

Income Tax Preparation of Appeals

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Remedies Available to the Aggrieved Tax Payer

- First Appeal
 - Against the Order of the Assessing Officer
 - Before the Commissioner of Income Tax (Appeals)
- Second Appeal
 - Against the Order Passed by the Commissioner of IT (Appeals)
 - Before the ITAT
- Third Appeal
 - Against the Order of the ITAT
 - Before the HC
- Fourth Level
 - Against the Order of the HC
 - Before the Supreme Court

Appealable Orders Before CIT (Appeals)

1. Regular Assessment Order – Sec.142(1)
2. Assessment u/s143(3) After Scrutiny
3. Assessment u/s.144 – Best Judgement Assessment
4. Assessment u/s.147 – Income Escaping Assessment
5. Assessment u/s153A – In case of Search
6. Tonnage tax scheme – Sec.115VP
7. Rectification order – Sec.154
8. Orders in respect of TDS/TCS
9. Other Miscellaneous matters
10. Orders Imposing Penalties under various sections

Appeal Form and Contents

- Every appeal to the Commissioner (Appeals) is to be filed in Form No. 35.
- 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.
- Statement of Facts
- Grounds of Appeal
- Prayer and Verification

Drafting – Statement of Facts

- Statement of Facts and Grounds of Appeal are most important,
- Form No. 35 requires to set out a statement of facts along with the grounds of appeal.
- Poor preparation of grounds of Appeal may result in a good case being lost.
- Ground of appeal represent the those issues which show the nature of the dispute between the assessee and the revenue.

Details

- Before the actual representation of matters before the CIT (A), comes the stage of filing of the appeal
- i.e. the Statement of Facts and Grounds of Appeal,
- a step which does not get the deserved attention from assesseees.
- In many cases, it is observed that the Statement of Facts is not filed before the CIT (A) or is filed in a cursory manner.
- The Statement of Facts and Grounds of Appeal before CIT (A) are the vital documents when appeals are filed before the Income-tax Appellate Tribunal (the “Tribunal”) and High Court.
- In Appeals before the Tribunal or the High Court, Statement of Facts and Grounds of Appeal taken before the CIT (A) compulsorily form part of the record before them.

Before the Tribunal

- Before the Tribunal, Statement of Facts cannot be filed.
- The assessee cannot bring out new facts on record in its favour unless the same have been duly so brought latest before the first appellate authority.
- Further, bringing out certain additional facts directly before the Tribunal may result in the matter being remanded back to the lower authorities
- This results in delay of the decisions

Details

- It is through the Grounds of Appeal before the CIT (A) that an assessee can bring out that a particular point was raised before the lower authorities.
- Require to file a detailed and comprehensive Statement of Facts and Grounds of Appeal before the CIT (A).
- Statement of facts and grounds of appeal are drafted in third person.

Statement of Facts

- The Statement of Facts should be comprehensive and complete.
- It must be used as an opportunity to bring additional facts on record which have been so brought before the Assessing Officer.
- All factual mistakes/ errors/ incorrect observations of Assessing Officer must be specifically mentioned, challenged and rebutted.
- This would include instances where the Assessing Officer has wrongly stated in the assessment order that certain details were called for and not submitted.
- It is essential to bring out the correct position and should be expressly narrated.

Preparation – Points to be Remembered

- SHOULD BE PREPARED CAREFULLY
- It is vital for the assessee to present the statement of facts (SOF) in first appeal in such a manner so as to bring out clearly the steps in the assessment/Penalty proceedings leading to the order under challenge.
- No Contradictions
 - Facts should be free from any contradictions.
 - Summary of all the relevant facts should be attached in details giving facts Give important evidences independently or in the form of paper book.
 - All these facts must be true.

General

- The general clause about the assessee to understand the assessee's business and the grounds of appeal should be part of the preamble.
- Most important thing is that the facts must be truthful as no other thing is as important as the facts.
- Ground wise statement of facts should then be submitted alongwith the citations of the case laws which are relied upon.

Don't's

- The statement of fact should however should not be coloured by opinion
- Not to use colourable device defraud the revenue which will be set back to the taxpayer.
- STATEMENT OF FACTS SHOULD NOT BE MIXED WITH GROUNDS OF APPEAL.
- Do not use special characters. ('-' , '/' , '@' , '&' etc.)

