Western India
Regional Council of
The Institute of Chartered
Accountants of India
(Set up by an Act of Parliament)

KEY TO DRAFTING SKILLS IN TAX PROCEEDINGS

(INCLUDING DRAFT DEEDS, DOCUMENTS AND PETITIONS)



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Price : ₹ 350/-

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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Foreword

Indian taxation has witnessed quite a few evolutionary and revolutionary changes in the last decade. As Chartered Accountants it is our responsibility to adapt and excel at each new challenge and change.

The new Faceless Assessment process is one such change which we have to adapt and master. Used to conduct face to face meetings with various officials, this new process is one which requires honing of a new skill set - that of effective written communication.

In this new paradigm, since we cannot visually observe the responses and reactions of various officers we have to ensure that our drafting skills are sufficiently developed to powerfully convey our interpretation across various proceedings.

Good legal writing forms the foundation for effective communication and is a necessity in the faceless governance. Used to as we are in dealing with numbers, outlining our thoughts on paper with respect to submissions will take some time. More importantly, we would need to be consciously aware of the impact of the written word and frame our submissions accordingly.

I am confident that we will rise up and succeed in this challenge as well. More so, as this book is a very well timed publication to guide us develop the relevant techniques to effective writing of submissions.

I thank CA. Drushti Desai, Chairperson, Direct Tax Committee of WIRC, for spearheading the initiative for this publication.

I, and members of the fraternity, thank all the authors comprising Chartered Accountants and Advocates for their tremendous efforts towards writing this practical book. I also thank Adv. Ajay Singh and CA. Gopal Kedia for taking out valuable time to vet this book. We look forward to implementing the instructions outlined herein to improve our drafting skills and submissions.

CA. Manish Gadia
Chairman, WIRC



Preface

'Change is the only constant' and definitely true in the taxation department. To increase efficiency, our Income Tax Department has been implementing technology at a steady rate since 2006 when the E-filing of Income Tax Return forms was first introduced.

Since then, tremendous progress has been made leading to Section 144B which lays down the foundation of the Faceless Appeals process. This is a radical departure and more so when considering that we are used to personal interaction taking place between the assessee and the Assessment Officers to put our points across.

This new method wherein assessee will have to explain the case through written submissions now puts the onus squarely onto us professionals to ensure that submissions are well written, documented and conclusive.

Hence, it is critical to learn to draft submissions which are absolutely clear, concise and free of all ambiguity to enable the authorities to perceive the document in the exact same manner in which the writer wants to communicate in order to attain our objectives.

Drafting is an art and while there is no perfect answer to what is the correct way to draft a legal document or submissions made before authorities, this publication will go far in providing the much required input to enable us to upgrade our professional writing skills.

I take this opportunity to thank all the contributing authors which include Chartered Accountants and Lawyers who have combined their expertise in the cause of providing relevant education for the profession at large.

I am confident that members who want to avail a deeper understanding of the drafting requirements and refine their skills will benefit from this well written publication.

CA. Drushti Desai
Vice-Chairperson WIRC

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KEY TO DRAFTING SKILLS IN TAX PROCEEDINGS

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Introduction - General
Drafting skills in tax proceeding considering the new Faceless Assessment

Yogesh Thar

What's so new in the faceless regime?

Harvard Law School professor Alan Dershowitz shares with his students a strategy for successfully defending cases. "If the facts are on your side", Dershowitz says, "pound the facts into the table. If the law is on your side, pound the law into the table. If neither the facts nor the law are on your side, pound the table".[1]

Many of us followed this for many years while arguing cases 'across the table' with the Assessing and Appellate Authorities under the Income-tax Act, 1961 ("the Act"). I have also heard some mischievous tax payers distorting this advice by replacing the last three words, "pound the table" by "a pound under the table".

Well. In the faceless regime, we do not have any physical table between us and the Assessing Officer any more. So the last sentence in the professor's advice is now redundant. But the first two sentences are still alive and kicking and we need to continue to follow that part of the advice even now. We need to pound (or strike effectively) the facts and / or the law in our written communication and, when the hearing over the video conferencing is granted, then, over such hearing. Our written communication is the "table" on which we can pound our facts and the law for being effectively communicated.

This entire book is dedicated to the objective of sharing with our fellow practitioners certain techniques to be able to really strike effectively what we want to say when the adjudicating officer is not in front of us, but will only be reading our submissions and will be largely making up his mind after such reading, often leaving the offer of a hearing over video conferencing a mere formality.

Know what opportunities you get in faceless assessment regime:

Before getting into these techniques, it is important to have a quick overview of the faceless assessment provisions in the Act. Section 144B lays down the foundation of the faceless assessments. While in the subsequent chapters, a detailed scope and the provisions of this section will be discussed, suffice to know at this stage the number of opportunities that one may get to make submissions before the NFAC in a typical assessment proceedings. This is required so that we know when and to what extent do we have to make our submissions in the faceless regime.

- NFAC issues a notice u/s 143(2) [See s. 144B(1)(i)] and within 15 days therefrom, the assessee is expected to "file his response" [See s. 144B(1)(ii)]. (First Opportunity)

  At this stage, detailed enquiry has not yet started. S. 143(2) notice typically says, "I would like to give you opportunity to produce any evidence / information which you feel is necessary in support of the said return of income on or before ____". So a question arises as to what response should be filed at this stage. It may be advisable to file a copy of the computation of income along with the notes to computation, audited accounts, directors report, additional claim that you would like to make etc. at this stage. No doubt you may get another chance at the stage when notice u/s. 142(1) is issued to supply these documents. But if furnished at this stage, one reduces the possibilities of any allegation of understatement of income and enhance the efficacy of defence that 'explanation is bona fide' for the purposes of section 270A(6)(a) at a later stage.

- NFAC calls for information as may be required by the Assessment Unit ("AU") from time to time [See s. 144B(1)(vi)] and the assessee is expected to file his response within the time allowed in the relevant communication from NFAC [See s. 144B(1)(vii)]. (Second set of Opportunities)

1 Source: https://quoteinvestigator.com/2010/07/04/legal-adage/

At this stage, you may provide complete details or may provide details on sample basis if the data set is too large. If only samples are provided, please say so giving reason as to why it is difficult / time consuming / futile to provide complete data set and, at the same time, assure that you will provide documents for any specific entry or transaction for further test check if the NFAC so requires. At this stage, you may also invite the designated officer (Verification Unit) to your factory or office to view the data on your SAP system etc. if so deemed necessary. Such positive statements can go a long way in providing an effective defence against any wild addition on the alleged ground that the required details are not furnished.

- AU passes a draft assessment order [s. 144B(1)(xiv)/(xv)] which is forwarded to the NFAC and if there are variations prejudicial to the interest of the assessee, NFAC has to serve a show cause notice ("SCN") to the assessee as to why the proposed variations should not be made [s. 144B(1)(xvi)(b)]. The assessee is expected to furnish his response within the time specified in the SCN [s. 144B(1)(xxii)]. (Third Opportunity – but first SCN).

  It is at this stage that the assessee can ask for a personal hearing (virtual mode) for making oral submissions or present his case before the income-tax authority in any unit. [s. 144B(7)(vii)]. If he does not ask, the section does not oblige the Department to grant a personal hearing. This is an important aspect to be kept in mind.

- AU then prepares a revised draft assessment order and if there are further variations proposed therein, then, NFAC issues a second SCN to the assessee [s. 144B(1)(xxv)(b)]. (Fourth Opportunity – second SCN).

  With the above broad background of the statutory provisions, let me now introduce to you the structure of the submissions that should ideally be adopted in any typical case.

Effective Opening:

For an effective drafting of the opening portion of any communication, I find Bhagwat Geeta is the best guide. Lord Krishna, before he would open an important topic, would repeatedly stress the importance of what He is about to speak. For example, at the start of the seventh chapter (07.01-03), the ninth chapter (09.01-03), the tenth chapter (10.01) and the fourteenth chapter (14.01-02).

Let's consider, for our understanding, the first two verses of the seventh chapter. Towards the end of the sixth chapter, Lord Krishna has expressed an opinion that the one who has successfully merged his mind in the nature of pure consciousness through the path of single pointed meditation is the highest seeker, and dearest to the Lord. This leaves a doubt in the mind of Arjuna as to how a limited and mortal mind of a finite creature could ever embrace and comprehend the limitless Infinite. So, when Arjuna is in this state of doubt, Lord Krishna says in the first two verses of the seventh chapter that:

> *"With the mind intent on Me, practicing Yoga and taking refuge in Me, how shall you know me fully, that you now hear.*
>
> *I shall declare to you in full this knowledge combined with realisation, which being known, nothing further remains to be known."*

So, Krishna knows what doubt Arjuna has before he starts the seventh chapter. In the same manner, you know what doubt the Assessing Officer ("the AO") has when you start addressing your submissions because you have read his show cause notice. Therefore, before you start addressing the issue, first convey to the AO that:

- You know exactly what doubt the ld. AO is anchoring or what details he is requiring while issuing the notice; and
- What you are going to say in the next few paragraphs is intended to address exactly that doubt or requirement.

This can be conveyed many a times by giving effective sub-titles to your submissions followed by a line or two as introduction. When we first stress the importance and the relevance of what we are going to say, we are increasing the likelihood of our submissions being seriously read, appreciated, assimilated and applied.

Effective Closing:

Interestingly, towards the Bhagwat Gita's end (18.63), just before its concluding verses (18.65-66), Lord Krishna actually says:

> *"Thus, the wisdom which is a greater secret than all secrets, has been declared to you by Me; having reflected upon it fully, you now act as you choose."*

We often close our communication to the AO using similar language:

> "Thus, the assessee submits that the proposed addition is uncalled for and illegal based on the facts and the law explained hereinabove. You may kindly consider the same in finalising the assessment."

By saying that you may kindly consider the same in finalising the assessment, we are telling the AO that you may now act as you choose.

This conclusion is, with due respect, often wrong. Lord Krishna could have ended Bhagwat Geeta here, but He didn't. He goes on in verse 64 to say:

> *"Hear again My supreme word, most secret of all; because you are My dear beloved, therefore, I will tell you what is good (for you)".*

Later in verses 65 to 71 Krishna actually summarises the knowledge, and gives assurances that if you follow the path shown to you, you shall attain liberation.

Follow this in your concluding paragraphs by summarising your submissions and providing an assurance to the AO that by following this you are actually administering justice and following the law in word and in spirit.

And this is not the end. Please note verse 72, where Lord Krishna says:

> *"Has this been heard, O son of Pritha, with single pointed mind? Has the distractions, caused by your 'ignorance', been dispelled, O Dhananjaya?"*

Of course, you won't write to the AO in so many words as used by Krishna. But, remember, Krishna reminds Arjuna twice in the verse who Arjun is: (a) son of Pritha; and (b) Dhananjaya. Without going into the nitty gritty of these terms, please note that these two modes of addressing Arjuna conveys that Krishna has utmost respect for Arjuna. You must use the same approach while addressing the AO / Appellate Authority (like 'Sir' or 'your good self' or 'your honour').

Secondly, by asking this question in verse 72, Krishna gave a chance to Arjun to speak out if any doubt has still remained in his mind after hearing 18 chapters of the Geeta. You too, leave the AO with this thought:

> "Sir, with the foregoing submissions, we believe, that the proposal of making the addition as laid out in the show cause notice would be dropped. If however, your goodselves still harbour any doubt or reservations in this behalf, we shall be glad to elucidate our submissions or provide more information / explanations, if need be, on hearing from you either in writing and / or in the video conference hearing that you may kindly provide to us in this behalf".

Arjun, in the next verse (verse 73) says that all his doubts have been cleared fully. The AO may not say this to you. But the last lines of your letter as aforesaid will serve the following purpose:

- The AO will be receptive because you have addressed him with due respect;
- He knows that this is not necessarily your last word leaving him free to interpret (read as 'misinterpret') your submissions the way he wants; and
- You have left an avenue open for you to really clarify certain things if the AO is still carrying any more doubts.

The heart of the submissions – the merits:

Between the opening and the conclusion lies the substance of the submissions, namely the merits of the issue raised by the AO.

Filling in the meat in the main portion of the submissions is extremely important. The submissions on the merits of the matter be presented in the following sequence, namely:

- Reproduction or brief narration of the exact query raised in the show cause notice / s. 142(1) notice along with the serial number of the relevant query so that there is absolute clarity as to what exactly you are addressing.
- Narrating how you have dealt with the relevant issue in your return of income and how has it been disclosed in your audited accounts and in the audit report / tax audit report / other statutory reports required to be filed with the return of income.
- Thereafter, narrate the concerned transaction / entry in greater detail along with adequate documentary evidences like agreements, invoices, receipts, vouchers, minutes of the board / shareholders' meetings, bank statements etc. If required, support your facts with the help of affidavits or certificates from an expert or a relevant third party. What is to be remembered is that putting the factual aspects before the AU is the most important thing in the entire gamut of tax proceedings because putting any new facts for the first time before the appellate authorities is always a challenge in view of restrictive provisions of rule 46A.
- In case the facts narrated by you are different from what is stated or alleged in the notice, make categorical statement that the allegation / presumption in the notice is unfounded.
- In case the facts are correct but the inference of the AO is incorrect, say so with the help of the documentary or other evidences.
- In case you need to produce evidences other than mere documents (for example – samples of goods produced, samples of wastages coming out in the production process, production of a witness like an engineer or an expert crave leave in the letter to produce the same before any designated officer of the Department).
- In case you are merely providing samples of documents where the AU has asked for all the documents, please say clearly that the ones produced are merely samples and that all the documents cannot be produced easily in view of the volume involved and, at the same time, assure that you will produce any more samples if so desired by the AO.
- Finally, support your stand with legal submission with the help of relevant provisions of the Act / Rules etc., case law, circulars etc. that you would like to rely on.

Other important aspects:

Give references of all the past communications sent in relation to the ongoing proceedings in the opening paragraph, irrespective of whether those past communications are in relation to the concerned subject matter or not. This merely reiterates the various submissions already made so that if in the Assessment order, the AO considers one and not the other, the reference to all the earlier submissions in all our communication comes to our rescue.

Preferably prepare a paginated paper book and file it along with an index of documents included in it with page numbers. Prepare separate paper books for factual documents and for legal case law / circular copies. Give cross referencing by way of page numbers or the unique file name of the attachments that you are submitting along with your submissions. This makes it easy at the stage of appeals etc. to prove that the said material was actually filed.

Reproduce the critical clauses from the agreements or critical extracts from the minutes of the meetings or from an invoice or any other document with pointing out exact page number of the paper book where he can find it so as to save time of the AU in going through big documents and to assist him in focussing on the issue concerned. Similarly, reproduce the critical paragraphs of a decision on which you are relying on even though the copy of the decision is filed by you separately.

To conclude:

Mr. Palkhivala's treatise is titled "The law and practice of Income-tax". The law is what it is. The present book is an effort by WIRC, to reinvent the practice of income-tax in the light of the new faceless regime such that (a) the tax administration is satisfied that all its queries and doubts are fully answered by the assessee; (b) the tax practitioner

is satisfied that he has left no stone unturned in his efforts to serve the client he is representing; (c) the tax payer is satisfied that his representative has put the best foot forward in representing him; and above all (d) the Government is satisfied that its decision of introducing the faceless regime is meeting with success.

Mr. Behram A. Palkhiwala, in the foreword to the Tenth Edition of the treatise, says that one of the principle kept in mind while Mr. Nani Palkhivala wrote the book is that "Enlightened administration is as essential as enlightened enactment, and it can be good recompense for a bad law". Here, I dare say, that "enlightened tax practitioner is as essential as enlightened administration, and he can be a good recompense for bad facts (of his client)".

Happy reading…

■■■

Notes

Faceless Assessment scheme/Appeal : Scope

CA. Ashok Bansal

PREFACE

The dictionary meaning of 'drafting' is to write down something for the first time (with an objective to improvise later). While preparing any communication, including a communication with respect to Income Tax Assessment and Appeal, it is always a good practice to revise your draft. Conversely, and at the same time, the limitations of time, cost and other resources may make it difficult to revise your drafts and proper care needs to be exercised to ensure that the first draft itself is without mistakes and is correct.

As far as we are concerned, while we write anything on 'drafting', essentially we will be discussing 'how to communicate in writing'.

FACELESS ASSESSMENT

The faceless assessment scheme, as it stands today, was notified by Notification Nos. 61/2019 and 62/2019 dated 12th September, 2019 and was modified by Notification Nos. 60/2020 and 61/2020 dated 13th August, 2020. The faceless assessment scheme covers all scrutiny assessments u/s 143(3), 144 and 148. When the assessment is done u/s 148, presently the jurisdictional assessing officer issues the notice, provides reasons and deals with the objection and thereafter the assessment is carried on under the faceless scheme. Assessments involving international taxation, Black Money Act, Benami Property Act and assessments by Central charges, which normally deal with cases involving search and seizures, are still being done physically.

Notwithstanding the above, the National Faceless Assessment Centre (NFAC) may, at any stage of the assessment, if considered necessary, transfer the case to the jurisdictional assessing officer, with the prior approval of CBDT.

SCOPE

Following are the provisions which will require communication by the assessee during the course of faceless assessments:

*144B(1)(ii): Response to notice received u/s 143(2). This has to be filed within 15 days of the receipt of the notice.

*144B(1)(vii): Response to request received u/s 144B(1)(vi). This is usually to seek further information, documents or evidence. The response has to be filed within the time specified in the notice received or if extension is sought, before time specified in such extension. The assessee may request for an extension of time and, if granted, the response may be filed within the extended time.

*144B(1)(xii): Response to show cause notice received u/s 144B(1)(xi). The show cause notice arises out of non-compliance with any notices issued u/s 142(1) or 144B(1)(vi) or with any direction received u/s 142(2A). The response has to be filed within the specified or extended time, as the case maybe.

*144B(1)(xxii): Where any variation prejudicial to the interest of the assessee is proposed, the NFAC shall provide an opportunity to the assessee by issuing a show cause notice u/s 144B(1)(xvi)(b). The response has to be filed within the specified or extended time, as the case maybe.

*144B(1)(xxvii): In case of non-resident assessees and in case of assessees where the Transfer Pricing Officer has passed an order u/s 92AC(3) proposing an adjustment, there is an additional response involved. This is in response to draft assessment order or revised draft assessment order or revised draft assessment order sent to the assessee u/s 144B(1)(xxiii)(a)(A) or 144B(1)(xxv)(a)(A). The response has to be filed within the specified or extended time, as the case maybe. The response can be either to accept the variations or to file objections with the Dispute Resolution Panel u/s 144C.

DRAFTING

In all the communications above, the following are the essential requirements of communication:

1. Grammatical accuracy
2. Factual accuracy. Additionally, one has to ensure that the information submitted is in agreement with the information already present in the public domain. If there is a difference between these two, a statement reconciling the submitted information with the information in the public domain may also be given.
3. Consistency. If first person is used, it should be used throughout the submission.
4. Simplicity. However, where the subject matter itself is technical or complicated, simplicity requirement may have to be sacrificed or compromised. As far as possible, technical terms should be explained in simple terms.
5. Brevity.
6. Further, as far as possible, one should use gender neutral addresses, should avoid local slangs and ought to be neither defensive nor aggressive.
7. For future use, the submissions as well as the annexures should be properly numbered and arranged. To avoid confusion, if the enclosures are numbered serially from 1 to, say, 10, in the first submission, the numbering in the 2nd submission should start from 11.
8. Wherever the items to be dealt with in the submissions are large in number, it is better to use a table.

Following are generally the contents of submissions:

A. Internal evidence in the form of bills, receipts, confirmations, statements, documents, etc.

B. Other evidences in the form of public domain information and external documents.

In case of both A and B above, the source and basis of all claims should be disclosed or at least preserved for future use.

C. Excerpts from law, including circulars and notifications; and

D. Case laws. Before submitting any case law in one's defense, the entire judgment ought to be studied to ensure that some portion of the judgement is not against one's interest. Further, the current status of the decision should be researched. It should not happen that one is citing an ITAT decision which has been later on overturned by the High Court before the submission date.

FACELESS APPEALS

Similarly, the faceless appeal scheme was notified by Notification No. 76/2020 and 77/2020 dated 25th September, 2020. The scheme applies to all appeals under Sec. 248 (Appeal by a person denying liability to deduct tax in certain cases) and Sec. 246A [all other appeals filed before the Commissioner of Income Tax (Appeals)]. Presently, the appeals relating to those assessments which are exempted from faceless scheme are being disposed of manually.

Following is the procedure involved, with specific reference to drafting:

i. Appeal ought to be filed after taking special care to ensure that all the objections are covered in the grounds of appeal, which are easy to understand and specific.

ii. The hierarchy of the ground should be; first legal, secondly factual and lastly the without prejudice grounds.

iii. If the appeal is not filed within the statutory time limit, the reasons should be properly explained for not having filed the appeal within the time limit and should be supported by evidence. A properly drafted notarized affidavit is recommended.

iv. If the appellant has not made payment of tax as stipulated in Sec. 249(4), a separate application ought to be filed giving reasons for non-payment and making a case for exemption from the requirements of the section.

v. Additional grounds may be filed during the pendency of the appeal, along with reasons for omission of these grounds from the appeal filed originally.

vi. If the appellant is filing any evidence which was not filed in the assessment proceedings, reasons for the same have to be given and a case has to be made out for admitting the additional evidence under Rule 46A.

vii. The CIT(A) may, during the pendency of appeal, propose an enhancement. The appellant shall have to show cause as to why the enhancement should not be done in his case.

Except the above points which are specific to appeals, the discussion in the case of faceless assessment shall apply to faceless appeals also.

■■■

Notes

Stay Application before Assessing Officer: Scope and Applicability Provision, Rules, circulars etc.

CA. Sanjay C. Shah

Cases of Demand arising out of order passed u/s 143(3) of the Act for which Appeal is filed with CIT(Appeals) which is pending disposal.

While passing order u/s 143(3) of the Act , there are additions made by Assessing officer with the result , income tax liability arises in such Assessee's Case. Assessee prefers an appeal before CIT(appeals) in which he disputes entire/part of Tax liability raised during Assessment . In such circumstances assessee needs to pay atleast 20% of disputed tax liability and 100% of undisputed Tax liability. (Office Memorandum issued by CBDT dated :- 31st July 2017).

In the above situation, once assessee pays requisite amount of disputed and undisputed tax liability as mentioned above balance disputed demand shall be kept in abeyance till the disposal of CIT(Appeals) and no coercive action can be taken against Assessee. It will be sufficient if assessee makes an application for stay of balance disputed demand under section 220(6) of the Act enclosing a Receipted Challan of payment of 100% of undisputed Demand and 20% of Disputed Demand and also referring to aforesaid Office Memorandum dated:-31st July 2017.

Once the balance demand is kept in abeyance till the disposal of appeal filed before CIT (Appeals), even subsequent refund if any must be paid to the assessee without adjusting the same against balance disputed liability 80%. As ITAT Chandigarh Tribunal held in the case of **Greater Mohali area Development Authority vs. Deputy Commissioner of Income Tax (2018) 53 CCH 0110 ChdTrib dated 09th May 2018.**

No Automatic Stay - The Madras High Court in **Paulsons Litho Works 208 ITR 676, (Mad)** has observed that mere filing or pendency of an appeal does not constitute an automatic stay of the order under challenge or recovery of the tax or penalty under dispute in such appeal. This is so because the mere fact that an order is subject matter of appeal can furnish no ground for not following it unless its operation is suspended by a competent authority.

In a case, where on account of high pitched assessments or for any other reasons, assessee is unable to pay even 20% of the disputed Demand , he will file an Appeal before CIT(appeals) and also shall make an application for stay of Demand either wholly or partly as per following procedure :-

a. Assessee shall have to make an application for stay of Demand u/s 220(3) of the Act before Assessing officer or any other relief sought such as granting instalments etc. Such Application must be made within 30 Days from the date of Receipt of order

b. On Receipt of such application Assessing officer, shall either accept, partly or wholly, the application made by Assessee as referred above. However, practically it is seen that Assessing officer, in most of the cases, refuses to grant stay or instalments for payment of disputed taxes. Accordingly Learned Assessing officer may issue a rejection letter to assessee in response to above application for stay of demand u/s 220(3) of the Act as mentioned above.

c. On Receipt of such Rejection letter, Assessee can approach Jurisdictional Additional Commissioner, with a request to grant Stay of Disputed Demand or any other Relief in the matter. Assessee shall also attach copy of Rejection letter issued by Learned Assessing officer, in the Stay application filed before Additional Commissioner. Additional Commissioner, in most cases, also rejects the said request made by Assessee and shall issue a Rejection letter in response to application filed.

d. Thereafter, Assessee can approach Jurisdictional Principal Commissioner of Income Tax with similar stay petition with copies of Rejection letter issued by lower authorities for a review of decision taken by the

Assessing officer & Additional Commissioner. In the said Stay petitions following major information must be presented :-

- A brief history regarding demand of the tax, interest, penalty, fine and sum or recovery which is ought to be stayed together with Nature of Additions;
- Status of the appeal filed before the Commissioner (Appeals);
- The accurate amount of demand, along with the amount undisputed therefrom and the outstanding amount.
- Reasons in brief for filing the application for Stay of Demand ;
- Whether or not the applicant is willing to offer security, and if willing, in what form?
- In case main reason for seeking for stay is financial incapacity of Assessee then a provisional Balance Sheet reflecting no capacity to pay disputed demand.

The Hon'ble Supreme Court on 20 July 2018 in **Civil Appeal No. 6850 of 2018 – PCIT vs LG Electronics India Pvt Ltd** has clarified that Commissioner is not bound by administrative circulars issued by the CBDT and can grant stay of demand on payment of an amount less than 20%.

e. In case, Jurisdictional Principal Commissioner rejects, application for Stay of Demand and appeal is pending before CIT(appeals) assessee will be left with no option but to file Writ Petition with jurisdictional High Court.

The Hon'ble Bombay HC in the writ petition filed on 11 Sept 2018 case of **Bhupendra Murji Shah Vs. Deputy Commissioner of Income Tax and others** (2020) 423 ITR 0300 (Bombay HC) held that - S. 220(6)/ 246: The AO is not justified in insisting on payment of 20% of the demand based on CBDT's instruction dated 29.02.2016 during pendency of appeal before the CIT(A). This approach may defeat & frustrate the right of the assessee to seek protection against collection and recovery pending appeal. Such can never be the mandate of law.

HIGH COURT OF BOMBAY WRIT PETITION NO.2157 OF 2018 AND 2160 OF 2018.

The directions of case law are produced herein as below

"If the demand is enforced and executed during its pendency. In that event, the right to seek protection against collection and recovery pending Appeal by making an application for stay would also be defeated and frustrated. Such can never be the mandate of law.

In the circumstances, we dispose both these petitions with directions that the Appellate Authority shall conclude the hearing of the Appeals as expeditiously as possible and during pendency of these Appeals, the petitioner/ appellant shall not be called upon to make payment of any sum, much less to the extent of 20% under the Assessment Order/Confirmed Demand or claim to be outstanding by the Revenue.

We direct that during the pendency of the above Appeals, the attachment, if any, levied on the petitioner's bank account to stand raised forthwith. However, this is without prejudice to the power conferred in the Revenue/ Department to collect and recover taxes, which are due and payable. We record the statement made by Mr.Agarwal on instructions as an undertaking to this Court and to this effect that during the pendency of the Appeals before the Commissioner (Appeals), Income Tax, the petitioner shall not dispose of or create third party right in respect of his movable assets and properties. This, however, shall not prevent the petitioner/ assessee from utilizing his assets and properties in the ordinary and normal course of business."

f. There is no provision in the law which restricts assessee's right of appeal where assessing officer refusing to grant of stay in other words appeal filed before CIT (Appeals) can not be dismissed solely on the ground that stay of demand is not granted.

g. Supreme Court in the case of ITO vs. M.K. Mohammed Kunhi (1969) 71 ITR 815 has held that an application for stay of demand could be made even before the CIT(A) as the first appellate authority has power to grant stay, which is incidental and ancillary to its appellate jurisdiction.

Common points for all types of Stay Petition before any Authorities:-

1. In my opinion, in certain situation, Demand must be stayed even without payment of 20% or on payment of amount lesser than 20% of disputed Demand. A few illustrative situations where stay could be granted are –

   a. If the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier; or

   b. if the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working); or

   c. if the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgement.

   It is clarified that in these situations also, stay may be granted only in respect of the amount attributable to such disputed points. Further, where it is subsequently found that the assessee has not cooperated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or court alters the above situation, the stay order may be reviewed and modified. The above illustrations are, of course, not exhaustive.

   In my opinion, this portion of directions contained in Instructions No :-1914 dated 02-12-1993 holds good even as on date.

2. It is clarified vide press Release dated :-7th November 2014, that no coercive action can be undertaken without disposal of application for stay before any authorities.

   Above clarification would mean that assessee must be prompt in making stay application before higher authorities in case application for stay is rejected by lower authorities. In this process no time is available with Department to take coercive action as Stay application will be pending at any given time before any one authority.

3. The Hon'ble Bombay High Court In the case of **Mahindra and Mahindra Ltd. v. Assessing Officer (2007) 295 ITR 43** held that, no coercive action should be taken till the expiry of the appeal period against the said order is over. Therefore, the Assessing Officer is duty bound to wait for the expiry of time period of appeal before proceeding to recover the tax due. Contempt of court proceedings initiated against AO and Jt.CIT.

■■■

Notes

Rectification Application u/s. 154 Scope and Applicability: Circulars & notifications on the point

CA. Vinod Jain

Introduction

If there is any mistake apparent from the record, the same can be rectified by concerned income tax authority by passing rectification order u/s. 154.

Note: Since rectifications can be done of issues related to income tax, TDS and TCS, I.T. Act refers the terms assessee, the deductor or the collector separately. For the sake of convenience the term "assessee" used in this article also includes the tax payer, the deductor and the collector, as the case may be.

Rectification can be done by -

a. Amending any order passed by the authority under any provisions of the Income-tax Act.

b. Amend any intimation or deemed intimation u/s. 143(1), processing of income tax return.

c. Amend any intimation sent under section 200A(1), processing of TDS statements.

d. Amend any intimation under section 206CB, processing of TCS statements.

Rectification can be initiated by:

The assessee can make an application to the income-tax authority for rectification of a mistake by making an application to the concerned officer or through e-portal.

The income-tax authority can rectify the mistake on its own motion. If due to rectification of mistake, the tax liability of the taxpayer is enhanced or refund is reduced, the authority shall give an opportunity of being heard to taxpayer, before passing such rectification order.

The assessing officer also passes rectification order, for giving effect to orders of appellate authorities such as orders passed by Commissioner of Income Tax (Appeals) / Income Tax Appellate Tribunal.

Who can pass the rectification order and mode of passing the order:

Any authority specified u/s 116 can rectify its order. If the order is passed by assessing officer he rectifies the same. Rectification is also done through e-portal, traces etc.

If the order is passed by the Commissioner (Appeals), then the Commissioner (Appeals) can rectify mistake which has been brought to his notice by the Assessing Officer or by the taxpayer.

An order of amendment u/s. 154 must be passed in writing by concerned authority.

Rectification of any matter considered and decided by way of appeal or revision is not allowed

If any matter in an order has been considered and decided in any proceeding by way of appeal or revision, rectification can be done of such an order on any matter other than the matter decided in appeal or revision. In other words no rectification can be done of the matter considered and decided in any proceeding by way of appeal or revision.

Opportunity of being heard:

If the authority wishes to make an amendment in its order, which has effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, in such case before passing the amendment order, tax authority must give assessee a reasonable opportunity of being heard.

Impact of Rectification order:

The income tax authority shall make refund which may be due to such assessee as a result of such amendment order. In case of there is a demand as a result of such order, the authority shall serve on assessee a notice of demand, which shall be deemed to be issued u/s. 156.

Time-limit for rectification

No order of rectification can be passed after the expiry of 4 years from the end of the financial year in which order sought to be rectified was passed. The period of 4 years is from the date of order sought to be rectified and not 4 years from original order. Hence, if an order is revised, set aside, etc., then the period of 4 years will be counted from the date of such fresh order and not from the date of original order.

In case an application for rectification is made by the taxpayer, the authority shall amend the order or refuse to allow the claim within 6 months from the end of the month in which the application is received by the authority.

Guidelines for e-file Rectification Request u/s 154 on Income Tax new Portal:

1. Overview

The Rectification Request service is available to:

- All taxpayers registered on the e-Filing portal
- Registered ERI Users / Registered Authorized Signatories / Registered Representative assessees (applicable only if the taxpayer wants to engage one)

This service is available only after logging in to the e-Filing portal. It allows you to rectify any mistake apparent from record in the intimation sent or order passed by CPC for processed returns.

2. Prerequisites for availing this service

- Registered user on the e-Filing portal with valid user ID and password
- For registered taxpayers (or Authorized Signatory / Representative Assessee on behalf of the taxpayer):
  - Received an intimation u/s 143(1) of the Income Tax Act, 1961 or u/s 16(1) of the Wealth Tax Act from CPC, Bengaluru
  - Add ERI using the My ERI service (applicable only if the taxpayer wants to engage an ERI)
- For registered ERI users:
  - Add the taxpayer as a client using the Add Client service
  - ERI status is Active
- Both registered taxpayers and registered ERI users:
  - Register valid DSC in e-Filing (not expired) to exercise Using Digital Signature Certificate (DSC) option; or
  - Generate EVC

3. Step-by-Step Guide

Step 1: Log in to the e-Filing portal using your valid user ID and password.

