

How to Prepare and Present before ITAT

Presentation by :

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OBJECT/SCOPE

***To deliberate and discuss the
Representation before ITAT and Issues
related thereto***

Statutory Provisions

Income Tax Act, 1961 – Provisions of Section 252; 253; 254 and 255

ITAT Rules, 1963 made under Section 255(5)

Importance of Appeal before ITAT

- ITAT- Final Fact Finding Authority
- Quick Fixation of Appeals (New Procedure supplemented it- acknowledgement containing 1st appeal date/bench etc) & More time lag for appeal disposal at High Court as compared to ITAT....
- If Concurrent finding of fact by Two appellate authorities CIT-A &ITAT- matter virtually closed for HC/SC (except on law and SC wide Powers under Article 136 of Indian Constitution -SLP)- SC in P.Mohankala 291 ITR 278
- Limited appeal from ITAT orders on Substantial Question of law.... Section 260A....
..... Therefore Proper Preparation Required

Nature of Proceedings before ITAT: Golden Words ONGC ITAT Ruling

- We need to notice one more aspect of the matter. **The proceedings before the Tribunal are not adversarial in nature; there is no lis between the department and the assessee in the sense of a civil litigation** between private parties. It is only an adjustment of the tax liability of the assessee. **Article 265** of the Constitution of India says that no tax shall be levied upon the citizens except by the authority of the law. A combination of these principles should govern the functioning of the Tribunal....**117 TTJ 318 (PER HON'BLE SH R.V.EASWER)**

Nature of Proceedings before ITAT: Golden Words ONGC ITAT Ruling

- These observations were no doubt made with reference to section 154 of the Act (similar to section 35 of the 1922 Act) but the same principles, in our humble opinion, should govern the provisions of section 254(2) also, not only because similar language has been employed in the latter but also **because the appeal to the Tribunal is only a continuation of the assessment proceedings. In fact this aspect of the matter has been highlighted by the Kerala High Court in the case cited by Mr. Vohra where the court observed, after referring to the observations of the Supreme Court in CIT v Mahalaxmi Sugar Mills Co. Ltd (1986) 160 ITR 920, that the principle laid down by the Supreme Court was equally applicable to the authorities other than the ITO working under the Act and on that basis held that even the Tribunal was bound to rectify its order by advertizing to a statutory provision though it was not raised in the course of the arguments before it ..117 TTJ 318**

Principles relating to ITAT in Ruling of Shahid Atiq 97 ITD 22

27. On examination of the scope of jurisdiction of Income-tax Appellate Tribunal in deciding the appeals and miscellaneous applications under sections 254(1) and 254(2) of the Act and on the analytical appreciation of the propositions laid down in various decisions in relation to the powers of the Tribunal referred to above, we can cull out the following postulates:

- (1) The power of Tribunal as defined under section 254(1) has been expressed in widest terms as the Tribunal can pass such orders as it thinks fit' on the subject-matter of appeal before it.
- (2) **In hearing and deciding the appeal, the Tribunal is not prevented from considering questions of law arising in assessment proceedings although not raised earlier.**
- (3) **The process of appeal before ITAT is part of integrated process of assessment and, therefore, the powers of Tribunal are co-extensive with the powers of Assessing Officer and that of CIT (A) subject to the limitation that ITAT cannot enhance the assessed income -Hukamchand Mills Ltd. v. CIT[1967] 63 ITR 232 (SC) – LATEST SC IN MCORP ETC**
- (4) **The Tribunal has also incidental and ancillary powers for doing such acts as are reasonably necessary in exercise of powers granted by the Act - Union of India v. Paras Laminates (P.) Ltd. [1990] 186 ITR 722 (SC).**

Principles relating to ITAT in Ruling of Shahid Atiq

...(5) The subject-matter of an appeal before Income Tax Appellate Tribunal encompasses the entire controversy between parties which is sought to be got adjudicated upon by the Tribunal - Ahmedabad Electricity Co. Ltd. v. CIT [1993] 199 ITR 351' (Bom.) .(FB).

(6) **The subject-matter of appeal is the relief sought by the appellant and objected to by the respondent. It is not proper to circumscribe the subject-matter of appeal by taking into account the rival submissions or the reasons or grounds which are put forward by the parties - CIT v. Sundaram and Co. (P.) Ltd. [1963] 50 ITR 35 (Mad.) (Sh. N).**

(7) While exercising its rectificatory powers under section 254(2) of the Income-tax Act, the Tribunal has no power to review its earlier order [see proviso to Rule 34A of Appellate Tribunal Rules, 1963 and decision of Hon'ble Delhi High Court in the case of CIT v. Vich tra Construction (P.) Ltd. [2004] 269 ITR 371 (Delhi)]. - denied by SC in Honda Siel 295 ITR 466 and Dhiraj Suri 179 CTR 265

(8) The Tribunal can recall its order passed ex parte [See Rule 24 of Appellate Tribunal Rules, 1963 and decision of Hon'ble M.P. High Court in the case of Estate of Late Tukoji Rao Holkar v. CWT [1997] 223 ITR 480].

(9) The power to rectify mistake can be exercised suomotu by Tribunal or on the notice of parties.

Principles relating to ITAT in Ruling of Shahid Atiq

(10) It is a mistake apparent on record, if the Tribunal has omitted to consider a ground of appeal taken before it or if it has failed to pass such order or to issue such directions which were necessary for proper adjudication of subject-matter of appeal, even if the assessee/or Revenue has not requested for such a direction by filing cross appeal or cross-objections.

(11) **Without recalling or reviewing the order, on issues already adjudicated by the Tribunal, the omission or error on the part of ITAT can be corrected or rectified by amending and adding something to it without subtracting anything from the main order.**

(12) There is legal obligation on the part of ITAT to rectify errors committed by the authorities below even if neither party objects to such mistake. Such obligation can be discharged by exercising jurisdiction suo motu also - Kapurchand Shrimalv. CIT[1981] 131 ITR 451 (SC).

