



PROCEDURE AND PRACTICAL APPROACH IN
DEALING WITH APPEAL BEFORE
COMMISSIONER OF INCOME TAX (APPEALS)

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Appeal before the Commissioner of Income Tax (Appeals) - Section 246A



Appealable orders u/s 246A

Appeal can be filed before the CIT(A) against orders referred in section **246A** of the Act, which covers substantial orders passed under the Act, such as:

- **Intimation/ Assessment:** u/s 143(1)/(1B), u/s 143(3), u/s 163
- **Rectification:** u/s 154
- **Reassessment:** u/s 147
- **TDS/ TCS:** u/s 200A(1), u/s 206CB(1), u/s 201; u/s 206C(6A)
- **Search/ Seizure:** u/s 153A
- **Penalty:** u/s 221; u/s 271, u/s 271A, u/s 271AAA, u/s 271AAB, u/s 271F, u/s 271FB, u/s 272AA or u/s 272BB; u/s 275(1A), u/s 271B or u/s 271BB; u/s 271C, u/s 271CA, u/s 271D or u/s 271E, u/s 272A, u/s 272AA; under Chapter XXI

Non - Appealable orders before the CIT(A)

- Order passed u/s 144C pursuant to DRP directions -ITAT
- Revisionary order passed by CIT u/s 263
- Order revoking registration u/s 12A passed by DIT(E) u/s 12AA(3) - ITAT
- Order disposing legal objections u/s 147 - Writ
- Order of refusal to grant stay of demand. [Sec 220(6)] – Writ
- Order passed by AO u/s 197(1) [No deduction of TDS or deduction at lower rates]
- Interest charged u/s. 220(2)

Sections under which Appeal can be Filed

Filing of appeal before CIT (A)

U/s
246A

Against the order
passed by the
Assessing Officer
(AO) u/s 143(1),
143(3), 147, 154,
201, 271 etc.

U/s
248

~~Against the order
passed by the
Assessing Officer (AO)
u/s 195~~

Repealed vide
FA 2022 w.e.f
01.04.2022 and
a new section
239A has been
inserted

Appealable orders u/s 248

- With respect to the payment to non-residents, an assessee can dispute its obligation to deduct tax at source through an application under section 195(2) of the Act.
- A separate appeal against such order passed by the AO under section 195(2) can be challenged before CIT(A) under section **248** of the Act.

Section 239A - Refund of TDS

Refund for denying liability to deduct tax in certain cases.

239A. (1) *Where under an agreement or other arrangement, in writing, the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government claims that no tax was required to be deducted on such income, may, within a period of thirty days from the date of payment of such tax, file an application before the Assessing Officer for refund of such tax in such form and such manner as may be prescribed.*

(2) *The Assessing Officer shall, by an order in writing, allow or reject the application:*

Provided *that no application under sub-section (1) shall be rejected unless an opportunity of being heard has been given to the applicant.*

(3) *The Assessing Officer may, before passing an order under sub-section (2), make such inquiry as he considers necessary.*

(4) *The order under sub-section (2) shall be passed within six months from the end of the month in which application under sub-section (1) is received.*

Time limit for filing appeal – 249(2)

- Appeal before CIT(A) has to be filed within **30 days** from the date of the service of relevant order, along with requisite appeal fee prescribed in **section 249(1)** of the Act.

The appeal should be filed within a period of 30 days of—

The date of **service of notice of demand** relating to assessment or penalty - Eg. 143(1)/143(3)/144/147 or 270A, 271AAB

The **date of payment of tax**, where appeal is under section 248

The **date on which intimation or the order sought to be appealed against is served**, if it relates to any other cases. Eg. an order made u/s 163 treating the assessee as the agent of a non-resident

Exclusion of time for calculating time limit for filing appeal [Section 268]

- The date on which the order complained of is served is to be excluded [**date of service of the order**] – **New Citizen Bank of India Ltd. [BHC] 58 ITR 468**
- Where an application has been made under section 270AA(1) [immunity from imposition of penalty], the period beginning from the date on which the application is made, to the date on which the order rejecting the application is served on the assessee, shall be excluded – [**Second Proviso to section 294(2)**]
- When only the assessment order is served without a copy of the Notice Of Demand, the period of 30 days would be counted **from the day assessee receives a copy of the Notice of demand u/s 156**

Condonation of delay in filing appeal [Section 249(3)]

- The CIT(A) can condone delay in filing the appeal beyond 30 days, if sufficient cause behind such delay is established.

