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**RIGHT TO APPEAL TO COURTS**

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*Introduction*

Right to appeal means whenever a party is aggrieved with the order of the assessing authority, it can appeal to the higher authority in the prescribed form, mentioning the grounds of appeal against which the appeal is sought, for observance of the facts of the case. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with the law in force at the relevant time. Thus, the right to appeal cannot be exercised unless the statute specifically provides that a particular order is appealable. There are different stages of appeals under the Income-tax Act. The first appeal against the order of the Assessing Officer shall lie to the Commissioner (Appeals) and it can only be filed by the assessee. Further appeal can be preferred before the Income-tax Appellate Tribunal. On a substantial question of law, further appeal can be filed before the High Court and even to the Supreme Court.

*Income-tax provisions regarding appeals to courts*

The provisions regarding the appeals to High Court and Supreme Court are contained in section 260A and section 261 of the Income tax Act. As per section 260A "An appeal shall lie to the High Court for every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law". The satisfaction of the High Court that the appeal involves a substantial question of law is sine qua non for the appeal to be admitted for hearing. However, the appeal should be filed within a period of 120 days from the receipt of the order. As per subsection (6) of section 260A of the Act, the High Court can determine any

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issue which has not been determined by the Appellate Tribunal and the High Court can also decide an issue which has been wrongly determined by the Tribunal. As per section 261 of the Income tax Act “the assessee or the Principal Commissioner or Commissioner may prefer an appeal to the Supreme Court from any judgment of the High Court. However, the appeal can lie to the Supreme Court only if the High Court certifies the case to be a fit case for appeal to the Supreme Court. Thus, this certificate of fitness is a must for preferring an appeal to the Supreme Court. If, however, the High Court decides not to give such a certificate, then the aggrieved party may make an application to the Supreme Court under article 136 of the Constitution for special leave to appeal against the decision of the judgment”. However, no appeal lies against the order of Supreme Court.

*What is substantial question of law*

The words “substantial question of law” has not been defined. But the expression has acquired a definite connotation through a series of judicial pronouncements. The Supreme Court, in the case of *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.* [1962] AIR 1962 SC 1314, held that “a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Supreme Court or of the Privy Council or of the Federal Court”. An issue on which there could be little legal dispute, nevertheless, needs to be dealt with in view of the elaborate arguments, the High Court had to rely on findings of fact independent of those considered by the learned Income-tax Appellate Tribunal which is the final fact finding authority. Reliance in this regard has been placed on several judgments of Supreme Court to contend that issues of fact determined by the Tribunal are final and the High Court, in exercise of its reference jurisdiction, should not act as an appellate Court to review such findings of fact arrived at by the Tribunal by a process of reappraisal and reappraisal of the evidence on record. The aforesaid position in law has been consistently laid down by this court in several of its pronouncements out of which, illustratively, reference may be made to *Karnani Properties Ltd. v. CIT* [1971] 82 ITR 547 (SC), *Rameshwar Prasad Bagla v. CIT* [1973] 87 ITR 421 (SC), *CIT v. Greaves Cotton and Co. Ltd.* [1968] 68 ITR 200 (SC) and *K. Ravindranathan Nair v. CIT* [2001] 247 ITR 178 (SC).

The Bombay High Court, in the case of *Rameshchandra and Company v. CIT* [1981] 168 ITR 375 (Bom) : Where an assessee has made a statement of facts, he can have no grievance if the taxing authority taxes him in accordance with that statement. If he can have no grievance, he can file no

appeal. Therefore, it is imperative, if the assessee's case is that his statement has been wrongly recorded or that he made it under a mistaken belief of fact or law, that he should make an application for rectification to the authority, which passed the order based upon the statement. Until rectification is made, an appeal is not competent.

In the case of *M. Janardhana Rao v. Joint CIT* [2005] 273 ITR 50 (SC), the Supreme Court has also clarified, at para 11, that the proviso to section 260A(4) lays down that nothing in section 260A(4) shall be deemed to take away the power of the High Court to hear, for reasons to be recorded, an appeal on any substantial question or questions of law not formulated by it, provided the High Court is satisfied that the case involves such a question. Also in the case of *Ganapathy and Co. v. CIT* [2016] 381 ITR 363 (SC), the Supreme Court held that the Tribunal, being is the final fact-finding authority, it is beyond the power of the High Court, in the exercise of its reference jurisdiction, to reconsider such findings on a reappraisal of the evidence and materials on record unless a specific question with regard to an issue of fact being opposed to the weight of the materials on record is raised in the reference before the High Court.