(13) If a mistake is found in the order of ITAT, then such mistake can be rectified by amending the order in the course of deciding the miscellaneous application itself and the order of ITAT need not be recalled for this purpose.

(14) A mistake arising as a result of subsequent interpretation of law by Hon'ble Supreme Court and of Hon'ble Jurisdictional High Court, would constitute a mistake apparent from the records and rectifications action under section 254(2) of Income-tax Act would be in order.

ITAT – Historical Perspective

- Established on 25/1/1941 on recommendations of Enquiry Committee
- Section 5A Income Tax Act of 1922 Dealt with same
- MOTTO- SULABH NYAY AND SATWAR NYAY
- One President; One Sr Vice President and Vice Presidents of Zones
- Judicial (can be if fulfills conditions specified): Advocate; Indian Legal Service Employee etc
Accountant Members (can be if fulfills conditions specified): CA; Indian Income Tax Service Employee etc

Basic Points- ITAT Functioning

- ITAT One – No. of Benches are there
- Generally Two Members /Division Bench hears the case (except Single Member Cases/SMC (Assessed income < INR 5lac), Special Bench and Third Member cases)
- One Member – Accountant Member & Other one Judicial Member
- AR'S and DR's: (Sr. DR and CIT-DR; Special Counsels etc)
- Weekly **Constitution** IN Advance
- Cause List & Friday **Pronouncement**
- **Stay Applications listed on Friday**

Basic Points- ITAT Functioning

- Bench Clerk with Every Bench; and Separate Receiving Clerk's with DR's of Respective Bench
- Filing with Registry of the Bench : Appeals & Paper Book (without court leave) etc (In Delhi 6th Floor Lok Nayak Bhawan Khan Market; Court Room and Bar at 10/11th Floor of Lok Nayak Bhawan)
- *Roll Call of Hearing:*
 - *Adjournments*
 - *Covered Matters/ Mentions (Paper Book Filing etc)*
 - *Regular Hearing of Other matters*

Basic Things to be kept in Mind for ITAT Hearing

- AR's Observe Dress Regulations : Butttoned Up Coat (preferably black) or Suit with Tie....(Lawyers can observe their Dress Regulations) (Female Black coat over white/other sober coloured saree) Rule 17A ITAT Rules
- Letter of Authority Rule 17/16 (no POA to firm/legal body- should be either to Individual/Joint Names)
- Extremely important to study the CIT-A order thoroughly and prepare on factual and legal aspect as discussed by CIT-A

Basic Things to be kept in Mind for ITAT Hearing

- 4 Copies of rulings relied if same are not reported in ITD/ITR (ONE SIDE PRINTS)
- Advisable to have separate set of papers involved in appeal : ITR/ROI; Assessment Order and Submissions before AO; CIT-A Grounds/Facts; CIT-A order; ITAT Grounds of Appeal – for ready reference at time of hearing; Study on recurring issue- earlier and subsequent orders 143(1)/143(3)/Past history
- Fully prepared with latest jurisprudence on relevant subject as ITAT members are extremely well versed with latest in law

Basic Things to be kept in Mind for ITAT Hearing

- Brief Written Synopsis a) Containing Para No/Page No of AO/CIT-A order with relevant observations and b) brief submissions before ITAT
- **BOTH ORAL AND WRITTEN ARGUMENTS CAN BE MADE-**
- a) helpful for drafting the final orders specially where large no of grounds are involved b) ensuring that arguments taken are well considered
- Carry ICARD ICAI/ITAT Bar/Bar Council for Entry in Lok Navak Bhawan

Basic Things to be kept in Mind for ITAT Hearing

- Make short notes for arguments in hearing so as to avoid skipping any one
- If Possible and required, one may have Assessee's Attendance during ITAT hearing (complex facts involved)
- On case laws relied by AO: Have their distinguishing case laws/material
- Be fair in inviting attention of court to adverse decisions
- Thorough knowledge of facts and prompt answer to queries of bench (appeal effect status)

Basic Things to be kept in Mind for ITAT Hearing

- Prior Discussion with Clients on critical points and instructions to be made etc
- Learn about Members hearing the case

Snapshot of Appeal at ITAT

Particulars	Appeal Before ITAT
Appealable Orders Section 253(1)	Assessee/Revenue: CIT-A order u/s 250;154;271 etc + by Assessee: CIT orders u/s 263; 12AA;80G(5); 271 etc
Cross Objections can be filed by respondent (CO)	
Time Limit	Appeal: 60 days; 30 days for CO filing (delay condonable)
Prescribed Form	Form No 36/36A(Rule 47)
Fees Payable (for income less than 1lac; 2lac and above it resp.)	500,1000,1%/10,000 maximum (as the case may be; general INR 500) ¹⁸

Snapshot of Appeal at ITAT

Particulars	Appeal Before ITAT
Documents with Appeal <u>Refer Rule 9 of ITAT Rules</u> -Certified copy can be marked by Appellant/ Authorized Representative -Only AO can file appeal for revenue, as directed by CIT concerned refer- section 253(2)	<u>TriPLICATE: Form No 36</u> <u>Grounds of Appeal &</u> <u>Form of Verification Section 140 & Two Certified Sets of</u> a) Order appealed against b) AO's order c) GOA/SOF before CIT-A d) Penalty Appeal: Assessment order copies e) Reasst: Original 143(3)

Filing fees for Appeal at ITAT

- It has been held that in case of appeals filed before tribunal disputing all types of penalties including penalty for concealment u/s 271(1)(c), the filing fee is Rs. 500.

