



National Conference on Direct Tax (Tax Kumbh 2.0)


**Appeals before ITAT and
Art of Representation**

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Agenda

- ▶ Appeals before ITAT – Statutory Provisions
 - ▶ Different types of Appeals / Other Applications before the Tribunal
 - ▶ Income-tax Appellate Tribunal Rules
 - ▶ Practical Tips for Representation
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Statutory Provisions



Relevant Provisions

- ▶ Section 252 – Constitution of Appellate Tribunal
- ▶ Section 252A – Qualifications of Members of Tribunal etc.
- ▶ Section 253 – Appeals to Appellate Tribunal
- ▶ Section 254 – Order of Appellate Tribunal
- ▶ Section 255 – Procedure of Appellate Tribunal
- ▶ Income-tax Appellate Tribunal Rules

Appeal – Basic Principles

- ▶ Right of Appeal is a Statutory Right – Not an Inherent Right
 - ▶ CIT Vs. Garware Nylons Ltd. 212 ITR 242 (Bom.) – Order u/s. 197(3) and section 80K
 - ▶ Professional Warehousing Co. P. Ltd. v. DCIT 21 SOT 57 (Lucknow Trib.) – Direction for special audit u/s. 142(2A)
- ▶ Right to be exercised as provided in Law – Alternate Remedy – writ petition before court
- ▶ Appeal is Continuation of Assessment Proceedings
- ▶ Assessment Proceedings are complete when appeal against assessment order is decided by ITAT – *CIT Vs. Mayur Foundation* 274 ITR 562 (Guj)

Appellant and Respondent

- ▶ Appeal before the Tribunal can be filed by
 - Assessee if aggrieved
 - Assessing officer as instructed by Pr. CIT or CIT
- ▶ Respondent in appeal of assessee should be assessing officer (Not CIT (A) or NFAC) – Rule 13

Appealable Orders

- ▶ Orders passed by CIT (A) or Jt. CIT (A)
 - Orders u/s. 250 / 154 / 270A/ 271 / 271A/ 271AAB/271AAC/ 271AAD/ 271J/ 272A
- ▶ Order passed by Assessing Officer u/s. 115VZC – Exclusion from Tonnage Tax Scheme
- ▶ Order passed by Pr. CIT or CIT under
 - Section 12AA / 12AB / 80G(5)
 - **Section 263**
 - Section 272A
 - Order u/s. 154 amending 263 order or 272A order
- ▶ Order passed by assessing officer in pursuance of Directions of DRP
- ▶ Assessment orders passed by the Assessing officer with prior approval of Pr. CIT / CIT where the provisions of GAAR are invoked – Section 144BA (12)
- ▶ Order passed u/s. 10(23C)

Time Limits



- ▶ From 1-10-24 : Two months from the end of the month in which the order is communicated
- ▶ Earlier 60 days from date of communication
- ▶ Cross Objection by Respondent – Sec. 253(4)
 - Within 30 days of communication that appeal has been filed by the opposite party

Condonation of Delay

- ▶ Tribunal has power to condone delay in a case where there is sufficient cause for the delay – Section 253(5)
 - File request for condonation of delay along with appeal
 - Better to file affidavit
 - Explain the **reason for each day of delay**
- ▶ Sufficient cause shall be interpreted liberally so as to advance the cause of justice
 - Mela Ram & Sons Vs. CIT 29 ITR 607 (SC)
 - CIT Vs. Ashoka Engineering Co. 194 ITR 645 (SC)
- ▶ Condonation of Delay by way of speaking order – Cannot be assumed
 - Kunal Surana Vs. ITO 144 ITD 195 (Mum.) – Additional Evidence admitted but delay not condoned – Also relevance of proper affidavit



Condonation – General Principles

- ▶ Sufficient cause must be liberally construed
- ▶ Technical faults Vs. Cause of Justice
- ▶ Length of Delay is immaterial
- ▶ Litigant never benefits by resorting to delay
- ▶ If no malafide intention – delay shall be condoned



