PRESENTATION ON:

DRAFTING & FILING OF APPEAL

BEFORE CIT (APPEALS)

Organized by

The Hyderabad Branch of SIRC of ICAI

On 12th June, 2021

Speaker: HARI AGARWAL, FCA

PART A: DRAFTING OF APPEAL

DRAFTING - SYNOPSIS

S.NO. PARTICULARS

- 1. Introduction
- 2. Whilst the Assessment is pending before the Assessing Officer
- 3. Once the Assessment Order is passed
- 4. Appealable Orders
- 5. Basics and Checklist before Drafting Appeal
- 6. Essentials while Drafting
- 7. Drafting the Statement of Facts
- 8. Drafting the Grounds of Appeal

DRAFTING - SYNOPSIS

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10.	Paper book
11.	Condonation of Delay
12.	Filing Additional Evidence
13.	Raising Additional Grounds
14.	Written Submissions
15.	Powers of CIT(A) - Section 251
16.	Issues

1. INTRODUCTION

2. Whilst the assessment is pending before AO

Before the AO frames the assessment **vide a formal order**, assessee may check compliance with the following points:

Whether all notices have been duly complied with -

If not, there is still time left for compliance

▶ Obtain all statements, evidence, recorded reasons etc.
which the AO has sought to use against the assessee
if not already obtained – A letter requesting these
details may be written to the AO

> Even if the *AO has not confronted the assessee* with any statement, evidence etc. but the *assessee suspects* that some material could be used against it, a precautionary *letter* may be written *to the AO requesting* him to *provide* such material should the AO choose to rely on the same in framing the assessment

Request the AO to provide an opportunity of cross-examination of persons whose statements have been referred to by the AO during assessment proceedings, if not already asked for

- Any evidence, reports or other material which could substantiate assessee's case may be filed, if not already filed
 - Every effort must be made to do away the need for filing additional evidence before the CIT (A). Filing of additional evidence before the CIT (A) results in delay in completion of appellate proceedings

If the AO has sought to secure from the assesse, attendance of any third party and in spite of assessee's best efforts, he is unable to do so, inform the AO of this fact and request him to issue summons to the said party - It may be noted that as a private party, assessee cannot enforce attendance of any other party before the AO while the AO has statutory powers to do so -Refer Chempure v. ITO [2010] 40 SOT 164 (Mum.)

If statement of assessee or his director, employee etc. has been *given under ignorance of facts or law* and has been recorded by AO during assessment proceedings, consider filing a proper clarification to the statement – This should be done only after considering all implications under the Act and under general law

Check if statutory notices had been issued/ served **properly** and **within time** – **If not, an objection** to this effect may be raised before completion of assessment **proceedings**, if not already raised. As per section **292BB** of the Act, certain objections cannot be raised unless taken before completion of assessment proceedings

In case of penalty proceedings, file explanation regarding the stand taken by the assessee and demonstrate how the same though not accepted by the Revenue, was bona fide. The sustainability of penalty to a large extent, depends on the explanation of the assessee and its substantiation

3. Once assessment order is passed – Filing of appeal before CIT (A)

Once the assessment order is passed by the AO, an assessee can file an appeal with the CIT (A) under section 246A of the Act.

However, *before filing the appeal*, assessee must *consider the pros* and cons of filing the appeal. This is because CIT (A) has powers of enhancement and the entire assessment proceedings are open before him.

CIT v. Sakseria Cotton Mills Limited [1980] 124 ITR 570 (Bom.): The entire assessment proceedings are open before the CIT (A). Furthermore, an appeal once filed cannot be withdrawn at the instance of the assessee. On the other hand, the appellate authority in its discretion may allow withdrawal of appeal and dismiss the same as not pressed.

CIT v. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC): Once filed, an appeal before CIT (A) cannot be withdrawn by the assessee.

In case the *assessee decides not to file an appeal*, it is *advisable that the tax demanded be paid expeditiously within the time allowed*.

If the assessee decides not to file an appeal owing to smallness of tax amount, but does not agree with the tax demand in-principle, assessee should file a letter with the AO clearly stating this fact.

Though res judicata is not applicable to income-tax proceedings, this pre-emptive measure should preclude the Revenue from alleging acquiescence on part of the assessee should the assessee decide to challenge an assessment order in a subsequent year on the same ground.