Step 2: Click Services > Rectification.

Step 3: On the **Rectification** page, click **New Request.**

Step 4a: On the **New Request** page, your PAN will be auto-filled.

Select **Income Tax** or **Wealth Tax.**

Step 4b: Select the **Assessment Year** from the dropdown. Click **Continue**.

Note: If you select the Wealth Tax option, you also need to enter the latest intimation reference number, and click Continue.

Step 5: Rectification requests have the following classification:

Income Tax Rectification

5.1 Reprocess the return

5.2 Tax credit mismatch correction

5.3 Additional Information for 234C Interest

5.4 Status Correction

5.5 Exemption section correction

5.6.a Return data correction (Offline)

5.6.b Return data correction (Online)

INCOME TAX RECTIFICATION REQUEST

5.1 Reprocess the Return

Step 1: Select the request type as **Reprocess the Return.**

Step 2: With this option, you just need to submit the rectification request –

Click Continue to submit the request.

Step 3: On submission of your request, you will be taken to the e-Verification page.

Note: Refer to the How to e-Verify user manual to learn more.

5.2: Tax Credit Mismatch Correction

Step 1: Select the request type as Tax Credit Mismatch Correction.

Step 2: The schedules under this request type are auto-populated based on the records available in the corresponding processed return. If you need to edit or delete a schedule, select the schedule, then click **Edit** or **Delete**.

Step 3: Enter the details under the following schedules:

Tax Deducted at Source (TDS) on Salary Details,

Tax Deducted at Source (TDS) on Other than Salary Details,

Tax Deducted at Source (TDS) on Transfer of Immovable Property/Rent,

Tax Collected at Source (TCS),

Advance Tax or Self Assessment Tax Details.

Click Save as Draft.

Step 4: Click Continue to submit the request.

Step 5: On submission, you will be taken to the e-Verification page.

Note: Refer to the How to e-Verify user manual to learn more.

5.3 Additional Information for 234C Interest

Step 1: Select the request type as Additional Information for 234C Interest.

Step 2: Click Add Details on any of these records, as applicable to you:

- Income from PGBP accrue or raise, first time (Applicable for 2016-17 onwards)
- Special Income Mentioned in 2(24)(ix) Taxable u/s 115B
- Income Referred in Section 115BBDA (Applicable for 2017-18 onwards)

Step 3: If you need to edit or delete a completed record, click **Edit** or **Delete**.

Step 4: Click **Continue** to submit your request.

Step 5: On submission of your request, you will be taken to the e-Verification page.

Note: Refer to the How to e-Verify user manual to learn more.

5.4 Status Correction

Step 1: Select the request type as Status Correction.

Note: Status correction is applicable only for ITR-5 and ITR-7 up to AY 2018-19.

Step 2: Select the status applicable to you from the list:

- Private Discretionary Trust
- Society Registered under Societies Registration Act 1860 or corresponding Act of the State
- Estate of the deceased
- Any other Trust or Institution
- Primary Agricultural Credit Society/ Primary Co-operative Agricultural Bank
- Rural Development Bank
- Other Cooperative Bank

Step 3: On the **Add Details** page, answer the additional questions listed by selecting the **Yes / No** options as applicable. Click **Continue**.

Your selected status correction may require you to upload supporting documents. On the **Add Details** page, click **Attachment**, and upload the required document(s), which should be in PDF format. Click **Continue**.

Note:

- The maximum size of a single attachment should be 5 MB.
- If you have multiple documents to upload, put them together in a zipped folder and upload the folder. The maximum size of all attachments in a zipped folder should be 50 MB.

Step 4: On submission of your request, you will be taken to the e-Verification page.

Note: Refer to the How to e-Verify user manual to learn more.

5.5 Exemption Section Correction

Step 1: Select the request type as Exemption Section Correction.

Note: Exemption Section Correction details is applicable only for ITR-7 from AY 2013-14 to A.Y 2018-19.

Step 2: On the Add Details page, enter your details in all the following fields:

- Name of the Projects/Institution,
- Approval/Notification/Registration Number,
- Approving/Registering Authority,
- Section under which the institution has claimed exemption.

Click Attachment to upload the necessary supporting document(s) in PDF format.

Click Continue to submit the request.

Note: The maximum size of a single attachment should be 5 MB.

Step 3: On submission of your request, you will be taken to the e-Verification page.

Note: Refer to the How to e-Verify user manual to learn more.

5.6.a Return Data Correction (Offline)

Step 1: Select the request type as Return Data Correction (Offline).

Step 2: Select the applicable rectification reasons - you can select multiple reasons under each category, if applicable. Then, click **Continue.**

Step 3: Select the schedules that need to be changed, then click **Continue.**

Step 4: Click **Attachment** and upload the Rectification XML / JSON generated from the ITR offline utility.

Note: The maximum size of a single attachment should be 5 MB.

Step 5: Enter the Donation and Capital Gains details, if applicable.

Step 6: Click **Continue** to submit the request.

Step 7: On submission, you will be taken to the e-Verification page.

Note: Refer to the How to e-Verify user manual to learn more.

Step 5.6b Return Data Correction (Online)

Step 1: Select the request type as Return Data Correction (Online).

Step 2: Select the rectification reasons- you can select multiple reasons under each category, if applicable. Then, click **Continue**.

Step 3: Click **Add Details** on the applicable schedule(s) to correct the details under them.

Step 4: When you have finished updating all schedules, click **Continue**.

Step 5: On submission, you will be taken to the **e-Verification** page.

Note: Refer to the How to e-Verify user manual to learn more.

Important Judgments on section 154

Mistake must be obvious and patent – A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two points. A decision on a debatable point of law is not a mistake apparent from the record-***TS. Balaram, ITO v. VOLKART BROS.*** **[1971]82 ITR 50 (SC).**

Even a mistake of law which is glaring and obvious can be rectified- If a mistake of fact apparent from the record of the assessment order can be rectified there is no reason why a mistake of law which is glaring and obvious cannot be similarly rectified- ***MK.Venkatachalam, ITO v. Bombay Dyeing & mfg. [1958]34 ITR 143 (SC).***

Time limit in case of reassessment: In reassessment cases, date of reassessment order is relevant for time limit of rectification. ***Saran Engg.Co Ltd. v.CIT [1983]143 ITR 765(ALL); [1983]140ITR 187(DELHI); [1986]157 ITR 531 (KAR)***

Relevance of subsequent High/Supreme court decision: Subsequent High court /Supreme court decision can form the basis of rectification. ***Nav Nirman (P)Ltd. v.CIT [1988]174 ITR 574 (MP) / [1988]174 ITR 579(Ker.) / [2001]252 ITR 76 (Punj & Har)***

In case of divergent views of various high courts: Rectification is barred if there are divergent views by different High courts. ***CIT v. Orient Paper Industries Ltd [1994]208 ITR 158 (Cal).***

Interpretation of term 'Mistake'

Omission of assessee to claim deduction in return or during course of assessment proceedings is not a mistake apparent from record- ***Punjab state co-operative Supply and Marketing Federation Ltd. v. Dy.CIT. [2008]173 Taxman 15 (Punj & Har)***

Fresh determination of facts should not be involved- ***Oil India Ltd v.CIT [1990]183 ITR 412 (Cal)***

Application of wrong provision of Act or erroneous application of same will amount to mistake apparent on the face of record- ***CIT V. Peirce Leslie & Co. Ltd. {1997] 227ITR759 (Mad)***

Interpretations of term 'Record'

The 'record' referred to in section 154 does not mean only the order of assessment but it comprises of all proceedings on which the assessment order is based and the ITO is entitled for the for the purpose of exercising his jurisdiction under section 154 to look into the whole evidence and the applicable to ascertain whether there was an error – ***Maharana Mills (P) Ltd.v.ITO [1959]36 ITR 350(SC).***

'Record' u/s 154 means which were available at the time of passing of the order which is the subject matter of the proceedings for rectification. They cannot go beyond the records and look into fresh evidence or material which were not on record at the time the order sought to be rectified was passed-***Gammon India Ltd .v. CIT [1995]214 ITR 50(BCOM).***

Section 154 is to be exercised with reference to the records of the assessee available with the Assessing officer and not with the particular reference to the assessment alone. The error apparent on the face of the records cannot be said to be the record of one particular assessment years – ***Upasana hospital and nursing Home v.CIT [2003]253ITR507(Ker).***

Notice to assessee is not always mandatory- The object of providing for issue of a notice in section 154 is that no order should be passed to the detriment of an assessee without affording him an opportunity but it cannot be said that the rule is so rigid that, if as a matter of course the assessee knows about the proceedings and the matter had been discussed with him then an adverse order will be invalid merely because no notice was given to show cause. Secondly, this provision is applicable only where the assessment is enhanced or refund is reduced – ***Maharana Mills (P) Ltd. v. ITO [1959]36 ITR 350 (SC).***

Power to rectify is mandatory¬- The ITO is an officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the revenue may be avoided .It is implicit in the nature of the power and its entrustment to the authority invested with quasi –judicial functions under the Act ,that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceedings – ***L.Hirday Narain . v. ITO [1970]78 ITR 26 (SC).***

Commissioner can rectify his order- The Commissioner is one of the authorities mentioned in section 116 and hence he has the power to rectify any obvious mistake (either of face or of law) in any order passed by him provided it is established that the mistake is one apparent from the record-***N. Rajamoni Amma v.deputy1 CIT [1990]86 CTR 26 (KER) 12.***

Important CBDT Circulars on section 154

1. **Circular No. 68 dated 17.11.1971**

   A mistake arising as a result of subsequent interpretation of law by the Supreme court would constitute *'a mistake apparent from the record'*

   In view of this circular, it is established position that the Supreme Court does not declare the law with effect from the date of its order and the law declared by the Supreme Court has effect not only from the date of the decision but from the inception of the statutory provision.

2. **Circular no. 73 dated 7.1.1972**

   In all the cases where a valid application under section 154(2)(b) is filed by the assessee within the statutory time limit but was not disposed of by the authority within time specified u/s. 154(7), it may be disposed of even after expiry of statutory time limit by concerned authority, on merits and in accordance with law.

3. **Circular no 87 dated 19.6.1972**

   Sometimes the income tax assessment, on the basis of which penalty order is passed, itself is either cancelled or annulled, and yet the penalty order survives. There will be a justification for cancellation of the penalty order by concerned income tax authority u/s. 154.

4. **Circular no. 4 of 2012 dated 20.6.2012**

   In cases where the figures of arrear demand is to be reconciled / corrected, appropriate corrections in the figures of such disputed arrear demands fter due verifications / reconciliation can be done, irrespective of the fact the period of limitation of 4 year u/s. 154(7) has elapsed.

5. **Instruction no. 3/2013 dated 5.7.2013**

   Hon. Delhi High court on in case of 'Court on its own motion v. UOI (2013) has issued several mandamuses for necessary action BY Income tax department such as maintenance of "Rectification Register" . Board decided henceforth all applications received u/s. 154 shall be dealt with by concerned jurisdictional authorities in manner specified in the circular.

6. **Instruction no.1/2016 dated 15.2.2016**

   The time limit of six months laid down in section 154(8) is to be strictly followed by Assessing Officer while disposing application u/s. 154.

7. **Instruction no. 2/2016 dated 15.2.2016**

   Board has directed that all rectification applications must be disposed of after passing an order in writing, duly served upon concerned taxpayer. It should not be by merely making necessary rectification on the AST system.

Circular No. 68, dated 17-11-1971

Circular : No. 68 [F.No. 245/17/71-A&PAC], dated 17-11-1971.

SECTION 154 RECTIFICATION OF MISTAKES

899. Mistakes apparent from records - Whether can be treated as such on the basis of subsequent decision of Supreme Court

1. The Board are advised that a mistake arising as a result of a subsequent interpretation of law by the Supreme Court would constitute "a mistake apparent from the records" and rectificatory action under section 35/154 of the 1922 Act/the 1961 Act would be in order. It has, therefore, been decided that *where an assessee moves an application under section 154* pointing out that in the light of a later decision of the Supreme Court pronouncing the correct legal position, a mistake has occurred in any of the completed assessments in his case, the application shall be acted upon, provided the same has been filed within time and is otherwise in order. Where any such applications have already been rejected and the assessee files fresh applications within the statutory time limit, the same may also be treated on par with the applications which may either be pending or received after the issue of this circular.

2. The Board desire that any appeals or references pending on the point at issue may please be withdrawn.

Circular No. 73, dated 07-01-1972

[Circular : No. 73 [F.No. 245/13/71-A & PAC], dated 7-1-1972]

902. Board's authorisation for taking action under section 154 beyond time limit specified under section 154(7) in cases where valid application has been field under section 154(2)(b) but was not disposed of within the said time limit - Order under section 119(2)(a)

In exercise of the powers conferred by clause (a) of sub-section (2) of section 119, the Central Board of Direct Taxes hereby orders that in all the cases where a valid application under clause (b) of sub-section (2) of section 154 had been filed by the assessee within the statutory time limit but was not disposed of by the authority concerned with in the time specified under sub-section (7) of section 154, it may be disposed of by that authority even after the expiry of the statutory time limit, on merits and in accordance with law.

Circular No. 87, dated 19-06-1972

[Circular : *No. 87 [F.No. 245/25/71-A & PAC], dated 19-6-1972 in supersession of Circular No. 81 [F.No. 245/25/71-A & PAC], dated 26-3-1972]*

Penalties based on cancelled/annulled assessments - Authorisation by the Board for taking action in respect of such penalties under section 154 beyond the time limit specified under section 154(7) - Order under section 119(2)(a)/(b)

I am directed to invite a reference to the Board's Circular No. 71 [F.No. 245/25/ 71-A & PAC], dated 26-3-1972 and to say that the CBDT have passed a revised order of date in supersession of their earlier order dated 28-2-1972, a copy of which was sent with the Board's above-noted Circular dated 26-3-1972. A copy of this revised order is attached herewith. This may be brought to the notice of ITOs/AACs/IACs in your charge.

ANNEX - ORDER REFERRED TO IN CLARIFICATION

1. The Board's Order F. No. 245/25/71-A & PAC, dated 28-2-1972 under section 119(2)(a)/(b) is hereby superseded and substituted by the following order :

2. It has been brought to the notice of the CBDT that sometimes the income-tax assessment, on the basis of which an order of penalty has been passed, is itself either cancelled or annulled and yet the order of penalty survives. Where such a penalty order has not been made subject of appeal or where it has been confirmed on appeal by the Appellate Assistant Commissioner or on revision petition by the Commissioner/Additional Commissioner, there will be justification for cancellation of the penalty order by the income-tax authority concerned under section 154; if the penalty order of the ITO/AAC/IAC is final, the respective authority will be entitled to cancel it, but if the latest position is as per appellate order of AAC or revision order of CIT/Addl. CIT, the competent authority to act under section 154 will be the AAC or the Commissioner/Additional Commissioner having regard to the provisions of section 154(1A).

3. In the above context it has been pointed out that action under section 154 by the aforesaid authorities in the types of cases mentioned above cannot sometimes be taken because of expiry of time limit under section 154(7). To obviate genuine hardship in such cases, the Board in exercise of the powers vested in them by section 119(2)(a)/(b), hereby authorise the ITOs/AACs/IACs/Addl. CITs/CITs to take action under section 154 suo motu or to admit applications under section 154 filed by the assessees seeking cancellation of penalty orders of the type mentioned above, waiving for this purpose, as may be necessary, the time limit prescribed under section 154(7). It is clarified that this order will not apply to—

   (a) penalties which stand confirmed by Income-tax Appellate Tribunal/High Court/Supreme Court ;

   (b) penalties based on assessments which have been set aside for being framed de novo ; and

   (c) penalties in respect of assessments for which appeals are still pending.

Circular No. 4/2012, dated 20-6-2012

Section 119 of the Income-tax Act, 1961 - Income-tax authorities - Instructions to subordinate authorities - Authorization of AOs in certain cases to rectify/reconcile disputed arrear demand

The Board has been apprised that in certain cases the assessees have disputed the figures of arrear demands shown as outstanding against them in the records of the Assessing Officer. The Assessing Officers have expressed their inability to correct/reconcile such disputed arrear demand on the ground that the period of limitation of four years as provided under sub-section (7) of section 154 of the Act has expired.

Further, in some cases, the Assessing Officers have uploaded such disputed arrear demand on the Financial Accounting System (FAS) portal of Centralized Processing Center (CPC), Bengaluru which has resulted in adjustment of refund arising out of processing of Returns against such arrear demand which has been disputed by such assessees on the grounds that either such demand has already been paid or has been reduced/ eliminated in the appeals, etc. The arrear demands, in these cases also were not corrected / reconciled for the reason that the period of limitation of four years has elapsed.

2. The Board, in consideration of genuine hardship faced by the abovementioned class of cases, in exercise of powers vested under section 119(2)(b) of the Act, hereby authorize the Assessing Officers to make appropriate corrections in the figures of such disputed arrear demands after due verification/reconciliation and after examining the same on merits, whether by way of rectification or otherwise, irrespective of the fact that the period of limitation of four years as provided under section 154(7) of the Act has elapsed.

3. In view of the above the following has been decided:—

   (a) In the category of cases where based on the figure of arrear demand uploaded by the Assessing Officer but disputed by the assessee, the Centralized Processing Center (CPC), Bengaluru has already adjusted any refund arising out of processing of return, the jurisdictional Assessing Officer shall verify the claim of the assessee on merits. After due verification of any such claim on merits, the Assessing Officer shall issue refund of the excess amount, if any, so adjusted by CPC due to inaccurate figures of arrear demand uploaded by the Assessing Officer. The Assessing Officer, in appropriate cases, will also upload amended figure of arrear demand on the Financial Accounting System (FAS) portal of Centralized Processing Center (CPC), Bengaluru wherever there is balance outstanding arrear demand still remaining after aforesaid correction/ reconciliation.

   (b) In other cases, where the assessee disputes and requests for correction of the figures of arrear demand, whether uploaded on CPC or not uploaded and still lying in the records of the Assessing Officer, the jurisdictional Assessing Officer shall verify the claim of the assessee on merits and after due verification of such claim, will make suitable correction in the figure of arrear demand in his records and upload the correct figure of arrear demand on CPC portal.

4. It is specifically clarified that these instructions would apply only to the cases where the figures of arrear demand is to be reconciled/ corrected - whether such arrear demand has been uploaded by the Assessing Officer on to Financial Accounting System (FAS) of CPC or it is still in the records of the Assessing Officer.

INSTRUCTION NO. 3/2013, DATED 5-7-2013

F.No: 25/76/2013/ ITA II

Hon'ble Delhi High Court vide Judgment in case of Court On its Own Motion v. UOI and Ors. in W.P. (C) 2659/2012 dated 14.03.2013 has issued several Mandamuses for necessary action by Income- Tax Department one of which is regarding maintenance of "Rectification Register" in which detail like receipt of applications under section 154 of the IT Act, their processing and disposal are to be maintained. (Reference: Para 16 to 18 of the order).

2. In view of the said order it has been decided by the Board that henceforth all applications received under section 154 of the I.T. Act by the concerned jurisdictional authorities shall be dealt with in the following manner-

3.

A. Receipt of applications under section 154 of the Income-tax Act, 1961:

A.1. Offices where Aayakar Seva Kendra is Centeralized Dak receipt Center

(i) All offices where Aayakar Seva Kendra ('ASK') is functional, it would be ensured that that all applications received under section 154 are duly entered into the system by the ASK and a system generated ASK acknowledgement number shall be given to the taxpayer.

(ii) The acknowledgement number of application received u/s 154 provided to the taxpayer at ASK receipt counter shall be transmitted online to the Assessing Officer while paper application shall be physically forwarded to the Assessing Officer.

(iii) At places where Aayakar Seva Kendra is non-functional but where ASK-Sofware is used for purposes of receipt of Dak, the procedure outlined for Aavakar Seva Kendras mentioned above would be adopted in respect of applications u/s 154 received by the concerned authority.

A.2. Offices where Dak is received by the jurisdictional Assessing Officer Offices where neither Aayakar Seva Keodra is functional nor ASK Software is used for receipt of dak, the applications u/s 154 should be received, diarized and acknowledgment number should be given to the assessee by the receiving jurisdictional Assessing Officer immediately at the time of filing the application.

B. Maintenance of "Register of Rectifications under section 154" online

B.1. To facilitate action u/s 154 in a time bound and transparent manner, all Assessing Officers should enter rectification applications in the "Valine Rectification Register" which has been made available in ITD Applications. The procedure to maintain this register online has already been intimated to the field formations vide AST Instruction No. 112 dated 29.11.2012 issued by the Directorate of Income-tax (Systems).

B.2. Rectification applications have to be compulsorily uploaded in "Online Rectification Register" by the Assessing Officer on the day application is received by him either through Aayakar Seva Kendra/ ASK Software or in his own office. The acknowledgement number provided to the taxpayer at the time of receiving application u/s 154 must invariably be entered in "Online Rectification Register" in appropriate column.

C. Disposal of application under section 154 of the Income-tax Act, 1961:

C.1. As per provisions of Section 154 of the I.T, Act, 196l, each application under that Section has to be disposed of by passing appropriate order within 6 months from the end of the month in which application is received. However, under Citizens Charter of 2010, the service delivery standard in respect of deciding rectification application has been fixed as 2 months. The concerned authorities should therefore, abide by this standard and ensure that rectification applications are decided as far as possible within a period of two months from the end of the months in which application is received.

C.2. Every Rectification application has to be processed through ITD applications only.

C.3. In cases where application were received through Aayakar Seva Kendra /ASK Software, Assessing Officer should also flag/mark the disposal of rectification application in ASK Software so that its disposed status could be tracked down.

C.4. The order under section 154 of income-tax Act muse fulfill all the legal requirements, should be a speaking order and has to be invariably communicated co the taxpayer immediately after its disposal.

3. In respect of e-filed returns, the rectification applications are also filed online. CPC would be required to immediately identify whether action can be taken at its own end or it has to be transferred to the Assessing Officer for necessary action. If CPC is required to take action, it would do so within the time-frame prescribed. On the other hand, if the Assessing Officer is required to dispose it off, he would enter the same in the online rectification register, process it on AST and shall again make necessary entries therein once the same is disposed off. The prescribed time limit would strictly be adhered to in this case also.

4. All CCsIT / DGsIT are requested to ensure that the above procedure is strictly followed in their charge with immediate effect and the maintenance and updating of online rectification register is monitored by the concerned supervisory officers in their respective charges.

Instruction No. 01/2016 dated 15.02.2013

(F. NO 225/305/2015- ITA II)

Subject: Following the prescribed time-limit in passing order under sub-section (8) of section 154 of Income-tax Act, 1961-regd.-

Sub-section (8) of section 154 of the Income-tax Act, 1961 ('Act') stipulates that where an application for amendment is made by assessee / deductor /collector with a view to rectify any mistake apparent from record, the income-tax authority concerned shall pass an order, within a period of six months from the end of the month in which such an application is received, by either making the amendment or refusing to allow the claim. It has been brought to the notice of the Board that the said time-limit of six months has not been observed in deciding some applications. In such cases, the field authorities often take a view that since no action was taken within the prescribed time-frame, the application of the taxpayer is deemed to have lapsed, thereby not requiring any action.

2. The matter has been examined by the Board. In this regard, the undersigned is directed to convey that the aforesaid time-limit of six months is to be strictly followed by the Assessing Officer while disposing applications filed by the assessee/deductor/collector under section 1 54 of the Act. The supervisory officers should monitor the adherence of prescribed time limit and suitable administrative action may be initiated in cases where failure to adhere to the prescribed time frame is noticed.

Instruction No. 2/2016 Dated 15-02-2016

[F. No. 225/305/2015 – ITA. II]

Subject: Passing Rectification order under section 154 Income – tax Act, 1961 – regd.-

Instances have come to notice of the Board that in some cases rectification order under section. 154 of the income – tax Act, 1961 ('Act') is being passed by the Assessing Officer on AST System without giving copy of the order to the taxpayer concerned. This is causing grievance to the taxpayers as they remain unaware of such orders and consequentially, are unable to pursue the matter further, either in appeal or rectification, if required.

2. Sub-Section (4) of section 154 of Act mandates that rectification order shall be passed in writing, by the Income- tax authorities. Therefore, on consideration of the matter, the Board hereby directs that all rectification applications must be disposed of after passing an order in writing, to be duty served upon the taxpayer concerned and not by merely making necessary rectification on the AST System.

■■■

Notes

Drafting of Submission/Representation

(Appeal Proceedings In New Regime of Faceless Proceedings)

CA Rohit R. Shah

I. INTRODUCTION:

Representation before the Assessing officer and first appellate authorities are foundation to the appeal. For making a good representation we should know the facts, law and procedure. One has to understand the concept such as legal principles, doctrines, interpretation of statutes and one should be update with latest development in law on the subject matter.

Assessment as it is understood is a process of determination of any liability under the provision of the tax laws (sec 2(8) of the Act). The term "assessment" is used in the Income tax Act at different places with different connotations -

Kailash Nath Bhargava v CIT 46 ITR 928, 945 (Pat)

Keshardeo Shrinivas Morarka v CIT 48 ITR 404, 416 (Bom)-

It is used as meaning sometimes " the computation of income". Sometimes " the whole procedure laid down in the Act for imposing liability upon the taxpayer"

II. THE FACELESS APPEAL SCHEME, 2021 (PREVIOUSLY KNOWN AS E-ASSESSMENT SCHEME):

The Faceless Appeal Scheme, 2021 (also called Faceless / team base assessment), will change the manner in which cases are assessed. In the new regime, the manner in which proceedings were conducted will undergo a sea change namely manner in which show cause notices are issued, reply /submission are filed, documentary evidence is produced etc, also manner in which cases shall be reopened u/s. 147/148, revision u/s. 263 and rectification u/s. 154 of the Act. The new scheme shall face new challenges on law and procedure.

III. SOME IMPORTANT FEATURES OF FACELESS APPEALS SCHEME ARE AS UNDER:

1. Faceless Appeals Scheme will cover all the pending appeals with the except appeals in relation to serious fraud, major tax evasion, and matters pertaining to searches, international tax, the Black Money Act and other sensitive issues.
2. The objective of faceless assessment is to completely eliminate physical contact between the taxpayer and the taxman to make tax administration objective, transparent and corruption-free.
3. The system will work under the National Faceless Appeals Centre (NFAC) headquartered in Delhi and various Faceless Appeal units.
4. The "Faceless Appeal Scheme, 2021" is notified vide Notification No.139/2021 dated: 28/12/2021.
5. The National Faceless Appeal Centre shall assign the appeal for disposal to a commissioner (Appeals) of a specific appeal unit through an automated allocation system;
6. All communication between the Commissioner (Appeals) and the appellant or any other person or the Assessing Officer with respect to the information or documents or evidence or any other details, as may be necessary under this Scheme shall be through the National Faceless Appeal Centre

For the purpose of Faceless Appeals, the CBDT would set up the below 'centres and units' and specify their respective jurisdiction:

A. ' National Faceless Assessment Centre' To facilitate the conduct of Faceless Appeals proceedings in a centralized manner

B. 'Appeal units' for condonation of delay, admission of additional ground, admission of additional evidence, identifying points or issues, material for the determination of any liability (including refund), seeking information or clarifications, analysis of material furnished by the assessee etc.

IV. E APPEAL PROCEEDING:

Drafting of grounds of appeal:

A. An appeal should be filed within a period of 30 days of the service of the Assessment order along with notice of demand. Orders are uploaded on portal.

B. The grounds should be concise without any argumentative or narrative.

C. The grounds should highlight the main controversy in issue.

D. The grounds should not be vague, general or too lengthy.

E. Specific ground to be taken for each and every issue involved. Proper figures involved in dispute should be available in the grounds.

F. Legal grounds relating to limitation, natural justice, jurisdictional issues etc should be raised and not left out

G. Language should not be very harsh.

H. The Statement of Facts should be filed before the Commissioner (Appeals) wherein facts can be narrated elaborately and factual errors in assessment order can be corrected at first available opportunity.

I. It is advisable to draft elaborate statement of facts covering all issues and wherever possible, along with details filed before Assessing Officer and the legal contentions. Filing of detailed statement of facts, along with supporting case laws will help the Assessee, especially when appeals are disposed of by the first appellate authority ex-parte. If certain factual errors are there in the asst order the same must be raised in the grounds of appeal and statement of facts. The detailed statement of facts can be uploaded as an attachment.

J. If there are clerical error or arithmetical error same should be explained and highlighted clearly in grounds and statement of facts. It is advisable to file separate rectification application for such mistake which are apparent on record.

APPLICATION FOR STAY OF DEMAND:

It is well known that the Income-tax department is very aggressive these days in making additions in the assessments and also for collection of demand raised pursuant to the assessment orders. In spite of the fact that courts have repeatedly observed that Assessing Officers are duty bound to consider the merits of the cases and also the financial hardships of the assesses, the Assessing Officers invariably do not consider the merits. In response to application filed for stay of demand in terms of section 220(6) of the Act, reply of the Assessing Officers is either to the effect application is rejected or directing the assesses to make payment of 20% of the demand in terms of circular of CBDT dated 31.07.2017. In case the assesses do not comply with the direction of the Assessing Officers straightaway coercive measures are taken to recover the demand such as attachment of bank accounts of the assesses. Many times, making payment of 20% of the demand itself becomes burdensome or impossible at times. In this regard Application for Stay Can be filed with Commissioner or even before CIT (Appeals) if Assessing Officer rejects stay application. as per the decision of **Hon'ble Supreme Court in the case of ITO v. MK Mohammad Kunhi (1969) 71 ITR 815 (SC)** and also

number of other judgements of the High Courts, CIT(A) is empowered to stay the demand during the pendency of appeal before him

Stay application should briefly discuss following things

A. Merit in the Case (If Facts of the Case are squarely covered in some other case)

B. Hardship that will cause to the Assessee is the Demand is recovered from him.

C. Financial Position of assessee.

Following Judicial Decisions may be relied upon for stay of demand :

A. Hon'ble Madras High Court in the case of Mrs. Kannammal v. ITO, W.P. No. 3849 of 2019, judgement dated 13.02.2019

B. Maheshwari Agro Industries v. Union of India (2012) 346 ITR 375 (Raj)

C. KEC International Limited v. BR. Balakrishnan & Ors. (2001) 251 ITR 158 (Bom)

D. N. Rajan Nair v. ITO (1987) 165 ITR 650 (Ker)

DRAFTING OF CONDONATION APPLICATION:

An application for condonation of delay along with affidavit stating the reasons for delay should be filed along with the appeal. The Hon'ble Calcutta High Court in **Charki Mica Mining Co. Ltd. vs. CIT (1978) 111 ITR 193** has held that the limitation period commences from the date of receipt of notice of demand by the Assessee and not from the date of receipt of Assessment order.

Affidavit should be properly drafted and notarized. Vague reasons should be avoided.

In **Collector of Land Acquisition v. Mrs. Katiji & Others 167 ITR 471 (SC)** the Hon'ble Supreme Court has held that the Courts should have pragmatic & liberal approach in admitting the appeal beyond the period of limitation.

While drafting the application and the affidavit for condonation of delay the following Legal Principle culled out from various decision should be kept in mind.

a. The expression 'sufficient cause' must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in interest of justice.

b. The primary function of any quasi-judicial body is furtherance of administration of substantial justice.

c. Pragmatic justice-oriented approach is required and not the technical detection of explanation of every day's delay.

d. Length of delay is immaterial.

e. A litigation does not stand to benefit by resorting to delay, therefore a justice-oriented approach is required by courts.

f. Since explanation of assessee did not smack mala fide or was not put forth as a dilatory strategy, delay in filing appeal was to be condoned.

g. In every case of delay there can be same lapses on the part of the litigant concerned, but that alone is not enough to shut the door against him.

h. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.

i. In matters of condonation of delay a highly pedantic approach should be eschewed and a justice-oriented approach should be adopted and a party should not be made to suffer on account of technicalities.

HEARING:

The Delhi High Court in the case of **Lakshya Budhiraja v. UOI & Anr. W.P.(C) 8044/2020** has issued notice to CBDT on 16th October 2020, on the grounds that the mechanism where the approval of the Chief Commissioner or the Director General of Income-tax is required for video conference facility is discriminatory in nature as it gives them the discretion to deny the same and that no person should be judged without a fair hearing in which each party is given an opportunity to respond to the evidence against them.

The personal hearing through video conference is not a matter of right and seems to be an exception rather than the norm. Subject to the outcome of the above matter or some clarification from CBDT on the issue lets understand what is expected from a representative in such e -proceeding.

At the outset filing of written submission and paper book at time of hearing is mandatory as there will be no oral arguments across the table . As now there would be e- appeal proceeding it is necessary that your paper book index should clearly demonstrate nature of documents enclosed. Documents should be in proper sequence and should be properly numbered. Under the New Faceless Appeals Regime, 2021, appellant may request for Video Conferencing and the request 'shall' be admitted and a hearing through Video Conferencing Mode is to be allowed. There are no discretionary powers with the Appeal Unit.

The CIT(A) has to pass a speaking order dealing with each ground of appeals. The CIT(A) should pass the order on merits even though heard ex parte / or assessee did not appear. Therefore, once detailed paper book and written submission is filed the Appellate authority will have to consider the same and cannot ignore to consider the same.