Condonation – General Principles

- ▶ There may be some lapse but the same shall not shut the doors of justice
- ▶ Denial of condonation results in a meritorious matter getting dismissed at threshold
 - Collector of Land Acquisition v. Mrs. Katiji & Others 167 ITR 471 (SC)
 - Earthmetal Electricals (P.) Ltd. vs. ITO (2005) 4 SOT 484 (Mum)
 - 71 Days Delay due to mistake of Tax Consultant's Staff
 - Bombay Mercantile Co-op. Bank vs. CBDT (2010) 45 DTR 377 (Bom)
 - Delay in filing Return due to change of auditor

Condonation – General Principles

- ▶ **Condonation is however an exception and not a rule**
- ▶ University of Delhi Vs. Union of India (SC) – itatonline.org – order dated 17-12-2019
 - Delay of 916 days
 - A liberal approach is to be taken in the matter of condonation of delay
 - However condonation of long delay should not be automatic
 - Affects the accrued right or adverse consequence to the opposite party
 - Routine explanation is not enough but it should be in the nature of indicating “sufficient cause” to justify the delay

Pathapati Subba Reddy (Died) by LRs v. The Special Deputy Collector (LA) (SC) – itatonline.org – 8-4-2024

- ▶ Law of limitation is based upon public policy that **there should be an end to litigation by forfeiting the right to remedy** rather than the right itself;
- ▶ A right or the **remedy that has not been exercised or availed of for a long time must come to an end** or cease to exist after a fixed period of time;
- ▶ The provisions of the Limitation Act have to be construed differently, such as Section 3 (Bar of Limitation) has to be construed in a strict sense whereas Section 5 (Extension of prescribed period) has to be construed liberally;
- ▶ In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same **cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;**

Pathapati Subba Reddy (Died) by LRs v. The Special Deputy Collector (LA) (SC) – itatonline.org – 8-4-2024

- ▶ Courts are empowered to exercise discretion to condone the delay **if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;**
- ▶ Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;
- ▶ **Merits of the case are not required to be considered** in condoning the delay; and
- ▶ Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision.

Condonation – Reasons

- ▶ Lack of Proper knowledge
- ▶ Serious illness of the assessee or family member
- ▶ Absence of due guidance by the consultant
- ▶ Facts surfacing at a latter date
- ▶ Reconciliation of various accounting items latter on
- ▶ Computer getting infacted – repaired latter on
- ▶ Appeal filed against assessment on levy of penalty
 - Ahmed Husain (SSM) Vs. ITO 48 ITR (Trib.) 417 (Chennai)

Be Careful



- ▶ Avoid giving very general reasons which are not digestible
- ▶ Try to support the reasons with documentary evidences
- ▶ Avoid – through oversight etc.
- ▶ Wrong Advice given by Consultant – Risk on the consultant
 - Vijay V. Meghani Vs. DCIT 153 ITD 687 (Mum.) – Observations against ICAI – Delay of 2984 days
 - HC removed observations against ICAI in Vijay V. Meghani Vs. DCIT 398 ITR 250 (Bom) – Cost imposed on assessee

Condonation – Reasons

- ▶ Subjective issue
 - Delay of 1902 days for non-advice by consultant condoned – Hosanna Ministries Vs. ITO 152 DTR 8 (Mad) – Appeal before Tribunal
 - Delay of 338 days was not condoned for a vague explanation – J. N. Chandrashekhar Vs. ITO 160 ITD 653 (Bang.)
- ▶ Delay caused due to new E-filing procedure shall be condoned
 - All India Federation of Tax Practitioners Vs. ITO – ITA No. 7134/Mum/2017 Dt. 4-5-2018
 - Hathway C-Net P. Ltd. Vs. TRO (2018) 192 TTJ 497 (Mum.)