Grounds of Appeal

- Purpose of filing an appeal is to get redressal in regard to the perceived injustice.
- To achieve this, 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.

Grievance

- 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
- Therefore, it is necessary that due care is taken in drafting.

Issues – Important Part

- Ground of appeal represent the issues which show the nature of the dispute.
- Grounds of Appeal is in fact nature of a claim thus it is distinguished from arguments
- Arguments are made in support support of claim.
- There may be several several arguments arguments in support support of a claim and all the arguments cannot form ground of appeal.

Points to be considered

- **ALL THE CAUSES FOR GRIEVANCE NEED TO BE INCLUDED IN THE GROUNDS**
- 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.
- Example
 - reopening of assessment. The powers 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 favour of the assessee may be available.
 - Hence to include and highlight all controversies involved and all the grounds on which the assessee is aggrieved.
 - It should not be vague or general in nature.

- **GROUNDS SHOULD BE SIMPLE, CONCISE ANY SPECIFIC**

- Grounds of appeal should be simple, clear, precise, concise, specific and without any ambiguity.
- Should avoid repetition.
- The assessee must state only the cause of grievance and avoid using long sentences.
- Strike the right balance between grounds being adequately clear without any significant matter being omitted and yet concise.
- Do not leave the grievance to be raised.

Arguments

- Only nature of dispute and relief expected should be clearly mentioned and highlighted.
- The grounds should not argumentative.

First Point for Arguments

- **FIRST SPECIFIC GROUND**
- **ISSUES SUCH AS LACK OF PROPER OPPORTUNITY OF BEING HEARD**
- **VIOLATION OF ANY OTHER PRINCIPLE OF NATURAL JUSTICE MUST BE SPECIFICALLY TAKEN IN THE GROUNDS OF APPEAL**

Principles of Natural Justice

- Denial of opportunity of cross examination, relying on material behind assessee's back etc.) must be specifically brought out.
- In case the time limit for the compliance is very short or if further opportunity as should be given was not provided or in case copies of statements recorded, even asked for, were not provided or when the books were in the custody of the department without being available either at the time of return or hearing or there is any other non-observance of principles of natural justice, all these or any of them can be stressed as a preliminary ground. In case opportunity of being heard is not granted to the assessee, the same should be clearly mentioned in grounds.
- Not providing an opportunity to the appellant, should specifically be mentioned in the statement of facts as well as in the grounds of appeal. It can be taken as an independent ground in the grounds of appeal.
- This will also help the assessee's case for admission of additional evidence under Rule 46A of the Income-tax Rules, 1962, if required.
- As lack of opportunity is a ground relating to jurisdiction, therefore, if possible it should be taken as the very first specific ground.

Format

- 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.
- For example – a particular disallowance may be erroneous for 2 or 3 different reasons, and those 2 or 3 different reasons may be stated by way of sub-clauses.

Avoid

- **SEPARATE GROUND FOR EACH ADDITION/ ISSUE MUST BE TAKEN**
- In case of more than one issue involved in appeal, draft one separate ground for one issue and preference of grounds should be decided.
- **AVOID REFERRING CASE LAW WHILE DRAFTING GROUNDS, IF ANY**
- Grounds should not refer case law unless binding decisions

Proceedings

- The Appellate Authority is bound to deal with all the grounds taken by the assessee.
- Where objection is taken against the jurisdiction of the Assessing Officer, it has to be dealt with.
- It should be decided as a preliminary issue before embarking on the merits of the controversy.
- Both jurisdiction and merits are decided first, where both are contested, though it would ordinarily not be necessary to deal with merits, if jurisdiction is lacking.
- A second round is avoided, in case the objections against the jurisdiction are found to be not maintainable.

Alternatives

- **ALTERNATIVE PLEA, WITHOUT PREJUDICE GROUNDS**
- Alternative plea, without prejudice grounds must be taken, where the circumstances so require;
- **Grounds of Appeal could be:**
- **FACTUAL GROUNDS:**
 - For example: Method of accounting, available records etc.
- **LEGAL GROUNDS:**
 - For example: Misinterpretation of law, jurisdictional grounds etc.
- **GROUNDS OF PROCEDURAL VIOLATIONS (TECHNICAL GROUNDS):**
 - For example: Notice served beyond limitation, notice not served , Invalid notice , Violation of Principles of natural justice, Inadequate hearing etc.