Therefore, the written submission should be drafted in such a manner that the facts and issue involved should be clearly brought out in the submission. Reference to documents and the relevant pages should be mentioned at relevant place. The grievance of the assessee should be clearly explained. The relief the assessee is seeking should be very specifically brought out in the submission. If there are various grounds submission for each ground should be separately drafted with proper paragraph numbers. The submission should not be confusing or vague.

The following points should be noted:

a. the facts of the case should be clearly explained

b. Sequence of events transpired during assessment proceeding should be explained alongwith show cause notice issued and reply /documents filed c. Various contention of assessee should be brought out clearly in submission.

d. Legal arguments or interpretation of any provision of law all should come in proper sequence.

e. Lastly the decisions if any relied upon should be referred. Also, if any decision is relied upon by AO in the assessment order, assessee should distinguish the same or there has to be an explanation why same is not applicable to facts of the case.

f. The submission should highlight the main controversy in the matter and relief prayed for.

g. The submission should not be vague, repetition of facts or arguments should be avoided.

h. Specific submission to be taken for each and every issue involved. Proper figures involved in dispute should be available in the submission and reference to documents where ever required should be made.

i. Legal grounds relating to limitation, natural justice, jurisdictional issues etc should be raised at the beginning of the submission

j. Language should not be very harsh. Use of simple English would be preferably

k. The Appeal Unit has power to make such further inquiry as he thinks fit or may direct the A.O. to make further inquiry and report to him. Assessee is entitled to reply to the remand report. Reply should be in form of rejoinder; each paragraph of remand report should be replied.

APPLICATION FOR PRODUCING ADDITIONAL EVIDENCE :

If the assessee is been prevented by good, sufficient or reasonable cause or adequate time is not allowed during assessment proceeding, assessee is entitled to produce such fresh evidence before the appellate authority by making an Application U/R. 46A. The Appeal Unit is entitled to send one copy to the Assessing officer and obtains a remand report. The assessee should draft application for producing additional evidence separately along with the said documents and should be separately indexed and filed. The assessee should state in the application what prevented him by good, sufficient or reasonable cause or adequate time is not allowed to produce such fresh evidence before AO. The application must state what is the relevance of the documents in the matter. Opportunity to Assessing officer to examine document and evidence should be given by appellate authority. Rule embodies provision of natural justice:

Under Rule 46A (4) the CIT(A) on its own discretion can ask the assessee to produce documents or evidence. Additional evidence gathered by the CIT(A) on his own is not required to be produced before Assessing Officer for his comments. Where ever documents are in vernacular language assessee should file Certified Translated copy of document.

RAISING ADDITIONAL GROUNDS:

Sub-section 5 of Section 250 gives power to the Commissioner (A) to allow the appellant to raise additional ground if he is satisfied that the omission of that ground was not wilful or unreasonable. Assessee should separately raise the additional ground of appeal. It should be accompanied by an application stating reasons why the additional ground was required to be raised in the matter and why the additional grounds should be admitted and adjudicated. The Assessee can raise the jurisdiction point at any time. As it is a question of law which goes to the root of the matter.

a) Jute Corp. of India Ltd. vs. CIT 187 ITR 688 (SC) (FB)

b) Heinrichde Frics GMBH vs. Jt. CIT 281 ITR 18 (Mum)(AT)

MAKING A CLAIM FOR THE FIRST TIME BEFORE APPELLATE AUTHORITY

If there was evidence or material on record, then only a claim made for the first time be entertained by the Appellate Authority. The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assessee in matters affecting their interests and convenience. Circular No.14(XL-35) of 1955, C.No.13(207)-IT/50, dated 11th April, 1955, states that the Officers of the Department must not take advantage of ignorance of an assessee as to his rights.

Proper submission should be filed along with supporting evidences and documents in respect of the new claim. It is advisable separate submission should be filed along with the supporting documents. Reasons for not making the claim in return or assessment proceeding should be spelt out in the submission. Decisions in support of the claim should be brought to notice of the authorities. Submission should clearly specify why the claim should be allowed. If conditions are required to be fulfilled the same needs to be explained and brought to notice of the authorities that same is complied with.

Conclusion:

In my view assessment and appeal proceeding under the changed scenario would require proper determination of facts by proper exchange and flow of correspondence between the assessee and revenue authorities. Since the government has done away with human interaction during the assessment as well as appeal proceeding, it is expected that assessee will clearly explain its stand in writing so the revenue authority can come to an objective conclusion on facts based on the record alone. The video conference hearing should be used as an opportunity to draw the attention of the authority to the material filed , assessee's contention and judicial decisions if any .

ART OF REPRESENTATION

1.1 The art of representation is nothing but art of communication or rather the art of persuasion. You must be able to convince the deciding authority that it is so.

The art of representation is not confined only to court, but anywhere in life, in any forum. The art of representation involves some degree of advocacy.

Advocacy is about persuading people, you cannot go through life without, on occasion needing to persuade. Advocacy is often useful and vital, in negotiation, in meetings and public lectures. If you do not practice law at all, principles of advocacy are still a valuable skill, a transferable skill, a lifelong skill.

1.2 Elements of persuasion

The task is threefold:

a) to be heard; to be interesting; to engage the audience in the presentation;

b) to get the message across; to select the right content and to emphasise the key points; and

c) to persuade the audience to accept the view advocated.

Presentation skills are the key to persuasion because presentation carries the message.

1.3 Some Important Principle of Good Representation:

A. There is no substitute for hard work. One must master the facts and read the law on the subject.

B. Adhere to dress code and file your letter authority in advance.

C. Observe Decorum in the court/online.

D. In the opening argument put forth the best points which cannot be disputed and carry the judge with you.

E. While arguing one must narrate the fact chronologically before the authorities /ITAT/court, one may take assistance of the paper book which is filed. One must avoid unnecessary and irrelevant papers in the paper book. Thereafter one should proceed to state the submissions and thereafter support the same with relevant case law.

F. You must know the Judge mind while you are arguing and tactfully you must put your points.

G. When the Judge is making a point, it is always advisable to listen carefully understand his view point and then reply.

H. One should keep a smile on his face and should have a good sense of humour. One must have common sense in a good measure.

I. Do not interrupt the Judge repeatedly, his ego is hurt. It is not advisable to rub the Judge's psychology. One has to be fair to the Judge as well as other side. You must never be unfair to your opponent.

J. You must remember that every man has his ego and when one is sitting on the judicial chair, the ego becomes still more important and that has to be respected.

K. One must never lose the temper in the court;

L. You cannot win all the cases and one should not get over identified with the client or the case.

M. One should not insist on displaying one's oratorical skill or his knowledge, which would not be relevant for the court. One should know when to stop.

N. Build the Reputation

1.4 Edward Abbott Parry, an eminent English Judge in his book captioned "Seven Lamps of Advocacy" published by T. Fisher Unwin Ltd., Fourth Impression 1926, has highlighted seven important attributes of a successful lawyer or seven lamps, which enlighten his future path as a professional for effectively pursuing legal profession before courts. These seven lamps have been enumerated by the author as under:

1. The Lamp of Honesty;
2. The Lamp of Courage;
3. The Lamp of Industry;
4. The Lamp of Wit;
5. The Lamp of Eloquence;
6. The Lamp of Judgement; and
7. The Lamp of Fellowship.

SAMPLE DRAFT OF APPLICATION FOR ADMISSION OF ADDITIONAL EVIDENCE

Date: 04/02/2022

To

The Commissioner of Income Tax (Appeals)

Sir,

Re: Appeal No. ……

PAN: ……...

Assessment Year:……

Kindly Refer to the above appeal of my client.

Please consider the enclosed fresh Documents which are additional evidences as the same could not be produced before AO in the undermentioned circumstances.

1. The AO has refused to admit these evidences which ought to have been admitted or
2. The appellant was prevented by sufficient cause from producing the said evidences which were called upon by the AO or
3. The appellant was prevented by sufficient cause from producing before the AO these evidences and the same are relevant to the Ground of Appeal
4. The AO has made Order appealed against without giving sufficient opportunity to the appellant to produce said evidence relevant to the Ground of Appeal

The above evidences may please be considered as per rule 46A of the IT Rules in the interest of natural justice.

Without prejudice to the above submission, I would like to submit that AO has made Assessment without any rationale and without giving sufficient opportunity of producing relevant evidences as stated hereinabove.

The evidences could not be submitted before the Ld. AO due to the reasons beyond the control of the appellant as stated hereinabove but the same is very vital for properly deciding the correct income of the appellant and therefore, your honour is requested to kindly consider the same.

My client also seeks your kind permission to produce herewith confirmations from third party

Under the circumstances, your honours is urged to kindly consider the above and pass appropriate order admitting the documents in the interest of natural justice and fair paly .

And for this act of kindness, my client, as duty bound, shall ever pray.

Yours Faithfully

Encl: As stated

Note:

1. Delete/ Modify wherever necessary
2. It is advisable to give proper reasons for considering new evidences under rule 46A

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Waiver Petition u/s. 270AA, 273A, 273AA: Scope and Applicability Draft Petition

CA. Atul T. Suraiya, CA. Sahil Sheth

1) Introduction

This chapter discusses the applicability, scope and process to be followed while applying for immunity / waiver u/s. 270AA, 273A and 273AA of the Income Tax Act, 1961 (ITA) specifying the conditions to be fulfilled for availing relief and the draft petition which could be drafted/filed for claiming the relief under the above mentioned sections.

2) Section 270AA- Immunity from imposition of penalty, etc.

2.1) Applicability and scope

The assessee is entitled to approach the assessing officer concerned with a request to grant immunity from

a) imposition of penalty under section 270A and

b) initiation of prosecution under section 276C (default in respect of willful attempt of evade tax) or

c) section 276CC (default in respect of failure to furnish returns of income).

by virtue of the provisions u/s. 270AA of the ITA subject to the following:

2.2) Conditions for relief

(1) The assessee is required to make the payment of tax and interest determined to be payable as per order of assessment or reassessment, as the case may be within the period prescribed.

(2) The assessee prefers no appeal against the orders passed under section 143(3) or section 147 by virtue of which his liability of pay tax and interest arose under the statute.

(3) The **penalty levied is not for** underreported income on account of **misreporting** [as set out in section 270A(9);

Thus, on satisfaction of the conditions mentioned above it can suitably lead the assessee on the path of immunity being extended in so far as the imposition penalty and initiation of prosecution is concerned.

2.3) Process:

- The assessee can **make an application,** in the prescribed form **(Form 68) (Format attached as *Annexure 1),*** within one month from the end of the month in which assessment order under section 143(3) of the Act or reassessment order under section 147 of the Act is received. Draft petition attached as ***Annexure 2***
- The Assessing Officer shall pass the order, within one month from the end of the month in which the assessee makes the application, accepting or rejecting the application for immunity
- The order rejecting the application shall not be passed without giving an opportunity of being heard to the assessee;

3) Section 273A- Power to reduce or waive penalty, etc., in certain cases

3.1) Applicability and scope

Section 273A(1) empowers the Principal Commissioner or Commissioner to grant waiver or reduction from penalty imposed or imposable under section 270A (i.e., penalty for under-reporting and misreporting of income) or under section 271(1)(c) (i.e., penalty for concealment of particulars of income or furnishing inaccurate particulars of income).

3.2) Conditions for relief

Relief under section 273A(1) is granted if following conditions are satisfied :

(1) Disclosure of particulars- The taxpayer voluntarily and in good faith, makes a full and true disclosure of such income, prior to the detection by the Assessing Officer of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income.

For the purpose of section 273A(1), a person shall be deemed to have made full and true disclosure of his/her income or of the particulars relating thereto in any case where the excess of income assessed over the income returned is of such a nature as not to attract penalty under section 270A or under section 271(1)(c).

(2) Cooperation for enquiry- The taxpayer should have co-operated in any enquiry relating to the assessment.

(3) Payment of Tax/Interest-The taxpayer either should have paid or made satisfactory arrangements for paying any tax or interest payable in consequence of an order passed under the Act in respect of the relevant year.

3.3) Waiver or reduction of penalty under section 273A(4)

Section 273A(4) empowers the Principal Commissioner or Commissioner to waive or reduce any penalty imposable under the Income-tax Act as well as to stay or compound any proceeding for the recovery of penalty.

3.4) Conditions for relief

Relief under section 273A(4) is granted if following conditions are satisfied :

(1) Levy of penalty will cause genuine hardship on the taxpayer.

(2) The taxpayer has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

3.5) Process:

- The waiver or reduction under section 273A(1) can be granted by the Principal Commissioner or Commissioner either on his own motion or otherwise, i.e., on an application made by the taxpayer. Draft petition attached as ***Annexure 3***
- Every order made under section 273A shall be final and shall not be called into question by any Court or any other authority.
- As per section 273A(3), where an order has been made under section 273A(1) in favour of any person, whether such order relates to one or more years, he shall not be entitled to any relief under section 273A in relation to any other year at any time after the making of such order. Thus, if a person has claimed relief under section 273A(1) at any time, then he cannot claim relief under section 273A [i.e., 273A(1) as well as section 273A(4)] thereafter.

4) Section 273AA- Power of Principal Commissioner or Commissioner to grant immunity from penalty

4.1) Applicability

Section 273AA empowers the Principal Commissioner or Commissioner to grant immunity from imposition of any penalty under the Income-tax Act in a case where the taxpayer has made an application for settlement under section 245C and the proceedings for settlement have been abated under section 245HA and penalty proceedings are initiated under the Income-tax Act.

4.2) Process

- For obtaining waiver, the taxpayer has to make an application to the Commissioner. Draft Petition attached as ***Annexure 4***
- The Principal Commissioner or Commissioner, as the case may be, shall pass order, either accepting or rejecting assessee's application to reduce or waive penalty, within a period of 12 months from the end of the month in which application is received. However, order shall be passed on or before May 31, 2017 in case of application pending as on June 1, 2016.
- Further, no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

Annexure - 2

Sample Petition u/s. 270AA of the ITA

To,
Assessing Officer

Assessee : Name of the Assessee

PAN : PAN

AY : 2017-18 onwards

Sub : Application u/s. 270AA(2) of the Income Tax Act, 1961 ('ITA')

Dear Sir/Madam,

We are in receipt of a notice u/s. 274 of the ITA, wherein we are required to show cause as to why penalty u/s. 270A of the ITA should not be levied for under-reporting income in relation to AY 2018-19. In this regard, we state that:

The return of income filed by the assessee-company for ..... was selected Scrutiny Assessment. On completion of the scrutiny proceedings, an order u/s. 143(3) of the ITA was passed, assessing an income of ₹ ……., after disallowing the following

a) .....

b) .....

c) .....

A copy of the assessment order, notice of demand u/s. 156 of the ITA and the Computation Sheet has been enclosed as **Annexure 1.** Pursuant to the order, we have received the above-mentioned notice, proposing to levy penalty u/s. 274 r.w.s. 270A of the ITA, for under-reporting income.

The assessee chooses to buy peace and not litigate the said disallowance as it feels that claim of the said expense can be made in the year of payment. The assessee has not stood to avoid any tax liability by claiming the said expense in the year under consideration. Further the law as it now stands in Section 270AA(1) of the ITA, provides the assessee with an immunity from penalty, upon its making an application in form 68 to the Assessing Officer. Accordingly kindly find enclose herewith the said application (in Form 68) **as Annexure 2,** with an earnest request to kindly accept the same and pass the requisite order u/s. 270AA(4) of the ITA.

Kindly appreciate that the taxes as demanded vide the notice of demand u/s. 156 of the ITA have been deposited and the relevant chalan is attached as **Annexure 3**

Kindly take the above on record and pass suitable orders granting immunity from levy of penalty u/s. 270A

Thanking You,

Yours Faithfully,

Annexure - 3

Sample Petition u/s. 273A of the ITA

To,

Principal Commissioner of Income Tax

Assessee : Name of the Assessee

PAN : PAN

AY : .....

Sub : Application u/s. 273A(1) of the Income Tax Act, 1961 ('ITA')

Dear Sir/Madam,

We are in receipt of a notice u/s. 274 of the ITA, wherein we are required to show cause as to why penalty u/s. 270A/ 271(1)(c.) of the ITA should not be levied for under-reporting income/ furnishing inaccurate particulars of income in relation to AY ..... In this regard, we state that:

The return of income filed by the assessee-company for ..... was selected for Scrutiny Assessment. On completion of the scrutiny proceedings, an order u/s. 143(3) of the ITA was passed, assessing an income of ₹ ..... after disallowing the following

a) .....

b) .....

A copy of the assessment order notice of demand u/s. 156 of the ITA and the Computation Sheet has been enclosed as ***Annexure 1.*** Pursuant to the order, we have received the above-mentioned notice.

It is submitted that during the course of assessment proceedings, as soon as the assessee received the notice u/s. 143(2), the assessee voluntarily disclosed errors/mistake committed by it in the return of income and offered the following

a) Thus thereby disclosing in good faith, even before the assessing officer could locate/identify the error/mistake in the income of the assessee. Further, the assessee has also cooperated throughout the assessment proceedings and have submitted all documents and information called for and there onwards made full and true disclosure of the income. Further the law as it now stands in Section 273A of the ITA, provides the assessee with an opportunity to seek waiver or reduction in penalty upon its making an application to the Principal Commissioner of Income Tax. Accordingly kindly consider the above letter as petition u/s. 273A of the ITA with an earnest request to kindly accept the same and pass the requisite order u/s. 273A(4) of the ITA.

   Kindly appreciate that the taxes on the voluntary disclosure made by the assessee have been deposited and the relevant chalan is attached as ***Annexure 2.***

   Further, it is also put on record and submitted that the assessee, has never applied and claimed relief u/s. 273A of the ITA on any previous occasion and the captioned application is made for the first time in case of the assessee. Thus, the limitation as mentioned in section 273A (3) will not apply on the case in hand.

   Kindly take the above on record and pass suitable orders granting waiver or reduction from levy of penalty u/s. 270A/271(1)(c.)

Thanking You,

Yours Faithfully,

Annexure - 4

Sample Petition u/s. 273AA of the ITA

To,

Principal Commissioner of Income Tax

Assessee : Name of the Assessee

PAN : PAN

AY : ……

Sub : Application u/s. 273AA(1) of the Income Tax Act, 1961 ('ITA')

Dear Sir/Madam,

We are in receipt of a notice/order u/s. 245HA whereby the application before the settlement commission made u/s. 245C of the ITA for the captioned assessee has been abated. Consequent to which, the original quantum proceedings and penalty proceedings have been re initiated. In this regard, we state that:

It is submitted that during the course of assessment proceedings, consequent to the abatement of settlement commission proceedings, the assessee offered the following to taxes and made a suo motu disclosure

a) .....

b) .....

thereby disclosing all material facts and making full and true disclosure of the income. Further the law as it now stands in Section 273AA of the ITA, provides the assessee with an immunity from penalty, upon its making an application to the Principal Commissioner of Income tax

Accordingly kindly consider the above letter as petition u/s. 273AA of the ITA, with an earnest request to kindly accept the same and pass the requisite order u/s. 273AA(3) of the ITA.

Kindly take the above on record and pass suitable orders granting immunity from levy of penalty.

Thanking You,

Yours Faithfully

Form No. 68

Form of application under section 270AA(2) of the Income-tax Act, 1961

Personal Information	First Name	Middle Name	Last Name or Name of Entity		*Permanent Account Number or Aadhaar Number*
	Flat/Door/Block No.		Name of Premises/Building/Village		Road/Street/Post Office
	Area/Locality		Town/City/District		State
	Country	Pin Code	Phone No. with STD code/ Mobile No.	Email Address	

| Details of orders and payments | | |

Notes

Section 220(2A) of the Income-tax Act, 1961 – Application for Waiver of Interest

CA R. V. Shah

1. The Section 220 (2A) was inserted by the Taxation Laws (Amendment) Act, 2014 with effect from 1st October, 1984.

   As per Section 220(2A), the interest paid or payable under sub- section (2) of Section 220, may be reduced or waived by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, if he is satisfied that:

   i) Payment of such amount has caused or would cause genuine hardship to the assessee;

   ii) Default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee; and

   iii) The assessee has co-operated in any inquiry relating to the assessment or any proceedings for the recovery of any amount due from him.

   The interest payable under Section 220(2) cannot be waived / reduced unless all the three conditions mentioned in Section 220(2A) are satisfied. It may be noted that Section 220(2A) is not a procedural law but a substantive one. **(Prakash Tubes Ltd. Vs. Union of India [2011] 330 ITR 561 (Delhi)**

2. **Jurisdiction:**

   Section 220(2A) of the Income-tax Act, 1961, contains a non- abstante clause. It confers jurisdiction upon the Pr. Chief Commissioner or Chief Commissioner or Pr. CIT or CIT if he is satisfied that all the three conditions mentioned in the said Section 220(2A) are satisfied. This would be done if he is satisfied that payment of such amount has caused or would cause genuine hardship to the assessee, or if default in the payment of such amount has caused or would cause genuine hardship to the assessee, or if default in the payment on which interest has been paid or was payable was due to circumstances beyond the control of the assessee. It is necessary for the assessee to cooperate in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

3. **Time limit within which application under Section 220(2A) for waiver of reduction of interest is to be disposed off?**

   As per Section 220(2A) was inserted by the Finance Act, 2016 with effect from 1st June, 2016. An application for waiver or reduction of interest under Section 220 has to be disposed off by the Principal Chief Commissioner, Chief Commissioner, Principal Commissioner or the Commissioner within 12 months from the end of the month in which application is made. All the pending applications as on June 1, 2017 are also to be disposed off on or before May 31, 2017. It is further provided that before rejecting such application, any opportunity of being heard to the assessee is to be granted. It may be noted that upto 31st May, 2016 there was no time limit for disposing of application under Section 220(2A) for waiver or deduction of interest under Section 220.

4. **Assessee to be given an opportunity of being heard: Principles of Natural Justice be applied.**

   No order rejecting the application, either in full or in part shall be passed unless the assessee has been given an opportunity of being heard. The power vested in the authorities for waiver of interest is quasi judicial and is to be exercised reasonably, and the principles of natural justice should be followed. Principles of natural justice would be clearly applicable. A decision which is taken by the authority under Section 220(2A) can be

subjected to judicial review, the decision of the authority may have repercussions with regard to the amount of interest which an assessee is required to pay, it would be imperative that some reasons are given by the authority while disposing of the application. The application for waiver of interest should be construed liberally. Partial waiver may also be given.

5. Genuine hardship:

The term "genuine" as per the New Collins Concise English Dictionary is defined as under:

"Genuine" means not fake or counterfeit, real, not pretending (not bogus or merely a rule)". For interpretation of this provision, the principle of purposive construction should be resorted to. Levy of interest although statutory in nature, is for compensating the revenue for loss suffered by non-deposit of tax by the assessee within the specified time. This principle should be applied for the purpose of determining as to whether any hardship has been caused or not.

Hardship would, inter alia, mean genuine difficulty. This would not lead to a conclusion that a person having large assets would never be in difficulty as he can sell those assets and pay the amount of interest levied. The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. Compulsion to pay any unjust dues may cause hardship. However, a question would arise as to whether the default in the payment of the amount was due to circumstances beyond the control of the assessee. The Hon'ble Supreme Court in **B.M. Malani Vs. CIT [2008] 306 ITR 196 (SC)** observed that hardship claimed by the Petitioner was on account of lack of resources either moveable or immoveable. However, the Petitioner had assets by way of units in the Unit Trust of India (UTI) on the date the Settlement Commissioner determined his liability to tax. The fact that a distress sale conducted by UTI fetched a lower rate did not make my difference on the consideration of application of the Petitioner for waiver of interest. It is pertinent to note that delay should have occurred because of "genuine hardship" is crucial.

It is difficult to conceive of non-genuine hardship, since a hardship, if not genuine, is not a hardship at all. The expression "genuine hardship" displays the anxiety of the legislature to spare penalty only in cases of real hardship. The Hon'ble Supreme Court while reversing the decision of the High Court had appreciated the expression "genuine hardship" to mean genuine difficulty on the part of the assessee in payment of tax. The fact that the assessee has large liquid assets by itself does not mean that there is no difficulty in selling the assets and payment the tax and interest levied. What is meant by genuine hardship is to be understood primarily in the sense that a person cannot take advantage of his own wrong as decided in a number of precedents from the Supreme Court. The Court allowed the waiver of interest.

However, in the above case, the High Court had upheld that refusal of ITAT to waive the interest on the ground that the assessee had some immovable property and that the explanation that the unit of the Unit Trust of India had been illegally foreclosed and appropriated towards tax could not by itself justify the waiver.

6. Can the TRO proceed with the sale of property pending application for waiver of interest under Section 220(2A)?

Where only interest is outstanding and assessee makes an application for waiver of interest under Section 220(2A), sale of property pending such application will vitiate the object and spirit of Section 220(2A) vide **Kings Infra Ventures Ltd. Vs. TRO [2019] 107 taxmann.com 132 (Madras)**

7. Can Interest payable under Section 220(2) be waived?

The Hon'ble Kerala High Court in the case of **G.T.N. Textiles Ltd. Vs. Dy. CIT [1996] 217 ITR 653 (Kerala),** the Patna High Court in the case of **Metallurgical and Engineering Consultants (India) Ltd. Vs. CIT & Ors. [2000] 242 ITR 547 (Pat.)** and Kerala High Court in the case of **N. Gopalakrishnan Vs. CIT & Anr. [2006] 280 ITR 592 (Kerala)** has held that interest payable under Section 220(2) cannot be waived / reduced unless all the three conditions mentioned in Section 220(2A) are satisfied.

It has been held by the Calcutta High Court in the case of **Apeejay Industries Ltd. Vs. CIT [2002] 120 Taxman 440 (Cal.)/[2001] 250 ITR 414 (Calcutta)** that Section 220(2A) gives the assessee the right to apply

for waiver and further to get the interest amount waived if the conditions mentioned therein are fulfilled. All the trappings of substantive law are to be found therein. Therefore, it cannot have retrospective operation.

8. The Hon'ble Supreme Court in **Kishan Lal Vs. Union of India [1998] 97 Taxman 556 (SC)/[1998] 230 ITR 85 (SC)/[1998] 145 CTR 450 (SC)** held that an application is filed under Section 220(2A), then it has the power either to reduced or waive the amount of interest. In this connection it may be mentioned that mere fact that the assessee is a wealth tax assessee is not a relevant consideration at all for providing that payment of interest would not cause any genuine hardship to the assessee. Though in the said sub-section, it is not mentioned that any reasons are to be recorded in the order deciding such an application, it is implicit in the said provision that whenever such an application is filed, the same should be decided by a speaking order and a proper application of mind. **J. Jayalalitha Vs. CIT & Ors. [1999] 107 Taxman 476 (Madras)/[2000] 244 ITR 74 (Madras), Auto Food Ltd. Vs. [2006] 153 Taxman 216 (Madras)/[2005] 276 ITR 658 (Madras), Mani Vs. CIT [2010] 190 Taxman 417 (Madras)/[2010] 320 ITR 472 (Madras), World Vision India Vs. Commissioner of Income-tax (Exemptions J, Chennai [2018] 89 taxmann.com 193 (Madras).**

9. An application for stay of recovery proceedings cannot be construed as non-co-operation by the assessee. Vide **Arun Sunny Vs. C.R. Building, CCIT [2014] 43 taxmann.com 467 (Kerala)/[2013] 350 ITR 147 (Kerala).** Similarly, belated filing of returns and non-payment of advance tax cannot be construed as non-co-operation and refusal of waiver of interest on such grounds in not valid.

10. **In the case of TCV Engineering Ltd. Vs. ACIT (2020) 426 ITR 516 269 Taxman 410 (Mad.) (HC)** wherein the Petitioner in respect of the tax due for the Assessment Years 1996-97 and 1997-98, had applied for the waiver under Section 220(2A) of the Act. For the Assessment Year 1996-97, the demand was Rs. 10,34,719/- and for the Assessment Year 1997-98, the demand was Rs. 3,79,120/- towards the interest payable under Section 234A, 234B and 234C of the Act. The waiver application was rejected by the revenue authorities. On writ the Petitioner contended that all three conditions prescribed under sub- Section 2(A) of Section 220 of the Act i.e. first the assessee must have genuine hardship, the second condition is that the non- payment was due to circumstances beyond the control of the assessee and the third condition is that the revenue must have the satisfaction that the assesee has cooperated in an enquiry relating to the assessment or any proceeding for the recovery of any amount due from him. The Petitioner relied on **B.M. Malani Vs. CIT [2008] 306 ITR 196 (SC), Benara Valves Ltd. Vs. CCE (2009) 20 VST 297 (SC)** wherein allowing the petition the Court held that according to the Petitioner the undue hardship faced by the assessee was that, there had been no business for four years consecutively, with the result, the assessee did not have any source to make the payment as demanded under Section 234A, 234B and 23C. Based on the balance sheet of the assessee, the Assessing Officer found that the assessee had a building worth Rs. 18 lakhs and machinery worth Rs. 45 lakhs. From the finding, it was clear that, apart from these immovable properties of building and machinery, which were the basic properties to run the industry or business of the assessee, no other source had been found out by the revenue. The AO being a quasi-judicial authority, while exercising the power of discretion vested in him under Section 220(2A) of the Act, had not acted judiciously with cogent and plausible reasons with supporting materials. Hence, the order was not sustainable. Accordingly, the matter was remitted back to the respondent for re-consideration.

Conclusion:

As per past experience grant of waivers by authorities are rare. In such matters, the authorities need to consider such application on case to case basis. The authorities are expected to see that whether an assessee is entitled to the relief of waiver under the Act. The provision is beneficial in nature to provide relief to the assessee's in genuine cases. Unfortunately, the authorities have failed to grant relief to assessee which has lead to sparing use of such beneficial provisions. Considering the present covid situation suffered by assessee's all over the Country, the authorities/professional should encourage assessee's to apply for waiver in genuine cases where the conditions are satisfied. CBDT can revisit the provisions and can provide further relaxation to assessee's and appropriate Circular / Notification / guidelines can be issued in this regard.

■■■

SPECIMEN PETITION FOR WAIVER / REDUCTION OF INTEREST UNDER SECTION 220(2A):

Before the Hon'ble Principal Chief Commissioner of Income-tax

In the matter of:

Petition for Waiver of interest under Section 220(2A) of interest for default in payment leviable under Section 220(2) relating to Assessment years.

And

In the matter of:

Notice issued under Section 220(2) of the Act

THE HUMBLE PETITION OF THE PETITIONER MOST RESPECTFULLY SHEWETH:

Background of the Assessee:

1. The Petitioner is a Company registered under the Companies Act, 2013 having its registered office at and is assessed to income-tax.

2. The assessee company since inception has been deriving income from house property and is covered by object clause of the Memorandum of Association.

Detail of Interest Waivers:

3. The Company had arrears of taxes along with interest under Section 215 and Section 201(1A), the details of which are as under:

Brief facts of the case:

4. The present management of the company is unfortunately unable to track down the cause of such arrears of taxes since it took over the company with effect from XX/XX/XX by purchasing the entirely of the equity shares from the previous shareholders and directors. The new management took over the company with the intention to make the dynamic by venturing out the estate dealings and more other productive activities gainful to the company and useful to the economy and society at large. The major attraction for purchasing the equity capital and thus taking over the management was the company's ownership of lands offering potentialities for a lucrative estate development activity.

5. But the new arrangement did not have the full picture of the tax liabilities, the legacy of the former management because the liabilities by then were not too large. The liability for taxpayer stood in the range of Rs. XXX ascertainable on reckoning from the available documents but the present management was caught unawares and had no idea that the interest under Section 220(2) payable for default in payment could climb to a figure in aggregate about Rs. XXX shown in columns 13 to 15 of Schedule 1). By the time the company discovered the position the mischief had already taken place. The new management was unwillingly laden with interest liability. This belied the bold optimism which prompted the present management to take over the equity capital and the management of the company. This at the moment far removes the prospects of any diversification. There was a continuing recovery by TRO-X by attachment of monthly rents, which in fact, started immediately on change over of the shareholders and management. The new management, however, took the attachment in good grace and never begrudged such recovery which, in the process, culminated in a collection of Rs. XXX vide Schedule III as against aggregate demands of Rs. XXX.

6. The new management also found out that the old management discharged the tax liability between the period from XX to XX amounting to an aggregate sum of Rs. XXX vide Schedule IV.

7. In any case, it would be apparent from the facts and figures furnished that the demands relate to the period of assessments long before the present equity shareholders took over the state of affairs with the bonafide

intention of diversifying the company which, deposits its static state under former management, offered tremendous opportunity.

8. The new management had the uphill task of discharging the entire tax liability of the company and to clear the mounting liability of tax in the hope of turning a new leaf. The Company had to take the desperate step of selling out its property being prime and in the industrial area admeasuring 4 acres at the consideration of Rs. XXX, but the main snag in effecting the sale was attachment resulting from default and the antecedent recovery proceeding initiated.

9. The sale was not feasible and viable in the ordinary course as the company could not be entitled to a clearance certificate under Section 231A(1) of the Income-tax Act, as was in force at the relevant time until the taxes were met to the satisfaction of the Tax Recovery Officer.

10. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

11. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

12. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

13. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

14. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

15. It is not the case of the Petitioner Company that the excess was not due but the Petitioner company seeks to stress the fact that your Petitioner is not at all responsible for the delay from the date of the decree, i.e., XXXXXXXXX till the dates the purchasers ultimately paid the sums of Rs. XXX as aforesaid in compliance with the order dated XX/XX/XX of the Hon'ble High Court at XXXXX. This is a matter wholly outside the control and beyond the powers of the assessee company which happened by reason merely of the dialatonness on the part of the said purchasers despite the degree of the Court. The assessee, however, continued to suffer interest liability at the rate of 12% per annum which the assessee could not suffer interest liability at the rate of 12% per annum which the assessee could not dispense with. The further accrual of interest continued, though it intended to terminate it by overstretching its resorts to the point of puling its property on sale to enable itself to discharge the tax liability without further delay. This shows full awareness on the part of the assessee that the arrears of outstanding taxes payable cold not brook any delay and it is the assessee's bounden duty towards the tax authorities and for that matter, towards the society to bring as earliest termination as possible. But all the efforts failed for reasons which the assessee held no means of preventing or controlling.

16. The unforeseen contingency has spelt complete run for this company. The Company is reduced to a state of downright destitution on account of a liability of Rs. XXX sheerly by way of interest, which was avoidable and the assessee left no stones unturned to avoid it in order to save it from the total ruin and the subsidence of its own capital, its sub-stratum. The Company, however, looks forward to your honour's compassion and nourishes the hope of clemency from your side because the assessee under the new management has shown unstintedly its bonafide intention to liquidate the demands.

17. The new management has also at every stage extended co- operation the Department in its efforts to collect the demands. In fact, it was only after the new management took over the company that collection started trickling by way of attachment of rents. The assessee never in any manner caused any difficulty in the collection. Far from disgruntled the assessee saw to it that the tenants are prompt in paying their rents to the Central Government. They never flinched from providing the tenants all facilities and services which as the landlord, the assessee company is under obligation to provide, so that there could be no hitch or trouble for the Department and uninterrupted flow of collection could maintain itself.

18. As a matter of fact, it was during the regime of the new management that a sum to the tune of Rs. XXX could be collected by the Department till March, XXX. The fact that there was no interruption in this steady proceed of collection is largely due to the cooperation which the assessee extended by causing to the disadvantage or annoyance to or the agitation of the tenants even though all the while the rents caused to reach its coffer.

19. The Petitioner further submits that your Petitioner still entertains the contemplation of diversifying in other useful and productive business to its rejuvenation and also to the services of the economy in its own small way.

20. But this depends on your honour's compassion in relieving your Petitioner of the tremendous and the colossal pressure of the interest liability which runs to an amount of over Rs. XXX lakhs. The assessee's case deserves special consideration in view of the fact that the assessee's total income for the period for which the demands were raised is far less than the aggregate demand and the arrears of taxes which stand payable. In fact, the total demand, tax and the interest works out to figure for exceeding the total income of the material period creating the demand.

Conditions are satisfied:

21. Considering all these aspects of the matter into consideration and having special regard to the following factors, the Petitioner submits that its case deserves waiver of interest in consideration of its hardship as well as the balance of convenience and a compassion on the ground of equity.

    i) The default in payment of the tax is not ascribable to the new management which took over on XX/XX/XX.

    ii) All the demands relate to the period prior to take over of management of the company by the present Directors.

    iii) The assessee company cooperated in the matter of realization of taxes by attachment of rents without creating any hindrance or obstacle or difficulty or inconvenience to the Department.

    iv) The Company has shown complete bonafides by selling out its valuable property yielding found to discharge the tax liabilities.

22. The Company is granted waiver of interest, it can have a new lease of life and can engage in productive efforts by continuing to a honest taxpayer to the public exchequer, creating employment opportunities and serving the economy in a small way by productive utility of its existence.

Prayer:

The Petitioner Company, therefore, prays that an order be passed waiving interest under Section 220(2A) which accrued since the date of the consent decree for sale of its property till the date of the dues could be ultimately discharged by bringing on purchasers to pay over the sale consideration to the Central Government towards the tax liability.

The calculation of such interest liability is shown in the Annexure enclosed herewith which comes to an aggregate sum of Rs. XXX.

And for this act of kindness, your Petitioner, as duty bound, shall ever pray.

Dated: ..... Signature:.....

Application Under Sec. 119(2) of The Income Tax Act 1961

Ajay R. Singh, *Advocate*

I. SECTION 119(2) : POWER GIVEN TO BOARD TO ISSUE CIRCULARS, ORDERS, INSTRUCTION ETC ;

INTRODUCTION :

1. Tax administration, a complex subject, consists of several aspects. To strike a balance in the imposition of tax between collection of revenue on the one hand and business- friendly approach on the other, Government have realised that, for tax collection, difficulties faced by the business have got to be taken into account. Policy decision on exemption is to be taken by the Government through its senior officers in the manner of difficulties, which the business may face, particularly in matter of tax administration. Hence, the Board, as empowered, takes authority to grant administration reliefs by issue of orders, instruction and directions to the officers under it.

2. In the context of clause (a) of Section 119(2) of the Act deals with the power to grant relaxation from the provisions of several sections enumerated therein. Clause (b) deals with power to grant relaxation from the period of limitation to avoid genuine hardship in any case or class of cases.

3. The Board can relax the rigour of the law or grant relief which is not to be found in the terms of the statute. Such circulars make for a just and fair administration of the law. **UCO Bank v/s. CIT 237 ITR 889(SC)**

4. By admitting a belated claim for refund, the Board neither interferes with the course of assessment of any particular assessee nor with the discretion of the Commissioner of Income-tax (Appeals). **Jaswant Singh Bambha v. CBDT, (2005) 272 ITR 1 (Punj-FB)**

5. In **Navnitlal Javeri v K. K. Sen, Ellerman Lines Ltd v CIT and Varghese v ITO** the Supreme Court accepted the validity and binding nature of such beneficent circulars, and recognised the taxpayer's right to enforce them in his favour even in the court. In **UCO Bank v CIT,** the Supreme Court, while exhaustively reviewing its earlier judgements, reiterated that such circular would be binding on the income – tax authorities even if they deviate from provisions of the Act so long as they seek to mitigate the rigours of a particular section for the benefit from the assessee.

6. Once the Supreme Court or the High Court has declared the law on particular question, it is not appropriate for the court to direct that a contrary circular should be given effect to. Thus, a circular can be issued to reduce the rigours of a provision or prevent hardship. At the same time, a circular cannot enforce an additional burden on the assessee which is not prescribed in the statute. Every circular issued by the board will continue to exist in fact and in law unless it is struck down by the High Court or the Supreme Court.

7. The High Court in the case of ***State of Bihar v/s. Kapildeo Vishkarma 2017 CTR 680*** directed the CBDT to reconsider its decisions to issue a circular that would reduce the hardship faced by the small farmers who received compensation for lands that had been acquired but payment is made after several years. The interest that accrued would make the amount cross the tax limit. These small farmers were not assessee and had very low income. The astonishing answer of the department was that the farmers could ask for refund.

8. Benevolent circulars providing administrative relief to the assessee have to be given effect to even if they are issued subsequent to the decision of an authority under the Act.

Chhabil Dass Agarwal v. UOI (2011) 56 DTR 19 / 241 CTR 331 (Sikkim)(HC)

SCOPE :

9. The power under s 119(2)(a) is to issue guideline. ***The power exercisable by the Board under this sub-section is quasi-judicial in nature.*** Under sub - S. (2) (a), the Board may issue general or special orders ***in respect of any class of incomes or class of cases for the proper management*** of the assessment and collection of revenue – for this purpose, it may even relax the provision of the section specified in sub-s. (2) (a).

10. The circulars issued under this sub-section cannot affect the assessee in an adverse manner .

Circular issued by the Central or State Government represent merely their understanding of the provisions. They are not binding on the courts. It is for the court to declare what the provisions of the statute say and not for the executive. Therefore, the circular cannot be given effect to in preference to the view expressed by the High Court or the Supreme Court.

CCE v. Ratan Melting & Wire Industries (2008) 220 CTR 98 / 14 DTR 324 (SC)

11. Legislative provisions cannot be amended by CBDT in exercise of its power under Section 119 of the Act . **CIT v. S. V. Gopala Rao (2017) 396 ITR 694 (SC)**

CBDT, under the garb of section 119 cannot exercise wider powers than the powers bestowed on it; CBDT has no power to introduce a substantial change or alteration in the provisions of the Income-tax Act, 1961 by importing the ideas unknown to the Act.

Jalgoan District Central Co-operative Bank Ltd. v. UOI (2004) 265 ITR 423 (Bom.)(High Court)

12. In this context CBDT keep issuing circulars , instructions etc . A borne of contention always is the instruction for waiver or reduction of interest issued in 1996 and modified from time to time .

Waiver or reduction of interest – Order : [F.No. 400/129/2002-IT(B)], dated 26-6-2006.

In exercise of the powers conferred under clause (a) of sub-section (2) of section 119 of Income-tax Act, 1961, Central Board of Direct Taxes, hereby directs that the Chief Commissioner of Income-tax and Director General of Income-tax may reduce or waive interest charged under section 234A or section 234B or section 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this Order for the period and to the extent the Chief Commissioner of Income-tax/Director General of Income-tax may deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire income-tax (principal component of demand) due on the income as assessed. The Chief Commissioner of Income-tax or Director General of Income-tax may also impose any other conditions as deemed fit for the said reduction or waiver of interest.

2. The class of incomes or class of cases in which the reduction or waiver of interest under section 234A or section 234B or, as the case may be, section 234C can be considered, are as follows :

(a) Where during the course of proceedings for search and seizure under section 132 of the Income-tax Act, or otherwise, the books of account and other incriminating documents have been seized, and the assessee has been unable to furnish the return of income for the previous year, during which the action under section 132 has taken place, within the time specified in this behalf, and the Chief Commissioner/Director General is satisfied, having regard to the facts and circumstances of the case, that the delay in furnishing such return of income cannot reasonably be attributed to the assessee.

(b) Any income chargeable to income-tax under any head of income, other than “Capital gains” is received or accrued after due date of payment of the first or subsequent instalments of advance

tax which was neither anticipated nor was in the contemplation of the assessee, and the advance tax on such income is paid in the remaining instalment or instalments, and the Chief Commissioner/ Director General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of the interest chargeable under section 234C of the Income-tax Act.

(c) *Where any income was not chargeable to income-tax in the case of an assessee on the basis of any order passed by the High Court within whose jurisdiction he is assessable to income-tax, and as result, he did not pay income-tax in relation to such income in any previous year, and subsequently, in consequence of any retrospective amendment of law or the decision of the Supreme Court of India, or as the case may be, a decision of a Larger Bench of the jurisdictional High Court (which was not challenged before the Supreme Court and has become final), in any assessment or reassessment proceedings the advance tax paid by the assessee during such financial year is found to be less than the amount of advance tax payable on his current income, and the assessee is chargeable to interest under section 234B or section 234C, and the Chief Commissioner/Director General is satisfied that this is a fit case for reduction or waiver of such interest.*

(d) *Where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the assessee or his legal heirs without detection by the Assessing Officer.*

3. *The class of cases referred to in paragraphs 2(a) and 2(d) are specified only for the purposes of waiver of interest charged under section 234A of the Income-tax Act.*

4. *Earlier Orders under section 119(2)(a) dated 23-5-1996 and 30-1-1997 on the subject stand superseded by this Order. If any petition in the past has been rejected because the Board had not issued this direction earlier, such petition may be reconsidered and decided in accordance with this Order. If any petition in the past was allowed in accordance with the Orders under section 119(2)(a) dated 23-5-1996 and 30-1-1997, such Orders allowing waiver should not be reopened/revised as per the guidelines contained in this Order. -* ***Order : [F.No. 400/129/2002-IT(B)], dated 26-6-2006.***

13. Similarly ***Circular no 11 of 2017, dated 24th March, 2017*** – order under section, 119 (2) (a) of the Income – tax Act, 1961 – Guidelines for waiver of interest charged under section 201 (IA) (i) of the Income – tax Act, 1961 (2017) 392 ITR 68 (St.)

FEW INSTANCES :

1. **Default in furnishing return of income - Bonafide family dispute - Entitle to waiver of interest u/s. 234A. [S. 119, ,234B, 234C]**

   It was held that the dispute with regard to the division of property was a bona fide dispute which directly relates to the assessbility of the petitioner to tax.

   R. Mani v. CCIT (2018) 253 Taxman 3 / 164 DTR 114 / 302 CTR 250 (Mad) (HC)

2. **Block assessment – Non levy of interests – If the delay in filing the return due to non furnishing of copies of the documents and not giving inspection of the seized documents, levy of interest was not justified, provision pre, 2002 :**

   Allowing the petition, the Court held that; if the delay in filing the return is completely attributable to the revenue for non-furnishing of copies of the documents and not giving inspection of the documents seized within a reasonable time after making the demand, the interest has to be waived. Though s. 158BFA (1) does not (pre 2002) confer the power to waive interest, it has to be read in on equitable construction because ***the subject cannot be made to pay for the negligence of the Officers of the State*** (CIT v/s. J. H. Gotla (1985) 4 SCC 343 followed). At the relevant time when the assessment orders were passed under the Act, Section 158BFA of the Act was not a part of Section 119 (2) (a) of the Act which empowered C.B.D.T.

   Mahavir Manakchand Bhansali v. CIT (2017) 154 DTR 185/297 CTR 38 (Bom.) (HC)

3. Benefit of circular available only when a decision is of High Court within whose jurisdiction assessee assessable or if Supreme Court declares law [S. 119,234C]

Exemption notifications and Board circulars would bind the Revenue authorities to the fullest extent but those notifications and ***circulars have to be strictly construed.*** Paragraph 2(c) of order F. No. 400/234/95 IT(B), dated January 30, 1997, issued u/s. 119(2)(a) of the Income-tax Act, 1961, as modified by order F. No. 400/129/2002-IT(B), dated June 26, 2006, indicates that where any income was not chargeable to income-tax in the case of an assessee on the basis of any order passed by the High Court within whose jurisdiction he is assessable to income-tax, and as a result he did not pay income-tax in relation to such income in any previous year and, subsequently, in consequence of any retrospective amendment of law or the decision of the Supreme Court, or, as the case may be, a decision of a larger Bench of the jurisdictional High Court in any assessment or reassessment proceedings the advance tax paid by the assessee during such financial year is found to be less than the amount of advance tax payable on his current income and the assessee is chargeable to interest u/s. 234B or section 234C, If the Chief Commissioner/Director General is satisfied that this is a fit case for reduction or waiver of such interest, he can exercise his power and grant the relief to the assessee. As is clear from the clause, if any order is passed on the basis of any order passed by the High Court within whose jurisdiction the assessee is not assessable to income-tax, then the benefit of the circular is not available to the assessee. ***The circular is carefully worded making it clear that it is only when in terms of a judgment of the High Court within whose jurisdiction the assessee is assessable*** it is not liable to pay tax or if the Supreme Court declares the law, it is the law for the whole country that the assessee would be entitled to have such benefit. (AY. 2001-2002)

CCIT v. UB Global Corporation Ltd. (2015) 378 ITR 461 (Karn.) (HC)

4. Interest - Deferment of advance tax - Waiver of interest - Failure to pay advance tax due to not releasing of FDRs, hence the assessee is entitled to waiver of interest [S. 119]

There was search and seizure action against the assessee on 10-12-1998 and FDRs of Rs. 29 crores were seized. The assessee had not paid the advance tax. The Assessing Officer levied the interest under section 234C. The assessee moved application to Commissioner for waiver of interest. Commissioner rejected the application for waiver.

The assessee filed a writ petition against the said order. The Court held that the assessee requested for release of FRDs to make the payment of advance tax, however the same was released latter. The assessee has paid the tax after release of FDRs, therefore the assessee would be entitled to waiver of interest under section 234C in view of Board notification dated 23-5-1996, para. 2(b). The matter was decided in favour of assessee. (A.Y. 1999- 2000, 2000-01)

Super Cassettes Industries Ltd. v. CCIT (2012) 207 Taxman 153 / 79 DTR 99 / 254 CTR 521 (Delhi) (HC)

5. Waiver of interests - Due to financial difficulties there was delay in payment of advance tax, interest levied under section 234B and 234C cannot be waived [S. 234B, 234C, Constitution of India, Art. 14]

The assessee was acting as a real estate agent. Due to financial difficulties, there was delay in payment of advance tax. The assessee filed application for waiver of interests levied, which was rejected. The assessee filed writ petition against the said order, and contended that it had made out a case for grant of waiver / refund and the same had been declined by misinterpretation and / or narrow interpretation of the order F. No. 400/29/2002 - IT(B) dated 26-6-2006 issued by the Central Board of Direct Taxes (CBDT). In the alternative, it was contended that paragraph 3 of the said order, to that extent it declined the benefit of waiver of interest charged under section 234B, and 234C to the class or classes referred to in paragraphs 2(a) and 2(d) of the said order dated 26-6-2006, was arbitrary and unequal and was in violation of Article 14 of the Constitution of India.

The High Court held that said order specifically mentioned that it would not apply to sections 234B and 234C, in view of above, the assessee was not entitled to any waiver / reduction of interest. Accordingly the writ petition was dismissed. (A.Y. 2008-09)

De Souza Hotels (P.) Ltd. v. CCIT (2012) 253 CTR 541 (Bom.)(HC) .

Editorial:- SLP of assessee was rejected. De Souza Hotels Pvt. Ltd. v. CCIT (2012) 210 Taxman 96(Mag.) (SC)]

PRINCIPLE OF NATURAL JUSTICE TO BE FOLLOWED :

14. The power exercisable by the Board under this sub-section is quasi-judicial in nature – therefore, the Board is required to follow the principle of natural justice by affording an opportunity of hearing to the assessee and passing a reasoned order.

Principles or procedures will necessarily include the power to waive interest. While disposing an application against imposition of penalty or for waiver of interest, the Board acts as a quasi- judicial authority and must pass orders giving reasons .

Board as a quasi judicial authority while exercising the power under section 119(2)(a), would be entitled to entertain application from an individual assessee against the order of the Assessing Officer declining the waiver of interest under section 234C and while doing so it is expected in law to give reasons while considering and passing on such application. (A.Y. 1990-91) ***Precot Mills Ltd. v. CBDT (2010) 321 ITR 293 (Mad.)(High Court)***

THE POWER TO ENTERTAIN A BELATED CLAIM

15. The power to entertain a belated claim under s 119(2) is similar to the power under s 5 of the Limitation Act, 1963; consequently, it can entertain a claim for refund beyond the period mentioned in s 239 of the Act. Section 5 of the Limitation Act, 1963 has not been expressly excluded by s 239.

16. Section 119(2)(b) authorises the Central Board to condone the delay among either things in entertaining a return if it considers it desirable or expedient to do so for avoiding genuine hardship for the assessee. The Board should condone the delay if failure to condone the delay causes genuine hardship to the assessee, no matter whether the delay in filing return is meticulously explained or not and what should be considered is the hardship to the party if the delay is not condoned. Once the board allows the application u/s 119(2)(b), the matter is taken up by the AO for considering the claim of the assessee for refund u/s 237.

Pala Marketing Co-operative Society Ltd v. UOI (2009) 311 ITR 177 (Ker)

North Eastern Electric Power Corpn. Employees Provident Fund Trust v. UOI, (2012) 348 ITR 584 (Gauh)

Amal Kumar Ghosh v. Asst CIT, (2014) 361 ITR 458 (Cal)

17. The Board may, direct that in any particular case of cases, a time- barred application or claim should be admitted and dealt with on merits. It is well settled that in matters of condonation of delay a highly pedantic approach should be eschewed and a justices- oriented approach should be adopted and a party should not be made to suffer on account of technicalities like postal delay due to floods. If refund is legitimately due to the applicant, mere delay should not defeat the claim for refund. At this stage, the authority is not expected to go deep into the niceties of law. If no time stipulation was, in the first instance, applicable to the return, the provision of s 119 (2)(b) were also not applicable and the AO has to process the return and make assessment in accordance with provision of the Act.

18. In this context a reference can be made to the following circular :

Circular No. 9/2015

F.No.312/22/2015-OT
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

Dated: 9th June. 2015

Subject: Condonation of delay in filing refund claim and claim of carry forward of losses under Section 119(2)(b) of the Income-tax Act

In supersession of all earlier Instructions/Circulars/Guidelines issued by the Central Board of Direct Taxes (the Board) from time to time to deal with the applications for condonation of delay in filing returns claiming refund and returns claiming carry forward of loss and set-off thereof under section 119(2)(b) of the Income-tax Act(the Act), the present Circular is being issued containing comprehensive guidelines on the conditions for condonation and the procedure to be followed tor deciding such matters.

2. *The Principal Commissioners of Income-tax/Commissioners ofIncome-tax (Pr.CsIT/CsIT) shall be vested with the powers of acceptance/rejection of such applications/claims if the amount of such claims is not more than 10 lakhs for any one assessment year. The Principal Chief Commissioners of Income-tax/ Chief Commissioners of Income-tax (Pr. CCsIT/CCsIT) shall be vested with the powers of acceptance rejection of such applications/ claims. if the amount of such claims exceeds 10 lakhs but is not more than 50 lakhs for any one assessment year. The applications/claims for amount exceeding Rs.50 lakhs shall be considered by the Board.*

3. ***No condonation application for claim of refund/loss shall be entertained beyond six years from the end of the assessment year for which such application claim is made.*** *This limit of six years shall be applicable to all authorities having powers to condone the delay as per the above prescribed monetary limits, including the Board. A condonation application should be disposed of within six months from the end of the month in which the application is received by the competent authority, as far as possible.*

4. *In a case where refund claim has arisen consequent to a Court order, the period for which any such proceedings were pending before any Court of Law shall be ignored while calculating the said period of six years, provided such condonation application is filed within six months from the end of the month in which the Court order was issued or the end of financial year whichever is later.*

5. *The powers of acceptance/rejection of the application within the monetary limits delegated to the Pr. CCsIT/CCsIT/Pr.CsIT/CsIT in case of such claims will be subject to following conditions:*

   (i) At the time of considering the case under Section 119(2)(b), it shall be ensured that. the income/ loss declared and /or refund claimed is correct and genuine and also that the case is of genuine hardship on merits

   (ii) The Pr. CCIT/CCIT/Pr.CIT/CIT dealing with the case shall be empowered to direct the jurisdictional assessing officer to make necessary inquiries or scrutinize the case in accordance with the provisions of the Act to ascertain the correctness of the claim.

6. *A belated application for supplementary claim of refund (claim of additional amount of refund after completion of assessment for the same year) can be admitted for condonation provided other conditions as referred above are fulfilled. The powers of acceptance/rejection within the monetary limits delegated to the Pr. CCsIT/CCsIT/Pr. CsIT/CsIT in case of returns claiming refund and supplementary claim of refund would be subject to the following further conditions:*

   (i) The income of the assessee is not assessable in the hands of any other person under any of the provisions of the Act.

(ii) No interest will be admissible on belated claim of refunds.

(iii) The refund has arisen as a result of excess tax deducted/collected at source and/or excess advance tax payment and/or excess payment of self-assessment tax as per the provisions of the Act.

7. In the case of an applicant who has made investment in 8% Savings (Taxable) Bonds, 2003 issued by Government of India opting for scheme of cumulative interest on maturity but has accounted interest earned on mercantile basis and the intermediary bank at the time of maturity has deducted tax at source on the entire amount of interest paid without apportioning the accrued interest/IDS, over various financial years involved, the time limit of six years for making such refund claims will not be applicable.

8. This circular will cover all such applications/claims for condonation of delay under section 119(2)(b) which are pending as on the date of issue of the Circular.

9. The Board reserves the power to examine any grievance arising out of an order passed or not passed by the authorities mentioned in para 2 above and issue suitable directions to them for proper implementation of this Circular. However, no review of or appeal against the orders of such authorities would be entertained by the Board.

(Ekta Jain)

Deputy Secretary to Government of India

19. Refund - Application for condonation of delay in filing return of income and claiming refund of TDS:

HELD, by the High Court that the impugned rejection order does not deal with the various criteria which the assessee were asked to satisfy for consideration of its application ie specific evidence/test laid down by CBDT as indicated in PCIT's notice has not been dealt with in respect to each of the heads. Order set aside to the file of PCIT for fresh disposal and considering the parameters indicated in PCIT's notice **Yash Society. v. CIT (E) (2018) 163 DTR 337/301 CTR 729 (Bom)(HC)**

20. Refund application-Refusal of condonation of delay and denial of refund adopting hyper technical view was held to be not proper.[S.10(10C), 237]

In the return of income the assessee did not claim refund of tax deducted at source. The assessee file revised return on September 8, 2011 claiming the benefit .However there was no response. The assessee file application for condonation of delay under section 119(2)(b) for claiming refund.The commissioner dismissed the application in view of instruction no 13 of 2006 dated 22-12-2006, on the ground that application was filed beyond six years from the end of the assessment year for which the application was made.The assessee filed writ petition. Allowing the petition the court held that the application for condonation of delay was rejected adopting a hyper technical view. The assesses case revised return filed should be considered as application for condonation of delay under section 119(2)(b) and revenue was directed to grant the refund.(AY.2004- 05)

Devdas Rama v. CIT(2014) 362 ITR 335 (Bom.)(HC)

21. Delay in filing Return of Income due to late appointment of statutory auditor must be condoned. (A.Y. 2001-02)

Bombay Mercantile Co-op. Bank Ltd v. CBDT (2011) 332 ITR 87 (Bom.)(HC)

22. Belated refund claim filed by an assessee : In every case of delay, there might be some lapse on the part of the party concerned - That by itself was not ordinarily sufficient to turn down the plea or to shut the doors against him

Assessee filed ROI beyond the period specified for belated return in section 139(4) and claimed refund of the TDS. AO did not act on the same and, consequently, assessee approached CBDT u/s. 119(2)(b) and sought condonation of delay in filing return of income. It was stated by the assessee in the application that, at the relevant time, its office was shifted and certain records including TDS certificates got misplaced and it took considerable time to retrieve them which caused delay in filing of return. CBDT declined to condone the delay. Assessee challenged CBDT's order by filing a writ petition in the High Court.

The High Court held in favour of assessee as under – It may be true that the returns might not have been filed within the period specified under section 139(1) of the Income-tax Act, nevertheless, the returns were filed in respect of all assessment years (except assessment year in question) within the time allowable u/s. 139(4) of the said Act. Further, in almost all cases return was accepted with only some minor disallowances. In light of such facts, the CBDT was obviously not right in condemning the assessee as a 'habitual late filer'. It could not be said that intention behind late filing of return was to avoid scrutiny since assessee had already made it clear that it had no objection to scrutiny assessment for the purposes of determining refund for the relevant AY. The circumstance that the accounts were duly audited within due date of filing of return was not a circumstance that could be held against the assessee. This circumstance, on the contrary added force to the explanation furnished by the assessee that the delay in filing of returns was only on account of misplacement of the TDS Certificates. For condonation of delay, what was really important was the acceptability of the explanation offered by the assessee rather than length of delay. Explanation offered by assessee that TDS certificates got misplaced due to shifting of office was not bogus. Hence, it could not be said that the assessee had obtained any undue advantage out of delay in filing of ITR. In every case of delay, there might be some lapse on the part of the party concerned. That by itself was not ordinarily sufficient to turn down the plea or to shut the doors against him. If the explanation offered did not smack of mala fides or it was not put forth as a part of dilatory strategy, the Court was expected to show utmost consideration to the applicant. An acceptable explanation was offered by the assessee and a case of genuine hardship was made out. Accordingly, the impugned order made by the CBDT was to be set aside. The delay in filing the ROI for the relevant AY was to be condoned and ROI was directed to be admitted for consideration.

Artist Tree (P.) Ltd. vs. CBDT [2014] 369 ITR 691 (Bom)(HC)

23. ROI delayed as Audit report not issued in time – Delay condoned and directed the Commissioner allow the claim under section 80P [S.80P, 139]

The assessee for the AYs : 1999-2000 to 2000-01 filed the ROI on 23-11-2004 for claiming exemption u/s. 80P, along with condonation of delay, which was rejected by Commissioner. On Writ allowing the petition the Court held that, where the assessee co-operative society could not file return within stipulated time due to interim stay on audit report, there was sufficient cause for delay, and denying condonation of delay on ground that assessee ought to have filed return within time on unaudited books was not sustainable. Court allowed the petition and directed the Commissioner to process the return and pass the order in accordance with law and effect the refund if the assessee is entitled. (AY.1999-2000, 2000-01)

Arecanut Processing & Sale Co-operative Society Ltd. v. CIT (2013) 358 ITR 337 (Karn.)(HC)

24. Condonation of delay in making investment - [S. 54EC, Art. 226]

Allowing the petition the Court held that; delay of six months was deserves to be condoned in view of the fact that the assessee, a doctor by profession was travelling from India to the U. S A. where she normally resided and came to India not only to meet her family members, but to sell the immovable property belonging to her and sought to avail of the genuine exemption from such tax liability upon making the investment in the prescribed investment in the form of bonds of infrastructure which she did make in the National Highways Authority. Accordingly the CBDT is directed to grant exemption. (AY. 2013 - 14) Dr. Sujatha Ramesh (Smt.) v. CBDT (2018) 401 ITR 242 (Karn) (HC)

25. Discretion to admit claim made beyond period specified is to be exercised on sound lines-Delay of one day in filing return :

One could take judicial note of the fact that uploading of return required not only an effort but was also time consuming. If the assessee had encountered certain hardship or difficulty in uploading its return, as alleged by it due to technical snags in the website of the Department due to the last hour rush of filing of returns, the delay deserved to be condoned. (AY. 2010-2011)

CBDT v. Regen Infrastructure and Services P. Ltd. (2016) 389 ITR 138 (Mad.)(HC)

GENUINE HARDSHIP:

26. Sub-section (2)(b): Genuine Hardship - The CBDT must construe the phrase " genuine hardship " liberally while granting relief. The existence of genuine hardship must depend on the facts of each case and no fixed criteria in a straitjacket formula can be laid down.

Where the Board issued circulars by a press release fixing certain criteria for selection of cases or fixing monetary limits for appeals or lesser time-limit for completion of assessment, the assessing Officer is bound by it. Further the Board is not empowered to clarify the meaning of a circular or order on the request of an individual.

Sub- Section (2)(c): Relaxation of Statutory Requirements :

27. Under sub-S. (2)(c), the board may relax any requirements in any of the provision of Ch IV or Ch VI-A, if the conditions specified in the sub - section are fulfilled. Clause(c) was inserted by Finance (No.2) Act, 1991 with effect from October 1, 1991. It enabled the power to relax the requirements contained in Chapter IV or Chapter VIA in case where the assessee has failed to company with the statutory requirements in those chapters provided the condition mentioned in cl (c)(i) and (ii) are satisfied. It is submitted that the word "and" after condition (i) should be read as "or" The assessee may not be able to comply with the requirement for circumstance beyond his control. Such circumstance may prevail even before completion of the assessment for the previous year in which deduction is claimed.

It may be added that Chapter IV deals with ss 14 to 59. Chapter VIA covers ss 80A to 80VV. Clause (c) becomes necessary as cl (a) does not enable relaxation of the requirement of mandatory provision like ss 201(1A) t0 211 and 234C.

I. **INSTANCES WHERE APPLICATION U/S 119(2) OF THE ACT WILL LIE :**

Some of the situations in which in assessee can approach the Board:

I. For waiver and reduction of interest under section 234A, 234B and 234C of the Act. **Union Home Products Ltd v UOI, (1995) 215 ITR 758, 783 (Karn)**

II. For admitting a belated claim for refund . For grant relaxation from period of limitation to avoid genuine hardship in any case or class of cases. **Jaswant Singh Bambha v. CBDT, (2005) 272 ITR 1 (Punj-FB)**

III. For relaxing any requirement contained in any of the provisions of Chapter IV or Chapter VIA relating to deduction claimed thereunder for avoiding genuine hardship occasioned by rigourous application of the rule of limitation in specified matters,. **Dr. K. Jagadeesan v. CBDT, (1998) 231 ITR 755, 759-60(Del)**

IV. For allowing the claim for loss, unabsorbed depreciation and relief by way of filing belated return. **Associated Electro Ceramics v CBDT, (1993) 201 ITR 501 (Karn)**

V. Condonation of delay in filing return of income beyond prescribed date under the Act. **Vasudev Adigas Fast Foods Pvt. Ltd v. CBDT (2020) 186 DTR 89/ 314 CTR 852 (Karn.)(HC)**

CONCLUSION :

The Board thus has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under Section 119 of the Income-tax Act which are binding on the authorities in the administration of the Act. Under Section 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in Section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship

may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities. We need to constantly bring to Board notice anomaly in the application of provision or understanding by the revenue authorities for which explanatory / clarificatory circulars can be issued .

While drafting such application it is expected to satisfy each condition of the provisions and demonstrate the genuine hardship/difficulty faced by an assessee if such relief is not granted. The task should be to bring out the case of an assessee before the authorities whereby the authorities could be asked to exercise their power in interest of justice and fair play. There is no particular format or form to draft such application, one needs to draft the application narrating the facts alongwith supporting documents. The drafting should be simple language, to the point and should bring out the case of an assessee clearly before the authorities. The remedy against orders passed by authorities u/s. 119(2) of the Act lies before High Court in writ jurisdiction.

■■■

Indemnity bonds for refunds: Scope and Applicability Provision, Rules, circulars etc.