Dr.Ashokkumar Pandey v. ITAT (310 ITR 195) (Pat)

Filing Fees for Appeal at ITAT

Filing Fee for appeal to ITAT in 'assessed loss' cases is Rs 500:

- *The assessee, having been assessed to a loss of Rs. 9 crores, filed an appeal before the Tribunal. S. 253 (6) provides that if the assessed 'total income' is "less" than Rs. 1 lakh, a fee of Rs. 500 for filing the appeal is payable while if the income is "more", a higher fee is payable subject to a maximum of Rs. 10,000. The Tribunal took the view that if the loss was more than Rs.1 lakh, the total income would be more than Rs.1 lakh(although negative) and a higher fee was payable on the basis that the object behind s. 253(6) was that big cases involving income of more than a particular figure, positive or negative, required more time and effort of the Tribunal to deal with and as the nature of fees was compensatory, a higher fee for a bigger case would be in consonance with the object.*

Signing of Appeal : Defect in Appeal Memo etc at ITAT

Even if there is an error or irregularity in appeal memo- appeal cannot be dismissed in liminie and appellant has to be given opportunity to rectify defect **(also refer 12 of ITAT Rules: ITAT empowered to return defective appeal memo for rectification)**

Refer:

- a) Mad HC in 45 ITR 407
- b) Pat HC in 12 ITR 59; 37 ITR 220; 39 ITR 414
- c) Orissa HC in 95 ITR 113
- d) Cal HC in 33 ITR 591
- e) BHC in 252 ITR 670 – PROCEDURES ARE HANDMAID OF JUSTICE AND TECHNICALITY MUST NOT COME IN WAY OF JUSTICE

Bombay Bench of ITAT in 9 ITD 93 & Gau HC in 213 ITR 715 held Appeal signed by CA/Advocate valid

Grounds of Appeal- ITAT Rule 8

Grounds of Appeal shall be set forth

- Concisely;***
- Under Distinct HEADS;***
- Without any argument;***
- Without being narrative; and***
- Numbered Consecutively***

Grounds of Appeal should be limited to grounds of challenge to Impugned order and should include all issues which the appellant wants to agitate before ITAT (***those not arising out of lower authorities orders being raised for First Time should be mentioned Separately***)

As per Rule 11- ITAT empowered to admit Additional GROUNDS

Additional Grounds of Appeal- ITAT Rule 11

Under Rule 11; Additional Ground can be taken by leave of ITAT by Appellant, not originally taken in Appeal Memo

As per Court verdicts Additional Grounds can be taken orally AT the time of hearing refer:

- Gaub HC in 223 ITR 173
- Gau HC in 224 ITR 57 (however practice differs....written application required)

SC in NTPC 229 ITR 383 : ITAT empowered to allow appellant to take new ground even though same do not arise out of impugned order/s And are raised for 1st time: eg Limitation Ground/ Jurisdictional Ground for Bad Service of Jurisdictional 143(2)/148 notice etc

Condonation of Delay in Appeal Filing

- Principles for condonation: Refer SC in 167 ITR 471 (Pragmatic and Justice Oriented approach required) – Judiciary is not respected for legalising injustice on technical grounds but for being capable of removing injustice....
- Every Day's delay must be explained does not mean that pedantic approach should be made. Why not every hour's delay, why not every second's delay? The doctrine must be applied in rational manner
- As against dismissal of appeal for delay, when delay is condoned the highest that could happen is that a cause is decided on merits after hearing the parties

Condonation of Delay in Appeal Filing

- Application well in advance before hearing in writing to placed on record with necessary affidavit and documentary evidence.....ITAT Mumbai Instruction 76 ITR Journal Section 1 (1970)
- Subsequent decision of Supreme Court/High Court is sufficient cause for condoning delay in appeal filing 159 ITR 59
- Latest P&H High Court Ruling in Poonam Industries ITA 625/2007: while allowing assessee's appeal and reversing the underlying ITAT and CIT-A order has interalia concluded that partner's illness is genuine reason in delay in appeal filing and a pragmatic approach in the matter needs to be taken which substantiates justice- DELAY OF 5 MONTHS...

Condonation of Delay in Appeal Filing

- Assessee did not file appeal initially against the Order passed u/s. 263 thereafter when its appeal filed against Order u/s. 143 (3) r.w.s. 263 was rejected (by CIT-A) THEN it filed a delayed appeal to the ITAT against the Order u/s. 263 –SakarPatel Vibhag39 TTJ 54 (Ahd).
- Tribunal may condone even if the Appellant has not moved for condonation –Hind Development Corp118 ITR 873 (Cal).

Condonation of Delay in Appeal Filing

- Madras High Court in Madhu Dadha TC(A) 421/2009: held for inordinate delay of 558 days : appellant taking plea of counsel's death : since did not show when papers were handed over to counsel and on what occasion, enquiry was made from counsel as to appeal filing status, rejected assessee plea:
"especially when authorised representative viz., representative who was given charge to file the appeal had died exactly one year after the last date of filing of the appeal. When that be so, it is pertinent to point out that actually the filing of the appeal was not done and even after the death of Ashok Kumbat, the assessee had taken more than six months in filing the present appeal" (assessee's appeal dismissed by HC against ITAT order)

Condonation of Delay in Appeal Filing

P&HHC in Sachdeva & Sons: In this case, P&HHC while allowing assessee's dealer appeal under Punjab VAT law, in context of Tribunal order allowing state's/revenue's plea for condonation of delay in appeal filing, P&HHC has very beautifully ruled that: (squarely applicable in context of Income Tax and Other fiscal statutes)

"To our mind, whether it is the State or the individual, unless explanation is offered for the delay that it is either reasonable or satisfactory to the satisfaction of the court, delay can not be VAT Appeal No. 2 of 2009 condoned. The learned counsel for the appellant has rightly submitted that no sufficient cause was shown by the State of Punjab for condoning the delay. The State, as a litigant, could not claim a special status..²⁹

Condonation of Delay in Appeal Filing

...or a right to condonation of delay without showing at least reasonable amount of care and diligence in pursuing this case. Moreover, Limitation Act still exists in the Statute book and its provisions had to be complied with. The record clearly spells out that the State had failed to show that it had sufficient reason for not filing the appeal in time and there was no justification from the record for condoning the delay merely on the ground that huge revenue is involved and moreover, the Tribunal, while disposing of the application for condonation of delay, could not touch the merits of the case. No reasons have been assigned by the Chairman of the Tribunal, which led him to condone the delay in filing the appeal.