Meaning of sufficient cause -

The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply law in a meaningful manner which sub serves the ends of justice and to dispose matters on merits.

- ✓ Collector, Land Acquisition v Katiji (Mst) (1987) 167 ITR 471 (SC) “**When substantial justice and technical considerations are pitted against each other, the case of substantial justice deserves to be preferred.**”
- ✓ CIT v. Gangadhar Gowd Rama Gowd & Co (1986) 158 ITR 75 (AP)
- ✓ CIT (Addl) v Prem Kumar Rastogi (1978) 115 ITR 503 (All.)
- It is advisable that the appeal in such cases is accompanied by an application for condonation of delay duly supported by an affidavit narrating the **reasons for delay and explaining each days delay**. However, the appellate authority may condone the delay even where there is no such application made by the assessee. [Markland Pvt. Ltd. v State of Gujarat AIR 1989 Guj 44]

'Sufficient cause' in condonation of delay

EXAMPLES

- **Time taken in pursuing other remedies may be a valid cause** - CIT v K.S.P Shanmugavel Nadar & Others (1985) 153 ITR 596 (Mad) – *Not to indulge in forum shopping*
- **A subsequent decision of the Supreme Court or a High Court resulting in change of legal position** – CIT v Sothia Mining & Mfg. Corp.(1990) 186 ITR 182 (Cal)
- **Delay due to reason that Director and Chief Executive Officer (DCEO) of assessee who had to take a decision to file an appeal had resigned** - Elnet Technologies Ltd. v DCIT, Chennai (2018) 259 Taxman 593 (Mad)
- **Where the delay was alleged to be on account of illness but the medical certificate was not filed, in spite of an opportunity having been given, the refusal to condone the delay was justified** – [Sital Prasad v CIT(1991) 187 ITR 135 (All)]

Procedure for filing appeal

- Appeal has to be filed **electronically** in Form No. 35, complete with the grounds of appeal and statement of facts prescribed under Rule 45 of the Income Tax Rules, 1962 ('the Rules').
 - ✓ The electronic form prescribes a fixed word limit, not exceeding 1000 words in case of statement of facts and 100 words per ground for grounds of appeal;
 - ✓ No special characters except for comma (,); dash(-), slash (/) and round brackets [()] are accepted while filing of the electronic form.
- Where return is filed electronically, the appeal form has to be filed electronically.
- The return form has to be signed by the person authorized to file the return of income under section 140 of the Act.
- Individual, Karta of HUF, Partner, **Managing Director** where for any unavoidable reason, such Managing Director is not able to sign, by any Directors thereof or where there is no Managing Director by any Director thereof. The Calcutta High Court in ***National Insurance Co. Ltd vs. CIT (1995) 213 ITR 862 (Cal)*** held that the return signed by a Director and not by the Managing Director was invalid in absence of any explanation.

Documents to attached to Form 35

The following documents shall be required while filing form-35

Order against which appeal is being filed.

- Notice of Demand
- In case of appeal against penalty order, the order of penalty and
- the assessment order

Attachments must not exceed 50MB in size and must be in pdf/zip format.