CA. Krupa Gandhi

1. Refund provisions:

1.1. Section 237 of the Act provides that where an assessee satisfies the AO that he has paid tax in excess of the amount with which he is chargeable under the Act, he shall be entitled to a refund of such excess tax.

1.2. Claim for refund shall be made by filing a return u/s 139 of the Act. Prior to Sept 1, 2019, refund claim had to be made in Form 30 which condition is now removed.

1.3. Under section 241A of the Act, applicable from A.Y. 2017-18, the AO can withhold refund determined u/s 143(1) if he is of an opinion, having regard to the fact that a notice u/s 143(2) has been issued, such refund could prejudicially affect the revenue.-record in writing with the previous approval of PCIT/CIT.

1.4. Where a refund becomes due to an assessee under the Act, he is entitled to receive interest @6% p.a. on the refund subject to other conditions. However, an assessee is not entitled to such interest if the amount of refund is less than 10% of tax determined u/s 143(1) or on regular assessment.

2. Evolution of the procedure of grant of refund:

2.1. In the past, Refund Orders ("RO") used to be granted physically. These had to be deposited like cheques after filling up certain details on the RO. However, banks and public at large faced many difficulties in handling physical RO.

2.2. Upon RBI pursuing the Government over the difficulties, the Government implemented Electronic Clearing System ("ECS") to credit refund to assessees. [RBI Circular No DGBA GAD No H-767/42.01.034/2003-04 dated March 9, 2004]. Accordingly, Income Tax Returns ("ITR"s) have been amended requiring assessees to mandatorily give bank details where refund has to be credited. After this change, refund gets credited to the bank account specified in the ITR.

3. TDS and tax payments mis matches on ITR processing:

3.1. Prior to electronic filing of ITR, all ITRs were filed in physical form. An assessee had to attach original TDS certificates (Form 16, 16A), tax payment challans, etc, with such physical ITR. However, often assessees may not get credit for such taxes TDS and tax if either the certificates were missing or were duplicate or there was a mistake in the name, PAN of assessee, etc. In such situation, the Assessee would give an Indemnity Bond with details of tax and relevant income, to the AO to claim tax credit. This was an accepted practice, since the revenue is not deprived of tax but the Assessee would be deprived of credit for technical reasons.

3.2. The same principle was followed in an old letter No 22 (LXXII-17) dated Aug 8, 1961, which directed that where the refund due to the estate of a deceased person should be paid to his son/widow or other legal heirs on their furnishing an indemnity bond and without the production of succession certificates or letters of administration, etc. provided that such indemnity bond should be supported by the guarantee of one or two solvent sureties.

3.3. Upon notification of Electronic furnishing of Returns Scheme 2007 ("the Scheme"), the entire procedure of filing of ITR has undergone a change. Now, ITR are filed without any attachments and all the relevant details of TDS and tax payments are specified in the respective schedules of ITRs. At the same time, TDS/TCS by each deductor/collector against every PAN is reported in Form 26AS which is the base to claim TDS credit in ITRs.

3.4. Subsequently, Centralised Processing of Returns Scheme 2011 ("CPC Scheme") was notified u/s 143(1A) under which the ITRs filed are processed electronically. Under the CPC Scheme, the sum payable to, or the amount of refund due to, the person shall be determined after credit of TCS, TDS and tax payments which are validated with reference to data uploaded through TDS and TCS statements and tax payment challans reported through authorised banks.

3.5. Errors could creep in filling up TDS/TCS and tax payment schedules in ITRs for various counts. Hence, while processing ITRs by CPC, there could be short refund or demand from short credit of TDS/TCS and tax payments even under the electronic regime. CBDT has issued a detailed circular no 8 of 2015 dated May 14, 2015 for guidance of assessees and the Department. That circular provides that if there is an outstanding demand of more than than Rs 25,000/- due to TDS mismatch, and TDS credits are not available in Form 26AS, only for individuals and HUFs, the AO should obtain an indemnity bond from the assessee in the specified format. If the outstanding demand is more than Rs 50,000/- in such cases, the AO should obtain approval of Range Head in addition to the indemnity bond. The format of Indemnity Bond specified in the said circular is given hereunder:

ANNEXURE A

Format for Indemnity Bond (to be typed on non-judicial Stamp Paper of ₹ 100[1]):

INDEMNITY BOND

This Bond of indemnity is made this ..... (Date of indemnity Bond) in favour of Government of India (Department of Finance) i.e. Income Tax Department by Mr./Mrs/Ms.....(Name of the Indemnifier) Son of/Daughter of/ Wife of on behalf of self or M/s. .....

PAN .....

Status .....

WHEREAS This is to undertake:

1. *That I had filed my Income Tax Return for the Assessment Year .....*
2. *That TDS claimed in the return of Rs. ..... belongs to me as per TDS certificates mentioned below*

   Name of Deductor, TAN of deductor, Date of TDS certificate, Amount

   a. .....

   b. .....

   OR

   That Challan(s) paid for Rs. ..... belongs to me as given below:

   Date of Payment, Bank through which payment made, Amount

   a. .....

   b. .....

3. *That in case it is found that the TDS certificates / Challan does not belong to me then the executor of this bond indemnify the Government of India (Ministry of Finance) for the loss, claim and excess amount of refund, if any, in all respect.*

1 To apply the prevailing stamp duty in the respective statea

The executor of this bond indemnifies the Government of India (Ministry of Finance) and keep it indemnified against all costs, damages, charges and expenses, Excess amount of refund, interest, reduction in demand and also against all sum/money, whether for damages, costs, charges, expenses or otherwise.

In witness where of this bond is executed today this ..... (Date)

(.....)

.....

4. Conclusion:

Indemnity Bonds provide the way forward where taxes are paid or deducted but due to some technical issues, credit is not reflected in the Income Tax system, in favour of an assessee. Hence, assesses can use them effectively to minimise the tax and TDS mismatch in the refund processing.

■■■

Application for compounding of offences under Income tax Act : Scope and Applicability Provision, Rules, circulars etc.

Rahul Hakani, Advocate

INTRODUCTION

1. Chapter XXII of the Income -tax Act, 1961 i.e. S.275A to S.280D deals with prosecution of offences under the Income Tax Act, 1961. Though under criminal jurisprudence the cardinal principle is "innocent until proven guilty", by virtue of Section 278E of the Act, a presumption is created as to culpable mental state i.e. the burden is on the Accused to prove that he is innocent. The Constitutional validity of the said provision was upheld by Apex court in Sasi Enterprises v. ACIT (2014) 361 ITR 163(SC).

2. The Income Tax Act provides that an Accused can pay compounding fee in-order to avoid punishment for a criminal offence. Section 279(2) of the Act provides that any offence under Chapter XXII of the Act may, either, before or after the institution of proceedings, be compounded by the Pr. CCIT/CCIT/Pr. DGIT/DG1T. As per section 2(15A) and 2(21) of the Act, Chief Commissioner of Income Tax includes Principal Chief Commissioner of Income Tax, and Director General of Income Tax includes Principal Director General of Income Tax.

3. Compounding of offences is not a matter of right. However, offences may be compounded by the Competent Authority on satisfaction of the eligibility conditions prescribed in these Guidelines keeping in view factors such as conduct of the person, the nature and magnitude of the offence in the context of the facts and circumstances of each case.

4. In **Vikram Singh v. UOI (2017) 394 ITR 746 (Delhi) (HC)** it is held that the CBDT has no jurisdiction to demand that the assessee pay a 'pre-deposit' as a pre-condition to considering the compounding application.

5. In **B.Gopi v. G. Thiyagarajan, ITO (2015) 370 ITR 353 (Mad.)(HC)** where Conviction and sentence was confirmed, liberty granted to Department to consider application for compounding offence.

IMPORTANT CIRCULARS REGARDING PROSECUTION

6 As per the **instruction No. 5051 of 1991 dt. 7/2/1991** issued by the Board states as under:

"Prosecution need not normally be initiated against a persons who have attained the age of 70 years at the time of commission of the offence".

7 **Circular No F. No.255/339/79-IT (Inv.)** dated 28.05.1980 issued by CBDT, wherein, it is mentioned that prosecution under Section 276 B of the Act should not normally be proposed when the amount involved and/ or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the government.

8 **Circular No F.No.285/90/2008-IT (Inv.)/05** provides that TDS default of Rs 25,000/- or more and same is not deposited even within 12 months of deduction shall be processed for prosecution.

9 Ministry of Finance, have on 6th August, 2013, issued a Press release wherein it was mentioned that the guidelines to pick up cases for launching prosecution has been modified and the criterion of minimum retention period of 12 months have been dispensed with. Thus, now, prosecution can be launched even for a delay of 1 day.

10 CIRCULAR NO. 24/2019 DATED 09.09.2019

Procedure for identification and processing of cases for prosecution under Direct Tax Laws identified. The CBDT has specified detailed criteria to ensure that only deserving cases get prosecuted. The objective is to

ensure that while habitual defaulters are not spared, casual offenders where the amounts involved is less than Rs. 25 lakh are not harassed.

"i. Offences u/s 276B: Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B. Cases where non-payment of tax deducted at source is Rs. 25 Lakhs or below, and the delay in deposit is less than 60 days from the due date, shall not be processed for prosecution in normal circumstances. In case of exceptional cases like, habitual defaulters, based on particular facts and circumstances of each case, prosecution may be initiated only with the previous administrative approval of the Collegium of two CCIT/DGIT rank officers as mentioned in Para 3.

ii. Offences u/s 276BB: Failure to pay the tax collected at source.

Same approach as in Para 2.i above."

11. GUIDELINES FOR COMPOUNDING OF OFFENCES UNDER DIRECT TAX LAWS, 2019 CIRCULAR F. NO. 285/08/2014- IT(INV.V)/147, DATED 14-6-2019

11.1 The above guidelines are currently prevalent and were issued in supersession of earlier Guidelines on this subject, including the Guidelines of the Board issued vide F.No.285/35/2013 IT(Inv.V)/108 dated 23rd December 2014.

11.2 These Guidelines are issued in exercise of power u/s 119 of the Act read with explanation below sub-section (3) of section 279 of the Act. Some of the important aspects of the Guidelines are as under :

Effective Date

These Guidelines shall come into effect from 17.06.2019 and shall be applicable to all applications for compounding received on or after the aforesaid date. The applications received before 17.06.2019 shall continue to be dealt with in accordance with the Guidelines dated 23.12.2014

Making an Application.

An application is made to the Pr. CCIT/CCIT/ Pr. DGIT/DGIT having jurisdiction over the case for compounding of the offence(s) in the prescribed format (Annexure-1) in the form of an affidavit on a stamp paper of Rs. 100/-

Applicability of these Guidelines to prosecutions under IPC

Prosecution instituted under Indian Penal Code(TPC'), if any, cannot be compounded. However, section 321 of Criminal Procedure Code, 1973, provides for withdrawal of such prosecution. In case the prosecution complaint filed under the provisions of both Income-tax Act, 1961 and the IPC are based on the same facts and the complaint under the Income-tax Act, 1961 is compounded, then the process of withdrawal of the complaint under the IPC may be initiated by the Competent Authority.

Classification of Offences

The offences under Chapter-XXII of the Act are classified into two parts (Category 'A' and Category 'B') for the limited purpose of Compounding of Offences.

Category 'A' offence on more than three occasions cannot generally be compounded. However, in exceptional circumstances compounding requested in more than three occasions can be considered only on the approval of the Committee as prescribed.

Meaning of term "occasion"

— If in one instance the assessee files multiple applications for one or more than one Assessment Year (AYs), all of these applications shall be treated as one "occasion".

— Any application for compounding of offence u/s 276B/276BB of the Act by an applicant for any period for a particular TAN should cover all defaults constituting offence u/s 276B/276BB in respect of that TAN for such period.

Limitation for filing Compounding Application & Relaxation of time

Compounding application is to be filed within 12 months from the date of filing complaint. The restrictions imposed of 12 months from filing of complaint for compounding of an offence in a deserving case may be relaxed, where application is filed beyond 12 months but before completion of 24 months from the end of month in which complaint was filed, by the prescribed Committee. However, a plea of pendency of appeal at any stage or before any authority cannot be treated as a reason beyond the applicant's control, because furnishing an undertaking to withdraw the appeal(s) having bearing on the offence is a prerequisite.

However, in all such cases where relaxation has been provided the compounding charges would be 1.25 times the normal compounding charges as applicable to the offence on the date of filing of the original compounding application.

COMPOUNDING CHARGES

The compounding charges shall include compounding fee as prescribed in the Guidelines, prosecution establishment expenses and litigation expenses, including Counsel's fee.

Prosecution establishment expenses will be charged at the rate 10% of the compounding fees subject to a minimum of Rs.25,000/- in addition to litigation expenses including Counsel's fees paid/payable by the Department in connection with offence(s) compounded by a single order. In a case where the litigation expenses are not readily ascertainable, the competent authority may arrive at litigation expenses, inter alia, on the basis of rates prescribed by the Government and on the basis of existing records with the Government and the counsels.

Wherever, extension of time allowed to make compounding charges is allowed beyond one month from the end of intimation of compounding charges in accordance with Compounding Guidelines, the applicant shall have to pay additional compounding charges @ 2% per month or part of month on the unpaid amount of the compounding charges upto three months and 3% for period, beyond three months.

The compounding charges are payable in addition to the tax, interest and penalty, if any payable or imposable as per provisions of the Act. Such tax, interest and penalty are to be paid before filing the compounding application as required in these Guidelines.

For the purpose of computation of the compounding fee, the word "tax" means- tax including surcharge and any cess by whatever name called, as applicable.

Powers of Finance Minister.

Notwithstanding anything contained in these Guidelines, the Finance Minister may relax restrictions for compounding of an offence in a deserving case, on consideration of a report from the Board on the petition of an applicant.

12. The Draft Compounding Application is as under :

I COVERING LETTER

Date : 22/1/2021

To,

The Chief Commissioner Of Income Tax – …

Room No ……., ….. floor, ……,

Mumbai- ……

Re : 1) M/s ……. (PAN No. …….)

…….. – 400021.

2) Prosecution proceedings launched u/s …… for A.Y. ……...

Sub : Application for Compounding of Offences.

Respected Sir/madam,

In this case prosecution proceedings were initiated under ……. of the Income tax Act ,1961 against the Assessee Company and it's ……..directors for the disallowance/addition of …….... Consequently Criminal complaint No …… has been filed before the Additional Metropolitan Magistrate, 38th Court at Ballard pier, Mumbai by the Income Tax department.

The assessee company and it's directors are desirous of compounding the offences u/s 279 (2) of the Act. In this regard please find enclosed the following documents:

a) Application for compounding of Prosecution proceedings initiated against the assessee in Annexure -1.

b) Justification for Compounding – annexure "A".

c) Challan of Stamp Duty paid of Rs 100/-

d) Assessment order u/s 143(3) dated …….

e) Penalty order u/s 271(1)(c) dated ……..

f) CIT(A) order dated …….

g) ITAT order dated ……...

We Request Your Honour to kindly take the above compounding application on record.

Thanking You.

Yours faithfully,

M/s ……(Managing director)

II COMPUNDING APPLICATION

Annexure 1

Sr No	Particulars	Remarks
1	Name of the applicant	M/s …….. Smt. …….. Shri …….....
2	Status	Company
3	Offences committed u/s *	276C(1) r.w.s 278B of Income Tax Act 1961
4	AYs / Date/ period involved in offence	AY ……..
5	Status of case (i.e. whether contemplated/ pending in Court/convicted/ acquitted	Complaint No ……. filed in the court of Additional Metropolitan Magistrate 38th Court At Ballard Pier, Mumbai.
6	Date of filing of complaint, if any	…….
7	Whether the offence(s) committed by the applicant is one for which complaint(s) was filed with the competent court 12 months prior to the filing of the application for compounding	
8	Particulars of offences along-with justification for compounding (separate sheet)	Annexure 'A'. To show how we have a good case on merits/ reasonable cause for committing the offence i.e. To give reasons why we wish to settle the dispute though we have good case on merits.
9	Whether the applicant has paid the amount of tax, interest, penalty and any other sum due relating to the offence	Yes.
10	Whether the applicant undertakes to pay further tax, interest, penalty and any other amount as is found to be payable on verification of record	Yes
11	Whether the applicant undertakes to pay the compounding charges as shall be intimated by the department.	Yes
12	Whether similar offences in the case of the applicant have been compounded earlier. If yes, how many times	No
13	Whether the offence is first offence as defined in para 8 (ii) of the guidelines	Yes
14	Whether the offence has been committed by the applicant who, as a result of investigation conducted by any Central or State agency has been found involved, in any manner, in antinational/terrorist activity	No
15	Whether any enquiry/ investigation being conducted by Enforcement Directorate, CBI, Lokpal, Lokayukta or any other Central or State agency is pending against the applicant? If so particulars may be given	No

Sr No	Particulars	Remarks
16	Whether the applicant was convicted by a court of law for an offence under any law, other than the Direct Taxes laws, for which the prescribed punishment was imprisonment for two years or more, with or without fine. If so, particulars may be given along with a copy of the court's order	No
17	Whether, the application for 'plea-bargaining' under Chapter XXI-A of 'Code of Criminal Procedure' is pending in a Court and the Court has recorded that a 'mutually satisfactory disposition' of such an application is not worked out?	No
18	Whether the applicant was convicted by a court of law for the offence sought to be compounded	No
19	Whether it is an offence in respect of which the compounding application has already been rejected	No
20	Whether it is an offence which has bearing on an offence relating to undisclosed foreign bank a/c / asset in any manner	No
21	Whether it is an offence which has bearing on any Black money (undisclosed foreign income and assets) & Imposition of Tax Act 2015	No
22	Whether it is an offence which has bearing on any offence under the Benami Transactions (Prohibition) Act 1988	No
23	Whether it is an offence u/s 275A, 275B or 276	No

VERIFICATION

I, ……., in my capacity as the managing director of …….. certify and solemnly affirm that the information in the above columns is true and correct to the best of my knowledge and belief.

Place : Mumbai

Signature

Date : .....……

1) For M/s ……..

……

(Managing Director)

2) Smt ……..

Note : Where a common application for Company and Directors is filed, it is advisable to pay stamp duty of Rs 100/- w.r.to each Director.

Appeal Before Tribunal: Scope and Applicability Provision, Rules, circulars etc.; Special emphasis on drafting of grounds of appeal and Cross Objection Condonation Application, Additional evidence Application

Advocate Jitendra Singh

(i) Introduction: -

The Income Tax Appellate Tribunal (hereinafter referred to as 'Appellate Tribunal') is a quasi-judicial institution set up on 25th January, 1941 with a moto to provide 'SULABH NYAY AND SATWAR NYAY' meaning easy and faster justice to the assessee's before it.

Ordinarily an appeal before the Appellate Tribunal lies against the order passed by Ld. Commissioner of Income Tax (Appeals) (hereinafter referred to as 'Ld. CIT(A)') passed under section 250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Hence, the proceedings before the Appellate Tribunal are also called as second appeal. The proceedings before the Appellate Tribunal are of utmost importance as the Appellate Tribunal is the final fact-finding authority and any appeal against the order of the Appellate Tribunal can only be challenged before the Hon'ble High Court if it involves substantial question of law. Thus, as far as factual position in a case is concerned the order passed by the Appellate Tribunal is final and binding on the assessee as well as on the Income Tax Department.

Hon'ble Supreme Court of India in the case of Ajay Gandhi & Anr. Vs. B. Singh & Ors. (2004) 265 ITR 451 (SC) has observed that: "The Tribunal exercises judicial functions and has the trappings of a Court".

The Appellate Tribunal is not an income-tax authority as contemplated under section 116 of the Act. Section 252 to 255 of the Act deals with the appeals before the Appellate Tribunal. The procedures before the Appellate Tribunal are governed by Income Tax Appellate Tribunal Rules, 1963 formulated under sub-section (5) of section 255 of the Act.

The Central Government has undertaken a number of measures to make the processes under the Act, electronic, by eliminating person to person interface between the taxpayer and the Department to the extent technologically feasible, and provide for optimal utilisation of resources and a team-based assessment with dynamic jurisdiction. A series of futuristic reforms have been introduced in the domain of Direct Tax administration for the benefit of taxpayers and economy. This started with faceless assessment in electronic mode involving no human interface between taxpayers and tax officials. The faceless procedures are being introduced in a phased manner in the Act.

As part of this process of making the tax administration transparent and efficient, provisions for notifying faceless schemes under section 253 was introduced by inserting sub-sections (8) to (10) in the Act through Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 with effect from 01.11.2020. The limitation period for issuing directions with respect to Faceless appeal to Appellate Tribunal is 31.03.2022. Similarly sub-section (7) to (9) were also inserted in section 255 of the Act through Finance Act, 2021 with effect from 01.04.2021. The Limitation period provided for issuing directions with respect to Faceless procedure of Appellate Tribunal is 31.03.2023. However, in the present scenario of COVID-19 pandemic era, the limitation period for issuing the directions under section 253 as well as 255 of the Act has been extended till 2024 by Finance Act, 2022.

(ii) Who can file an appeal?

Filing of appeal before the Hon'ble Income Tax Appellate Tribunal is a statutory right and not a vested right. Hon'ble Supreme Court of India in the case of National Insurance Co. Ltd vs. Nicolleta Rohtagi AIR 2002 SC 3350 has held that a right of appeal is not an inherent right or common law right, but a statutory right.

Thus, an appeal can be filed before the Appellate Tribunal from the order of the Ld. CIT(A) only if the assessee is aggrieved by the said order.

Hon'ble Madhya Pradesh High Court in the case of CIT vs. Princess Sarla Kumari (1988) 171 ITR 14 (MP) held that when an order is passed by the first appellate authority, allowing the appeal of the assessee, he cannot be said to be aggrieved by the order passed by the said authority.

Hon'ble Mumbai Appellate Tribunal in the case of Nedlloyd B.V. vs. DDIT (IT) [2013] 144 ITD 236 (Mumbai) held that when no tax is payable by assessee, a Netherland Company, as a result of order of Commissioner (Appeals), it could not be termed as 'assessee aggrieved' as envisaged in section 253(1) of the Act.

(iii) Procedures for filing of appeal: -

Section 253 of the Act provides the procedure of filing an appeal before Appellate Tribunal: -

Appeal preferred by an assessee

(a) Section 253(1) provides that any Assessee who is aggrieved by any of the following orders can prefer the appeal before the Appellate Tribunal:

- An order passed by Commissioner (Appeals) under section 154, 250, 270A, 271, 271A, 271J or 272A; or
- an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or
- an order passed by an Assessing Officer under section 115VZC; or
- An order passed by Principal Commissioner or Commissioner under section 12AA or section 12AB or under section 80G(5)(vi) or 263 or 270A or 271 or 272A or 154 amending the order passed under section 263 or order passed by a principle chief commissioner or chief commissioner or a Director General or Director General or a Principal Director or Director under section 272A; or
- An order passed by an Assessing Officer under section 143(3) or section 147 or section 153A or 153C in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order;
- An order passed by Assessing Officer with the approval of Principle Commissioner or Commissioner as referred to in section 144BA (12) of the Act or an order passed under section 154 or section 155 in respect of such order; or
- An order by prescribed authority under section 10(23C) (iv) or (v) or (vi) or (via)

Appeal preferred by Department

(b) Provisions of Section 253(2) of the Act provides that the Principal Commissioner or Commissioner, if objects to any order passed by a Commissioner (Appeals) under section 154 or 250, may direct the Assessing Officer to file an appeal before Tribunal against the said order. However, filing of appeal by the department before the Appellate Tribunal and other forums is subject to the monetary tax effect limit prescribed by the Central Board of Direct Taxes (hereinafter referred to as 'CBDT') from time to time.

(iv) Time Limit for filing of appeal: -

Section 253(3) of the Act provides that every appeal under section 253(1) & (2) shall be filed within sixty days from the date on which the order sought to be appealed against is communicated to the Assessee or Principal Commissioner or Commissioner.

Hon'ble Supreme Court in the case of Tarun Prasad Chatterjee v. Dinanath Sharma [2000] 8 SCC 649, explained the principle contained in section 9 of the General Clauses Act, 1897 and section 12 of the Limitation Act, 1963 and held that when a period is delimited by statute or rule which has both a beginning and an end, and the word 'from' is used indicating the beginning, the opening day is to be excluded and if the last day is to be included the word 'to' is to be used. Hon'ble Supreme Court has held as under:

"In order to apply Section 9, the first condition to be fulfilled is whether a prescribed period is fixed "from" a particular point. When the period is marked by terminus a quo and *terminus ad quem, the canon* of interpretation envisaged in Section 9 of the General Clauses Act, 1897 require to exclude the first day."

(v) Grounds of appeal before Tribunal:

Rule 8 of the Appellate Tribunal Rules, 1963 provides that every memorandum of appeal shall be written in English and set forth, concisely and under distinct heads, the grounds of appeal without any arguments or narrative; and such grounds shall be numbered consecutively.

Suggestions for drafting the grounds of appeal: -

a. The Grounds of appeal should be concise, clear and precise

b. Avoid mentioning the arguments in the grounds of appeal

c. It is advisable to raise the grounds on legal aspect and on merits separately. The same may help the Bench to understand the issues.

(vi) Cross Objection: -

When an appeal is filed by the assessee or the Assessing Officer and the same is admitted as per Rule 12 of the Appellate Tribunal Rules, 1963 a notice is sent to the Respondent mentioned in the appeal memo enclosing the memorandum and grounds of appeal. The Respondent can on receipt of such notice under Section 253(4) of the Act file a memorandum of cross objection in Form No. 36A against any part of the order of the Commissioner (appeals) deciding any issue against him.

(vii) Time limit for filing cross objection

The memorandum of cross objection should be filed by the assessee or Assessing Officer within a period of thirty days from the date of receipt of the notice intimating about filing of the appeal by the other party.

The Memorandum of cross objection should be verified in prescribed manner and the same shall be disposed of by the Tribunal as if it was an appeal presented within the time specified in sub-section (3) of section 253 of the Act. [CIT vs. Puranchal Paribahn Gosthi (1998) 234 ITR 663 (Guwahati), Tata Sponge Iron Ltd. v. CIT (2008) 307 ITR 441 (Orissa)]

(viii) Fees for filing the appeal and cross objection before the Tribunal: -

- Liability to pay court fee for preferring an appeal to the Appellate Tribunal has been imposed by sub-section (6) of section 253 of the Income-tax Act, 1961. Section 253(6) provides that the appeal to the Tribunal shall be in prescribed form and shall be verified in prescribed manner and shall in any case of an appeal made, on or after 1st day of October, 1998, irrespective of the date of initiation of the assessment proceedings relating thereto, be accompanied by a challan of payment of fee of: -

  (a) Rs.500/-, where the total income of the assessee as computed by the Assessing Officer, in the case to which the appeal relates is Rs.100,000 or less

(b) Rs.1,500/-, where the total income of the assessee as computed by the Assessing Officer, in the case to which the appeal relates is more than Rs.100,000/- but not more than Rs.200,000/-

(c) Where the total income of the assessee computed in the cases to which the appeal relates is more than Rs.200,000/-, one percent of the assessed income, subject to maximum of Rs.10,000/-

(d) Whether the subject matter of an appeal relates to any matter other than those specified in clauses (a), (b) and (c), Rs.500/-

- Further the Proviso to this section provides that no fee shall be payable in the case of an appeal referred to in section 253(2) or a memorandum of cross objection referred to in sub-section (4) of section 253 of the Act.

  Hon'ble Patna High Court Dr. Ajith Kumar Pandey vs. Income Tax Appellate Tribunal [2009] 310 ITR 195 (Patna) has held that if a person is aggrieved by an order imposing penalty, approaches the Tribunal by preferring an appeal against penalty, it will be covered by clause (d) of section 253(6) and fee of Rs. 500 would be payable.

- Section 253(7) provides that the stay of demand shall be accompanied by a fee of five hundred rupees.

(ix) Monetary Limits for filing the appeal before the Appellate Tribunal by department (Tax Effect): -

The filing of appeal by the department before the Appellate Tribunal is subject to the tax effect involved as per the circulars issued by the CBDT from time to time. The basic objective of the CBDT instructions is squarely to reduce avoidable tax litigation. The CBDT vide Circular No.17 of 2019, dated 08.08.2019 has revised the monetary limit for filing the appeal by the Department before Income Tax Appellate Tribunal, High Court and Supreme Court by amending its earlier Circular No. 3 of 2018, dated 11.07.2018 only to the extent of paragraph 3 and 5. Circular No. 3 of 2018 was also amended by the Notification No. F. No. 279/Misc. 142/ 2007-ITJ(Pt) dated 20.08.2018. Hence, one has to refer above circulars collectively to calculate the tax effect in the departmental appeals. The contents of the said circulars are summarised as under:

- The appeals shall not be filed by the Department before the Appellate Tribunal if the tax effect involved in the appeal is less than Rs.50,00,000/-.
- The AO has to calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee.
- If the disputed issues arise in more than one assessment year, the appeal can be preferred in respect of such assessment year or years in which the tax effect exceeds the specified monetary limit.
- In case of a composite order of appellate authority which involves more than one assessment year and common issues in more than one 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.
- In the cases where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A/12AA of the Act, filing of an appeal shall not be governed by the limits specified in the said circular.
- In the following circumstances, issues can be contested and appeal can be filed, irrespective of tax effect: -

  (a) Where constitutional validity of the provisions of an Act or Rule is under challenged, or

  (b) Where Board's order, Notification, Instruction or Circular has been held to be *ultra-virus*, or

  (c) Where Revenue Audit Objection in the case has been accepted by the Department, or

  (d) Where addition relates to undisclosed foreign asset / bank accounts, or

(e) Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI/ ED / DRI / SFIO / Directorate General of GST Intelligence (DGCI), or

(f) Cases where prosecution has been filed by the Department and is pending in the court.

(x) Discretion for condoning the delay in filing the appeal and cross objection before Tribunal

Section 253(5) of the Act empowers the Tribunal to admit an appeal or permit the filing of a cross objection after the expiry of the relevant period provided under sub section (3) & (4), if the Tribunal satisfied that there is a sufficient cause for not presenting the appeal or cross objection within the prescribed period.

Some decisions which deal with the issue of condonation of delay:

a. In N. Balakrishnan v. M. Krishnamurthy [1998] 7 SCC 123 the Hon'ble Supreme Court has held that as long as the conduct of the applicant does not, on the whole, warrant to castigate him as an irresponsible litigant, generally, the delay can be condoned. The Hon'ble Supreme Court has observed that during these days when everybody is fully occupied with his avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities and to visit him with drastic consequences.

b. Mistake of counsel may be taken into account while condoning the delay in filing the appeal M/s. Bhagwati Colonizer Pvt. Ltd. vs ITO [ITA 169/Asr/2015] (Amritsar ITAT) Third member decision.

c. The Delay of 2819 days in filing the appeal caused by the fault of CA/ Counsel has to be condoned. M/s. Midas Polymer Compounds Pvt. Ltd vs. ACIT [ITA 288/Coch/2017], Order dated 25.06.2018.

d. A delay of 2191 days caused by an employee leaving the services of the assessee and not handing over the papers to the assessee deserves to be condoned. M/s Lahoti Overseas Ltd. vs. DCIT [ITA 3786/ Mum/2012], Order dated 18.03.2016.

e. The delay of 420 days in filing appeal due to subsequent decision of the Supreme Court is a valid ground for condonation of delay. An order can be said to suffer from a "mistake apparent from the record" if it is contrary to a subsequent judgement of the Supreme Court. The Courts do not make any new law, they only clarify the legal position which was earlier not correctly understood. Such legal position clarified by Courts has retrospective effect as the law was always the same. Anadkumar Jain vs. ITO [ITA 4912/ Mum/2012], Order dated 20.08.2019

(xi) Documents to be accompanied with the appeal memo:

The appeal shall be filed in triplicate and shall be accompanied with following documents: -

a. Form No. 36 duly signed by the person as specified in sec 140 of the Act along with Grounds of appeal

b. Certified copy of the order appealed against (e.g Order passed by the CIT(A) under section 250, order passed under section 263, order passed by the DIT(E) cancelling the registration granted under section 12AA etc.)

c. Form No. 35, Statement of facts and Grounds of appeal filed before Commissioner of Income Tax (Appeals)

d. Copy of the Assessment order (in case of penalty appeal also enclose the penalty order)

e. Challan of payment of appeal fees as per sec 253(6) (one copy shall be original)

f. If the appeal is against the order of DRP, the order of the TPO is to be filed

As per Rules 6 and 7 of the Appellate Tribunal's Rules, 1963, the Memorandum of appeal shall be submitted to the Registrar. However, in case of emergency the same can be handed over to the Registrar at his residence or to the members, wherever they are available (Order dated 1 of 1973 dated 01.10.1973).

(xii) Documents to be accompanied with the cross objection: -

a. Form No. 36A and grounds of appeal before Tribunal

b. Copy of the order against which the Assessee wants to file the cross objection

c. Form No. 35, Statement of facts and Grounds of appeal filed before Commissioner of Income Tax (Appeals)

d. Copy of the Assessment order (in case of penalty appeal also enclose the penalty order)

(xiii) Drafting and Filing of Miscellaneous Application

Section 254(2) of the Act provides that the Appellate Tribunal may, at any time within a period of six months from the end of the month, amend any order passed by it under section 251(1) of the Act, with a view to rectify the mistake apparent on record in the said order, if the mistake is brought to its notice by the assessee or the Assessing Officer.