Revenue Vs.Capital

- Treatment of Expenditure
- Revenue Expenditure
 - If deductions are not allowed
 - Should be asked for treatment of Capital Expenditure and thereby request for allowing depreciation on the same.

Sequence

- Grounds of appeals should be drafted in logical sequences and be numbered properly. The first ground should be a general ground – Income assessed and Income declared.
- In the last ground, crave, leave for addition, modification, substitution or withdrawal of grounds of appeal.

Legal Grounds - examples

- **LEGAL GROUNDS [Eg: MISINTERPRETATION OF LAW, JURISDICTIONAL GROUNDS etc.]**
- Assessing Officer has erred in framing the assessment under section 147 of the Act, without following the mandatory procedure prescribed under sections 147 to 151 of the Act.
- The assessment may please be held as bad in law and additions made thereon may kindly be deleted.”
- That the Ld. Assessing Officer has erred on facts and in law in reopening of the assessment by invoking the provisions of section 147 of the Income Tax Act when no fresh facts or material were available to the assessing authority after the completion of the assessment under section 143(3) of the Act.

Specific Issues

- SECTION 41(1) – Deemed Profit
- “That having regard to the facts and circumstances of the case, the Ld. Assessing Officer has erred on facts and in law in making addition of under section 41(1) of the Act in contravention of the provisions of the section without appreciating the fact that ledger account statement submitted by the assessee of the creditor M/s..... for the F.Y..... relevant to assessment year has not been contradicted by either the creditor and the Assessing Officer merely because such liabilities are outstanding for the last many years, it cannot be presumed that the said liabilities have ceased to exit”.

Disallowances

- **DISALLOWANCES BASED ON THE PAST HISTORY OF THE CASE**
- “That having regard to the facts and circumstances of the case, the Ld. Assessing Officer erred on facts and in law in making disallowances purely on the past history of the case without bringing any fresh material on record to give a finding as to their disallowance in a new and fresh manner”.

Books of Account

- **REJECTION OF BOOKS OF ACCOUNT**
- “That having regard to the facts and circumstances of the case, the Ld. Assessing Officer has erred on facts and in law in rejecting books of account which have been duly audited and the audit of which has not been disputed by the Assessing Officer at any stage of the assessment proceedings to be invalid and legally untenable mere non-filing of the details of..... cannot lead to the inference that books of account are not proper and are liable to be rejected”.

Sec.145

- “That having regard to the facts and circumstances of the case, the Ld. Assessing Officer has erred on facts and in law in invoking the provisions of section 145 and rejected the audited accounts without pointing out any specific defects or shortcomings in the audited accounts without pointing out any defect in the accounts which could lead to the belief that proper profit cannot be deducted from the books of account”.

Others

- Staff Welfare Expenses
- TDS Certificates – Difference in 26as
- Income escaping assessment – Sec.147
 - Credits
 - Sources not explained (Sec.68 and Sec.69)

Declaration – Example – levy of penalty

- That the Ld. Assessing Officer has misdirected himself in law in levying penalty under [section 271\(1\)\(c\)](#) of and his order is thus *prima facie* devoid of merits and contrary to law and needs to be quashed and prayed for accordingly”.
- “That the aforesaid grounds of appeal are without prejudice to each other.
- “That the Appellant prays that the addition/disallowance of made in respect of/out of be deleted.”

Prayer

- In the last ground, a prayer to crave, leave for addition, modification, substitution or withdrawal of grounds of appeal must be made in the end.
- That the relief prayed for may kindly be allowed and the order of the Assessing Officer may kindly be quashed, set aside, annulled or modified.

Case Law Discussion

Before ITAT

- Income Tax Appellate Tribunal (ITAT) is the second appellate authority.
- Appeal to the ITAT can be filed by any of the aggrieved party either by the taxpayer or by the Assessing Officer.
- The ITAT is constituted by the Central Government and functions under the Ministry of Law. ITAT consists of two classes of members – Judicial and Accountant. In this part you can gain knowledge about various provisions relating to appeals to the ITAT.