Clause	Criteria - Section 249(1)	Fees
(a)	Where the total income/loss computed by the A.O is ₹1,00,000 or less	250
(b)	Where the total income computed by the A.O exceeds ₹1,00,000 but does not exceeds ₹2,00,000	500
(c)	Where total income computed by the A.O exceeds ₹2,00,000	1000
(d)	Where the subject matter of appeal relates to any matter other than specified in clauses (a), (b) and (c) above	250

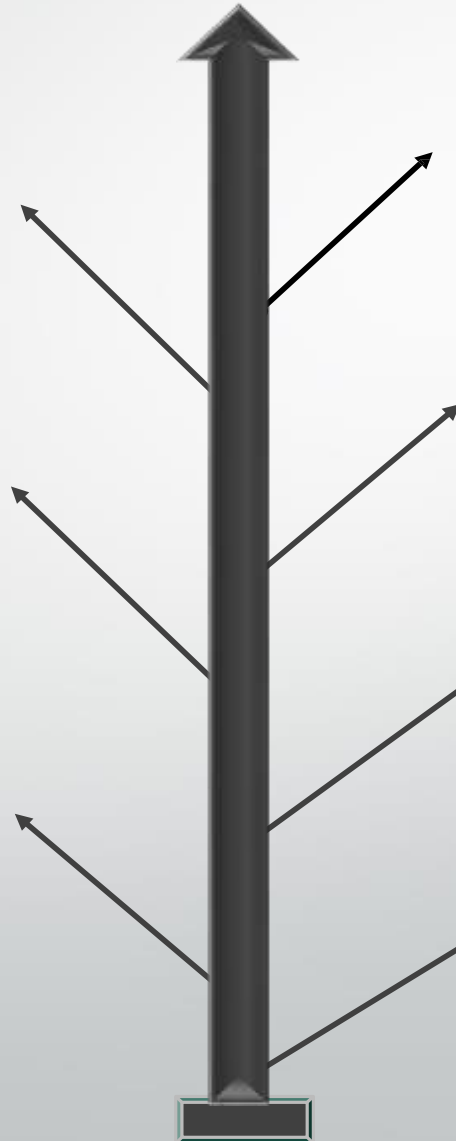
**In case of assessed loss – “Minimum Fees” (Rs.250)
[Gibs Computer Ltd. vs. ITAT – 317 ITR 159 (Bom HC)]**

Drafting of Statement of Facts

There is no prescribed format/order for drafting of Statement of facts.

The Statement of facts should have facts only and not the law points.

Facts should contain only those facts which are relevant and directly or indirectly connected with the additions made in the assessment order.



All these facts must be true as the saying goes "Every man has a right to his opinion but no one has a right to be wrong on facts"

Facts should be clear and should not be in argumentative form.

The facts should also cover those facts which are not considered by AO.

The facts should be comprehensive and complete

Drafting Of Grounds of Appeal

Ground of appeal represents those issues which show the nature of the dispute between the assessee and the revenue. A ground of appeal is in fact nature of a claim thus it is distinguished from arguments because arguments are made in support of claim.

1

- **Based of the facts Ground for Natural Justice must be taken**

2

- **Grounds of appeal should be precise, comprehensive, clear and consecutively numbered**

3

- **Grounds of appeal should be based on law point as well as merit point**

4

- **Grounds of Appeal in order of additions made in assessment order**

5

- **Separate ground for each addition must be taken.**

Drafting of Ground Of Appeal

- **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
- **Alternative plea, “Without Prejudice” grounds must be taken, where the circumstances so require**
- **Levy of interest, if any, should be taken as a ground of appeal - 234B/234C**
- **Must mention the Appellant craves leave to add/ alter/ amend/ withdraw any or all grounds of appeal before or at the time appeal proceedings.**

Hearing of appeal – Additional GOA

- Sub section (5) of section 250 empowers the CIT(A) to allow the appellant to raise additional grounds of appeal if satisfied that, the omission thereof was not willful or unreasonable. The aforesaid is a discretionary power which is exercised based on the facts and circumstances of each case. **(refer Jute Corporation of India Ltd. vs. CIT: 187 ITR 688 (SC)).**
- Where a claim not made in return of income, including revised return of income, although the AO is not empowered to allow such claim, the same can be raised before CIT(A) as additional grounds of appeal.
 - ✓ Goetze India Ltd. v. CIT 284 ITR 323 (SC)
 - ✓ CIT v. Jai Parabolic Springs Ltd. 306 ITR 42 (Del.)
- Circular issued by CBDT dated 11-4-1955 officers of the Income-tax should not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist the taxpayers in every reasonable way, particularly in the matter of claiming and securing reliefs

Specimen Application for Admission of Additional Ground

Hon'ble CIT (A)
.....