Hon'ble Bombay High Court in the case of Daryapur Shetkari Sahakari Ginning and Pressing Factory vs. ACIT [2021] 277 Taxman 155 (Bombay) held that period of limitation prescribed in section 254(2) would commence from date when affected party got knowledge of decision in question and it would not commence from date when order was passed.

(xiv) Circumstances under which Miscellaneous Application can be filed: -

A Miscellaneous Application can be filed before the Appellate Tribunal in the following circumstances, viz,

a. Against an *ex-parte* order passed by the Tribunal without providing an appropriate opportunity of being head seeking restoration of the appeal

b. In any case if there is a mistake apparent from record in the order passed by the Tribunal to correct the said mistake

(xv) Drafting and Filing of Stay Application before Appellate Tribunal

An assesses can file a Stay Petition before the Appellate Tribunal seeking stay of recovery proceedings of an outstanding demand disputed in appeal before the it. Hon'ble Andhra Pradesh High Court in the case of Bhoja Reddy vs. CIT [1998] 231 ITR 47 (AP) relying upon the decision of Hon'ble Supreme Court in the case of CIT v. Bansi Dhar & Sons [1986] 157 ITR 665 (SC) held that the power to grant stay is incidental and ancillary to appellate jurisdiction and the exercise of such incidental and ancillary power will certainly take within its fold the power to grant stay of recovery of interest as well.

Hon'ble Patna High Court in the case of Agricultural Produce Market Committee v. CIT [2006] 156 Taxman 423 (Patna) held that once an appeal is pending, appellate authority has power to pass an order of stay even in absence of specific provisions.

Hon'ble Bombay High Court in the case of KEC International vs. B.R. Balakrishnan [2001] 251 ITR 158 (Bombay) has laid down certain parameters to grant stay by the appellate authorities while disposing of the stay applications. The parameters are:

(a) while considering the stay application, the authority concerned will at least briefly set out the case of the assessee;

(b) the authority will consider whether the assessee has made out a case for unconditional stay; if not, whether a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order;

(c) in cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit;

(d) the authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order; and

(e) if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the department like Commissioner need not once again give reasoned order.

Procedure for filing and disposal of stay application

Rule 35A of the Appellate Rules, 1963 prescribes the procedure for filing of application of Stay and disposal of the same by the Appellate Tribunal. Rule 35A provides that every application for stay of recovery of demand of tax, interest, penalty, fine, estate duty or any other sum shall be presented in triplicate. Separate applications shall be filed for stay of recovery of demands under different enactments. Every application shall be neatly typed on one side of the paper and shall be in English and shall set forth concisely the following information: -

(a) short facts regarding the demand of the tax, interest, penalty, fine, estate duty or any other sum, recovery of which is sought to be stayed;

(b) the result of the appeal filed before the Commissioner of Income Tax (Appeals);

(c) the exact amount of tax, interest, penalty, fine, estate duty or any other sum demanded, as the case may be, and the amount undisputed therefrom and the amount outstanding;

(d) the date of filing the appeal before the Tribunal and its number, if known;

(e) whether any application for stay was made to the revenue authorities concerned, and if so, the result thereof (copies of correspondence, if any, with the revenue authorities to be attached);

(f) reasons in brief for seeking stay;

(g) whether the applicant is prepared to offer security, and if so, in what form;

(h) prayers to be mentioned clearly and concisely (stating exact amount sought to be stayed);

(i) the contents of the application shall be supported by an affidavit sworn by the applicant or his duly authorised agent;

Rule 35A further provides that an application which does not confirm with the above requirements is liable to be summarily rejected.

(xvi) Filing of Paper Book before the Appellate Tribunal:

It is desirable that a detailed paper book in conformity with rule 18 of the Income-tax (Appellate Tribunal) rules, 1963, is submitted in triplicate, as early as possible. Whatever papers or documents or statements are proposed to be referred to or relied upon at the time of hearing deserve to included, indexed and paged and submitted before the date of hearing of the appeal along with proof of service of a copy of the same on the other side at least a week before.

Each paper should be certified as true copy by the party filing the same, or his Authorized Representative and indexed in such a manner as to give the brief description of the relevance of the document, with page numbers and the authority before whom it was filed.

No supplementary paper book can be submitted without the permission of the Bench. If the paper book is found not in conformity with the rule, can be ignored by the Bench. Paper Book is an important document and deserves to be prepared with caution and care. The Tribunal many Suo motu direct the preparation of a paper Book at the cost of the appellant or the respondent containing copies of such statements, papers and documents as it may consider necessary for the proper disposal of an appeal.

(xvii) **Hearing before the Appellate Tribunal:**

The Tribunal shall notify to the parties the date and place of hearing of the appeal. Sufficient time should be given. In case, any party is prevented by good, sufficient or reasonable cause form getting the appeal argued on the specified date, must make an application for adjournment sufficiently in advance and supported by the supporting material. Authority Letter / Vakalatnama should be filed in original. (In Baja Bhavan Owners Premises Co-op 224 Taxman 206 (Mag)(BOM) it was held time ought to have been given to obtain POA.

In the recent COVID-19 pandemic, the Appellate Tribunal has effortlessly and successfully worked for providing a systematic solution to the taxpayers and the professionals to appear and argue the appeal before it in virtual mode. Vide Notification dated 05.06.2020 Hon'ble Appellate Tribunal has initiated the hearing of appeals through virtual mode. SOP's and protocols for appearing and arguing the appeal before the Appellate Tribunal has been issued by the Hon'ble Appellate Tribunal from time to time. It is always advisable that while appearing before the Appellate Tribunal proper dress code and decorum of the court must be followed. Paper Books and judgement should be filed in advance to refer to the same at the time of hearing.

Due to again rising of COVID-19 cases in the country, the Hon'ble Appellate Tribunal has issued notification dated 27.01.2022 suspended the physical functioning of the courts and allowed hearing of appeals in virtual mode. Even as on date the Appellate Tribunal is functioning on virtual as well as physical mode for the benefit of the taxpayers as well as professionals.

(xviii) **Admission of additional ground by the Appellate Tribunal**

Rule 11 of the Income Tax Appellate Tribunal Rules, 1963 provides that the Appellant shall not except, by leave of the Tribunal, urge or be heard in support of grounds not set forth in the memorandum of appeal. However, the Tribunal is competent to allow the Appellant to raise at the time of hearing of the appeal an additional grounds even without a formal amendment of the memorandum of appeal.

Hon'ble Supreme Court of India in the case of National Thermal Power Co. Ltd. vs. CIT reported at [1998] 229 ITR 383 (SC) held that under section 254, the Tribunal may after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is, thus, expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. There is no reason why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

Hon'ble Gauhati High Court in the case of Amines Plasticizers Ltd vs. CIT [1997] 223 ITR 173 (Gau.) has held that normally, as per rule, the grounds are to be stated in the memorandum of appeal before the Tribunal. But the parties are not prohibited from taking additional ground at the time of hearing. Under rule, 11 of the Appellate Tribunal Rules, the appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule. However, if the appellant desires to urge any additional ground, leave of the Tribunal has to be sought for. If such leave is granted, it will be incumbent on the part of the Tribunal to give full opportunity to the other side of being heard. Rule 11 speaks only of leave and the leave may be sought for either in writing or by an oral prayer.

(xix) **Application for admission of additional evidence - Rule 29 of Income Tax (Appellate Tribunal) Rules, 1963**

Rule 29 of the Appellate Tribunal Rules, 1963 does not conger any right on the parties as such to produce any additional evidence either oral or documentary before the Appellate Tribunal. Such power has been vested only in the Appellate Tribunal to admit fresh evidences and affidavits, etc. CIT vs. Smt. Kamal C. Mehboobbani [1995] 214 ITR 15 (Bom).

The Assessee can prefer a petition under rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 for seeking admission of the additional evidence filed first time before Appellate Tribunal. If the evidences produced by the assessee is genuine, reliable and proves assessee's case, then assessee should not be denied opportunity of it being produced for the first time before the Appellate Tribunal.

(xx) **When Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963 can be relied upon: -**

In a case where department has preferred an appeal against the relief granted by the Commissioner of Income Tax (Appeals) and if the Assessee has not preferred an appeal against the any of the issues decided by the CIT(A) against it, in such circumstances the Assessee, being respondent in the department's appeal can support the order appealed against on any of the grounds decided against him as per Rule 27 of the Income Tax (Appellate Tribunal).

(xxi) **E-filing of appeal before the Appellate Tribunal**

In line with the e-Governance policy of the Government of India, Income Tax Appellate Tribunal has launched portal for E-Filing of Appeals for providing efficient taxpayer services. With this facility, the appellants before the Tribunal can electronically file their appeals and get acknowledgement for the same and later on, within the permitted time they may submit the physical documents in the Tribunal Office. The FAQs released by the Tribunal clarifies that for physical presentation appeals, the above-mentioned rules and other relevant provisions of the Act shall be considered for limitation purposes.

All the communication related to their appeals, like filing of appeal, fixation for hearing, adjournments, pronouncements and disposals will be sent to the appellant's/respondent's Mobile as well as E-Mail Id. Tribunal Orders will also be sent to their E-Mail Id.

Appellants in the e-filed appeals will also be permitted to submit their adjournment petitions, additional grounds, paper books, etc. and a copy of the same will be forwarded to the respondents electronically, if the respondents choose to update their contact details.

(xxii) **Appellate Tribunal should pass reasoned / speaking order**

The Appellate Tribunal is under a duty to decide all questions of fact and law raised in the appeal before it; for the purpose it must consider whether on the materials relied upon by the assessee his plea is made out. The Appellate Tribunal cannot make arbitrary decisions; it cannot find its judgements on conjectures, surmises or speculation. Between the claims of the public revenue and of the taxpayers, the Appellate Tribunal must maintain a judicial balance – Esthuri Aswathiah vs. CIT [1967] 66 ITR 478 (SC)

Hon'ble Delhi High Court in the case of CIT vs. Sudhir Choudhrie [2005] 278 ITR 490 (Del) held that the Appellate Tribunal should pronounce the order in open court.

(xxiii) **Difference between "remand" and "set aside": -**

If the Appellate Tribunal in its order remands the proceedings before it to the lower authorities, the demand subsists, but where the assessment is set aside, whether with or without remand, the demand gets cancelled, till it is reimposed by way of fresh assessment.

(xxiv) **Binding nature of Appellate Tribunal orders**

The First Appellate Authority of the Assessing Officer are bound by the orders of the Appellate Tribunal. Even where the assessee or the department has preferred an appeal before the Hon'ble High Court against the order of the Appellate Tribunal, it does not act as a stay of operation of the order of the Appellate Tribunal.

Hon'ble Bombay High Court in the case of Bank of Baroda vs. H.C. Shrivatsava [2002] 256 ITR 385 (Bom) held that the judgment delivered by the Tribunal is very much binding on the Assessing Officer. The Assessing Officer is bound to follow the judgments in their true letter and spirit. It is necessary for the judicial unity and discipline that all the authorities below the Tribunal must accept as binding the judgment of the Tribunal. The Assessing Officer being inferior officer vis-a-vis the Tribunal, is bound by the judgment of the Tribunal and the Assessing Officer should not have tried to distinguish the same on untenable grounds. In this behalf, it will not be out of place to mention that 'in the hierarchical system of the Courts' which exists in India, 'it is necessary for each lower tier' including the High Court, 'to accept loyally the decisions of the higher tiers'. 'It is inevitable in hierarchical system of the Courts that there are decisions of the supreme Appellate Tribunals which do not attract the unanimous approval of all members of the judiciary. But the judicial system only works if someone is allowed to have the last word, and that last word once spoken is loyally accepted'. The better wisdom of the Court below must yield to the higher wisdom of the Court above as held by the Supreme Court.

■■■

Miscellaneous Applications Before The Tribunal

Adv. Paras S. Savla

A. Introduction

The Income-tax Appellate Tribunal ('Tribunal') is a quasi-judicial institution constituted on 25/01/1941 by virtue of section 5A of the Income Tax Act, 1922. It specializes in dealing with appeals under the Direct Taxes Acts. There have been no fundamental changes either in the constitution or the functioning of the Tribunal in the Income Tax Act, 1961. The Tribunal's powers in dealing with the appeals are of the widest amplitude and have in some cases been held similar to and identical with the powers of an Appellate Court under the Civil Procedure Code.

B. Procedure

As per section 254(2) Tribunal may rectify the order either at the instance of the Assessee or the Assessing officer, if such a mistake is brought to Tribunal's notice. Such rectification application is termed as miscellaneous application and should be accompanied with a fee of Rs.50/-.

Further, where such rectification has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

Rule 34A provides for the procedure for dealing with applications u/s 254(2). As per the rule, the application should clearly and concisely state the mistake apparent from the record of which the rectification is sought. Such application shall be in triplicate and the procedure for filing of appeals will apply mutatis mutandis to such rectification applications. The Applicant shall also state whether any Miscellaneous Application under section 254(2) was filed earlier before the Tribunal against the same order and if so, the fate of such application. Copies of the orders passed by the Tribunal on such applications shall also be filed before the Tribunal in triplicate along with the Miscellaneous Application.

Sub Rule (4) mandates that such an order disposing of the application shall be in writing giving reasons in support of its decision.

C. Hearing

Earlier there was a controversy as to whether the principle of natural justice should be followed while rectifying the order. However, the controversy has been set to rest. Rule 34A states that the Bench which heard the matter giving rise to the application (unless the President, the Senior Vice-President, the Vice-President or the Senior Member present at the station otherwise directs) shall dispose it after giving both the parties to the application a reasonable opportunity of being heard. This is irrespective of the fact that there is no enhancement.

D. Time limit for such rectification

Earlier section 254(2) allowed rectification within four years from the date of the order. However, w.e.f. 1-6-2016, this period was reduced to six months. Now, such rectification can be done within six months from the end of month in which the order was passed.

To hold the date of the order to be the relevant date for the purpose of calculating the period of six months envisaged under section 254(2), can lead to several absurd and anomalous situations. An order passed without the knowledge of the aggrieved party, would render the remedy against the order meaningless as the same

would be lost by limitation while the person aggrieved would not even know that an order has been passed. Such an interpretation would not advance the cause of justice and would not be the correct approach and, thus, cannot be countenanced. A person who is aggrieved or concerned with an order would legitimately be expected to exercise his rights conferred by the provision and unless the order is communicated or is known to him, either actually or constructively, he would not be in a position to avail such a remedy. The words 'six months from the end of the month in which the order was passed' therefore, cannot be given a narrow and restrictive interpretation.[1]

The Supreme Court held that where an application was well within four years and it was the Tribunal which took its own time to dispose of the application, in the circumstances, the Tribunal could yet entertain the rectification application[2].

E. Power of Rectification

Section 152 and 153 of The Code of Civil Procedure, 1908, makes it clear that the court may set right any mistake in their records at any time. While Sec 152 is confined to amendments of Judgments, orders or decrees, Sec 153 confers a general power on the court to amend defects or errors in any proceeding in a suit. On similar lines section 254(2) empowers the Tribunal to amend any order with a view to rectify any mistake apparent from the record.

It may be noted that section 254(2) uses the phrase "mistake apparent from record", which is similar to wordings used in section 154.

Section 254(2) makes it amply clear that a 'mistake apparent from the record' is rectifiable. To attract the jurisdiction under Section 254(2), a mistake should exist and must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. 'Mistake' means to understand wrongly or inaccurately; it is an error; a fault, a misunderstanding, a misconception. 'Apparent' implies something that can be seen, or is visible, obvious; plain. A mistake which can be rectified under section 254(2) is one which is patent, obvious and whose discovery is not dependent on argument. The amendment of an order under section 254(2), therefore, does not mean entire obliteration of the order originally passed and its substitution by a new order which is not permissible. Further, where an error is far from self-evident, it ceases to be an 'apparent' error. Undoubtedly, a mistake capable of rectification under section 254(2) is not confined to clerical or arithmetical mistakes, at the same time, it does not cover any mistake which may be discovered by a complicated process of investigation, argument, or proof[3]. Significantly, the language used in Order 47, Rule 1 of the CPC, 1908, is different from the language used in section 254(2) of the Act. Power is conferred upon various authorities to rectify any 'mistake apparent from the record'. Though the expression 'mistake' is of indefinite content and has a large subjective area of operation, yet, to attract the jurisdiction to rectify (an order) under section 254(2), it is not sufficient if there is merely a mistake in the orders sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on the debatable point of law or undisputed question of fact, is not a mistake apparent from the record.

Power available to Tribunal under section 254(2) is not limited to a mistake committed by Tribunal and amendment to order of Tribunal can also be made if it is triggered on account of a mistake of counsel for parties[4].

1 Golden Times Services (P.) Ltd. v. Dy. CIT [2020] 113 taxmann.com 524 (Delhi)

2 Sree Ayyanar Spinning & Weaving Mills Ltd. v. CIT [2008] 171 Taxman 498 (SC); also see PCIT v. Income tax Appellate Tribunal [2020] 116 taxmann.com 451 (Bombay)

3 CIT v. Maruti Insurance Distribution Services Ltd. [2012] 26 taxmann.com 68 (Delhi)

4 Federal Mogul Goetze (India) Ltd. v. Asst. CIT [2022] 134 taxmann.com 322 (Delhi)

Further, the Tribunal possesses the power to rectify any mistake apparent on the record in the order passed by it under sub-section (1). If the order under sub-section (2) of section 254 is passed, the said order would not be available for rectification of mistake again under section 254(2) of the Act. The order passed under section 254(2) cannot be rectified nor amended by invoking sub-section (2) of section 254 once again. Repetitive applications under section 254(2) of the Act are not permissible[5].

Non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a 'mistake apparent from the record' which can be rectified under section 254(2)[6].

The Supreme Court has recently held that even if the merits might have been decided erroneously and the ITAT had jurisdiction and within its powers, it may pass an order recalling its earlier order which is an erroneous order cannot be accepted. The Apex Court was of the view that if the order passed by the ITAT was erroneous on merits, the remedy available to the Assessee was to prefer an appeal before the High Court[7].

5 PCIT v. Smt. Alpana Bhartia [2019] 106 taxmann.com 397 (Karnataka)

6 ACIT v. Saurashtra Kutch Stock Exchange Ltd. [2008] 173 Taxman 322 (SC)

7 CIT v. Reliance Telecom Ltd. [2021] 133 taxmann.com 41 (SC)

SPECIMEN OF MISCELLANEOUS APPLICATION

BEFORE THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " K "
MISCELLANEOUS APPLICATION UNDER SECTION 254(2)
OF THE INCOME TAX ACT, 1961
ARISING OUT OF ITA NO. 1985/M/2017
ASSESSMENT YEAR : 2013 – 2014

ABC Pvt. Limited
Fort
Mumbai – 400 003.

New Address :
ABC Limited
Matunga,
Mumbai-400 019. … Applicant
(Original Appellant)

Vs.

Dy. CIT
Circle – 14(2)
Mumbai. … Respondent
(Original Respondent)

THE APPLICATION OF THE APPLICANT ABOVENAMED MOST RESPECTFULLY SHOWETH :

1. The above-mentioned appeal was disposed of by the Hon'ble Appellate Tribunal, Mumbai Bench " K " by its order dated 13 March, 2018 for assessment year 2013 – 2014 received on 19 January, 2019. The Hon'ble Bench has dismissed the assessee's appeal in limine for non – prosecution.
2. The applicant wants to submit certain circumstances that have led into ex-parte disposal of the above appeal.
3. The Assessee is a private limited company engaged in the manufacture of stationery and allied items.
4. Return of income was filed on 09-09-2013 declaring the total income at Rs.10,00,000/-.
5. The Assessing officer made an addition on account bogus purchases and loans and computed the income at Rs.2,00,00,000/- vide order dt. 31-03-2015
6. The Assessee filed an appeal before the CIT(A) on 28-04-2015
7. The CIT(A) confirmed the additions vide order dt.19-04-2017
8. The Assessee then filed an appeal before the Honourable Tribunal on 30-05-2017.
9. No notice of hearing was ever received by the assessee.
10. The Assessee wrote a letter to the Registrar, ITAT informing the new address on 17-10-2017.
11. The Assessee wrote a letter on 07-11-2018 enquiring the status of the appeal and once again on 07-01-2019.
12. The Assessee was informed that the order has already been passed and the copy of the order was hand delivered on 19-01-2019.

13. It was seen that in the order it was mentioned that notice was sent by R.P.A.D. and the same has not been returned by postal authorities. The Case was dismissed applying the decision of Multiplan India (P) Ltd. 38 ITD 320

14. The Assessee wrote a letter on 07-02-2019 to the Registrar, ITAT to provide the copy of RPAD to verify the signature of the recipient of the notice.

15. Thereafter the Assessee wrote a letter dt. 14-03-2019 requesting for the inspection of the records of the case.

16. On inspection, it was noticed that the notice was unserved was returned back by the postal authorities.

17. The Assessee immediately wrote a letter filed on 24-03-2019 to the Registrar to provide the copy of the notice and the envelope, and also to certify that the notice was unserved and returned back by postal authorities.

18. The Assessee received a copy of said documents after payment of necessary fees.

19. The Assessee hereby submits that no notice was ever received by the Assessee and hence no one was present on the date of hearing.

20. Further, the Assessee had continuously followed the Tribunal to enquire the status of the case and finally received the copy of the order on 19-01-2019.

21. The Assessee immediately took necessary steps to inspect the file and collect the case records.

22. The Applicant submits that the non-attendance on the day of hearing on the part of the Applicant was neither deliberate nor with any malicious intention. The default, if any, was due to the bonafide mistake and circumstances beyond the control of the Applicant.

23. The Applicant submits that the default of non-attendance before the Appellate Tribunal was due to reasonable cause. Therefore, the Applicant prays that your Honours may be pleased to exercise the discretion vested under the proviso to Rule 24 of the Income Tax Appellate Tribunal Rules, 1963 and cancel the ex-parte order dated 13-03-2018.

24. Without prejudice to the above the Applicant further submits that the appeal has not been decided on merits. The Applicant submits that the Hon'ble Supreme Court has in the case of CIT vs. Chenappa Mudiliar 74 ITR 41 held that the Appellate Tribunal while deciding the appeal exparte should decide it on merits. The Applicant's humble submission is that the ex-parte order is a mistake apparent on record, as the same has not been decided on merits. Therefore, the mistake may be rectified by setting aside the order dated 13-03-2018.

25. The Applicant, therefore, prays that the Hon'ble Appellate Tribunal may be pleased to:

    a) Set-aside the ex-parte order dated 13-03-2018 and grant the relief prayed for in the appeal ; or

    b) In the alternative, the order dated 13-03-2018 may be set aside and the Appeal may be decided afresh in consonance with the provisions of section 254;

    c) Any other relief which the Hon'ble Bench deems fit.

APPLICANT

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Stay Application Before Tribunal: Scope and Applicability

Advocate Sashank Dundu

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Specimen Stay Application

I. Introduction:

Income Tax Appellate Tribunal (ITAT) was set up in 1941, meant to function as an independent quasi-judicial authority and a final fact finding authority in the hierarchy; there is no right of appeal provided to High Court though one can approach High Court on questions of law and in a reference jurisdiction, High Court is empowered to answer the questions of law placed before it in its advisory jurisdiction. Tribunal has the power to dispose an appeal but the legislature has not specified in the Act as to whether it has inherent power to pass interim orders, in the form of stay, till the disposal of appeal pending before it. The Apex Court however clarified that the Appellate Tribunal has got wide powers to grant relief and if there is no inherent power to grant stay, the very purpose of disposal of the appeal, in certain circumstances, may become nugatory and thus clarified that the Tribunal has inherent power to grant stay in genuine cases. In the case of M.K. Mohammed Kunhi[1] the Apex Court observed as under:

"12. Sec. 255(5) of the Act does empower the Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion ***the Tribunal must be held to have***

1 Income Tax Officer Vs. M.K. Mohammed Kunhi [1968] 71 ITR 815 (SC)

the power to grant stay as incidental or ancillary to its appellate jurisdiction. *This is particularly so when s. 220(6) deals expressly with a situation when an appeal is pending before the AAC, but the Act is silent in that behalf when an appeal is pending before the Tribunal.* ***It could well be said that when s. 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory." (emphasis supplied)***

II. Insertion of Statutory Provisions and Analysis:

In line with the Judicial interpretation of the inherent power, The Income Tax (Appellate Tribunal) (Amendment) Rules, 1970, inserted Rule 35A w.e.f. 12-2-1970 whereby the procedure for filing an application for stay and disposal thereof was laid down. Thereafter Finance (No.2) Act, 1998 with effect from 1.10.1998 accorded statutory recognition to the view taken by the Apex Court by inserting sub section (7) to section 253 which reads as under:

> ***"253. Appeals to the Appellate Tribunal.*** *…….. (7) An application for stay of demand shall be accompanied by a fee of five hundred rupees.……."*

While tabling the Finance Bill 2001, the Finance Ministry intended to restrict the powers of the Appellate Tribunal in granting stay on the ground that though ordinarily matters pending before the Appellate Tribunal are to be disposed of within 4 years, in many stay granted cases, there was inordinate delay in disposal of the appeals. Vide Finance Act 2001, two provisos were inserted under Sec.254(2A), which state that all the stay granted matters need to be disposed of within 180 days and if the Appeal is not disposed of within the specified time, stay stands vacated. Subsequently above provisos to Section 254(2A) of the Act were amended vide Finance Act 2007 and a new proviso was inserted wherein the first proviso states that stay shall be granted after considering the merits of the application made by the Assessee for a period not exceeding 180 days and Tribunal shall dispose of the Appeal within specified period. The subsequent Proviso inserted vide Finance Act 2007 states that if Appeal is not disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, the order of stay shall stand vacated after the expiry of such period or periods. Finance Act 2008 included additional phrase to the third proviso to Sec.254(2A) i.e. stay granted by the Tribunal shall stand vacated even if the delay in disposing of the appeal is not attributable to the assessee.

However, Apex Court in the case of Pepsi Foods Ltd.[2] held that third proviso to section 254(2A), introduced by Finance Act, 2008, resulting in automatic vacation of a stay upon expiry of 365 days even if delay in disposing of appeal by Tribunal is not attributable to assessee, is both arbitrary and discriminatory and, therefore, liable to be struck down as offending Article 14 of Constitution of India.

Despite the recognition of inherent powers of the Appellate Tribunal in granting stay by the Apex Court time and again, the Legislature, in its wisdom, thought fit to narrow down the powers of the Tribunal and accordingly amended first and second proviso to Sec.254(2A) of the Act through the Finance Act 2020 whereby the Appellate Tribunal was denuded from granting absolute stay even in genuine cases. The amended provisos read as under:

By virtue of insertion of provisos (supra), the Appellate Tribunal was stripped of the powers to grant absolute stay even in genuine cases and its power is restricted to granting stay subject to the Assessee paying 20% of the disputed demand.

It is not out of place to mention that stay of demand is not granted by the Tribunal in a routine and mechanical way, but a judicious approach is adhered to before a decision is taken to grant stay. The Courts have time and again observed that basic parameters for considering stay application is (a). prima facie case, (b) financial

2 DCIT Vs. Pepsi Foods Ltd. [2021] 433 ITR 295 (SC) [06.04.2021]

position and (c) balance of convenience and also observed that even if an assessee has the capacity to pay the tax, stay should not be rejected, if on merits it has a strong prima facie case. In the light of the amendment to the first and second provisos to section 254(2A) by the Finance Act 2020, the Appellate Tribunal is not empowered to grant complete stay even in such genuine cases.

It is pertinent to observe that the Finance Ministry had not taken note of the factual data of number of cases pending before the Appellate Tribunal and the percentage of stay granted cases therein whereas the Honourable Delhi high court in the case of Pepsi Foods Pvt. Ltd.[3] referred to the celebrated decision of the Supreme Court in the case of M.K. Mohammed Kunhi, and observed the factual position as under:

> *"These words of the Supreme Court were indeed prophetic, as can be discerned from the data which has been referred to by a division bench of this court in Maruti Suzuki (India) Limited (supra) which shows that in less than 10% of the appeals filed by assessees, the tribunal has granted stay orders…"*

Under the Faceless Assessment and Appeals method and prima facie adjustments made through CPC mode, several high Pitched Assessments were made in the recent past, which are, at times, way more than the total capital of the organisation wherein even expecting the Assessee to pay 20% of the Tax demand may virtually force an Assessee to close down the business and an appeal pending before the Appellate Tribunal, even disposed of favourably at a later stage, may render the very process nugatory and the amendment made by Finance Act 2020 is directly coming in conflict with the express view taken by the Apex Court in the case Mohd Khuni and therefore the correctness of the amendments need to be tested in an appropriate forum.

III. Procedure for filing and disposal of stay petition [Rule 35A Income - Tax (Appellate Tribunal) Rules, 1963] – [Specimen of Stay Application provided at the end of this chapter]

Every application for stay of recovery of demand of tax, interest, penalty, fine, estate duty or any other sum shall be presented in triplicate(three copies) by the applicant in person, or by his duly authorised agent, or sent by registered post to the Registrar or the Assistant Registrar, as the case may be, at the headquarters of a Bench or Benches having jurisdiction to hear the appeals in respect of which the stay application arises.

As per clause (b) of Rule 35A, separate applications shall be filed for stay of recovery of demands under different enactments. Bombay bench of the Tribunal in Elcid Co-op. Hsg. Society Ltd.[4] followed the earlier decision of Chiranjilal S. Goenka[5] where it was held that a single application can be filed in respect of several appeals and several assessment years of an assessee when all the matters are under one enactment.

Every application shall be neatly and legibly typed on one side of the paper and shall be in English and shall set forth concisely the following :—

(i) short facts regarding the demand of the tax, interest, penalty, fine, estate duty or any other sum, recovery of which is sought to be stayed ;

(ii) the result of the appeal filed before the 35A[CIT (Appeals)], if any ;

(iii) the exact amount of tax, interest, penalty, fine, estate duty or any other sum demanded, as the case may be, and the amount undisputed therefrom and the amount outstanding ;

(iv) The date of filing the appeal before the Tribunal and its number, if known;

(v) whether any application for stay was made to the revenue authorities concerned, and if so the result thereof (copies of correspondence, if any, with the revenue authorities to be attached);

(vi) reasons in brief for seeking stay ;

3 Pepsi Foods Pvt. Ltd. vs. ACIT & Anr (2015) 376 ITR 87 (Delhi) (HC)

4 Elcid Co-op. Hsg. Society Ltd. v. ITO [2004] 2 SOT 553 (Mumbai)[11-04-2003]

5 Chiranjilal S. Goenka v. WTO (2000) 66 TTJ 728 (ITAT) (Mumbai)

(vii) whether the applicant is prepared to offer security, and if so, in what form ;

(viii) prayers to be mentioned clearly and concisely (stating exact amount sought to be stayed);

(ix) the contents of the application shall be supported by an affidavit sworn by the applicant or his duly authorised agent.

The documents should be submitted with the Registrar/Assistant Registrar of ITAT in the following chronology:

1. Covering Letter
2. Index of Documents Attached
3. Stay Application
4. Correspondences before lower authorities (Documents highlighting the reasons for seeking stay, if any).
5. Power of Attorney
6. Copy of challan paying the requisite fees(Rs. 500) for filing the stay application

IV. Parameters for granting stay:

The Bombay high Court in the case of Mumbai Metropolitan Region Development Authority[6] extracted the guidelines in the form of a summary for deciding the stay application and the manner of disposing stay application, as under:

(a) The order on stay application must briefly set out the issue and the submission of the assessee/ applicant in support of the stay;

(b) In cases where the assessed income under the impugned order far exceeds returned income so as to make the demand arbitrary or the issue arising for consideration stands concluded by a decision of an higher forum or where the order appealed against is in breach of Natural Justice or the view taken in the order being appealed against is contrary to what has been held in the preceding previous years (even if issue pending before higher forum) without there being a material change in facts or law, stay should normally be granted;

(c) If not, whether looking to the questions involved in appeal, keeping in view the likelihood of success in appeal what part of the demand, the whole(in case issue covered against the applicant by a decision of higher forum) or part of it, must be justified by short reasons in the order disposing of the stay application;.

(d) Lack of financial hardship would not be a sole ground to direct deposit/payment of the demands if the assessee/applicant has a strong arguable case on merits;

(e) In cases where the assessee/applicant relies upon financial difficulties, the authority concerned should briefly indicate whether the assessee is financially sound and viable to deposit the amount or the apprehension of the revenue of non-recovery later. Thus warranting deposit. This of course, if the case is not otherwise sustainable on merits;

(f) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

(g) In exercising the powers of stay, the Authority should always bear in mind that as a quasi-judicial authority it is vested with the public duty of protecting the interest of the Revenue while at the same time balancing

6 Mumbai Metropolitan Region Development Authority vs. DDIT (2015) 273 CTR 317 (Bom.)(HC)

the need to mitigate hardship to the assessee. Though the assessing officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order; the application for stay must be considered from all its facets and the order should be passed, balancing the interest of the assessee with the protection of the Revenue.

The above guidelines are only illustrative and the authority concerned would have to exercise his discretion in matters of stay on the facts of the case before him.