4. Appealable Orders (Section 246A)

5. Basics and Check list before drafting

> Drafting of appeals is an Art.

> Check whether *appeal lies or not.*

Do not file frivolous appeals.

Carefully study the appealable orders and

find anamolies and differences from facts

Ascertain the *authority before whom* appeal lies.

Ascertain the *limitation period* within which *appeal is to be filed*.

Check *computation of income* and *tax* and *interest* computation thereof.

Hairsplit which errors are to be appealed and which errors are required to be rectified.

6. Essentials while drafting

Appeal against penalty can be filed even if appeal not filed against the assessment order.

Ensure whether *authority passing the order*

had jurisdiction to pass the order.

Ensure whether assessment/appeal order was passed within limitation period.

Note that whether any claim had remained to

be raised - fresh plea can be raised

Ensure that *fees for appeal* is *paid* under the appropriate head and sub head.

ESSENTIALS WHILE DRAFTING contd...

Certified copy of challan evidencing payment of appeal to be filed.

7. Points to be taken care in drafting statement of facts (SOF)

> SOF should be *descriptive* and *detailed*.

> Should *not* be *argumentative*.

Ensure to add only those facts which are disclosed in the assessment proceedings.

SOF should be *just facts and not be turned in submissions*.

Add every minute details and facts
with dates and sequence of how it
happened in earlier proceedings.

> Basic details should be always given

like ROI filed date, returned income,

heads of income, about the assessee.

Chronological,

Comprehensive and

Complete

8. Points to be taken care in drafting grounds

Grounds should be precise, concise, simple and without any ambiguity.

Should be *wide and not restrictive*.

Should not be argumentative.

> Avoid multiple grounds for single issue

unless every ground is distinct.

Always add prayer at the end with specific requests.

Last ground should be to grant leave to add, amend, withdraw any ground.

Never add decisions to grounds unless absolutely essential.

Use of clear and simple language and avoid jargons.

Nature of dispute and relief

expected should be highlighted.

> Expected relief should be clearly mentioned.

In case of more than one issue involved,

preference of grounds should be decided.

> Avoid using long sentences.

In case of *opportunity of being heard not granted*, the same should be *clearly taken in grounds*.

Decide *order* in which grounds should appear.

All grounds need to be adjudicated in the order so as to ensure that the grounds are not repetitive or too many.

Read order carefully to take hidden grounds.

9. Some types of grounds

> Technical Grounds

Challenging Jurisdiction Grounds

Natural Justice Grounds

Legal Grounds based on merits of the case

Alternate Grounds/Without Prejudice Grounds

Consequential Grounds

Additional Grounds (section 250(5))

10. PAPER BOOK

10.1. Preparation of PAPER BOOK

Paper book – *all notices, replies, papers*,

documents and communications between

assessee and AO.

Arranged in *Chronological order*.

> Index - relevance, page numbers.

Certify that all the said papers are available on the file of AO. The paper book does not contain any fresh evidence.

> Signature of Assessee on each paper.

10.2. Proforma of Index of Paper Book

BEFORE THE COMMISSIONER OF INCOME-TAX (APPEALS) — (NO.), (PLACE) IN THE CASE OF

(NAME OF THE ASSESSEE)

(ADDRESS OF THE ASSESSEE)

<u>PAN - ()</u>

ASSESSMENT YEAR ()

APPEAL NO. ()

PAPER BOOK

INDEX

S.NO.	Description	Page No.	
		From	То
1.			
2.			

CERTIFICATE

This is to certify that all the enclosures to the Indexed Statements have been filed before the Assessing Officer. They do not contain any additional evidence or fresh evidence not filed before the Assessing Officer.

*

11. Condonation for delay in filing of Appeal

- Explaining delay day-by-day.
- Section 249(3) Power of CIT to admit belated appeal.
- Refusal of Condonation of delay Speaking order.
- No Condonation of delay for negligence and inaction.

11.1. Delay in filing appeals – Manner of filing application for condonation of delay

The appeal must be filed in *Form No. 35* and as per *section 249(2)* of the Act, *within 30 days of service of notice of demand*. It is important to note that the period of limitation starts from the date of such service.

Therefore, *even if any application* under *section 154* of the Act *for rectification is pending before the AO*, assessee must *not wait for its disposal* before filing the appeal with the CIT (A).

Section 249(3) gives power to the CIT (A) to admit a belated appeal, if there is sufficient cause for the delay.