Date.....

Sir,

Sub: Prayer for admission of additional grounds.

The assessee begs to move the following grounds as additional grounds:-

1. That having regard to the facts and circumstances of the case, the impugned penalty order passed u/s 271(1)(c) is void-ab-initio and bad in law as Ld. AO did not clarify in the notice issued under section 271(1)(c) dated 5.12.2016 whether assessee has concealed the particular of the income or furnished inaccurate particulars of such income.

The above said grounds are purely legal grounds and do not require any fresh investigation of facts and therefore these may kindly be admitted in view of the judgment of Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd. 229 ITR 383.

We shall be obliged.

Thanking you,

Stay of Demand

- No automatic stay of demand on filing of appeal, or during the pendency of such appeal, with the CIT(A) [Refer: Union of India v Nawn (BC) (1972) 84 ITR 526 (Cal.)]
- Power with CIT(A) to grant stay

Favorable view

- The powers of granting stay on demand are inherent with CIT(A) u/s 251
 - ✓ Paulsons Litho Works v ITO (1994) 208 ITR 676 (Mad.)

Contrary View

- Power relating to stay is governed by the provision of section 220(6) of the Act which is vested with the AO.
- Stay to be granted by AO in accordance with guidelines contained in CBDT Circular dated 29.02.2016 as amended by Circular dated 31.07.2017

Stay of Demand- AO

- When appeal is pending disposal before the CIT(A), the power to grant stay of demand vests with the AO. The AO relies upon the CBDT's office memorandum for granting stay on recovery of balance demand, subject to payment of 20% of disputed demand.
- However, Courts have consistently held the insistence on payment of 20% of disputed demand merely on the basis of the Office Memorandum despite prima facie case of the assessee, as not justified
 - ✓ PCIT & Ors. v. LG Electronics India (P) Ltd: 303 CTR 649 (SC) - The Hon'ble SC on 20 July 2018 clarifies that Commissioner is not bound by administrative circulars issued by the CBDT – can grant stay of demand on payment of an amount less than 20%
 - ✓ Filpkart India (P) Ltd v. ACIT(2017)79 taxmann.com159 (Kar) – High Pitched assesement Circular No 1914 dated 02.02.1993 still holds good.
 - ✓ Turner General Entertainment Networks India Pvt. Ltd. v. ITO: WP (C) 682/2019 & CMAPPL. 3018/2019 (Del.)
 - ✓ Mrs. Kannammal v. ITO: W.P.No.3849 of 2019 and W.M.P.No.4278 of 2019 (Mad.)

Rights reserved to Assessing officer while granting stay

In granting stay the Assessing Officer may -

- require an undertaking from the assessee that he will **cooperate in the early disposal of appeal.**
- reserve the right to **review the order passed after expiry of reasonable period** (say 6 months) or if the assessee has not co-operated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;
- reserve the **right to adjust refunds arising**, if any, against the demand, to the extent of the amount required for granting stay and subject to the provisions of section 245.

Hearing of appeal – Additional GOA

- Sub section (5) of section 250 empowers the CIT(A) to allow the appellant to raise additional grounds of appeal if satisfied that, the omission thereof was not willful or unreasonable. The aforesaid is a discretionary power which is exercised based on the facts and circumstances of each case. (**refer Jute Corporation of India Ltd. vs. CIT: 187 ITR 688 (SC)**).
- Where a claim not made in return of income, including revised return of income, although the AO is not empowered to allow such claim, the same can be raised before CIT(A) as additional grounds of appeal.
 - ✓ Goetze India Ltd. v. CIT 284 ITR 323 (SC)
 - ✓ CIT v. Jai Parabolic Springs Ltd. 306 ITR 42 (Del.)