Appeal Fees

Situation	Appeal Fees
Total Income < 1 Lac	500
Total Income > 1 Lac but < 2 Lac	1500
Total Income > 2 Lac	1% of total income assessed – Maximum 10000
Subject Matter of Appeal not covered by above	500

- No Fees payable by Revenue for filing appeal
- No Fees payable by the Respondent for filing Cross Objection
- Application for stay of Demand – Rs. 500

Section 254 – Order of Tribunal

- ▶ Order to be passed after giving opportunity of being heard to both the parties
- ▶ Suggestive timeline for disposal of appeal
 - 4 years from the end of FY in which appeal is filed – 254(2A)

Miscellaneous Applications – Section 254(2)

- ▶ Any mistake apparent from the record can be rectified by way of amendment to the order – 254(2)
 - Suo-motto
 - On Application filed by either party – Misc. Application
- ▶ Fees of Rs. 50/- to be paid
- ▶ Cannot be in the nature of review

Stay Application before ITAT

- ▶ Stay in any proceedings – relating to appeal filed
- ▶ Stay after considering merits of the application made
- ▶ Stay can be for maximum 180 days
 - Condition : assessee to deposit at least 20% of disputed amount or to provide security of the said amount (part payment condition inserted w.e.f. 1-4-2020)
 - UTI Mutual Fund v. ITO 31 taxmann.com 222 (Bombay) – Where there is a prima-facie good case on merits requirement of pre-deposit of 20% would itself result in hardship to assessee.
- ▶ ITAT will attempt to dispose of the appeal within the period of 180 days

Stay Application before ITAT

- ▶ No extension of stay if appeal is not disposed unless
 - Fresh application is made
 - Conditions are complied
 - Satisfaction that the delay in disposing of appeal is not attributable to assessee
- ▶ Maximum stay – 365 days
 - Dy. CIT v. Pepsi Foods Ltd. 433 ITR 295 (SC) – Third Proviso to section 254(2A) is arbitrary – liable to be struck down
 - Stay can be granted beyond 365 days where delay is not attributable to assessee – Pr. CIT vs. Jindal Steel & Power Ltd. 133 taxmann.com 214 (SC)
- ▶ After the stay period, the order gets vacated even if delay is not attributable to assessee – Fresh application necessary to continue stay
- ▶ Tribunal can grant cost of any appeal at its discretion

Tribunal Benches

- ▶ Regular Bench – Judicial Member + Accountant Member
- ▶ SMC Bench – If Income assessed is below 50 Lakhs
- ▶ Special Bench can be constituted by President
 - Three or more Members – with at least one JM and one AM
- ▶ Larger bench
 - In case of difference in opinion between members
 - Majority view will be binding
- ▶ Tribunal is deemed to be a Civil Court

Income-tax (Appellate Tribunal) Rules 1963



Grounds of Appeal before Tribunal

- ▶ Rule 8 of Tribunal Rules
- ▶ Grounds of Appeal shall be concise
- ▶ Grounds shall be under distinct heads
- ▶ Grounds cannot be argumentative or narrative
- ▶ Grounds shall be numbered consecutively

Documents to be attached to Memorandum of Appeal (Rule – 9)

- ▶ Memorandum of Appeal (Form No. 36) to be in triplicate
- ▶ Two copies of the following orders
 - Order appealed against
 - Order of Assessing Officer
 - Form No. 35
 - Grounds of Appeal before CIT (A)
 - Statement of Facts before the CIT (A)
 - For penalty appeal – Also attach two copies of the assessment order
 - For DRP related assessment – also attach two copies of draft assessment order
 - If assessment is completed as per directions of Jt. CIT u/s. 144A – also attach two copies of directions of Jt. CIT
 - For reassessment cases – Also attach original assessment order if the same is a regular assessment
- ▶ One of the two copies should be certified true copy
- ▶ Form No. 36 can be revised where there is a change in address after filing the same
- ▶ For any factual errors / omissions in the orders of lower authorities – An Affidavit needs to be filed in support of correct facts

Hearing before Tribunal (Rules 11)