Appealable orders – Tax Payer

- Rectification order passed by the Commissioner of Income-Tax (Appeals) under section 154; or
- Order passed by the Commissioner of Income-Tax (Appeals) under section 250, section 270A, section 271, section 271A, 271J or section 272A; or
- An order passed by a Principal Commissioner of Income-Tax or Commissioner of Income-Tax under section 12AA (it relates to registration application made by a charitable or religious trust).
- An order passed by a Principal Commissioner of Income-Tax or Commissioner of Income-Tax under section 80G(5)(vi) (it relates to approval of a charitable trust for donations made to it which would be eligible for deductions in the hands of the donor).

- An order passed by a Principal Commissioner of Income-Tax or Commissioner of Income-Tax under section 263 (it relates to revision of the order of Assessing Officer which is considered as prejudicial to the interest of revenue).
- An order passed by a Principal Commissioner of Income-Tax or Commissioner of Income-Tax under section 154 for rectification of order passed under section 263 .
- An order of penalty passed by a Principal Commissioner of Income-Tax or Commissioner of Income-Tax under section 270A, under section 271 or under section 272A
- An order of penalty passed by a Principal Chief Commissioner or Chief Commissioner or a Principal Director General a Director General or a Principal Director or Director under section 272A.

- An order passed by the Assessing Officer under section 115VZC(1) (i.e., order of excluding the taxpayer from tonnage tax scheme).
- An order passed by the Assessing Officer under section 143(3) or under section 147 or under section 153A or under section 153C in pursuance of the direction of Dispute Resolution Panel or a rectification order passed under section 154 in respect of such order.
- An order passed by the Assessing Officer under section 143(3) or under section 147 or under section 153A or under section 153C with the approval of the Principal Commissioner of Income-Tax or Commissioner of Income-Tax as referred to in section 144BA(12) (i.e., assessment after invocation of General Anti-avoidance Rules) or an order passed under section 154 or under section 155 in respect of such order (applicable from 01-04-2016) .

- An order passed by the Commissioner of Income-tax (Exemption) under section 10(23C)(vi) or Section 10(23C)(via) [it relates to filing of application by educational institute or hospital (other than those which are wholly or substantially financed by the Government or whose aggregate annual receipt do not exceed Rs. 1 Cr.) for the purpose of grant of exemption under section 10(23C)(vi) or section 10(23C)(via), respectively.]
- An order passed by the Commissioner of Income-tax (Exemption) under section 10(23C)(iv). It relates to approval of a charitable institution or fund for exemption under section 10(23C)(iv) having regard to its objects and its importance throughout India or throughout any State or States.
- An order passed by the Commissioner of Income-tax (Exemption) under section 10(23C)(v). It relates to granting exemption under section 10(23C)(v) to any trust (including any other legal obligation) or institution formed wholly for public religious purposes or wholly for public religious and charitable purposes.

Departmental Appeal

- The departmental appeal shall be allowed only in cases where the tax effect involved in the appeal exceeds Rs. 10,00,000. In other words, the Commissioner of Income-Tax can direct the Assessing Officer to file an appeal to the ITAT against the order of the Commissioner of Income-Tax (Appeals) only in those cases in which the tax effect exceeds Rs. 10,00,000

Time Limit

- Appeal to ITAT is to be filed within a period of 60 days from the date on which order sought to be appealed against is communicated to the taxpayer or to the Principal Commissioner of Income-Tax or Commissioner of Income-Tax (as the case may be).
- The ITAT may admit an appeal even after the period of 60 days if it is satisfied that there was sufficient cause for not presenting the appeal within the prescribed time.

Form of Appeal

- The appeal to ITAT shall be filed in Form No. 36. In case of appeal by the taxpayer, the form of appeal, the grounds of appeal and the form of verification are to be signed and verified by the person authorised to sign the return of income under section 140.