The Supreme Court, in the case of *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.* [1962] AIR 1962 SC 1314 (applied by the apex court in *M. Janardhana Rao v. Joint CIT* [2005] 273 ITR 50 (SC)), has laid down the following tests to determine whether a "substantial question of law" is involved :

1. Whether the issue directly or indirectly affects substantial rights of the parties ?
2. Whether the question is of general public importance ?
3. Whether it is an open question in the sense that the issue has not been settled by a pronouncement of the Supreme Court ?
4. Whether the issue is not free from difficulty ?
5. Whether it calls for a discussion for alternative views ?

#### *Recommendation by CAG on appeals by Income-tax Department*

The CAG, in its Performance Audit Report No. 20 of 2009-10, states that the dimensions of disputes in income-tax are staggering and that it takes a long time to settle tax disputes. The report also states that the Income-tax Department lacks credible and reliable data on the volume and impact of appeals which points to weak internal controls. Inadequate internal control, in turn, lead to time-barring of appeals and delays in implementation of appellate orders. The CAG report recommended automation of receipt and disposal of appellate orders. The following are the some of the recommendation of the CAG report :

- a system of peer review at the Assessing Officer level to examine the merits in escalation should be in place. The periodicity of such review may be such that it does not render the Assessing Officer's workload unviable ;
- automation of receipt and disposal of appellate orders, with in-built supervisory controls be implemented. Pending automation, maintenance and updation of control registers should be monitored regularly ;
- an effective system, involving Departmental representative/legal counsel may be laid down to ensure timely collection of appellate orders to stem the delays in implementation ;
- a stricter accountability structure should be formulated to fix responsibility on Assessing Officers for incorrect implementation of appellate orders.

*Steps Taken by Central Board of Direct Taxes to discourage appeals by Income-tax Department*

1. *Standard operating procedure on filing of appeals to High Court :*

The Government has formulated the National Litigation Policy 2010, for conduct of litigation on its behalf. The policy declares :

"Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, 'let the court decide', must be eschewed and condemned."

*The Central Board of Direct Taxes issued Instruction No. 7 of 2011 [F. No. 279/MISC./M-42/2011-IT]] regarding standard operating procedure on filing of appeals to the High Court under section 260A and related matters.*

(a) *Responsibility for filing of appeal to High Court*

The jurisdictional Chief Commissioner of Income-tax shall be the authority to decide whether to contest an order of the Income-tax Appellate Tribunal, in the light of the facts and circumstances of a particular case and the statutory provisions. He shall take a view in the matter after taking into consideration the recommendations of the authorities below. Once the Chief Commissioner of Income-tax communicates his decision to contest a particular order of the Income-tax Appellate Tribunal, it shall be the responsibility of the Commissioner of Income-tax to ensure timely and proper filing of appeal in the High Court and consequential follow-up actions.

(b) *Quality of appeals*

(i) An appeal to the High Court or the Supreme Court can be filed only on a "substantial questions of law". The CCsIT/CsIT have to bestow their personal attention on this issue while taking decision to file appeal under section 260A of the Act. The substantial questions of law arising out

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of the order of the Income-tax Appellate Tribunal must be clearly identified and suggested draft question of law should be sent to the Standing Counsel for their consideration.

(ii) Perversity of facts also constitutes “substantial question of law” as it falls in (d) and (e) above. The hon’ble Supreme Court, in *Sudarshan Silk and Sarees v. CIT* [2008] 300 ITR 205 (SC), has laid down the attributes of perversity by holding that an order or finding is perverse on facts, if it falls under any of the following categories :

(a) The finding is without any evidence.

(b) The finding is contrary to the evidence.

(c) There is no direct nexus between the conclusion of fact and primary fact upon which that conclusion is based.

(d) When an authority draws a conclusion which cannot be drawn by any reasonable person or authority on the material and facts placed before it.

*Decision of the Chief Commissioner of Income-tax on the recommendation of the Commissioner of Income-tax*

The Chief Commissioner of Income-tax shall take final decision as regards filing of appeal to High Court under section 260A of the Income-tax Act.

(i) The Chief Commissioner of Income-tax may approve or modify the “substantial question of law” proposed by the Commissioner of Income-tax or accept the order of the High Court giving reasons.

(ii) In case where the Commissioner of Income-tax has not recommended filing of appeal and the Chief Commissioner of Income-tax is not in agreement with the Commissioner of Income-tax, he may record reasons for differing with the Commissioner of Income-tax and direct filing of appeal after drafting/indicating the “substantial question of law” involved.