- ▶ Appellant cannot be heard on any ground other than the grounds listed in the appeal memo
- ▶ If there is any additional ground to be argued – permission of the bench is required for the same.
- ▶ Tribunal need not confine its decision to the grounds raised
- ▶ If there are any other ground on which the Tribunal decides the appeal – Opportunity of hearing is to be given to the other side who is adversely affected

Additional Grounds

- ▶ Rule – 11 – Additional ground can be raised only if permitted by the Bench
- ▶ To file additional ground in writing and giving copy to the other side
- ▶ Judicious manner – Normally should be permitted – advance the cause of justice
 - Jute Corporation of India Ltd. Vs. CIT 187 ITR 688 (SC)
 - New India Industries Ltd. Vs. CIT 207 ITR 1010 (Guj)
 - Hindustan Construction Co. Vs. CIT 208 ITR 291 (Bom)
- ▶ Additional Ground before ITAT – Relevant facts shall be on records
 - National Thermal Power Corpn Vs. CIT 229 ITR 383 (SC)
 - Ultratech Cement Ltd. Vs. Addl. CIT 157 DTR 253 (Bom.)



Paper Book before Tribunal (Rule 18)

- ▶ All the documents which are to be relied need to be filed in the form of paper book – No loose papers can be filed.
- ▶ The paper book must be duly indexed
- ▶ It should carry certificate about the documents being available before which of the lower authorities
- ▶ Each page should be certified to be true copy by Assessee or Representative
- ▶ Additional / Fresh Evidence to be filed by a Separate Paper book – Application for admission of the same to be accompanied

Paper Book before Tribunal (Rule 18)

- ▶ Time to file Paper book
 - For members – at least a day before the hearing
 - For the other side – at least a week before hearing
 - Delay can be condoned by Bench – discretionary
- ▶ Tribunal can direct for filing of paper book

Cross Objection and Cross Appeal

- ▶ Difference between cross objection and cross appeal
- ▶ Appeal before Tribunal cannot be disadvantageous to the appellant – No power of enhancement
- ▶ Scope of Cross Appeal is wider than cross objection

Hearing of Appeal

- ▶ The appellant shall be first heard in support of his appeal
- ▶ Rule – 23 – The Tribunal shall, then, **if necessary**, hear the respondent against the appeal
- ▶ The appellant shall be entitled to reply
 - **No second chance to respondent**
- ▶ If appellant / respondent does not appear – Tribunal may dispose of the appeal on merits after hearing the other side
- ▶ If sufficient cause for non attendance – Tribunal can recall the order and restore the appeal

Rule – 27 – Right of Respondent

- ▶ Respondent can defend the order on any ground decided against him
- ▶ This right is available even if there is no cross appeal / objection filed by the respondent
- ▶ To make application in writing for invoking Rule 27
- ▶ Rule 27 can help in various situations
 - Validity of reassessment
 - Validity of addition when the subject matter of appeal is penalty
- ▶ Limitation of Rule 27
 - Respondent cannot be at advantage
 - Appellant cannot be worse off than what he was earlier

Additional Evidence



- ▶ Parties are not entitled to file additional evidence subject to certain exceptions
 - Tribunal finds it necessary to get the evidences on record to decide the matter
 - **Insufficient opportunity given**
- ▶ Tribunal can examine a witness if required
- ▶ Witness shall comply with the directions of the Tribunal in this regard

Misc. Application – Sec. 254(2)

- ▶ Application should clearly and concisely state the mistake apparent from the records.
- ▶ Normally there cannot be multiple Misc. Applications against the same order
- ▶ Applicant need to inform if any earlier MA filed and the fate of the same.
- ▶ MA will be heard by the same members who had passed the order initially.
- ▶ Scope of MA – similar to rectification u/s. 154 – Cannot be in the nature of review

Stay Petition



- ▶ Application should mention short facts, Result of appeal filed before CIT (A), Exact amount of Tax / Interest / Penalty / Fine / Other sum
- ▶ Break-up of amount disputed and undisputed
- ▶ Application made to revenue authorities and the result thereof to be communicated
- ▶ Reasons for seeking stay
- ▶ Whether any security can be offered ?
- ▶ Exact Prayer