VAT Appeal No 2/2009...(point of huge revenue was in mind of tribunal...)

Condonation of Delay in Appeal Filing

BHC in Advani Orelikon Ltd: on revenue's Condonation pleas:

- a) This (sympathetic) approach of the court seems to have been taken as licence by the department for preferring the appeals much after the period of limitation has expired. The Department presumes that before a sympathetic court, the law of Limitation does not apply to them.

- b) In our opinion, the effect of condoning the delay is that the assessee who is otherwise entitled to an order in his favour has to once again engage counsel and to appear before this court apart from having the threat of assessment being re-opened after several years. Considering this aspect of the matter costs will have to be imposed so that the assessee would be recompensed to that extent.....

ITA(L) 3209/2008 DATE 24/3/2009

Cross Objections- CO

- In case CIT-A allows appeal of assessee giving relief on some grounds, advisable to file on revenue's appeal, Memo of Cross Objections (this also can be filed by revenue raising grounds against assessee...)
- Relevant Form is Form No 36A Time Limit within 30 Days from receipt of notice of appeal from ITAT (by respondent)
- No Fees required for filing CO
- To be registered and disposed as an appeal as per Rule 22 of ITAT Rules

Cross Objections- CO

- Right to file CO is independent to right of appeal BHC in 141 ITR 367
- Cross Objection can be against entire order, need not be confined to points taken by opposite party in MAIN APPEAL...GAUHATI HIGH COURT 234 ITR 663
- WHETHER ADDITIONAL GROUNDS IN CROSS OBJECTIONS CAN BE RAISED BEFORE ITAT LIKE ADDITIONAL GROUNDS IN MAIN APPEAL?

Rule 27 : Supporting CIT-A order without appeal/CO ITAT Rules

- It empowers the respondent to defend the order appealed against on **any of the grounds decided against him**, though he may not have filed appeal or CO against said CIT-A order.
- Huge Practical Relevance
- Comprehensive verdict in Delhi ITAT ruling of Gurinder Kaur 102 ITD 189 (PER SH R.V.EASWER)
OTHER HIGH COURT RULINGS: . **B.R. Bamasi vs. CIT(Bombay), 83 ITR 223 (Bom.)** Marolia and Sons vs. CIT, 129 ITR 475 (All); 176 CTR 406 (Gauhati); 200 CTR 265 (Guj.); CIT vs. Cochin Refineries Ltd., 220 ITR 398 (Ker.) etc

Rule 27 : Supporting CIT-A order without appeal/CO ITAT Rules

- 11. Even de hors Rule 27 of the Appellate Tribunal Rules, it is open to the respondent in an appeal before the Tribunal to raise a new ground in defence of the order appealed against. It has been so held by the Supreme Court in **Hukam Chand Mills Ltd. vs. CIT, Central (Bom.), 63 ITR 232**. At page 237 of the report it was held (hat even assuming that Rule 27 is not strictly applicable, the Tribunal has inherent powers u/s 254(1) to entertain the argument of the respondent which amounted to a new ground. It was further held by the Supreme Court as follows....
- Therefore, whether it is the appellant or the respondent before the Tribunal, new points or contentions can be raised provided they did not involve investigation into facts (as contrasted with the record) and that an opportunity is given to the other side to meet the contentions. Applying these principles to the present case, we overrule the preliminary objection of the Ld.Sr.DR and permit the assessee to raise the new points before us as a respondent – Delhi ITAT Gurinder Kaur

Rule 27 : Supporting CIT-A order without appeal/CO ITAT Rules

- Connotation of Word Grounds Decided Against in Rule 27:
- Grounds before CIT-A not adjudicated : Deemed to have been decided against the assessee and hence can be taken via Rule 27 before ITAT (refer DHC in Rohtak Electric 128 ITR 52 – analysed by Del ITAT in Gurinder Kaur)
- **Example: Jurisdictional Ground for Non Service of Notice (taken before CIT-A, remained undecided) : can be pressed before ITAT via Rule 27**

Additional Evidence before ITAT: Rules 29 to Rule 31

- **As per Rule 29/ITAT Rules, in following circumstances additional evidence may be admitted:**
 - **Orders have been passed by lower authorities without giving sufficient opportunity**
 - **ITAT requires evidence to enable it to pass orders**
 - **For any other substantial cause**
In case assessee desires to file additional evidence, then same has to be filed by way of separate paper book containing application with reasons thereof.....