In case of delay in filing the appeal, the appeal should be filed along with an application for condonation of delay explaining delay day-by-day [refer: Soorajmull Nagarmal v. Golden Fibre and Products AIR 1969 Cal 381] along with supporting evidence, if any, such as affidavit, doctor's certificate, etc.

Care must be taken to explain the delay right from the date of expiry of the period of limitation till the date of actual filing of the appeal.

12. Additional Evidence - Rule 46A

Production of Additional Evidence under Rule 46A

Where the AO has refused to admit evidence which ought to have been admitted.

ADDITIONAL EVIDENCE contd...

Where the appellant was prevented by sufficient cause from

producing the evidence:

- Which he was called upon to produce by the AO.
- Which is relevant to any ground of appeal.

ADDITIONAL EVIDENCE contd...

When AO has passed order without giving sufficient opportunity to the appellant for producing additional evidence relating to the grounds.

13. Raising Additional Grounds

ADDITIONAL GROUNDS contd...

During the course of appeal, the *Commissioner of Income-tax (Appeals) may allow the taxpayer to go into additional grounds of appeal*.

ADDITIONAL GROUNDS contd...

However, additional grounds will be accepted only if the Commissioner of Income-tax (Appeals) is satisfied that omission of these grounds from the form of appeal was not willful or unreasonable.

14. Written Submissions

Ground wise - separately explained in detail.

Numbered and indexed.

Font size - 12 to 14

and

Line Spacing - 1.5 to 2.0

First preference to facts, then to law.

Submit a soft copy.

Copy of the Case laws on which the appellant

is relying should be cited.

The *case laws* which the appellant want to cite should not be taken into consideration only by reading the GIST/ Head note/ Conclusion, the full judgment of the case law should be read.

Ensure that the appellant must check the *latest*position of the order similar to this case and a copy of it should be enclosed and duly indexed.

The *case laws* on which the reliance was placed by the AO must be *distinguished case wise*.

The *facts* of the case must be *specifically* distinguished para wise.

> To confirm, reduce, enhance or annul the assessment.

> To reduce or enhance the penalty amount.

The CIT(A) shall not enhance or reduce an assessment or a penalty unless appellant had reasonable opportunity of cause against such.

As per circular dated 01.06.2001, CIT(A) cannot set aside the appeal. CIT(A) can remand the case to the AO for enquiry of the matters which were not the subject matter of appeal.

Consolidated Order:

The appellate authority can pass a consolidated order

for appeals of different years.

No Power to challenge:

Appellate authority's decision *cannot be challenged*

after the appeal is decided.

Appellate decision must be supported by reasons:

- It shall *state* the *facts, points for determination* and the *reasons for the decision*.
- Decision must be firm and should not be vague and unclear.

Tax due on returned income

Must be *paid on income returned before appeal*

Examination of all matters covered by the assessment order and correct the assessment in all respects.

The scope of the powers of the appellate authority is coterminous with that of the Assessing Officer.

No new sources can be examined.

Power of enhancement need not be a suo-moto action.

It can be based on the information furnished by the AO.

In response to such enhancement, the appellant must be given reasonable opportunity in showing cause against such assessment.

A reasonable hearing means that the authority should point out the issue of enhancement and then allow some reasonable period so that the assessee can check factual and legal position and make a proper representation as to why enhancement is not required.

Whether or not the appellant was given a reasonable opportunity to show cause, is a question of fact. Merely because the assessee was represented before the CIT(A), the CIT(A) cannot say that it is not necessary to issue notice before enhancement. The issuance of notice and specific opportunity is pre-condition laid down in the enhancement.

Neither the AO nor the appellate authority have right to change the status of an assessee in reassessment proceedings.

16. Issues

1. Can CIT(A) discover new source of income?

Ans: CIT(A) *cannot* discover new source of income.

[CIT v. Sardari Lal & Co. [2001] 251 ITR 864/ [2002] 120 Taxman 595(Delhi)(FB)]

2. Is it Possible to dismiss appeal because of defect in Memo of Appeal?

Ans: Appeal *cannot* be dismissed because of defect in memorandum of appeal. Appellate commissioner may cure irregularity regarding signature.

[Shilpa Associates v. ITO [2003] 263 ITR 317(Raj)]

3. Is it possible to recall ex- parte order?

Ans: CIT(A) can recall ex- parte order passed by him.

