. While disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which order appealed against was passed, even if such matter was not raised by the tax payer.

**Rule 46A - Circumstances under which Appellate shall be entitled to produce additional evidences before CIT(A)**

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

***Rule 46A- Sub-rule (2)***
No evidence shall be admitted under sub-rule (1) unless the CIT(A) records the reasons for its admission in writing.

***Rule 46A- Sub-rule (3)***
The CIT(A) shall not take into account any evidence produced under sub-rule (1) unless the AO has been allowed a reasonable opportunity—

a) to examine the evidence/ document or to cross-examine the witness produced by the appellant, or
b) to produce any evidence/ document or any witness in rebuttal of the additional evidence produced by the appellant.

***Rule 46A- Sub-rule (4)***
Nothing contained in this rule shall affect the power of the CIT(A) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the AO u/s 251(1)(A) or the imposition of penalty u/s 271).

**Procedural Aspects of Section 250**

- Commissioner (Appeals) shall give notice to the assessee and AO regarding fixation of day & place of hearing.
- The appellant in person or through his AR and the AO or his AR shall have right to be heard.
- CIT (A) has powers to adjourn the hearing from time to time.
- Before disposing of the appeal, the CIT (A) has power to make further inquiry or may direct the AO to further inquire and report the same.
- Entertain new ground of appeal – the Commissioner (Appeals) may at the time of hearing , allow the appellant to go into Additional ground of appeal not specified in the ground of appeal, if he is satisfied that the omission was not willful or unreasonable.
- **Order of the CIT(A)** shall be in writing stating the point for determination, the decision thereon and the reason for the decision.
- **Disposal of appeal**: The CIT(A) may, where it is possible, hear and decide the appeal within a period of one year from the end of the financial year in which appeal is filed u/s 246A of the Act.
- **Communication of order passed**: On disposal of appeal, the CIT(A) shall communicate the order passed to the assessee and to the Chief Commissioner or Commissioner.

**Powers of CIT(A) as specified in Section 251**

- To confirm, reduce, enhance or annul the assessment.
- To confirm, reduce, enhance or annul the assessment in respect of assessment in pursuance to abatement of proceeding before the Settlement Commission u/s 245HA after taking into consideration all the material and other information produced before the Settlement Commission and such other material as may be brought on his record.
- To confirm or cancel or enhance or reduce the penalty against order of penalty.
- To allow reasonable opportunity of being heard in case of enhancement of assessment/ penalty or reduction of refund.
- To grant adjournments.
- To exercise powers u/s 131.
- To pass order on alternate plea.
- To admit additional ground and decide the additional ground.
- To admit additional evidence filed by the appellant.
- To rectify apparent errors in the order.

***NOTE***: CIT(A) no more has powers to set aside the case.

**Common Errors in filing Appeals**

1) Filling of Form No. 35 (Rule 45) column wise.
2) Preparing of Statement of Facts to be annexed as A to the Form No. 35.
3) Preparing of Grounds of Appeal.
4) Signing by the person who verifies the correctness of facts.
5) Column "relief claimed in appeal" should indicate the amount of reduction in income or any other relief sought in appeal.
6) Statement of Facts should contained nature of business or profession, state of account books etc. The assessee should mention the relevant facts in brief separately for each ground of appeal.
7) Ground of appeal is required to indicate the points without any argument or narration.

**How to improve effective representation before Appellate Authority**

1) As soon as hearing notice is received, the AR should ensure that the Appeal field was in order in all respects. The Authorisation should normally be enclosed with Form No. 35 and in exceptional circumstances it should be submitted at the time of First hearing. No photo-copy authorisation should be submitted.
2) All submissions ground wise must be in writing.
3) The observation and the findings of the AO must be proved factually incorrect because of the wrong appreciation of facts and law.
4) In the course of hearing, the AR must bring minimum of books of a/c. such P&L a/c., B/S and the schedules thereof.