Additional Evidence before ITAT: Rules 29 to Rule 31

- **In K Venkatarmaiah versus A Reddy AIR 1963 SC 1526: interpreting the words any other substantial cause, it was held: There may well cases where even though the court finds it is able to pronounce judgment on the state of record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence .followed by Cal HC in 112 ITR 423**
- **Further refer: Delhi ITAT in UOP 108 ITD 186**

Paper Book Rule 18 ITAT Rules

If reference required to be made to documents stated in AO's/CIT-A's order; documents on file of AO/CIT-A- Paper Book can be filed containing said documents DULY INDEXED, manner (ITAT Can Suo Motto Direct also)

- Two Copies- At least day before hearing in Registry with one copy served on Other side a week before hearing (Bench can admit the same in hearing also)
- Each document to be certified in the Paper Book by Person Filing/Athd Representative
- Index must give document wise description – Relavance; Page Numbers; Authority before whom filed

Paper Book Rule 18 ITAT Rules

- **UNDERTAKING WITH PAPER BOOK (EXAMPLE)**
- **"IT IS HEREBY CERTIFIED THAT ALL THE ABOVE DOCUMENTS WERE AVAILABLE BEFORE AO AND CIT-A (AS CASE MAY BE) AND NO NEW EVIDENCE HAS BEEN ADDUCED AT THIS STAGE"**
- **IN LIGHT OF RULE 18(4) ITAT RULES**
- **DOCUMENTS IN PAPER BOOK REFERRED AT THE TIME OF HEARING WILL ONLY BE CONSIDERED**
- **SUPPLEMENTARY PAPER BOOKS WITH THE LEAVE OF BENCH CAN BE FILED**

Paper Book Rule 18 ITAT Rules

- Advisable not to mix Reported Case Laws with Other Documents**
- and as far as possible separate paper book of case laws can be prepared**
- also can be given individually during hearing and if reported in ITR/ITD citation can be mentioned and hard books can be carried**
- Related Adjournment Aspect**

COD Approval

Appeals filed by/against Public Sector Undertakings:

Approval is required from Committee of Disputes □'Oil & Natural Gas Commission (104) CTR on page 31'

Whether such an approval is also required in case of state government entity Maharashtra State Electricity Board recent unreported decision of the Bombay High Court

Also refer latest Pune ITAT in 122 TTJ 865

Monetary Limit Appeal Filing by Revenue CBDT Instruction

CBDT Instruction No 5/2008 dt 15/5/2008

Appeallate Forum	Tax Effect Exceeds the Monetary Limit (Rs) of
ITAT	200,000
High Court	400,000
Supreme Court	1,000,000

Monetary Limit Appeal Filing by Revenue CBDT Instruction

CBDT Instruction No 5/2008 dt 15/5/2008

- For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issue against which appeal is intended to be filed (hereafter referred to as "disputed issues").
However, the tax will not include any interest thereon. Similarly, in loss cases notional tax effect should be taken into account. In the cases of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

Adjournment before ITAT

- Rule 32 of ITAT rules states ITAT can grant adjournments
- Application for adjournment should mention the reasons therefor (reasons can be, if facts state so):
 - Recent Engagement as Counsel
 - Time required in preparation of paper book for want of necessary documents from previous counsel etc (should be genuine reasons and not delay tactics)

Application should be made at the earliest possible time before date of hearing

Blocking of Appeals by ITAT

Instruction in 76 ITR 1 (Journal Section):

ITAT can block appeals to await decision of High Court/Special Bench wherein similar points are involved

Advisable to take details in which cases Special Bench/High Court is Pending so as to make application for blockage and provide necessary linkage to said pending case....

Tagging of Connected Appeals- Before ITAT

Instruction 76 ITR 1 (Journal Section)

In relation to an appeal coming up for hearing, parties should draw attention of the Bench to:

- A)** Connected Appeal/CO of same party elsewhere pending....for Same or different years....which includes CONNECTED ISSUES...to avoid wastage of time etc....
- B)** In Penalty Appeal, Quantum/Merits Appeal (if any) pending

Application for Intervention

- Intervention? : In other's appeal, an assessee is permitted to be heard together, on common issue of importance...
- The tribunal allows intervention by third party in the course of hearing on important issues, especially by its special benches.
- Position of Intervener is not equivalent to appellant Delhi ITAT in 86 ITD 572

Application for Early Hearing before ITAT

- Rule 4A Registry to receive early hearing application to be disposed off by President/Sr VP/VP/Sr Member
- In now a days, since appeals are ordinarily fixed for hearing which date stands intimated in Acknowledgement for Appeal fining, virtually all appeals comes for hearing in 60-80 days period (this procedure is providing huge relief in Covered Cases etc)
- Apart from above, appeals covered by ITAT/HC/SC orders and Appeals of Sr Citizen, High Demand Cases (on revenue's insistence) can be taken on early basis
- Application : No fees required, BRIEF case background, copy to DR

Application for Transfer of Appeal before ITAT

- Application to registrar with whom appeal filed
- Order made by President/VP concerned after examining the case
- Possible Factors for Transfer:
 - Assessment Jurisdiction transfer
 - For hearing with connected appeals
 - On alleged bias

Enhancement & ITAT

- Unlike CIT-A, ITAT has no enhancement power refer:
 - SC ruling in MCorp Global 309 ITR 434
 - Delhi High Court in Dalmia (ITAT cannot travel outside record amounting to enhancement) 176 Taxman 169
 - Delhi High Court in Hindustan Tin (Dismissal of Additional Ground by Revenue taking to enhancement RELATING TO SECTION 14A etc) ITA 55/2009
 - Special Bench in Sakura Bank 100 ITD 215 (APPLICABILITY OF RETROSPECTIVE AMENDMENTS)
 - Delhi ITAT Shahid Atiq etc

Held in 6 ITD 521 that no appeal to ITAT lies against CIT-A dropping proposed enhancement

Revenue's Appeal in ITAT

Carefully study Revenue's Appeal - Ground before ITAT and accordingly submit....

Onus on revenue to prove findings of Ld.CIT-A are perverse, by supplying tangible material on record (can be AO's findings etc)....174

**Taxman 93 Magazine and 121 TTJ 510 Mum
ITAT**

Revenue's Appeal in ITAT

HOW FAR ITAT CAN DIRECT ASSESSEE ON
REVENUE'S APPEAL TO FILE PAPER BOOK, VIS
A VIS NON AGITATED ISSUE ARE CONCERNED?