4. Does CIT(A) has power to reject books of accounts?

Ans: CIT(A) *has the power to reject* assessee's books *even if it is accepted by AO.*

[CIT v. Mcmillan & Co. [1958] 33 ITR 182(SC)]

5. Addition which had been upheld in appeal against the original assessment cannot be made subject matter of appeal by the assessee against the order of reassessment.

[CIT v. V.N.A.S Chandran [2003] 130 Taxmann 618 (Mad)]

6. Appeal does not lie against agreed addition.

[Pawn Construction v. ITO [2001] 78 ITD 176 (Rajkot)]

CONCLUSION

Questions and Answers

Presented by:

HARI AGARWAL & ASSOCIATES

Chartered Accountants

Basheer Bagh office: 5-9-58/304, Gupta Estate, Basheer Bagh

circle, Hyderabad, 500 004

Jubilee Hills office: No. 214, Second floor, Westend mall,

Road No.36, Jubilee hills, Hyderabad, 500 033

Email: cahariagarwal@yahoo.in

Website: www.hariagarwalfca.com

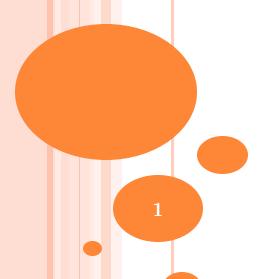
Ph: 040-23299778

Cell: 9848092761

THANK YOU

Virtual CPE Course

DRAFTING AND REPRESENTATION BEFORE AUTHORITIES



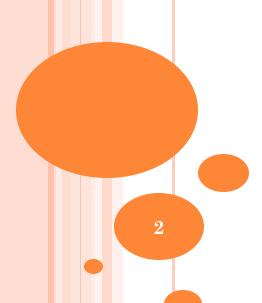
How to

Research & Analyse Case Laws and

Apply the same in

Representing matters before the

Income-Tax Authorities

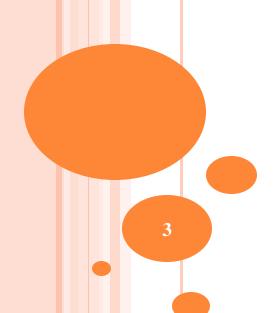


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SYNOPSIS

- Need for this topic
- Suggested Study Material
- > Time Management for Regular updates
- Steps in Research & Analysis
- How to identify the issue
- Validity of Notices, Letters
- > How to search for the most relevant case laws
- > Precautions before relying on any case law
- Questions & Answers

INTRODUCTION

Need for this topic

Monitor the case,

right from Assessment stage

Presently CIT(Appeals)

Faceless - hearings

Good Opportunity for younger CAs

Can Do LLB Course for further

Knowledge and Growth

TIME MANAGEMENT FOR REGULAR UPDATES

• Work for 6 hours

Study for 2 hours

On Regular Basis

Research of case law is like a solution finder

For this –

Firstly **Identify the issue** of the case

Research of case law is like a solution finder (Contd...)

Secondly Investigate the issue of the case

Research of case law is like a solution finder (Contd...)

Finally Treat and Solve the issue of the case

*Suggested Study Material

* Circulars

Continues.....

Study Material (Contd...)

* Notifications

Study Material (Contd...)

* Frequently Asked Questions (FAQs)

Study Material (Contd...)

* Finance Bill of the Relevant

Amendment

Study Material (Contd...)

* Finance Minister's Speech

***Study Material (Contd...)**

* Memorandum to Finance Bill

Facts of the Case

are

Very Important

Study the facts of the case - Thoroughly

- Nature of Business Activity
- Method of Operation
- Method of Accounting
- Maintenance of Records
- Computation of Income
- Audit Report
- o ITR Form
- Statutory Compliances
- Compliances to Intimation, Letters, Notices,
 Summons etc..

Identifying an issue involved in the case.

On Facts

Continues.....

On Law

On Procedures Followed Properly

or Not

On Jurisdiction – Whether Correct

or Not

Whether Proper Approvals from Superior
 Authorities were obtained or Not

Timely obtained or Not

Validity of

Notices,

Letters,

Assessment orders etc

• Whether Notices etc.. were Issued within the prescribed Limitation of Time ?

• Limitation of Service of Notices, etc?

Continues.....

• Limitation of time in completing the proceedings followed?

Check validity of Notices, Intimations, Assessment orders, etc...