Hearing of appeal – Additional Evidence

- Rule 46A lists down the circumstances wherein an assessee can be entitled to produce such evidence, which covers cases -
 - where the AO refused to admit such evidence;
 - where the assessee was prevented by sufficient cause from producing such evidence which was called upon by the AO;
 - where the assessee was prevented by sufficient cause from producing evidence relevant to any ground of appeal; or
 - where the AO has made the order without providing sufficient opportunity to the assessee to adduce evidence relevant to any ground of appeal.
 - Documents available in public domain cannot be treated as additional evidence - **Jatia Investment Co. Vs. C.I.T.** (Calcutta High Court) 206 ITR 718

Hearing of appeal – Additional Enquiry

- Power to make further enquiry is different from the power to remand, as wherein the CIT(A) made the enquiry himself, cannot remand the case to the AO.
- CIT(A) can confirm, reduce, enhance, or annul the assessment by virtue of the powers conferred u/s 251.
- The CIT(A) can make further enquiries allowing the assessee to produce additional papers/ evidence, as provided under sub section (4) to section 250. The CIT(A) may either conduct the enquiry himself or either direct the AO to make further inquiry and report the results derived.
 - ✓ Jwaladutt Jiwankumar v. CWT (1974) 95 ITR 183 (Cal.)
 - ✓ Punjab Ice Factory & Cold Storage v CIT (1986) 160 ITR 761 (Pat)
 - ✓ CIT v. Jan Sampark Advertising and Marketing P Ltd. (2015) 375 ITR 373 (Del.)¹³

Hearing of appeal - Power of Enhancement - 251

- The CIT(A) is vested with the power to enhance the assessment.
 - **View I:** Appellate powers are not confined to the matters considered by the AO and, therefore, it is open to the CIT(A) to make addition relating to new sources of income not considered by the AO, since power of CIT(A) are co-terminus with those of the AO.
 - **View II:** Power of enhancement by CIT(A) is restricted to the sources of income subject matter of consideration by the AO [refer **Jagdish Narayan Sharma v. ITO :194 TTJ 825 (Jaipur Tri.); Hari Mohan Sharma v. ACIT: ITA No. 2953/Del/2018)**

Power of Enhancement- Penalty Sec 251

- **Power to enhance the quantum of penalty**: The CIT(A) has the power to enhance quantum of penalty imposed by the AO.
 - ✓ CIT v. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565 (Kar.)
 - ✓ Bhoomareddy Bros v. CIT (1987) 163 ITR 854 (Kar.)
 - ✓ CIT v. Lotte India Corporation Ltd. (2007) 290 ITR 248 (Mad.)
- If any enhancement / addition to income is made in appeal by CIT(A), then it is only the CIT(A) who can initiate the penalty proceedings under section 271 or 270A of the Act.

Power to set- aside

- CIT(A) has no power to set aside the assessment for fresh verification by the AO
- CIT(A) has to give finding on each ground of appeal raised by the assessee
- CIT(A) can, however, give findings on legal issue(s) involved and set aside the matter for verification and give effect to the finding of the CIT(A) on the answered question of law.
 - ✓ Addl. CIT v. Samad Carpet (P) Ltd.: 116 ITR 811 (All.)
 - ✓ ITO v. Kalyan Kumar Roy Trust: 75 ITD 36 (Cal.)(TM)
- CIT(A) can, however, remand the matter to the AO for verification of facts or conducting necessary enquiries and submitting its report for consideration and adjudication of matter by the CIT(A). [Section 250(4)]

Written submission and oral presentation before the CIT(A)

- The written submission to be presented before the CIT(A) must be a **detailed one**.
- **Ground wise explanation** of each issue contested in the appeal must be given.
- For each Ground the submission must have three components – **Facts , Finding and Argument**.
- Further, as far as possible each contention should be **supported by relevant evidence**.
- The evidence relied upon by the appellant must either be attached with the main submission in the form of Annexures or may be given as a separate **Paper Book**.
- In either case, **references of these evidences** should be given in the written submission.
- Other than relying on evidences, contentions can also be **supported with relevant case laws** of the Supreme Court or the jurisdictional High Court and ITAT.
- References made to the case laws should be to the point by stating proper citation and **reproducing relevant extracts of the judgement**.