ITAT Cannot fill lacunas on part of AO and thereby order fresh enquiry/remand ... (Luck ITAT TM in Rohtas Projects; **Delhi ITAT in Chandni Bhuchar** ITA 1580/DEL/2008etc) - **SC in 106 ITR 1 applied by Delhi ITAT in Mentor Graphics 109 ITD 101...**

Revenue's Appeal in ITAT

Case Laws: No remand by ITAT which gives revenue new innings to improve its case

- a) Agra Bench TM ITAT 313 ITR 123 9AT)
Laxman Dass Makhija**
- b) Delhi ITAT TM in Amina 73 ITD 125; In SMC
Share Brokers 109 TTJ 700(affirmed by
DHC 288 ITR 345); Chd ITAT in Neena
Syal 70 ITD 62; All ITAT TM in 50 ITD 1**
- c) Zuari Leasing Delhi ITAT TM 112 ITD
205/115 TTJ 721- Remand principles...**

Scope of ITAT Order vis a vis Improvising Revenue Case

In the situation which is before me, I may refer the case of Raj Kumar Jain v. Asst. CIT [1994] 208 ITR (AT) 22 (All) in which Shri Ch. G. Krishna-murthy, the then President of the Income-tax Appellate Tribunal sitting as Third Member has decided the issue after taking note of the case of Kapur-chani Shrimai v. CIT [1981] 131 ITR 451 (SC) and other cases relied on by the parties and the relevant observations are being reproduced which are as under (page 41) :

“.... In my opinion, the learned Accountant Member has failed to grasp the real purpose of the Tribunal. The Tribunal acting as an appellate authority has to see whether the assessment framed by the Assessing Officer and whether the appellate order appealed against were according to law and properly framed on facts and whether there was sufficient material to support it. When there is no material to support it and when as observed by the learned Accountant Member the additions made by the Assessing Officer could not be sustained, it is not for the Tribunal to start investigations suo motu and supply the evidence for the Department..... **114 TTJ 339 / 282 ITR 42(AT) Third Member Luck ITAT Ruling in Rohtas case**

Scope of ITAT Order vis a vis Improvising Revenue Case

..... If the additions are not supported by evidence, the only course open to the Tribunal is to delete the additions pointing out how the additions made could not be sustained for want of adequate supporting material. It is for the Department to gather the material and make proper assessments and the Tribunal is not in that fashion an income-tax authority. Under the income-tax authorities stipulated under the Income-tax Act, the Income-tax Appellate Tribunal is not one of them. It is purely an appellate authority. Therefore, the subject of the appeal before the Tribunal is whether the addition or disallowance sustained was in accordance with law and supported by material. If there is no sufficient material, the addition must be deleted. The Tribunal cannot order further enquiry with a view to sustain the addition. This will amount to taking sides with the parties which is not the function of a judicial authority like the Tribunal."

That clinches the very issue involved before me that the Department cannot be given fresh innings in the absence of any material brought on record by the Departmental authorities. The scope of the Tribunal has been specifically defined and last observation is very material in which it has been opined by the Third Member that the Tribunal cannot order further enquiry with a view to sustain the addition.....

Revenue's Appeal in ITAT

Brief CIT-A order banking upon Assessee's Submissions before CIT-Awhether non speaking & deserving set aside....? P&HHC in Anil Goel and165 Taxman 46

Remand by ITAT: Not in Routine Manner 115 TTJ 721

After considering Host of Case Laws: Held that (ON BASIS OF ITS SLOGAN SULABH NAYAY AND SWATAR NYAY)

10. It is clear from above that primary power, rather obligation of the Tribunal, is to dispose of the appeal on merits. The incidental power to remand, is only an exception and should be sparingly used when it is not possible to dispose of the appeal for want of relevant evidence, lack of finding or investigation warranted by the circumstances of the case. Remand in a casual manner and for the sake of remand only or as a short cut, is totally prohibited. It has to be borne in mind that litigants in our country have to wait for long to have fruit of legal action and expect the Tribunal to decide on merit. It is, therefore, all the more necessary that matter should be decided on merit without allowing one of the parties before the Tribunal to have another inning, particularly when such party had full opportunity to establish its case. Unnecessary remands, when relevant evidence is on record, belies litigant's legitimate expectations and is to be deprecated....

Remand by ITAT: Not in Routine Manner P&HHC Latest

"No doubt, where material is enough, the appellate Court should normally determine the issue on merits, even if such issue has not been dealt with by the original authority. However, power of remand can be exercised when as a result of finding of the appellate authority, re-determination of issue becomes necessary. In the present case, on facts, the Tribunal held that it was necessary to have re-determination of assessment for the reasons mentioned in the impugned order. We are unable to hold that the reasons mentioned by the Tribunal for rejecting the conclusion for re-determination of issues are perverse.." Maheshwari Synthetics Aug 2009

Demand Stay Petition before ITAT : Section 253/254

- Section 253(7) Fees for Stay Application: INR 500
- Proviso to Section 254(2A): First stay for maximum 180 days, If appeal by ITAT not disposed in said 180 days period, stay can be extended to maximum of (including all previous periods of stay) 365 days
- Condition for extension of Stay
 - Delay not attributable on part of assessee (advisable to have chart/information on appeal hearing dates, revenue took adjournment)

Automatic Vacation of stay after 365 days....if appeal not Disposed by ITAT

Rule 35A ITAT Rules prescribes relevant form....