5) In cases additions made u/s. 68, the bank book/statements should be produced before the authorities.
6) The AR should have c/f Depreciation and Business loss computations during the course of hearing.
7) All the pages of the submission made must be numbered with indexation. The submission should be in the form of Paper Book which includes the details submitted before the AO.
8) Case laws are relied upon mindlessly without drawing the relevance to the case represented.
9) Any additional evidences submitted must be with reasons for and the relevance to the fact of the case.
10) Condonation of delay for late filing of appeal must be supported by "sufficient cause" – a question of facts.
11) All written submissions should be submitted in soft copy as well.
12) Finally, the submissions must have clarity on the disputed matter.

**<u>Other points to be kept in mind</u>**

1) That it is not open to the Appellate Assistant Commissioner to introduce in the assessment a new source of income and the assessment has to be confined to those items of income which were the subject subject-matter of original assessment. And, therefore, it was not open to the first appellate authority to direct the Assessing Officer to conduct enquiry about such new source of income.
2) Power of CIT(A) is co-terminus with that of the Assessing Officer. He can do what the assessing officer can do and also direct him to do what he failed to do. However CIT(A) cannot discover new sources of income.
3) Where the additional evidence is obtained by the first appellate authority on its own motion, there is no requirement in law to consult or confront the Assessing Officer with such additional evidence.
4) The Commissioner is also entitled to admit additional evidence which he may think necessary for facilitating further enquiry.
5) Additional evidence should be admitted under proper and satisfactory reasons recorded in writing further AO should be given an opportunity of being heard.
6) No Assessee can be heard in an appeal where the tax which is admittedly payable by the Assessee is outstanding. It is to enforce payment of tax on admitted income.

**<u>Precautions in filing appeal and during representations</u>**

1) Ground taken can be withdrawn at any time
2) Written submissions preferably be filed, however it is not necessary.
3) Instant query should be answered on spot, if possible.
4) Paper book containing pleadings and evidences placed before assessing officer, be file.
5) Past history- an important evidence- but to be used carefully at this stage.
6) Representation of information based on information already filed is possible.

7) Details given in past assessment can be made part of paper book.
8) File Power of attorney. (CA has to file its POA at stamp paper of Rs. 50, however stamps could not be used to pay court fee, An Advocate may file POA with stamp of Rs. 13.50/ 13.50/- stamp paper not required.)
9) Give due importance to facts.
10) Furnish paper book.
11) File affidavit, where ever required.
12) Get acquainted with the latest law and decision, also see judgments in against.
13) Facts in against should be recollected and points to defend the same should be determined.
14) Be reasonably brief.
15) Make the arguments in summarized manner.
16) Show importance to authorities.
17) Don't ignore summons or notices.
18) Don't take adjournment on frivolous basis.
19) Don't lie- Statement can be recorded on Oath.
20) Don't mislead.

**Format Of Form No. 35**

# FORM No. 35
# (See rule 45)

Appeal to the Commissioner of Income-tax (Appeals)

Designation of the Commissioner (Appeals) ___, NEW DELHI

No.__________of________________

| | |
|---|---|
| Name and address of the Appellant | |
| Permanent Account Number | |
| Assessment year in connection with which the appeal is preferred. | |
| Assessing Officer/Valuation Officer passing the order appealed against. | |
| Section and sub-section of the Income-tax Act, 1961, under which the Assessing Officer/Valuation Officer passed the order appealed against and the date of such order. | |
| Where the appeal relates to any tax deducted under section 195(1), the date of payment of the tax. | |
| Where the appeal relates to any assessment or penalty, the date of service of the relevant notice of demand. | |
| In any other case, the date of service of the Intimation of the order appealed against. | |
| Section and clause of the Income-tax Act, 1961, under which the appeal is preferred. | |
| Where a return has been filed by the appellant of the assessment year in connection with which the appeal is preferred, whether tax due on the income returned has been paid in full. (If the answer is in the affirmative, give details of date of payment and amount paid.) | |
| Where no return has been filed by the appellant for the assessment year in connection with which the appeal is preferred, whether an amount equal to the amount of advance tax payable by him during the financial year immediately preceding such assessment year has been paid. (If the answer is in the affirmative, give details of date of payment and amount paid.) | |
| Relief claimed in appeal. | |
| "Where an appeal in relation to any other assessment year is pending in the case of the appellant with any Deputy Commissioner (Appeals) or Commissioner (Appeals), give the details as to the-<br>(a) Deputy Commissioner (Appeals) or Commissioner (Appeals), with whom the appeal is pending;<br>(b) Assessment year in connection with which the appeal has been preferred;<br>(c) Assessing Officer passing the order appealed against;<br>(d) Section and sub-section of the Act, under which the Assessing Officer passed the order appealed against and the date of such | |