Faceless Appeals

Faceless Appeals Faceless appeal provisions

250(6B) *The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of disposal of appeal by Commissioner (Appeals), so as to impart greater efficiency, transparency and accountability by—*

- (a) eliminating the interface between the Commissioner (Appeals) and the appellant in the course of appellate proceedings to the extent technologically feasible;*
- (b) optimising utilisation of the resources through economies of scale and functional specialisation;*
- (c) introducing an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more Commissioner (Appeals).*

250(6C) *The Central Government may, for the purposes of giving effect to the scheme made under sub-section (6B), by notification in the Official Gazette, direct that any of the provisions of this Act relating to jurisdiction and procedure for disposal of appeals by Commissioner (Appeals) shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:*

Provided that no direction shall be issued after the 31st day of March, 2022. 250(6D)

Every notification issued under sub-section (6B) and sub-section (6C) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.

Faceless Appeals

- As per the power conferred u/s 250 (6B) and 250 (6C) of the Income Tax Act, 1961, the MoF, through CBDT launched Faceless Appeal Scheme, 2020 on 25th Sept. 2020
- The said Scheme has been superseded by notification number 139/2021 dated 28th December 2021.
- CBDT order dated April 7, 2021 - Faceless Scheme applies to **only Income-tax Law and no other Direct tax Acts** including Wealth-tax Act, Interest tax Act, Equalisation Levy , Securities Transactions Tax, Commodities Transaction Tax, Gift tax Act
- CBDT press release dated Sept 25, 2020 - Appeals not covered under the scheme:
 - Appeals relating to serious frauds
 - Major tax evasion,
 - Search matters
 - International tax
 - Black Money Act

Composition of NFAC

National Faceless Appeal Centre (NFAC) headed by Pr.CIT)

- To facilitate the conduct of e-appeal proceedings in a centralised manner

Regional Appeal Centre (RFAC) (headed by CCIT)

- To facilitate the conduct of e-appeal proceedings having jurisdiction to dispose appeal
- Four RFAC are established at Delhi, Mumbai ,Chennai and Kolkata

Repealed

Appeal Units (one or more CIT(A)s and other income-tax authority, staff etc)

- To facilitate the conduct of e-appeal proceedings
- Admission of additional grounds of appeal
- Making further inquiries
- Directing the NeAC or the AO for making further inquiry
- Seeking information or clarification on admitted grounds of appeal
- Providing opportunity of being heard to the taxpayer
- Analysis of the material furnished by the taxpayer
- Review of draft order

Faceless Appeal Scheme 2021

CBDT v. Lakshya Budhiraja – SC [2021] - grant of opportunity of hearing to all taxpayers/assessee and to hold that the same should not be at the discretion of the Chief Commissioner [RFAC] the Faceless Appeal Scheme, 2020.

Amendments brought about in FAS 2021:

- Personal Hearing allowed to the appellant on request
- No Draft appeal order
- Imitation of Penalty Proceeding by the same Commissioner (Appeals)
- No Regional Faceless Appeal unit
- Appeal unit shall have only one Commissioner (Appeals)

Alternative Dispute Resolution

- **DRP Section 144C** : There is an alternative dispute resolution mechanism for **foreign companies/Non residents** or cases involving **transfer pricing adjustments** or international taxation matters, in the form of a Dispute Resolution Panel(DRP), to which an application can be filed by the taxpayer on receipt of a draft assessment order
- **Authority for Advance Ruling:** A foreign company or any taxpayer intending to enter into an international transaction, may approach the Authority for Advance Ruling(AAR) for obtaining final ruling on an issue, before the dispute arises.
- **Revision by Commissioner of Income Tax u/s. 264** : The option for revision may be preferred, if the appeal is not filed or it has become time barred for filing. However, after filing an appeal before CIT(A), application for revision cannot be made to CIT or vice versa



THANK YOU

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