Check validity of notices w.r.t. Date, Time, Period, PAN,
 Name, Status of the Assessee, Sign of AO, Jurisdiction,
 approvals etc

Check validity of Notices, Intimations, Assessment orders, etc... (Contd...)

You will get Mistakes Occurred on Legal Points Check validity of Notices, Intimations, Assessment orders, etc... (Contd...)

Check Sec 292BB, Validity of
 Service of Notices, etc...

Continues.....

Check validity of Notices, Intimations, Assessment orders, etc... (Contd...)

Assessment Procedure followed properly or not

Thorough Analysis of Assessment order

Read the Assessment order thoroughly –

write para wise remarks

Analysis of Assessment order (Contd...)

o Distinguish the cases mentioned by

AO on Law & Facts

How to Search for the Most Relevant Case Laws

 Most common method of searching case laws on a subject are "Journals, Digests and Commentaries. Journals are weekly and

Give: Case wise, Section wise, Subject wise-Case Laws, Circulars, Notifications, Articles, News, etc...

o Digest summarizes the main points of the case.

Subject indexes can be used which are

given at the end of the Commentaries.

• Databases are available both

Online and on CD-ROM.

Few Major online research sites available without subscription fees include

www.itatonline.org

www.indiakanoon.org

*With subscription fees include

- Taxmann,
- CCH,
- Tax Publisher,
- ITR,
- CTR,
- Tax Sutra...etc.

We can Search and Refine case laws by using:

* Name of the Appellant or Respondent

* Section wise

* Reporting Year wise

* Citation wise - of each Journal

* Court Wise/Bench Wise

* In favour of Assessee / Against Assessee/
Set Aside/ Partially Allowed

- Date Wise
- Most Recent Wise
- During Specified Period
- After a particular Date, etc...

- Subject Wise
- Phrase Wise
- Exact Words
- Any words
- Under

Catch note / Full text/ Conclusion.....

 Name of the Judge of High court or Supreme court

ITAT Member Wise

Name of the Authorised Representative

We can **Search and Refine** case laws: (Contd...)

- Advanced Search /
- Combined Search/
- Composite Search with multiple options

We have an option of

Further Refining our search

with different options to

Search Identical Cases

 Case citation to be mentioned along with
 the Name of the Case

Before Relying on the Case laws

o To be careful while Purely relying on

ITAT and Court cases, the same may get

reversed in future

• Read thoroughly the full text of case law before relying/quoting

Continues.....

Quote only Appropriate cases

Continues.....

• Instead adopt the contentions of similar cases argued by AR as our own contention

Search cases both on Law & Facts

Continues.....

• Read Allied laws cases like - transfer - Sec 53A of The Transfer of Properties Act etc..

Create own Library

 Regular Reading of Daily mails relating to Caselaws, Circulars & Notifications.

Notings in word file -Year wise − Ctrl+F

Suggested Order of Preference in quoting or relying on case laws

- 1. Supreme Court
- 2. Jurisdictional High Court
- 3. Other High Courts
- 4. Jurisdictional ITAT
- 5. Other ITAT

Suggested Sequence for mentioning the case laws in Written Submissions

- Ground of Appeal
- Reproduce the contention of AO from Assmt. order
- Distinguish the contention of AO Specifically
- Make our Submissions with Clarity

Suggested Sequence for mentioning the case laws in Written Submissions (Contd...)

- Cite Appropriate Case Laws
 - (i) Reproduce extract in Italics
 - (ii) Leave more margin both sides
 - (iii) Wherever emphasis is supplied mention that
- \circ Use easily readable Font 12-14 Size with $1^{1}/_{2}$ Space
- Specify para numbers properly
- Use only one side of paper

In High Stake Cases and Complicated Cases

- Obtain Written Opinion of Experts in the field,
- AR of Identical case
- Work as a team

QUESTIONS AND

ANSWERS

Presented by:

HARI AGARWAL & ASSOCIATES

Chartered Accountants

Basheer Bagh office: 5-9-58/304, Gupta Estate, Basheer Bagh circle, Hyderabad, 500 004

Jubilee Hills office: No. 214, Second floor, Westend mall, Road No.36, Jubilee hills,

Hyderabad, 500 033

Email: cahariagarwal@yahoo.in

Website: www.hariagarwalfca.com

Ph: 040-23299778

Cell: 9848092761

THANK YOU