**2. National Judicial Reference System :** National Judicial Reference System (NJRS) project is one of the key measures being taken up by the Central Board of Direct Taxes to streamline the litigation management system in the Income-tax Department (ITD). NJRS is envisaged to be a comprehensive electronic database of all appeals and judgments in Direct Tax cases pending before various judicial authorities, i.e., the Income-tax Appellate Tribunal (ITAT), the High Courts and the Supreme Court of India. It will also bring automation in the working of the judicial wings of the Department. NJRS has the facility to help in tracking of appeals in the Income-tax Appellate Tribunal, High Courts and the Supreme Court, and issuing alerts and reminders in case of delays in filing appeals.

NJRS is also a knowledge repository that will enable the Assessing Officers to be consistent in framing assessment orders due to easy accessibility of judicial information, case law and judgments. Thus, NJRS will help in improving the quality of work output. It will assist the Departmental representatives/counsel in improving the quality of representation before the Tribunals and courts and enhancing the success rate of the Department in appeals.

NJRS is thus envisaged as a tool for effective tracking and monitoring of appeals at various stages, reduce litigation and disputed tax demand by bunching and targeting high-demand cases, a comprehensive reference system and a decision-support system to achieve efficiency in the tax litigation processes of the Income-tax Department, Government of India. It is accessible to all officers of ITD over the internet.

### *3. The Central Board of Direct Taxes raises the monetary limits of tax disputes for filing appeal*

According to the Central Board of Direct Taxes Circular No. 17 of 2019 ([2019] 416 ITR (St.) 106), the Government has doubled the monetary limits of tax disputes for filing appeals by the Income-tax (I-T) Department in the High Courts and the Supreme Court (SC) to effectively reduce taxpayer grievances/litigation and help the Department focus on litigation involving complex legal issues and high tax effect, the monetary limits for filing of appeals by the Department were last revised on 11th July, 2018 by the Central Board of Direct Taxes Circular No. 3 of 2018 ([2018] 405 ITR (St.) 29). As a step towards further management of litigation by the Government, the monetary limits for filing Departmental appeals before various appellate fora including Income-tax Appellate Tribunal, High Court and the Supreme Court have been revised as under :

<i>Appellate Forum</i>	<i>Existing Monetary Limit (Rs.)</i>	<i>Revised Monetary Limit (Rs.)</i>
Before Income-tax Appellate Tribunal	20,00,000	50,00,000
Before High Court	50,00,000	1,00,00,000
Before Supreme Court	1,00,00,000	2,00,00,000

This will further reduce time, effort and resources presently deployed in litigation to focus on issues involving litigation of substantial value.

The Central Board of Direct Taxes circular also states that in the case of composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one

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assessment year, no appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit as specified.

*Economic survey for the year 2017-18*

According to the economic survey for the year 2017-18, "Tax Department should exercise self-restraint in filing appeals". As per the survey, the success rate of the Department at all three levels of appeal—Appellate Tribunals, High Courts and Supreme Court—and for both direct and indirect tax litigation is under 30 per cent. In some cases it is as low as 12 per cent. The Department unambiguously loses 65 per cent. of its cases. Over a period of time, the success rate of the Department has only been declining, while that of the assesseees has been increasing. None the less, the Department is the largest litigant. As per below table, the Department's appeals constitute nearly 85 per cent. of the total number of appeals filed in the case of direct taxes. Of the total number of direct tax cases pending by the quarter ending March, 2017, the Department initiated 88 per cent. of the litigation at Income-tax Appellate Tribunals and the Supreme Court and 83 per cent. of the litigation is pending at High Courts.

*Petition rate and success rate of the tax department, as on March 31, 2017*

<i>Direct Tax</i>		
<i>Court</i>	<i>Success rate</i>	<i>Petition rate</i>
Supreme Court	27%	87%
High Court	13%	83%
ITAT/CESTAT	27%	88%

*Conclusion*

Thus, the Assessing Officers should be encouraged to file quality appeals, only if merited, which, in turn, would improve the rate of success. Generally, it is observed that arbitrary or irrational demands are raised by the Assessing Officers, because they want to meet unrealistic targets which hinge their performance appraisal. This led the assessee to resort to appeals to higher authorities. Also, at present, there is no adverse consequence against the Income-tax Officers, if an appeal is filed without merit or evidence. An effective system should be built so that the Assessing Officers can be made accountable for the appeals filed by them in order ensure that only genuine cases are being appealed. The Department energy can be focussed on valuable cases, thus enhancing the resources and the assessee's confidence in the assessing mechanism of the Income-tax Department.

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