V. Other relevant legal aspects to be borne in mind:

1. Whether the Tribunal has power to stay the proceedings before the Assessing Officer?

The Hon'ble A. P. High Court in Khalid Mehdi Khan[7] has taken the view that the Tribunal can not only stay the recovery proceedings but can also stay the proceedings before the Assessing Officer. Therefore, in a case where order under section 263 is passed and if the appeal is pending before Tribunal and in the meantime, if the Assessing Officer starts the assessment proceedings then in such circumstances, the assessee can file stay petition before the Tribunal and the Tribunal can stay the proceedings before the Assessing Officer.

2. In cases where there is stay of recovery of tax, how should the Tribunal deal with the appeals pending before it?

In the case of Nokia Solutions[8] in 2019, it was held that in cases where there is stay of recovery of demand of tax, the Tribunal should deal with the appeals pending before it on a higher priority. The Tribunal should consider forming a separate list of such cases which should be heard on priority after arranging the cases on the basis of their seniority as well as the quantum involved in the stay.

3. While deciding an application for stay of demand, can the Appellate Tribunal give a final finding on merits and decide the appeal itself?

No. ITAT cannot give a final finding on the merits while disposing of a stay application and decide the appeal by holding that it is devoid of merits. In the case of Maharashtra State Road Transport Corporation[9], the stay application was dismissed and while deciding the stay application, even the appeal was dismissed by the Appellate Tribunal on the ground that the same did not have merit. The Court held that the approach of the Appellate Tribunal is completely erroneous. What was heard before the Appellate Tribunal was the application for stay. There was no occasion for the Appellate Tribunal to go into the merits and decide the appeal itself by holding that it was devoid of any merits.

4. Can a stay application be filed before the Tribunal despite non-filing of stay petition before lower authorities?

The Mumbai Tribunal in the case of DHL Express[10] held that it is not mandatory on the part of the assessee to move an application before the Revenue Authorities. Seeking stay before the lower authorities is directory and not mandatory.

It is pertinent to mention here that an appeal against the rejection of stay cannot be filed before ITAT. For a stay application to be filed before the ITAT, there should be a valid appeal pending before the ITAT. This aspect has been considered by the Lucknow - Tribunal in the case of Rajya Krishi[11].

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7 ITO vs. Khalid Mehdi Khan (minor) 110 ITR 79

8 PCIT v. Nokia Solutions & Networks India (P) Ltd., ITA 916/2019, dt. 21.10.2019 (Del) (HC) – A.Y. 2011-12

9 Maharashtra State Road Transport Corporation v. CST, Writ Petition No. 5704 Of 2014 dt. 13.11.2017 (Bom) (HC)

10 DHL Express (India) P Ltd v. ACIT Stay Application No. 119/Mum/2010 Arising out of ITA No. 7360/Mum/2010 dt. 19.11.2010

11 Rajya Krishi Utpadan Mandi Parishad v. ITO (2015) 153 ITD 101 / (2016) 158 ITD 71(TM) (Luck.) (Trib.) [22-04-2014]

5. Can stay application be filed against Prosecution Proceedings?

No. Since the Tribunal has no power to interfere in a prosecution matter either at stage of show-cause notice or at any other stage. In the case of PCIT v. ITAT[12] it was held that pendency of appeals regarding quantum and penalty and an appeal challenging an order passed under section 263 would not confer power upon Tribunal to stay the show-cause notice calling upon assessee as to why prosecution should not be launched against it.

6. Can the lower authorities recover the tax dues by attaching the bank accounts etc., even though a stay application was filed and was pending to be disposed of before the Tribunal?

No. The revenue authorities are pre-cluded from taking any such action until the disposal of the stay application. In the case of RPG Enterprises Ltd.[13] it was held that the Assessing Officer is precluded from taking coercive action for recovery of disputed demand until expiry of period of limitation allowed for filing appeal against decision of the first appellate authority and also during pendency of the stay application before any Revenue authority or Tribunal.

7. Whether tax recovery can be made on the demand arising out of protective assessment?

No. When assessment is made on protective basis, no recovery can be made[14].

8. Should Penalty proceedings be stayed when quantum appeal is pending?

Penalty proceedings can be stayed to await decision on quantum appeal so as to avoid multiplicity of proceedings & harassment to assessee.[15]

VI. Epilogue

When an appeal is filed before the Appellate Tribunal, only when Assessing Officer as well as the First Appellate Authority decides an issued against an Assessee on merits, though revisional proceedings stand on a different footing.

When there is a concurrent finding of fact, the onus is heavy upon the Assessee with the supporting material, to prove that the Assessee has a strong prima facie case on merits and at this stage, care has to be taken to look into all finer aspects of the case including the legal grounds, if any, not considered before the lower authorities and raise appropriate grounds before the Appellate Tribunal moving an application for stay of collection of outstanding demand.

12 PCIT v. Income Tax Appellate Tribunal, Delhi Bench, New Delhi [2016] 382 ITR 321 (P&H) (HC)

13 Rpg Enterprises Ltd. v. DCIT [2002] 74 TTJ 391 (Mumbai)(ITAT)[14-07-2000]

14 Jagannath Bawri v. CIT [1998] 234 ITR 464 (Gauhati) (HC)

15 GE India Industrial (P.) Ltd. v. CIT(A) [2014] 148 ITD 70 /[2013] 152 TTJ 536 (Ahd - Trib.)[04-01-2013]

Specimen of Stay Application

(As per Office Manual for ITAT, revised and dated 15.04.2014)

BEFORE THE INCOME TAX APPELLATE TRIBUNAL,
STAY APPLICATION NO. ..... OF 2022

ABC Co. Ltd. ... Appellant

v.

Assessing Officer ... Respondent

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E	Copy of stay petition filed before the Commissioner of Income -tax	
F	Copy of rejection order by the Commissioner of Income -tax	
G	Statement of financial statement as on dt._____	
H	Affidavit of director _____ of the Appellant Company	
I	Challan of Rs. ____/-	

Appellant

Appendix X(E)

Specimen Form of Application for Grant of Stay in the Income Tax Appellate Tribunal

————————— BENCH

Stay Application No._____ of _____ in the case of _____

for the assessment year(s) _____ under the _____ Act _____ for stay of recovery of tax/interest/ penalty/fine/other items.

1. Name and address of the applicant :
2. Act under which the demand is raised
   (i.e. Income-tax Act etc. for which stay application is moved) :
3. Assessment year(s) involved :
4. Date of filing of appeal before the
   Tribunal and its number, if known :

5. From the demand give break up:

   Tax :

   Interest :

   Penalty :

   Fine :

   Others

6. (a) Amount already paid :

   (b) Amount outstanding :

   (c) Amount which is not disputed out of (b) :

7. (a) Details of application for stay made to the revenue authorities :

   1. ITO 2. CIT

   (b) Result :

8. Reasons for seeking stay :

   (Separate sheet may be used if space is not sufficient)

9. (a) Whether the applicant is prepared to offer security :

   (b) If yes, in what Form :

10. Prayer stating exact amount sought to be stayed

11. If stay is sought in relation to a matter pending in reference before the High Court give full particulars of Appeal :

Date: Signature of the applicant.

Note: 1. The application shall be made in triplicate and shall be neatly typed on one side of the paper with copies of all the relevant documents including demand notice, copies of correspondence with the Revenue authorities for stay of demand and copy of letter refusing stay of demand.

2. The contents of the application shall be supported by an affidavit duly sworn in by the applicant or his authorised agent.

3. The application shall be presented by the applicant in person or by his authorised agent or sent by registered post to the Bench of the Tribunal where appeal was filed or which has jurisdiction to hear the appeal.

BEFORE THE INCOME TAX APPELLATE TRIBUNAL,
STAY APPLICATION NO. ..... OF 2022

ABC Co. Ltd.	**...**	**Appellant**
	v.	
Assessing Officer	**...**	**Respondent**

1. The appellant is a company engaged in the business of _____ since___. The appellant filed the Return of income for the assessment year 2021 -22 on dt.____ showing the income of Rs _____

2. The assessment of the appellant is completed on _____ under section 143(3) of the Act, assessing the income at Rs. _____- (Hereto marked as Exhibit "A" copy of the assessment order.)

3. Being aggrieved by the order of the Assessing Officer the appellant filed an appeal before the Commissioner (Appeals) on – dt._____. The Learned Commissioner (Appeals) has confirmed all/part of the additions in respect of _____ amounting to Rs. _____ which amount is the ___ of the Company received/expended during the relevant previous year. (Hereto marked as exhibit "B" copy of the order of the Commissioner (Appeals)

4. Being aggrieved by the order of the Commissioner (Appeals), the appellant filed an appeal before the Appellate Tribunal on _____.

5. After giving effect to the order of the Commissioner (Appeals) the Assessing Officer has raised the demand of Rs _____ which includes interest of Rs. _____ (Hereto marked as Exhibit "C" copy of the order giving effect to the order of the Commissioner (Appeals)

6. The Appellant of made an application before the Assessing Officer to stay the demand of Rs. _____ till the disposal of the appeal by the Appellate Tribunal. (Hereto marked as exhibit "D" copy of stay application made before the Assessing Officer)

7. The appellant states that under protest, the appellant has paid __% of tax in dispute i.e. Rs _____ however the Assessing Officer rejected the stay application only on the ground that _____ and that the entire tax in dispute must be paid within 30 days.

8. The appellant has filed a stay petition before the Commissioner of Income- tax to stay the demand till the disposal of appeal by the Appellate Tribunal. (Hereto marked Exhibit "E" copy of stay petition filed before the Commissioner of Income -tax.)

9. The learned Commissioner of Income -tax by its order dt._____ rejected the application for stay of demand on the premise that _____ and in the rejection order it is stated that if demand is not paid within ___ days, coercive action will be taken to recover the tax in dispute. (Hereto marked as exhibit "F" copy of rejection order by the Commissioner of Income -tax .

10. The appellant states that it has filed _____ documents and information to prove _____. Even the judicial precedents(if any) are in favour of the Appellant. Hence the Appellant has a fair chance of fair chance of succeeding in appeal before the Appellate Tribunal on facts and also on law.

11. The appellant states that they are not having the liquidity/financial condition is weak due to _____ reasons due to which the appellant is in no position to pay the tax in dispute and they are availing the overdraft facilities(if any). (Hereto marked as Exhibit " G" statement of financial statement as on dt.____)

12. The appellant states that they are prepared to file an undertaking with the Department that it will not dispose of its fixed assets till the decision of the Appellate Tribunal for the year under consideration.

13. The brief facts of the appellant are as under:

a)	The Appeal filed on	:		
b)	Appeal number allotted	:	ITA No. Bench '__'.	
c)	Returned Income	:	Rs.	/-
d)	Income assessed	:	Rs.	/-
e)	Income assessed after giving effect of the order of the CIT(A)	:	Rs.	/-
f)	Tax payable on the income assessed after giving effect to the order of the CIT(A)	:	Rs.	/-
g)	Tax Paid	:	Rs.	/-

h) Balance tax payable as per assessed income after effect to the order of the CIT(A). :

i)	Tax	: Rs.	/-
ii)	Interest	: Rs.	/-
	Total of tax in dispute	: Rs.	

14. The appellant therefore, prays:

(a) That the recovery proceedings initiated against the Petitioner may be stayed till the receipt of the order of the Hon'ble Tribunal;

(b) That the Assessing officer or the Commissioner of Income-tax or their subordinates or their successors may be restrained from taking any action as regards recovery of tax, interest and penalty levied or leviable for the relevant assessment year;

(c) that the hearing of the Appeal may be expedited; and

(d) that any other relief which the Hon'ble members of the Appellate Tribunal may deem fit and proper in the nature and circumstances of the case.

I, the Director of ABC Co. Ltd.., state that whatever is stated hereinabove in the Stay Petition is true to the best of my knowledge and information.

Place:

Dated:

For ABC Co. Ltd.

Director

(Appellant)

AFFIDAVIT

I, A, Director of ABC Co. Ltd. aged __ having its office at _____ have to on solemnly affirmation state as under:

1. That the appellant company filed its return of income of income declaring the income of Rs _____.
2. That the Assessing Officer assessed the income of the appellant company at Rs _____
3. That the Commissioner (Appeals) in appeal confirmed the addition of Rs. _____ in respect _____.
4. That being aggrieved by the order of the Commissioner (Appeals) the appellant filed an appeal before the Appellate Tribunal on dt. _____ which is pending for final disposal.
5. That the Assessing Officer and Commissioner of Income -tax rejected the stay application of the appellant due to ____ reasons.
6. That the appellant company does not have the liquidity/other reasons(specify) to pay the tax in dispute.
7. That whatever is stated herein above in paras 1 to 6 and stay application is true to the best of my knowledge and I believe the same to be true.

Solemnly affirmed at (Place)_____

on this__ day by the Director Identified by me,

Before me

Deponent

Note: If the affidavit is sworn before the Registrar or Asst Registrar of the Appellate Tribunal, it does not require any stamp duty. In _____ state, stamp duty on Affidavit is Rs _____. It can be sworn before the Magistrate or Notary.

Appeal to High Court including Cross Objections Law and Procedure

Ms. Neelam C. Jadhav, *Advocate*

Introduction:

Section 260A was inserted w.e.f01/10/1998, which provides for direct appeal before the High Court against any order passed on or after 01/10/1998 by the Appellate Tribunal. The legislative intent behind giving a go-by to the procedure of reference to the High Court as contained in S. 256 to 260(1) of the Act was to simply the procedure of seeking the opinion of High Court on a point of law. The intention can be understood from the notes on clauses *[231 ITR (St.) 207]* & memorandum explaining the provisions in the Finance (No.2) Act, 1998 *[231 ITR (St.) 246]*.

Pursuant to the insertion of S.260A, the Chief Justice have issued certain practice/directions for the purpose of filing of the Direct Appeals to High Court – *Practice Note No.7, issued by the Prothonotary & Senior Master, Bombay High Court, O.S. Bombay, dated 30/09/1998 – 236 ITR (St.) 249.*

Appealable orders:

The S.260A provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal. Thus, there is no ambiguity as far as the orders passed u/s. 254(1) of the Act are concerned. It is a mute question whether appeal lies against an order passed by the Appellate Tribunal u/s.254(2) or not. The Hon'ble Bombay High Court in the case of *ChemAmit vs. DCIT (2005) 272 ITK 397 (Bom.)and Safari Mercantile Pvt. Ltd. v. ITAT (2016) 386 ITR 4 (Bom.) (HC)* has held that the order passed by the Appellate tribunal u/s 254 (2) is not an order passed in appeal. Thus, no appeal lies to the High Court u/s 260A of the Act against an order passed u/s 254 (2). Whereas the Karnataka High Court has taken a view that an appeal u/s.260A lies against an order u/s.254(2) is a substantial question of law arises from such an order. *L. Sohanraj v. DCIT (2003) 260 ITR 155 (Karn)(HC), ICIT v. H.V. Shantharam (2003) 260 ITR 156 (Karn)(HC).* The Hon'ble Bombay High Court further observed that the ratio laid down by the Appellate court in the case of *Durga Engineering & Foundry Works (2000) 245 ITR (SC)* is not applicable to the appeal filed u/s 260 A. However, writ can be filed against an order u/s. 254(2). The orders passed by the Appellate Tribunal u/s. 254(1) disposing of an appeal is appealable u/s. 260A. An order u/s. 254(2) which modifies the order passed u/s. 254(1) and which raises substantial question of law is also appealable u/s. 260A.

- *Who Can File Appeal:*

  Sub-section (1) of Section 260A(1) provides that an appeal shall lie before the High Court from every order passed in appeal by the Appellate Tribunal. The Finance Act, 1999, has amended sub-section 2 of Section 260A to provide that the Chief Commissioner or Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court. The Finance (No. 2) Act, 2014, w.r.e.f. 01/06/2013, has inserted in sub-section 2 of Section 260A that, "Principal Chief Commissioner or Principal Commissioner may file an appeal to the High Court.

- *Time Limit Of Filing Appeal:*

  Clause (a) to sub-section 2 to Section 260A provides that an appeal shall be filed within 120 days from the date on which the order appealed against is communicated to the appellant. However, the court has the discretion to condone the delay and admit the appeal if the assessee or the department is able to show the reason for delay in filing the appeal.

- *Jurisdiction of Appeal:*

  The ordinary jurisdiction will be determined not by the place of business or residence of the assessee but by the location of the office of the Assessing Officer. Thus, the jurisdiction to file an appeal before the Hon'ble

High Court depends upon the order passed by the Assessing Officer *CIT v. Motorola India Ltd. (2010) 326 ITR 156 (P&H)(HC).*

In the case of *Rani Hi-Tech Ltd. v. CIT in ITXA No. 634 of 1993* the Hon'ble Calcutta High Court while passing the restraint order decided the question of jurisdiction in a case of this nature. It has been held since the petitioner/ assessee in that case has already been assessed to tax in Calcutta so part of the cause of action has certainly arisen in Calcutta, so this Court had jurisdiction.

In *CCE v. Parle Agro Pvt. Ltd. 2015[40] S.T.R.1052(Guj.)(HC)* held that in anomalous situation that would arise is that in a case where there are two similar proceedings in relation to the same assessee situated within the Union Territory of Dadra and Nagar Haveli or Daman and Diu as the case may be, one falling within the jurisdiction of the Asst Commissioner/Dy. Commissioner at Silvassa and the other falling within the jurisdiction of the Commissioner of Central Excise at Vapi; against the ultimate orders passed in both the appeals which may even be decided by the Tribunal at Ahmedabad by a common order, appeals would lie to the High Court of Gujarat against the order originating from the order passed by the Commissioner, Central Excise at Vapiand before the High Court at Bombay against the same order to the extent the same decides the lis originating from the order passed by the Asst Commissioner/Dy. Commissioner at Silvassa. This could never have been the intention of the Legislature. The upshot of the above, it is the High Court at Bombay which has the jurisdiction to entertain the appeal and not the Gujarat High Court.

- *Fees For Filling An Appeal:*

Sub-clause (b) to sub-section (2) to Section 260A has been omitted w.e.f. 1-6-1999, which prescribed the fees of ₹ 10,000/- for filing an appeal before the High Court. The note on clauses clarifies that it is proposed to omit clause (b) of sub-section (2) to Section 260A and after its omission the fees for filing the appeal to the High Court shall be such fee as may be specified in the relevant law relating to the court fees for filing the appeal to the High Court.

As far as the Bombay High Court is concerned, Article 16A is inserted in Schedule I to the Bombay Court Fees Act to provide that an appeal filed after 1-6-1999 and pending before the High Court against the order passed in appeal by the Appellate Tribunal, u/s. 260A(2) of the I.T. Act, 1961, Ad-valorem fee would be leviable on the amount in dispute, i.e. the difference between the amount of tax actually assessed and the amount of tax admitted by the assessee as payable by him, subject to maximum fee of ₹ 10,000/-.

- *Importance of Substantial Question of Law:*

Sub-section (1) to section 260A provides that if the High Court is satisfied that the question involved in the appeal is a substantial question of law. The term "substantial question of law" is neither defined under the Income-tax Act, 1961 nor under the civil procedure code. Therefore, the courts would have to determine whether the appeal relates to a question of law or a substantial question of law.

The Supreme Court observed in the case of *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd., 1962 Supp (3) SCR 54* that "a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties and/or there is some doubt or difference of opinion on the issue".

In the case of *Santosh Hazari vs. Purushottam Tiwari 251 ITR 84 (SC) and M. Janardhana Rao vs. Jt. CIT 273 ITR 50 (SC),* The tests for determining whether a substantial question of law is involved in an appeal are: (i) whether directly or indirectly it affects substantial rights of the parties, or (ii) the question is of general public importance, or (iii) whether it is an open question in the sense that the issue Is not settled by a pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (iv) the issue is not free from difficulty, on (v) it calls for a discussion for alternative view. In *Dy. CIT vs. Marudhar Hotels (P). Ltd. 107 Taxman 452(Raj.)* has held that simply because a question of law is involved in the appeal and, on the same question, a reference has been made, it will not be a substantial question of law for the purpose of Section 260A of the Income tax Act.

➢ PROCEDURE TO FILE APPEAL BRFORE HIGH COURT:

1. When the order received from the Appellate Tribunal, shall be verified properly as to whether all the grounds of appeal including additional grounds, cross objections if any, are covered in the order.
2. The appellant desire to file an appeal before the high court, it is the prime duty of the appellant to see carefully whether the substantial Question of Law is arising out of that Order.
3. Clause 2 of sub section 2 of section 260A of acts provides that, the date on which the order of the Appellate Tribunal was communicated so as to file the appeal within the prescribed time limit i.e. within 120 days of the date of communication of the order. Further, the High Court may admit an appeal after the expiry of the period of 120 days, if it is satisfied that there was sufficient cause for not filing of appeal within that period. Therefore, the appellant has to file an appeal within time limit as prescribed in the statute.
4. The Memorandum of appeal should be in conformity with the requirements of the said sections and should be accompanied by a statement of facts, orders of the Appellate Tribunal and also of the lower authorities. Any document on which reliance was placed before the Tribunal should be annexed. If, while deciding the appeal, the Tribunal has followed any of its earlier order/orders either in the case of the assessee or in respect of any other assessee, such order/orders should also be annexed to the memorandum of appeal.
5. After this process, the draft of the Appeal is to be file before the high court, on being numbered, such appeals shall be placed for admission before the High Court in bench of not less than two Judges.
6. When the High Court is satisfied that a substantial question of law involved in appeal, it shall formulate that question.
7. The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.
8. The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.
9. The High Court may determine any issue which, has not been determined by the Appellate Tribunal; or has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law.
10. Before the High Court, the Appeal is heard at two stages, first at admission stage to consider whether the issue involved in appeal is a substantial question of law or not. And second at the final hearing when the appeal is finally disposed of.

CROSS OBJECTION BEFORE HIGH COURT :

The provisions of Section 260A do not provide a clear answer to this question. However, sub-section (7) to section 260A provides save as otherwise provided, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

As per the provisions of CPC, 1908, a cross-objection in second appeal can be maintained only if a substantial question of law is involved in the cross objection since it is also subject to the conditions embodies in section 100 of CPC.

The Cross-objection is not maintainable if the appeal is only registered on the file of the High Court. *Cipla Ltd. v. ACIT (2016) 387 ITR 52 (Bom)(HC).*

Rule 22 of order 41 of CPC provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

(i) Yes, the respondent can file a cross-objection. (ii) The cross- objection has to be filed within 30 days from the notice to the respondent.(iii) The cross-objection should give rise to a substantial question of law. (iv) The cross-objection is maintainable only when the appeal has been taken on file of the High Court.

POWER TO GRANT COSTS

The sub-section (5) of Section 260A provides that the High Court shall deliver the judgment on the questions formulated by it. The High Court shall have the power to grant costs if it deems fit in any case.

CHART FOR APPEAL UNDER CHAPTER XX

Sr. No.	PARTICULARS	HIGH COURT
	Income –tax Act, 1961	***Sec.260A & 260B***
1.	Orders Appealable	Mentioned U/s. 260A
2.	Time Limit of Filing the Appeal.	Within 120 days from the date of Communication of Appellate Tribunal order.
3.	Prescribed Form No.	As per High Court original side Rules.
4.	Who can file Appeal	Aggrieved Assessee or Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner.
5.	Fees Payable	Ad-volarem fee leviable on the amount in dispute, i.e. the difference between the amount of tax actually assessed and the amount of tax admitted by the assessee as payable by him, subject to a maximum of ₹ 10,000/-. {As per Article 16A to Schedule I of the Bombay Court Fees Act}.
6.	Documents to be Filed.	Appeal; Statement of facts, orders of the lower authorities and other documents relied upon by the Tribunal and lower authorities, if any.
7.	Documents to be Submitted in :	Duplicate
8.	Place of Filing.	Respective High Court.
9.	Cross Objection : Prescribed Form No.	Rule 22 of order XLI of CPC
10.	Time Limit for filing the Cross Objection.	Within 30 days from date of service of the appeal.
11.	Fees Payable.	₹ 10,000/-
12.	Application other than Appeal or Cross Objection	If the Appellant intend to file any Application other than Appeal or Cross Objection then they have to follow the rules prescribed / mentioned in the Civil Procedure Code, 1908 and The Bombay High Court (Original Side) Rules, 1980, Part –II (Amended up to 06th July, 2021).

Note : Vide Notification No. 1604/2021 dt.6th July, 2021, the Honourable Chief Justice and Judges of the Bombay High Court direct the amendment in Chapter IV, Rule 26 of the Bombay High Court, Appellate Site Rules, 1960, that "Superior quality A4 size paper having not less than 75GSM printing on both the side of the paper"

Vide Notification No.G/Amend/ 671/2021 dt.6th July, 2021, the Honourable Chief Justice and Judges of the Bombay High Court direct the amendment in Chapter IV, Rule 42(1) of the Bombay High Court, Original Site Rules, 1980, that "Superior quality A4 size paper having not less than 75GSM printing on both the side of the paper with Font – Times New Roman or Georgio, Font Size 14 with inner margin of 5cms and outer margin 3cms".

Therefore, while filing an Appeal before High Court this most important amendment have to keep in mind as it is part of procedure of filling an appeal.

Now the Bombay High Court, on 22/12/2021 proposed for interim e-filling procedure w.e.f.01/01/2022 in all the Appeals, Cross Objections and any other applications which are enforceable / maintainable under the Civil Procedure Code as well as in High Court Rules. For the e- filling procedure, the Bombay High Court from time to time will issue guidelines and notifications for the same.

Format of Appeal

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. ..... OF .....

IN THE MATTER OF

.....

.... Petitioner

versus

.....

....Respondents

AY :

INDEX

Sr. No.	Particulars	Pg. No.

FROM NEXT PAGE

A. SYNOPSIS AND LIST OF DATES

B. POINTS TO BE ARGUED

C. ACTS TO BE REFERRED TO

Appeal under Section _____ of Income Tax Act, 1961

TO,

THE HON'BLE CHIEF JUSTICE
AND THE OTHER HON'BLE
JUDGES OF THIS HON'BLE COURT.

THE HUMBLE APPEAL OF THE
APPELLANT ABOVENAMED
MOST RESPECTFULLYSHEWETH

1. Facts of the case
2. Substantial Questions Of Law
3. Grounds
4. Averment
5. Prayer

In the above premises, it is prayed that this Hon'ble Court may be pleased:

(i) .....

(ii) to pass such other orders and further orders as may be deemed necessary on the facts and in the circumstances of the case.

FILED BY:.....

Appellant

DRAWN: .....

FILED ON: .....

The Appeal should be accompanied by:

i. Affidavit of the Appellant duly sworn.
ii. Annexures / Exhibits referred to in the Appeal
iii. Court fee of ₹ 10,000/-
iv. Index (As per Specimen)
v. Cover page (as per Specimen)
vi. Memo of Appearance.
vii. Application seeking permission to appear and argue in person (in case of Appeal filed by Appellant-in-person)

NOTES

Writ Petitions Before The High Court Under Article 226 of The Constitution of India

Adv. Aditya Ajgaonkar and Adv. Sharon Patole

Introduction:

A Writ is a formal written order issued by anybody, executive or judicial, authorised to do so. In India, a Writ Petition, as is understood means Petition to a constitutional Court in the exercise of the constitutional jurisdiction under Article 32 of the Constitution of India by the Supreme Court or under Article 226 of the Constitution of India by a High Court to issue a command to a person holding public office or a public authority by which such person/ authority has to act or abstain from acting in a certain way. Thus, the prerogative conferred by the constitution of India to a constitutional court with respect to the issue of writs is an essential dimension of the exercise of judicial power in order to make the rights under the constitution justifiable and enforceable.

The Fundamental Rights are contained in Part III of the Indian Constitution. These include the right to equality, right to life, liberty, and amongst others, also includes a fundamental right to constitutional remedies. This is primarily because the Constituent Assembly was aware that merely providing for Fundamental Rights would not be sufficient but that it is essential that the Fundamental Rights are protected and enforceable as well. To protect Fundamental Rights, the Constitution of India, under Articles 32 and 226, provide the right to approach the Supreme Court or High Court, respectively, to any person whose Fundamental Right has been violated. At the same time, the two articles give the right to the highest courts of the country to issue writs in order to enforce Fundamental Rights. The Ambit of the power of the High Court to issue writs is wider than that of the Supreme Court, primarily as the Writ Jurisdiction of the Supreme Court is confined to those cases where fundamental rights are violated. The High Courts however, do not suffer from this said restriction and given the wider scope of their powers, protect not only fundamental rights but also other constitutional rights and act as a defence against any possible arbitrariness by public authorities or violations of the principles of natural justice. This is also the reason why writs relating to taxation that are more often than not relating to inherent lack of jurisdiction, exercise of excess jurisdiction, retrospective application of laws and issues arising out of Part XII of the Constitution of India are often moved before jurisdictional High Court in the form of Writ Petitions. A Special Leave Petition can always be filed before the Supreme Court of India from the order of the High Court in exercise of its Writ Jurisdiction. The writ jurisdiction is some cases can be invoked only where the lis is between a private party and the state and not between two private parties while in other cases it can be invoked in either of the two cases (like the writ of habeus Corpus). The Supreme Court in the case of **Director of Settlements, A.P. v. M.R. Apparao (2002) 4 SCC 638** held that *"It appears that the Constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression "for any other purpose". The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along the recognised lines and subject to certain self-imposed limitations. The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters."*

The power to grant writs is one of the most important powers granted to the Supreme Court and the High Courts. This a constitutional power and it emanates from the constitution itself. The words of Article 32 and 226, especially the latter are couched in wide terms in order to provide a wide discretion to a constitutional court. Writs protect the rights of the citizens against the fundamentally wrong actions of the state or agents of the state. The importance of writs cannot be underestimated, and the courts necessarily use this power judiciously and with extreme caution as they have been given a very wide ambit to practice this power.

Article 32 of the Constitution reads as under :

Remedies for enforcement of rights conferred by this Part.—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by the Constitution.

Article 226 of the Constitution of India reads as under :

Power of High Courts to issue certain writs.—

(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or [writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

[(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.]

[(4)] The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.]

The invoking of the Writ Jurisdiction before a High Court looks to be an attractive process to many Petitioners as it often seems to be a way to obtain quick and effective relief for an aggrieved. However, the Writ Jurisdiction of a Constitutional Court is highly discretionary in nature and given the wide powers conferred upon the Constitutional Courts, the presence of an alternative and efficacious remedy is considered to be a bar for the exercise of these extra-ordinary Constitutional powers. It is moot however, that the final discretion lies with the Court. Such an issue would obviously not arise when the constitutional validity of a particular legislation or any amendment to the same, or a secondary (delegated) legislation is challenged as being un-constitutional. Strong grounds need to be invoked in order to convince the Constitutional Court that it must

exercise it's extra-ordinary jurisdiction, especially where it is brought to the notice of the Court that the exercise of the constitutional power may short circuit the statutory adjudicatory process envisaged by a particular statue.

FIVE TYPES OF WRITS

The Indian Constitution provides broadly five types of writs which can be issued by the Courts. They are:

1. Habeas Corpus
2. Mandamus
3. Certiorari
4. Quo Warranto
5. Prohibition

Each of these Writs have different meaning and different implications. Further, Parliament by law can extend power to issue writs to any other courts (including local courts) for local limits of jurisdiction of such courts. The Writs of Habeas Corpus and Quo Warranto are confined to specific situations and are very often not applicable to tax proceedings. While the Writs of Certiorari and Mandamus are the two most commonly sought writs to control the actions of the state and administrative bodies.

Habeas Corpus

The Writ of Habeas Corpus is issued by the Courts in those cases where a person is illegally detained. The Latin term 'Habeas Corpus' means *'to have the body'* and it is one of the most effective remedies available to a person detained.

By this Writ, the Court commands the person or authority who has detained another person to present such person before the Court, so as to enable the court to decide the validity, jurisdiction or justification for such detention. The principal aim of the Writ of Habeas Corpus is to ensure swift judicial review of the alleged unlawful detention on liberty or freedom of the prisoner or detainee. The relevance of the writ of Habeas Corpus in tax proceedings would be confined by and large to tax prosecutions or economic offenses. Many economic offenses are now under special legislations governing them and that these special legislations have multiple agencies looking after arrest / investigation and others actions under various statutes. The Writ of Habeas Corpus perhaps is not wholly irrelevant for professionals and practitioners in the economic spheres.

Mandamus

Mandamus means 'we command'. In the Writ of Mandamus, a superior court orders the Inferior Courts to do an act or to abstain from doing an act. This order can also be given to an Inferior Tribunal, Board, Corporation or any other type of administrative authority. This writ is a command issued by the court to a official, public body, corporation, inferior court, tribunal or government asking them to perform their duties and is a 'positive writ' that results in directions being issued.

This Writ is useful for enforcing the duty which is required to be done by law or by the office which a person holds. For e.g. the Assessing Officer has a duty to follow the principles of natural justice or the procedure prescribed by law and if the officer, deliberately or otherwise, fails to do so, a Writ can be issued by the High Court to direct the officer to follow the said principles of natural justice to the procedure prescribed by law. The Writ of mandamus cannot be invoked in a *lis* between two private parties and therefore can only be invoked against the state or and agent / instrument of the state. The Writ of Mandamus is not a writ of right and is not granted as a matter of course. Its grant or refusal is at the discretion of the court. A court may refuse mandamus unless it is shown that there is a clear legal right of the applicant or statutory duty of the respondent and there is no alternative remedy available to the applicant.

The Supreme Court in the case of **Director of Settlements, A.P. v. M.R. Apparao (2002) 4 SCC 638** held that *"One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any*

corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law."