Demand Stay Petition before ITAT : Section 253/254

- Genesis of ITAT Power to Grant Stay of Demand etc:
SC in Kunhi case 71 ITR 815 held inherent powers available to ITAT which includes stay grant power (locus classicus on subject)
- Stay petition can be filed provided appeal pending with ITAT
- Till pendency of appeal with CIT-A, either CIT-A or AO can grant stay (including Administrative CIT)
- To pursue Stay application before ITAT, as per ITAT ruling in 86 ITD 462 80 ITD 218/223,92 ITD 205; 3 SOT 886 no need for exhausting/coming after approaching Jurisdictional CIT etc as ITAT has independent power to grant stay of demand (refer DHC in 226 ITR 490; Delhi ITAT in RPG 74 TTJ 391) 61

Demand Stay Petition before ITAT : Section 253/254

- Delhi ITAT in MTNL 77 ITD 8: ITAT cannot grant stay against recovery when order in appeal before it is CIT order u/s 263 and not order creating demand (to be passed by AO as a consequence of same)
- Bang ITAT in Karntaka Golf Association case; 90 ITD 749 Held stay can be granted by ITAT on assessment proceedings to be completed by AO; post rejection of registration application u/s 12A ; which rejection order is in appeal before ITAT (similar case in 74 TTJ 578 Pune ITAT)
- Delhi ITAT Magazine section of 147 Taxman Page 114 Technip similar to MTNL above

Demand Stay Petition before ITAT : Section 253/254

- Separate stay application for different enactments
- Separate stay application for different years (Wipro ITAT Ruling 86 ITD 407 Contra Mum ITAT in 66 TTJ 728/ITA No: 124/M/2003)
- Generally put up on Friday
- Principles for Stay:
 - Prima Facie Case
 - Financial Hardship
 - Irreperable cause
 - Revenue Interests
 - Security Offered by Assessee
 - Major demand from Enhancement by CIT-A – 80 ITD 218
 - Cal HC in 256 ITR 754 & BHC in KEC 251 ITR 158

Demand Stay Petition before ITAT : Section 253/254

- Stay application (in triplicate filed) to mention/annex
 - Affidavit of Appellant supporting contentions of Stay Application
 - Reasons for Stay
 - Prayer in Concise and clear words
 - Amount of tax etc demanded : Break up in Amount Disputed and Amount Paid and Amount Outstanding
 - Result of stay application (if any) before CIT Jurisdictional/AO etc

Issues Whether SC Dunlop Ruling in Excise matter has umbrella applicability to stay applications before ITAT? Delhi ITAT in Bechtel 92 ITD 205/Cal ITAT in 71 TTJ 153/ SC in Penners (Justice A Pasayat) etc

Demand Stay Petition before ITAT : Section 253/254

- Can the Tribunal Have policy while dealing with stay applications (to grant early hearing etc)? No refer All HC in 213 ITR 299
- Recovery During Pendency of a stay petition – powers to ITAT even to order refund for coercive collections
 - Mum ITAT in RPG 251 ITR 20 AT
 - Chennai ITAT in 86 ITD 462
 - Delhi ITAT in Glaxo 2 SOT457

Rectification by ITAT u/s 254(2)

- Law extensively laid down by Supreme Court in latest rulings of
 - Honda Siel 295 ITR 466 (no one should suffer from court's error)
 - Saurashtra Kutch Stock Exchange 305 ITR 227 (subsequent Jurisdictional HC/SC ruling etc)

Illustrations

- a) Non consideration of cited ruling : SC in Honda Siel (supra); 114; 114 TTJ 825
- b) Non disposal of Ground: 199 ITR 771; 249 ITR 323; 257 ITR 74; 84 TTJ 1; 175 Taxman 154
- c) Non consideration of argument/contention: Delhi ITAT in 114 TTJ 825; 188 ITR 398 etc
- d) Recall Power: SC Jyotsana Suri applied by Pune ITAT in 119 TTJ 519; latest MPHC in 220 CTR 282; Guj HC in 20 DTR 153
- Non consideration of factual position/material on record as referred during hearing: 158 ITR 755 171 ITR 586 172 ITR 158; 190 CTR 332 257 ITR 74

Rectification by ITAT u/s 254(2)

- Issues: Whether for first time in Misc Application u/s 254(2) fresh legal plea not taken in original proceedings can be taken? Held Yes
 - By Delhi ITAT in ONGC (supra)
 - Ker HC in 235 ITR 467
 - Delhi ITAT in Somany Piklington 49 ITD 207

Issues:

- a) Reference to a judgment: Noted by ITAT without applying it COMPLETELY/correctly Guj HC in 265 ITR 445; Delhi ITAT in Megha Towers Misc Appl 633/2008; BCAJ June 2009 Jayendra Jhaveri) – Kar HC in Mc Dowell 219 CTR 544 etc
- b) Remand and Covered Grounds: Whether 254(2) possible?
- c) For decisions used at back of assessee: 220 CTR 282 MPHc
- d) No further 254(2)/MA for earlier 254(2) MA?

Representation AT ITAT

- Open with a synopsis of issues
- For each issue, explain the facts, the earlier proceedings, the legal issues and your arguments
- Refer to orders, Paper Book, copies of judgements and chart
- Communicate in simple and clear language
- Use numerical examples for complex calculations
- Distinguish or rebut cases/ incorrect facts relied upon by the opposite side

Representation AT ITAT

- Be on time
 - Dress appropriately
- Be calm and confident
- Be courteous
- Maintain eye contact
- Make every effort to hold the listener's attention
- Show respect to the authority's opinions
- Resist getting personal
- Be moderate in criticism

Representation AT ITAT

- Suggest –do not insist
- Let the other person feel that the idea is ;
Repeat wherever necessary
- Pause from time to time;
- Be time conscious; □ Know when to stop
- Observe the reactions of the authority
- Be a good listener yourself
- Wait when the authority are preoccupied
- Provide all information required by the authority. Do not reject any question as irrelevant

Representation AT ITAT

Don't's

1. Don't Mislead Facts.
2. Don't Under Estimate other side.
3. Never be Over Confident.
4. Don't lose your temper whatever be the provocation.
5. Do not argue loudly
6. Do not cite law first. First analysis facts and then law.7. Do not argue with the judge.