Monetary Limits for Revenue Appeals

- ▶ Instructions issued by CBDT from time to time specifying monetary limits for Tax effects for revenue for not filing appeals
- ▶ Circular No. 5/2024 Dt. 15-3-2024
- ▶ Tax Effects specified
 - Appeal to Tribunal – 60 Lakhs
 - High Court – 2 Crores
 - Supreme Court – 5 Crores
- ▶ Courts have taken view that for this purpose only Tax will be considered
 - Surcharge and Cess will be considered **but Interest is not to be considered.**
- ▶ Tax effect to be seen as per order assailed and not subsequent orders
 - Gyan Chand Jain v. CIT 137 taxmann.com 323 (SC)

Exceptions to the instruction for lower tax effect

- ▶ Challenge to constitutional validity of provisions
- ▶ Any circular / Notification held ultra-vires
- ▶ Assessment based on information from any government department / agency specified (including Sales Tax / GST Department – ED / DRI etc.)
- ▶ Prosecution filed by department and trial is pending
- ▶ Strictures / Adverse Comments against CBDT or officers or cost imposed
- ▶ Tax is not quantifiable or not involved – Ex 10(23C) / 12AA/ 12AB

Exceptions to the instruction for lower tax effect

- ▶ Order passed u/s. 263
- ▶ Addition is about undisclosed foreign income / assets
- ▶ Organised tax evasion including bogus capital gains through penny stock
- ▶ Mandated by court direction
- ▶ TDS matters where the liability to deduct Tax is challenged
- ▶ Applicability of DTAA provisions

Withdrawal of Appeal



- ▶ Whether appeal filed can be allowed to be withdrawn ?
 - Before ITAT
 - Sainath Enterprises Vs. ACIT (TM)(ITA No. 189/Mum/2011 Dt. 18-11-17)
 - Before CIT (A) – Whether possible to withdraw ?
 - Explanation to Section 251 – The CIT (A) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed notwithstanding that such matter was not raised before the CIT (A) by the appellant
 - CIT Vs. Premkumar Arjundas Luthra HUF 69 taxmann.com 407 (Bom.)
 - No specific question before HC

Appeal – Practical Tips



- ▶ Study the Case Very Well – Be clear about Facts of the case
- ▶ Go through all the correspondence and orders in greater detail
- ▶ Prepare a proper synopsis of arguments that you wish to make.
- ▶ If felt necessary file additional evidence and make appropriate application
- ▶ In some of the cases, alternate pleas may be helpful –
Decide all your arguments and set their order properly

Appeal – Practical Tips

- ▶ Study the entire decisions that supports you – Headnote and Catch notes can be deceptive
- ▶ **Don't overlook the decisions relied on by AO or decisions against you**
- ▶ Carry proper Power of Attorney at the time of hearing
- ▶ Request the client to join you
- ▶ If there is a delay in filing appeal – **first request for condonation of delay and then deal with the issues.**

Appeal – Practical Tips

- ▶ Support your request for condonation with documentary evidences and affidavit if required.
- ▶ Address the Bench – **Avoid Confrontation with the DR**
- ▶ Never speak out of turn – Hold your horses
- ▶ Try to help the bench to understand the facts very well – Assist the bench in dispensing justice
- ▶ Never put across incorrect facts or propositions which are legally not correct – Your image is much valuable then the outcome of the case.
- ▶ Avoid personal criticisms for AO or CIT (A)

Appeal – Practical Tips

- ▶ Be Brief yet effective – Short is usually sweet
- ▶ Speak at slow speed but not very slow
- ▶ **Avoid citing too many case-laws**
- ▶ Be Natural – Not filmy or flamboyant
- ▶ Prepare paper-book in a logical sequence – No frequent jumping
- ▶ Know where to stop – You are not there to display your knowledge





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