Memorandum of Cross Objection

- On filing of the appeal to the ITAT by the taxpayer or by the Assessing Officer (as the case may be) the opposite party will be intimated about the appeal and the opposite party has to file a memorandum of cross objection with the ITAT.
- The memorandum of cross objection is to be filed within a period of 30 days of receipt of notice. The memorandum of cross objection is to be filed in Form No. 36A.
- There is no fee for filing the memorandum of cross objection. The ITAT may accept a memorandum of cross objection even after the period of 30 days if it is satisfied that there was sufficient cause for not submitting the same within the prescribed time.
- Person who is competent to sign Form 36 (i.e., form of appeal) has to sign and verify the memorandum of cross objections. The ITAT will dispose of the memorandum of cross objections like an appeal in Form 36.

Documents

- Form No. 36 – in triplicate.
- Order appealed against – 2 copies (including one certified copy).
- Order of Assessing Officer – 2 copies
- Grounds of appeal before first appellate authority [i.e., Commissioner of Income – Tax (Appeals)] – 2 copies.
- Statement of facts filed before first appellate authority [i.e., Commissioner of Income-Tax (Appeals)] – 2 copies.
- In case of appeal against penalty order – 2 copies of relevant assessment order.
- In case of appeal against order under section 143(3), read with section 144A – 2 copies of the directions of the Joint Commissioner under section 144A.
- In case of appeal against order under section 143, read with section 147 – 2 copies of original assessment order, if any.
- Copy of challan for payment of fee.

FORM NO.36

[See rule 47(1)]

FORM OF APPEAL TO THE APPELLATE TRIBUNAL

In the Income-tax Appellate Tribunal _____ Appeal No.

_____ of _____ 20 _____

----- Versus -----

Appellant

Respondent

- 1 The State in which assessment was made
- 2 Section under which the order appealed against was passed
- 3 Assessment year in connection with which the appeal is Preferred
- 3A Total income declared by the Assessee for the assessment year referred to in item 3
- 3B. Total income as computed by the Assessing Officer for the assessment year referred to In item
4. The Assessing Officer passing the original order
5. Section of tile Income-tax Act, 1961, under which the Assessing Officer passed the order.
6. The Deputy Commissioner (Appeals) in respect of orders
(Appeals) passing the order under section 154/250/271/271A/272A -
7. The Deputy Commissioner in respect of orders passed before the 1? day of October 1898 or the Joint Commissioner or the Joint Director passing tile order under section 154/272A/274(2)
8. The chief Commissioner or Director General or Director or Commissioner passing the order under section 154(2)/250/263/271/271A/272A -
9. Date of communication of order appealed against
10. Address to which notices may be sent to the appellant
- 11 Address, to which notices may be sent to the respondent
- 12 Relief claimed in appeal

#GROUNDS OF APPEAL

Signed

(Authorised representative, if any)

Signed

(Appellant)

Verification

I. -----

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

Verified today the-----day of -----20-----

Signed

Submission of Paper Book

- The appellant or the respondent, i.e., the opposite may submit a paper book.
- A paper book is to be submitted in duplicate and should contain documents or statements or other papers referred to in the assessment order or the appellate order on which appellant/respondent wants to rely.
- The paper book should be duly indexed and page numbered. It should be filed at least a day before the hearing of the appeal. It should be filed along-with the proof of service of copy of the paper book to the opposite party at least a week before. Each paper in the paper book is to be certified as true copy by the party filing the same.
- The delay in filing the paper book may be condoned in genuine cases of delay.
- The ITAT can also on its own direct the preparation of paper book in triplicate by and at the cost of appellant or the respondent as it may consider necessary for disposal of appeal.
- Additional evidence, if any, should be filed separately and should not form part of the paper book.

Case

- X filed return of income for the AY 2020-21. Paid Rs.15,000 as tax. The Tax payable on such income is Rs.20,000.
- His income is assessed at Rs.5,00,000 and the taxable payable is determined at Rs.30,000.
- X wishes to file an appeal against the above order.
- Advise X

Ans

- X to deposit Rs.5,000 (20,000-15,000)
- X to deposit Rs.1,000 as filed fee (income is more than Rs.2.00 lakhs)
- X to file appeal in Form 35
- Appeal should be filed within 30 days of receipt of notice
- Apply for stay of demand of Rs.10,000 (30,000-20,000)