Representation AT ITAT

After representation:

- a) Make a record of the proceedings
- b) Communicate with the client
- c) Take necessary further action

Judicial Discipline & ITAT

Facet	Citation
1. Where there is a coordinate bench decision, whether same can be overruled by another coordinate bench, without constituting Special Bench?	No DHC in DLF etc.
2. Where there is a non jurisdictional HC ruling, and there is no Jurisdictional HC ruling, whether same is binding on non jurisdictional ITAT?	Yes Pune ITAT in Aurangabad Resorts etc.
3. Whether 2 above applies even if there is Contrary Special Bench Verdict, which one to prefer by ITAT?	Pune ITAT supra : HC to be follow

Judicial Discipline & ITAT

Facet	Citation
4. Where there are two sets of non Jurisdictional High Court one in assessee's favor and another in revenue, which one to be followed by ITAT?	One favoring assessee Special Bench/ITAT in ITC etc
5. Whether ITAT can comment negatively on a Jurisdictional High Court decision stating it to be PERINCURIAM/Incorrect on Law etc?	No refer MPH C in National Textiles

Appeal Effect to ITAT- Further remedies Possible

For Alleged Incorrect Appeal Effect:

- a) Appeal to CIT-A u/s 246A
- b) Rectification Application u/s 154
- c) Revision u/s 264
- d) Writ under Article 226 of Constitution (refer **Guj HC in Nike case**)

But No direct Rectification to ITAT u/s 254(2)

: Refer All High Court in Sahara case Further refer status of Appeal effect orders: **Delhi ITAT in Sanat Products**

Scope of ITAT Appeal on remand (second round)

Example: Whether challenge to reopening u/s 148 not made in original round before CIT-A/ITAT and matter stands remanded by ITAT to do assessment fresh (de novo) to AO, can be made before ITAT in second round of appeal?

Seems to be Yes Refer Guj HC in PV Doshi and BHC in Inventors Industrial

Jurisdictional Lapse versus Merits Decision : ITAT

Once a case stands covered in favor of assessee on Jurisdictional Point, as per Special Bench followed by Pune ITAT in Aurangabad case, there is no requirement to proceed to MERITS, as they become infructuous.

Impact of Revenue Accepting in ONE year stand of ITAT

Whether Consistency principle will be attracted, to subsequent year revenue appeals in High Court in similar facts?

- DHC Usha India
- SC JK Charitable Trust/CK Gangadharan
- Section 268A

ITAT Power to Another Year Finding

Whether for an expense found to un-incurred/inadmissible in Year 1 in appeal before ITAT but undoubtedly allowable in Year 2, can finding by ITAT in Year 1 appeal can go to Year 2?

SC Mohd .Kunni case (supra) Incidental Power to complete the justice ; Section 153 etc

ITAT : Penalty Appeal Scope

Whether in appeal before ITAT against Penalty Order, where assessment stands accepted/non appealed, can assessment jurisdiction be challenged in said penalty appeal so as to annul the penalty?

Yes As per Luck ITAT in Surinder Kaur; Delhi ITAT in Tide Water and Dhiraj Suri; **All HC in Raghu Partap; Kar HC in BTP Structural etc.**

ITAT : Misc Issues/Powers

Particular	Precedent
To pronounce on constitutional Validity of the "Act"	No: SC in 60 ITR 156
To award costs (for unwanted adjournments & frivolous appeals etc)	Section 254(2B) Yes
To call for record/documents like search warrant etc	Yes All HC in 95 ITR 523
Requirement for speaking order containing facts and reasons for decision clearly etc (in 3 months of hearing order must get pronounced by ITAT - BHC Per Justice V.C.Daga)	Refer Guidelines from Hon'ble President ITAT on the subject ; 256 ITR 685; 65 ITR 416

ITAT : Misc Issues/Powers

Particular	Precedent
No restriction on no. of plea in a ground	73 ITD 5; 21 ITD 320; 88 ITD 96 TM; 21 TTJ 578 TM; 11 ITD 723
Factual Pleading Unchallenged – Deemed to be accepted	Guj HC in Echke 2008-TIOL-314-HC
EX PARTE DISMISSAL Rule 24 ITAT Rules (refer 302 ITR 243/ 294 ITR 401 - Multiplan Bad Law)	No Power to ITAT dismissal of appeal (to decide on merits)
Can AO argue the matter before ITAT?	No only appointed DR's can argue (67 ITD 56)

Power of Special Bench to Admit Additional Ground

DHL Case 108 TTJ 152:

“20. We find that s. 255(1) of the Act provides that powers and functions of the Tribunal are to be exercised and performed by the Benches constituted by the President from among the Members thereof. Sec. 255(3), *inter alia*, further provides that the President may constitute a Special Bench for 'disposal of a particular case'. It is therefore clear that it is the Bench so formed which will exercise the powers of the Tribunal, unless, of course, reference to the Special Bench itself restricts powers of such a Special Bench, as may be expedient and necessary, to deal only with a limited aspect of the appeal. In our considered view, therefore, once this Special Bench comes to be in seisin of the entire appeal, it is for this Bench to decide whether or not to admit the grounds of appeal; all the powers of the Tribunal, so far as these appeals are concerned, are to be exercised by the Special Bench alone. The objection taken by the assessee respondent to the effect that this Special Bench has no powers to admit an additional ground of appeal, in this view of the matter, is devoid of legally sustainable merits. We reject the same”⁸³

Order of THIRD member/ITAT

ITAT in Padam Parkash 104 ITD 1

Accordingly, we hold that majority decision in Third Member case is entitled to as much weight and respect as a decision of a Special Bench. It should be followed and applied by regular benches and cannot be disregarded.... Regular benches are required to follow and act upon the decision of Special Bench and in case its view's are contradictory to the views of the Third Member, preference is required to be given to Special Bench. This is held on the basis of language and purpose of provision of sub-sections (3) and (4) of section 255 dealing with two different situations.

Thank You

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