| | |
|---|---|
| order”; | |
| Address to which notices may be sent to the appellant. | |

…………………………….
Signed
(Appellant)

**STATEMENT OF FACTS**

………………………………………………………………………………………………………

**GROUNDS OF APPEAL**

………………………………………………………………………………………

……………………………….
Signed
(Appellant)

**FORM OF VERIFICATION**

I, ………………………., the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

…………………………
Place ……………………….. Signature

Date ……………………….  ……………………….
Status of Appellant

**Major issues faced by appellant/applicant/litigant**

***Rejection in condonation of delay due to failure of counsel to take action***

**Issue**

Quite often delay in the filing of an appeal or application occurs due to the failure of the counsel on whom the litigant depends for timely advice and action in pursuing the matter involving the dispute, whether civil or criminal. The delay, at times, is so enormous that it causes serious concern and worry, both to the litigant and to the Court or Tribunal in considering or substantiating the delay that has occurred as being justified by sufficient cause so as to warrant condonation of delay.

More than the inaction of the counsel, the assessee is found fault with for his negligence and in all such cases the rejection of the application for condonation of delay would not be justified as may be seen from the recent decision of the Supreme Court in the case of N. Balakrishnan vs. M Krishna Murthy AIR 1998 SC 3222.

The result is that the case of the petitioner gets rejected even on ground of bar of limitation without going into the merits of the case thereby depriving the litigant of the opportunity to obtain justice through the case initiated by or against him.

**General Law**

The law is generally well-settled that the mistake of the counsel should not by itself be taken as the only basis to penalise the litigant and to deny justice and the litigant should not be made to suffer from the fault of his counsel. Still there are many cases in which the litigant has to undergo the problems due to the failure or omission of the counsel in view of the inaction of the litigant being regarded as contributory negligence to justify the rejection of request for condonation of delay in the filing of the appeal or other petition in the Court.

**Court's Guidelines**

The Supreme Court has analysed the facts of many cases and the conduct of the litigant, has held that "Appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him.

**Suggestions/advice for avoiding such rejection of cases where delay was not caused due to the fault of litigant/appellant**

1) Liberal approach needed- The judicial guidelines provided by the Supreme Court in the matter of condonation of delay indicate a realistic and most pragmatic view to be taken in every case so as to secure that effective justice to which the petitioner is entitled is not denied.
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) "Everyday's delay must be explained" does not mean that a 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) Time limits should also be specified for the following:
   (a) Providing appropriate data and other relevant details by the litigant to the counsel for appearing before higher authorities.
   (b) Period within which counsel (legal advisors of the applicant/litigant) should appear before the higher authorities relating to a particular case.
   (c) Predefined amount of compensation and relief available to the counsel and litigant in case of default of any one party.
   (d) Predetermined action by the courts and other authorities in favour or against the case if there is any default done by the litigant or counsel.
   (e) Period within which notices (demand notice or any other orders) from courts and other higher authorities should be forwarded to the litigant, in case the same were received by the counsel. Amount of penalty to be levied on the counsel and litigant in case of any default (information not being transferred by the counsel to litigant or timely response not provided by the litigant)