The Gujarat High Court in **All Gujarat Federation of Tax Consultants v. UOI [2021] 432 ITR 225 (Gujrat) (HC)** when asked to issue a writ of mandamus to the Central Board of Direct Taxes for extension of time limit to file Tax Audit Reports and Income Tax Returns, while refusing to issue the same went on to hold that :

"(a) certain conditions have to be satisfied before a writ of Mandamus is issued;

(b) the petitioner for a Writ of Mandamus must show that he has a legal right to compel the respondent to do or abstain from doing something;

(c) there must be in the petitioner a right to compel the performance of some duty cast on the respondents;

(d) the duty sought to be enforced must have three qualities. It must be a duty of public nature created by the provisions of the Constitution or of a statute or some rule of common law;

(e) the remedy of a Writ of Mandamus is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defence legitimately open in such actions;

(f) the power to issue a Writ of Mandamus is a discretionary power. It is sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a Civil Court and to refuse to issue a Writ of Mandamus;

(g) a Writ of Mandamus is not a writ of course or a writ of right but is, as a rule a matter for the discretion of the Court;

(h) in petitions for a Writ of Mandamus, the High Courts do not act as a Court of appeal and examine the facts for themselves. It is not the function of the Court to substitute its wisdom and discretion for that of the person to whom the judgment in the matter in question was entrusted by law. The High Court does not issue a Writ of Mandamus except at the instance of a party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded;

(i) a Writ of Mandamus is not issued to settle private disputes or to enforce private rights. A Writ of Mandamus cannot be issued against the President of India or the Governor of State;

(j) A writ will not be issued unless the Court is certain that its command will be carried out. The Court must not issue a futile writ."

Prohibition

The Writ of Prohibition means that the Supreme Court and High Courts may prohibit the lower courts such as special tribunals, magistrates, commissions, and other judiciary officers who are doing something which exceeds to their jurisdiction or acting contrary to the rule of natural justice. The Writ of Prohibition is primarily issued to prevent an inferior court / Tribunal/ Quasi-judicial authority from exceeding its jurisdiction or acting contrary to the principles of Natural Justice. The remedy is preventive in nature.

In **Isha Beevi v. Tax Recovery Officer [1975] 101 ITR 449 (SC),** the Supreme Court held that *"The grievance of the appellants, however is that the tax recovery officer had no jurisdiction whatsoever to start tax recovery proceedings against them. They have, therefore, asked for writs of prohibition. The existence of an alternative*

remedy is not generally a bar to the issuance of such a writ or order. But in order to substantiate a right to obtain a writ of prohibition from a High Court or from this Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong section of provision of law is cited in a notice or order if the power to proceed is actually there under another provision."

In **P. Kandappa Gounder v. Fifth Income-tax Officer [1972] 83 ITR 42 (Madras)** the High Court held that *"A writ of prohibition is issued only in cases where the court's conscience is satisfied that there is a total absence of jurisdiction on the part of the statutory Tribunal whoever he is, functioning under a particular enactment, to exercise the power which he has assumed and pursuing the process further by affecting the rights of third parties and acting to their prejudice. The essential pre-requisite, therefore, is the complete absence of jurisdiction on the part of the Tribunal whose order is sought to be challenged under article 226 of the Constitution. It should be found as a fact and beyond doubt that, on the materials placed before the court, no reasonable person will assume that the statutory Tribunal has ever the authority to assume such power and act in the manner contemplated."*

Certiorari

Certiorari means to *'certify'*. The Writ of Certiorari is a different type of writ when compared with other Writs. This Writ is corrective in nature which means the purpose of this Writ is to correct an error which is apparent on the records.

The Writ of Certiorari is the Writ that is often used by the Constitutional Courts to 'quash' orders passed by an 'inferior court', tribunal or quasi-judicial authority. The Writ of Certiorari is the writ that is perhaps the most sought out, but also the most susceptible to the argument of an alternative and efficacious remedy. The Quashing of a Judicial or quasi-judicial order is not an exercise that the Constitutional Court shall get into routinely, in the presence of an elaborate appellate procedure that has been put in place by the various taxing statutes.

In **Hari Vishnu Kamath v. Syed Ahmad Ishaque (1995) 1 SCR 1104** the Supreme Court held that

"(1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) Certiorari will also be issued when the court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous. This is on the principle that a court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior court were to rehear the case on the evidence, and substitute its own findings in certiorari. These propositions are well-settled and are not in dispute.

(4) The further question on which there has been some controversy is whether a writ can be issued, when the decision of the inferior Court or Tribunal is erroneous in law." To answer this question, the Court held that "A writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record."

In **Naresh Shridhar Mirajkar & Ors. V. State of Maharashtra & ors. (1966) 3 SCR 744,** the Supreme Court, while relying upon its earlier case of **T.C. Basappa v. T. Nagappa (1955) 1 SCR 250,** observed that *"that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of certiorari, the superior court does not exercise the powers of an Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The supervision of the superior Court exercised through writs of certiorari goes to two points, one is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of*

its exercise. Certiorari may lie and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances. When the jurisdiction of the court depends upon the existence of some collateral fact, it is well settled that the court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess". The Court ultimately held that the Judicial orders of the High Court in or in relation to proceedings before them are not amenable to by corrected by exercise of the writ jurisdiction under Article 226 of the Constitution of India.

Quo Warranto

The Writ of Quo Warranto is issued by the Constitutional courts against a private person when he assumes an office on which he has no right. Quo Warranto literally means *'by what authority'* and it is an effective measure to prevent people from taking over public offices. It restrains the person or authority to act in an office which he / she is not entitled to; and thus stops usurpation of public office by anyone and is applicable to the public offices only and not to private offices.

SOME BASIC PRINCIPLES TO BE KEPT IN MIND WHILE DRAFTING WRITS

The following basic principles are to kept in mind while drafting a Writ Petition before the High Court. Each High Court shall have its own set of rules, which need to be scrupulously followed so as to avoid inconvenience to the Court and to avoid objections being raised before the Petition being listed. It is to be kept in mind that these are mere suggestive pointers and by no stretch of imagination can be considered to be an exhaustive authoritative list.

CLEARLY SPECIFYING THE WRIT PRAYED FOR

While drafting a Writ Petition, it is imperative that the Writ/Writs prayed for our clearly brought out and explicitly prayed for. Often, multiple Writs are prayed for in a single Petition for various reliefs arising out of a common array of facts. It is imperative that each prayer should clearly bring out the sort of Writ prayed for (mandamus/certiorari etc.) for a relief that is sought. It is also common practice, that after seeking a specific Writ, out of abundant caution "any other writ in the nature of…" is also sought for. It is also common practice to ask for "any other writ or order as this Hon'ble Court may feel fit to issue in the facts and circumstances of the case". The prayer clause is one of the most important parts of the Petition. The Court may not find it fit to grant a relief that is not sought for.

THE SYNOPSYS AND A LIST OF DATES AND EVENTS

The synopsis which often includes a table of dates and events in a chronological order is perhaps the most underrated but most crucial aspect of a Writ Petition. The synopsis should, with the least amount of words used, convey the heart and soul of the Petition. The list of dates and events arranged chronologically is an invaluable tool not just for the Court but also for the Counsel while arguing the Petition. The synopsis is to be made with the rules of the High Court in mind.

THE CAUSE OF ACTION AND THE GROUNDS OF CHALLANGE

The Petition must clearly bring out both, the cause of action as well as the grounds on which the action is sought to be challenged through a Writ Petition. In cases of violations of the principles of natural justice or beating the legality or even in cases where jurisdiction has roundly been assumed, the injustice and prejudice caused should be clearly and succinctly brought out. As the Writ Jurisdiction is highly discretionary in nature and not to be exercise routinely, establishing a clear locus and cause of action is critical. In case of a challenge to the constitutional validity of a statute/provision/delegated legislation, the challenge must be clearly spelt out with respect to how it violates the constitutional scheme and the prejudicial effect that it would have to the Petitioner if it were to remain in its existing form on the statute books.

ALTERNATIVE AND EFFICACIOUS REMEDY

The presence of an alternative and efficacious remedy is often the reason why a constitutional court may not exercise its power in the writ jurisdiction. This is because the power being extremely wide has to be exercise with

extreme caution. In the case of **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC** 1 the Hon'ble Supreme Court, while considering the maintainability of a writ petition, in view of the availability of an effective alternative remedy, had held that an alternative remedy does not operate as a bar in at least three contingencies.

(1) Where the Writ Petition has been filed for the enforcement of any of the Fundamental Rights; or

(2) Where there has been a violation of the principle of Natural Justice; or

(3) Where the order or proceedings are wholly without jurisdiction, or the vires of an Act is challenged.

In **Raza Textiles Ltd. v. ITO (1973) 1 SCC 633,** the Supreme Court held that no authority, much less a quasi-judicial authority can confer jurisdiction to itself by deciding a jurisdictional fact wrongly. This echoes the observation made by the Supreme Court in the earlier quoted case of **Naresh Shridhar Mirajkar & Ors. V. State of Maharashtra & ors. (1966) 3 SCR 744.** The Supreme Court held that the question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a Writ of *certiorari*.

The absence of a provision in a statute for Appeal would leave the Writ jurisdiction as the only remedy for an aggrieved party. However, where the statute prescribes an Appellate procedure the exercise of which would not prejudice the aggrieved, the Constitutional Courts do not usually interfere in the absence of a pressing reason to do so. It is advisable to positively aver to and bring out the absence of an alternative and efficacious remedy in the Writ Petition.

JURISDICTION

A High Court can only issue writs within its territorial jurisdiction and therefore it is important that a specific averment is made as to how the Petition within the jurisdiction of the court. While averring to the jurisdiction of the High Court to entertain the Petition, especially in the cases where certain authorities may not fall within the territorial jurisdiction of the court, due attention may be attracted to Article 226(2) of the Constitution of India that states as under follows :

"The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

The Supreme Court in the case of **Kusum Ingots & Alloys Ltd. v. UOI & Onr. (2004) 6 SCC 254** held that in view of the clause (2) of Article 226 of the Constitution of India, even if a part of the cause of action arises outside the jurisdiction of the High Court, it would have the Jurisdiction to issue a writ, however even if a small part of the cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In the appropriate cases, the court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of 'forum conveniens'.

Conclusion

The underlying theme that emerges with respect to filing a Writ Petition before the Constitutional Court is the discretionary nature of the exercise of such power. The courts have often cautioned against the indiscriminate invocation of this jurisdiction by aggrieved parties and have developed doctrines to avoid the abuse of the same. The party seeking to invoke this jurisdiction must do so with utmost caution and due regard to the consequences of the same. Similarly, a higher quality of drafting skill required for drafting of Writ Petitions in order to effectively cover complex issues in a concise yet succinct manner.

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Special Leave petition before Supreme Court

Advocate Aditya Ajgaonkar

APPEALS TO THE SUPREME COURT

INTRODUCTION

As per section 261 and 262 of the Income Tax Act, 1961 (hereinafter referred to as "the said Act"), the Appeal to the Supreme Court can be made from the orders passed by the Hon'ble High Court under Section 260A of the said Act, provided the High Court grants it a 'Certificate of Fitness' certifying that that case is one that is fit for an appeal before the Supreme Court.

A judgement passed by it under the reference made to it under Section 256 in respect of orders passed by the Tribunal under Section 254, passed before 1st October, 1998; or a judgment passed by the High Court under 260A, against the order of the Tribunal passed under Section 254, on or after 1st October, 1998; are both appealable judgements under Section 261.

SECTION 261 OF THE INCOME TAX ACT,1961

"An appeal shall lie to the Supreme Court from any judgment of the High Court delivered before the establishment of the National Tax Tribunal on a reference made under section 256 against an order made under section 254 before the 1st day of October, 1998 or an appeal made to High Court in respect of an order passed under section 254 on or after that date in any case which the High Court certifies to be a fit one for appeal to the Supreme Court."

CERTIFICATE OF FITNESS

The courts have laid out various principles on the basis of which the 'Certificate of Fitness' can be granted for the appeal arising out of a case under Section 261.

If the grant of Certificate of fitness is refused, an application may be made to the Supreme Court under art 136 of the Constitution for Special leave to appeal from the High Court's decision. The Certificate of fitness to Appeal can be asked for by the aggrieved party under Article 134A of the Constitution of India orally, if the court does not 'suo-moto' certify the case to be a fit one for appeal to the Supreme Court.

After the grant of Certificate of fitness, the litigant may file an appeal to the Supreme Court within the time specified in the Supreme Court Rules,1966 in this regard.

FILLING OF APPEAL

The petition of appeal has to be presented within Sixty days, from the date of grant of the 'Certificate of Fitness'. In a situation where there has been a delay in filing appeal, a proper explanation would be required for the appeal to be accepted.

The Petition of Appeal needs to be accompanied by a certified copy of the order granted by the High Court and the Certificate of Fitness.

SECTION 262 OF THE INCOME TAX ACT,1961

"(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under section 261 as they apply in the case of appeals from decrees of a High Court :

Provided that nothing in this section shall be deemed to affect the provisions of sub-section (1) of section 260 or section 265.

(2) The costs of the appeal shall be in the discretion of the Supreme Court.

(3) Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 260 in the case of a judgment of the High Court."

SPECIAL LEAVE PETITION

As per Article 136 of the Constitution of India, the Supreme Court is vested with a special power to grant special leave in cases involving 'substantial question of law' or in cases where injustice has been done. This discretionary power of the Supreme Court empowers it to grant 'special leave' to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed to made by any court or tribunal in the territory of India. This power of the Supreme Court grants an opportunity to the aggrieved party to be heard against any order, even where the Certificate of fitness to appeal is not granted or refused. The Special Leave Petition is not an appeal, rather it is a petition filed for an appeal. This means that after a Special Leave Petition is filed, the Supreme Court may hear the matter and if it deems fit, then grant a 'leave' and convert it into an 'appeal'. Special Leave Petition can be filed against any order/decree/judgement of any High Court/Tribunal within 90 days from the date of such an order/decree/judgement. Further, the petition needs to be filed within 60 days of the High Court refusing to grant the 'Certificate of Fitness'.

In CIT v. Enercon India Limited [2020] 121 taxmann.com 43 (Bom) it was held that the mere filing of a Special Leave Petition against the order of a High Court, in the absence of a stay does not in any manner affect the binding nature of the order against which special leave to appeal is sought on all authorities functioning within the state.

Article 136 reads as follows:

136. Special leave to appeal by the Supreme Court-

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

It was held in Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. (2019) 4 SCC 376 that a Review Petition before the High Court is maintainable even if it is filed after the Special leave Petition filed by the aggrieved party is dismissed by the Supreme Court in limine. The Supreme Court can allow a litigant to withdraw the Special Leave Petition with the liberty to file a Review Petition before the High Court.

In cases where there is a suppression of the material facts and the court is being misled this leave can be revoked. The jurisdiction under Article 136 is extra-ordinary in nature. The very wording in the constitution clarifies that granting of the leave is purely discretionary. When the leave is granted for a SLP, the court relies on the statements made by the petitioner, hence it becomes a matter of utmost importance that there is no suppression of the material facts and the court is not being mis leaded.

It was held in R.A. Rehman Munshi v. V.D. Modi A.I.R. 1970 S.C. 1475 that "A party who approaches this Court invoking the exercise of this overriding discretion of the Court must come with clean hands. If there appears to be any attempt to overreach or mislead the Court by false or untrue statement or by withholding true information, which would have a bearing on the exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if a discretion has been exercised, in revoking the leave to appeal granted even at the hearing of the appeal"

The aggrieved party or the petitioner filing a Special Leave Petition has to:

(a) Provide **a brief synopsis of the facts** and issues presented in the case along with a list of dates specifying the chronology of events with respect to the Judgement / Order / Decree / Determination / Sentence or Order that is being challenged.

(b) the petitioner has to **formulate questions of law** to appeal against the judgement. In Income-tax Appeals, as there questions of law are already formulated by the High Court, they can be reproduced if the grievance persists or can be added to include new grievances that may arise out of the order of the High Court. There are numerous principles that have been laid down by various courts in matters of staying demand and the considerations that authorities must bear in mind while considering an application for stay of demand. If a prayer for stay is being made, the draftsman must bear these principles in mind while drafting the petition. It is advisable that averments in the SLP be in line with the ratio of prior judgements of the Supreme Court that may be relevant to the question of law being assailed. It is advisable to cite the applicable judgements in the application itself in order to ensure that

Dismissal of Special Leave Petition

It was held in Delhi Administration vs. Madan Lal Nangia AIR 2003 SC 4672 that if a Special Leave Petition is summarily dismissed, this cannot prevent other parties from filing a Special Leave Petition against the same judgement. It is pertinent to note that, mere dismissal of Special Leave Petition does not mean that High Court judgement is approved on merits so as to be a judicial precedent. However, when Supreme Court dismisses an SLP with reason, it might be taken as the affirmation of the High Court views on merits of the case, thus there is no reason to dilute the binding nature of precedents in such cases.

The Special Leave Petitions are governed under Supreme Court Rules, 1966 under Order XVI. The relevant extracts are reproduced below:-

Supreme Court Rules, 1966

ORDER XVI

APPEALS BY SPECIAL LEAVE

1. Where a Certificate of fitness to appeal to the Court was refused in a case by the High Court, a petition for special leave to appeal to the Court shall, subject to the provisions of sections 4,5,12 and 14 of the Limitation Act, 1963 (36 of 1963) be lodged in the Court within sixty days from the date of the order of refusal and in any other case within ninety days from the date of the Judgment or Order sought to be appealed from:

   Provided that where an application for leave to appeal to the High Court from the Judgment of a single Judge of that Court has been made and refused, in computing the period of limitation in that case under this rule, the period from the making of that application and the rejection thereof shall also be excluded.

   Explanation:- For purposes of this rule, the expression 'order of refusal' means the order refusing to 2 [grant the certificate under article 134A of the Constitution being a certificate of the nature] referred to in article 132 or article 133 of the Constitution on merits and shall not include an order rejecting the application on the ground of limitation or on the ground that such an application is not maintainable.

2. Where the period of limitation is claimed from the date of the refusal of 2 [a certificate under article 134A of the Constitution, being a certificate of the nature referred to in article 132 or article 133 of the Constitution], it shall not be necessary to file the order refusing the certificate, but the petition for special leave shall be accompanied by an affidavit stating the date of the Judgment sought to be appealed from, the date on which the application for a Certificate of fitness to appeal to the Court was made to the High Court, the date of the order refusing the certificate, and the ground or grounds on which the certificate was refused and in particular whether the application for the certificate was dismissed as being out of time.

3 [(1)] (a) The petition for seeking special leave to appeal (SLP) filed before the Court, under Article 136 of the Constitution shall be in Form No. 28 appended to the rules. No separate application for interim relief need be filed. Interim prayer if any should be incorporated in Form No. 28.

(b) Along with the petition, list of dates in chronological order with relevant material facts or events pertaining to each of the dates shall be furnished.

(c) Special Leave Petitions shall be confined only to the pleadings before the Court/Tribunal whose order is challenged. However, the petitioner may, with due notice to the respondent, and with leave of the Court urge additional grounds, at the time of hearing.

(d) (i) The petitioner may produce copies of such petition/documents which are part of the record in the case before the Court/Tribunal below if and to the extent necessary to answer, the question of law arising for consideration in the petition or to make out the grounds urged in the Special Leave Petition, as Annexures to the petition-numbering them as Annexure 1, 2, 3 and so on.

(ii) If the petitioner wants to produce any document which was not part of the records in the Court, he shall make a separate application stating the reasons for not producing it in the Court/ Tribunal below and the necessity for its production in the Court and seek leave of the Court for producing such additional documents.

(e) Every petition shall be supported by the affidavit of the petitioners or one of the petitioners as the case may be or by any person authorised by the petitioner in which the deponent shall state that the facts stated in the petition are true and the statement of dates and facts furnished along with the Special Leave Petition are true to his knowledge and/or in formation and belief.

(f) The papers of the Special Leave Petition shall be arranged in the following order:

i. List of dates in terms of clause (b) of sub-rule (1).

ii. Certified copies of the judgment and order against which the leave

iii. The special leave petition in the prescribed Form No. 28.

iv. Annexures, if any, filed along with the Special Leave Petition.

(g) If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. Provided in the case of a special leave petition against an interlocutory order, the notice may be served on the advocate appearing for the party in the Court/Tribunal against whose order the leave to appeal is sought for.

(2) No petition shall be entertained by the Registry unless it contains a statement as to whether the petitioner had filed any petition for special leave to appeal against the impugned Judgment or order earlier and if so, with what result, duly supported by an affidavit of the petitioner or his Pairokar only.

(3) The Court shall, if it finds that the petitioner has not disclosed the fact of filing a similar petition earlier and its dismissal by this Court, dismiss the second petition if it is pending or, if special leave has already been granted therein, revoke the same.]

(4) The petition shall also contain a statement as to whether the matter was contested in the Court appealed from and if so, the full name and address of all the contesting parties shall be given in the statement of facts in the petition.]

5. The petition shall be accompanied by-

i. a certified copy of the Judgment or order appealed from; and

ii. an affidavit in support of the statement of facts contained in the petition.

6. No annexures to the petition shall be accepted unless such annexures are certified copies of documents which have formed part of the record of the case in the Court sought to be appealed from; provided that uncertified copies of documents may be accepted as annexures if such copies are affirmed to be true copies upon affidavit

7. The petitioner shall file at least seven spare sets of the petition and of the accompanying papers.

8. Where any person is sought to be impleaded in the petition as the legal representative of any party to the proceedings in the Court below, the petition shall contain a prayer for bringing on record such person as the legal representative and shall be supported by an affidavit setting out the facts showing him to be the proper person to be entered on the record as such legal representative.

9. Where at any time between the filing of the petition for special leave to appeal and the hearing thereof the record becomes defective by reason of the death or change of status of a party to the appeal or for any other reason, an application shall be made to the Court stating who is the proper person to be substituted or entered on the record in place of or in addition to the party on record. Provisions contained in rule 33 of Order XV shall apply to the hearing of such applications.

10. (1) Unless a caveat as prescribed by rule 2 of Order XVIII has been lodged by the other parties, who appeared in the Court below, petitions for grant of special leave shall be put up for hearing ex-parte, but the Court, if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition:

Provided that where a petition for special leave has been filed beyond the period of limitation prescribed therefor and is accompanied by an application for condonation of delay, the Court shall not condone the delay without notice to the respondent.

(2) A caveator shall not be entitled to costs of the petition, unless the Court otherwise orders. Where a caveat has been lodged as aforesaid, notice of the hearing of the petition shall be given to the caveator; but a caveator shall not be entitled to costs of the petition, unless the Court otherwise orders.

(3) Notwithstanding anything contained in sub-rules (1) and (2) above, the Respondents who contested the matter in the Court appealed from shall be informed about the decision on the petition after it is heard ex-parte, if the petition stands dismissed.]

10A. (1) Where the petitioner is not represented by an Advocate of his choice, the Court may in a proper case direct the engagement of an Advocate amicus curiae at the cost of the State. The fees of the Advocate so engaged shall be Rs. 250/- up to the admission stage and a lump sum not exceeding Rs. 500/- for the hearing of the appeal arising therefrom as may be fixed by the Bench hearing the appeal, and in an appropriate case the Bench hearing the case may, for the reasons to be recorded in writing, sanction payment of a lump sum not exceeding Rs. 750/- to the said Advocate.

(2) After the hearing of the petition or the appeal, as the case may be, is over, the Registrar or the Deputy Registrar shall issue to the Advocate amicus curiae a certificate in the prescribed form, indicating therein the name of the said Advocate engaged at the cost of the State, and the amount of fees payable to the said Advocate.

(3) The State concerned shall pay the fees specified in the certificate issued under sub-rule (2) to the Advocate named therein within three months from the date of his presenting before it his claim for the fees supported by the certificate. If the fees are not paid within the period abovesaid, the Advocate shall be entitled to recover the same from the State concerned by enforcement of the certificate as an Order as to costs under the Supreme Court (Decrees and Orders) Enforcement Order, 1954.

Explanation: - For the purposes of this rule, the term “State” shall include a Union territory.]

11. On the grant of special leave, the petition for special leave shall, subject to the payment of additional Court-fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The provisions contained in Order XV shall with necessary modifications and adaptations, be applicable to appeals by special leave and further steps in the appeal shall be taken in accordance with the provisions therefor:

[Provided that if the respondent had been served with the notice in the Special Leave Petition or had filed caveat or had taken notice, no further notice is required after the lodging of the appeal.]

11A. The record of the appeal arising out of the petition for special leave shall normally consist of the petition of appeal and the paper book of the Court below, if available, plus such additional documents that the parties may file from the record of the case, if the printed record of the Court below be not available. In that event, no fresh printing of the record shall be necessary, and the original record will be called for, from the Court below for reference of the Court:

Provided however, that where in a particular case the Court feels that fresh printing of record is necessary, a specific order to that effect shall be made by the Court at the time of granting special leave to appeal, the provisions contained in Order XV relating to preparation of record shall with necessary modification and adaptation apply.]

12. While granting special leave in all matters in which the Bench granting special leave is of the opinion that the matter is capable of being disposed of within a short time, say within an hour or two, it will indicate accordingly. The office shall maintain a separate register of such matters to enable the Chief Justice to constitute a Bench for the disposal of such matters.]

13. 4[(1) Respondent to whom a notice in a Special Leave Petition is issued or who had filed a caveat shall be entitled to oppose the grant of leave or interim orders, without filing any written objections. He shall also be at liberty to file his objections within 30 days from the date of receipt of notice or not later than 2 weeks before the date appointed for hearing, whichever be earlier, but shall do so only by setting out the grounds in opposition to the questions of law or grounds set out in the SPECIAL LEAVE PETITION and may produce such pleadings and documents filed before the Court/ Tribunal against whose order the SPECIAL LEAVE PETITION is filed and shall also set out the grounds for not granting interim order or for vacating interim order if already granted.]

(2) No separate application for vacating interim order need be filed. The respondent shall, however, be at liberty to file application for vacating stay separately before or after filing objections.

(3) (a) Where any statement of objection is filed by the respondent, it shall be supported by an affidavit of the party or any person authorised by him verifying to the correctness of the statements made therein and also to the effect that annexures produced are the true copies of the originals which formed part of record in the Court below.

(b) If respondent wants to produce any document which was not part of the record in the Court below, he shall file an application seeking permission of the Court to produce such documents setting out the reason as to why it was not produced in the Court below as also the necessity of producing it before the Court.

(4) The respondent may, if considered necessary, file additional list of dates with material facts in addition to those furnished by the petitioners if he considers that the list of dates and facts by the petitioner is inaccurate or incomplete.

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Partnership and LLP agreements, including a) Admission b) Retirement c) Dissolution d) Conversions

Adv. Ranit Basu

PARTNERSHIP AND LLP AGREEMENTS

The principal document governing the affairs of a Partnership Firm or a LLP (*collectively referred to as* **"Firm"**) is the Partnership Deed or a LLP Agreement (*collectively referred to as* **"Deed"**). It is critical that the understanding of the Partners is clearly captured in the Deed. Partners incorporate a Firm, with a certain commercial agreement in mind. Such commercial agreement may include aspects such as, manner of distribution of profits and losses, the manner in which new Partners will be inducted in the Firm, the manner in which a Partner can be removed from the Firm and manner of dissolution of Firm.

Partners need to decide on the aforesaid aspects while drafting the Deed and ensure that such Deed reflects their commercial agreement. This is important because the Partnership Act, 1932 and the LLP Act, 2008 both specify instances, wherein in the absence of a written agreement between the Partners, the provisions of the relevant act will apply. The provision of the acts may not reflect the commercial understanding of the Partners which may lead to difficulties and problems later.

In this article we highlight certain key clauses that must be captured in a Deed and the points to consider while drafting such clauses.

1. DISTRIBUTION OF PROFITS AND LOSSES

In some cases, the commercial agreement may be such that, certain Partners would be entitled to a larger share in the firm's profits due to their initial contribution or their overall contribution in business of the Firm. While in some cases, certain Partners would be required to bear lesser losses compared to the other Partners, this may be due to their non-participation in the management of the Firm or their role being limited to bringing in initial capital or assets to the Firm.

In the absence of any written agreement between the Partners, the profits of a Firm will be equally distributed between the Partners and the Partners will contribute equally to the losses sustained by the Firm[1].

Drafting Points

Clause should clearly identify the Partners, the percentage of the profit share that each Partner will be entitled to, the amount of a Partners contribution towards losses sustained by the Firm and the timing and manner of making of such payments.

2. ADMISSION OF NEW PARTNERS

A Firm is incorporated by Partners who share a common vision and have agreed upon commercial terms in relation to the Firm and its business. Naturally, admission of a new Partner is a critical aspect. The incoming Partner needs to be aligned with the objectives and vision of the Firm and the existing Partners. In most cases all Partners would prefer having a right to accept or deny the admission of a new Partner into the Firm. However, in some cases, the intention of the Partners may be to grant only few Partners the right to admit a new Partner. In such cases, careful consideration is required in drafting clauses pertaining to admission of a new Partner.

1 Section 13 (b) of the Indian Partnership Act, 1932 and Schedule 1 of the Limited Liability Partnership Act, 2008

In the absence of any written agreement between the Partners, the consent of all existing Partners of the Firm will be required to admit a new Partner into the Firm[2].

Drafting Points

Clause should clearly identify the Partners who would have a right to admit new Partners in the Firm and it should be stated that only such Partners would be entitled to introduce new Partners in the Firm. Any eligibility criteria required to be fulfilled by any incoming Partners can be included.

3. RETIREMENT OF PARTNERS

Partners play an important role in the overall performance and business of a Firm. In many cases, roles and responsibilities of the Firm would be divided between Partners. Accordingly, careful consideration is required in determining the manner in which Partners can retire from the Firm. In order to ensure smooth transition of business it is important that proper planning and reallocation of responsibilities is completed. Partners should keep in mind the time that would be required for such planning and reallocation and appropriate duration of notice should be mentioned in the Deed.

In the absence of any written agreement between the Partners, in the case of a Partnership Firm, the consent of all Partners is required for a Partner to retire. In case of a Partnership at Will[3] a Partner is permitted to retire after providing a written notice to the other Partners[4]. In case of a LLP, a Partner is permitted to retire by providing a written notice of thirty days to other Partners.

Drafting Points

Clause should clearly set out the manner of retirement of a Partner. In cases where approval of specific Partners is required for a Partner to retire – such Partners should be clearly identified. Clause should specifically state that the retirement notice shall be in writing and addressed to relevant Partners, address wherein such notices are to be served should be set out in the Notices clause. If required, a specific hand-over clause should be inserted which would include an obligation on any retiring Partner to complete handover of responsibilities, documents and confidential information in a specified manner.

4. EXPULSION OF A PARTNER

The constitution of a Firm may be such, wherein certain Partners have superior rights as compared to other Partners. It may be the intention of the Partners that majority of Partners should have the right to expel a Partner from the Firm if a Partner is negligent in fulfilling his duties, or in case of disputes with such Partner.

In the absence of any written agreement between the Partners, majority Partners cannot simply expel a Partner from the Firm[5].

Drafting Points

Clause should state that a Partner may be expelled by a majority of the existing Partners. Specific grounds on which such expulsion can be triggered should be stated. Clause should set out the procedure to be followed for such expulsion, such procedure should include manner of serving notice, requirement to pass a resolution by majority of the Partners, time frame within which such expulsion will be effective and any procedure of appeal if required.

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2 Section 31 of the Indian Partnership Act, 1932 and Schedule 1 of the Limited Liability Partnership Act, 2008.

3 Section 5 of the Indian Partnership Act, 1932 states that, "Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership-at-will"".

4 Section 32 of the Indian Partnership Act, 1932.

5 Section 33 of the Indian Partnership Act, 1932 and Schedule 1 of the Limited Liability Act, 2008

5. DISSOLUTION OF FIRM

A Firm is incorporated by Partners to achieve a common business objective. A large amount of effort, time and resources are spent by the Partners to set up and operate the Firm. In such cases it is necessary to ensure continuity of the Firm. An event which may not be in the control of other Partners may lead to dissolution of the Firm. As per the Indian Partnership Act, 1932, unless otherwise agreed in writing by the Partners, death or insolvency of one partner will lead to dissolution of the Firm. If the intent of the Partners is that, death or insolvency of one of the Partners should not impair the continuity of the Firm, such intent needs to be clearly captured in the Deed.

A LLP's continuity is however, not affected by the death of a Partner. A LLP may be wound up voluntarily by the Partners by passing a resolution to that effect with 3/4th majority.

Drafting Points

Clause should state that death, lunacy or insolvency of one Partner will not lead to dissolution of the Firm. Relevant clause of the Deed may empower majority of Partners to expel an insolvent or unfit Partner. Manner of distribution of the outgoing Partner's share from the Firm should be set out.

6. CONVERSION OF A PARTNERSHIP FIRM INTO LLP

A Partnership Firm may be converted into a LLP. All Partners of a Partnership Firm are required to be Partners in the LLP. Upon conversion of the Firm into a LLP, all tangible (movable and immovable) property as well as intangible property, all assets, agreements, rights, privileges, liabilities, obligations relating to the Partnership Firm shall be transferred to the LLP.

KEY ATTRIBUTES OF PARTNERSHIP FIRM AND A LLP

In addition to the above points, in order to provide a holistic view, we have set out certain key attributes of a Partnership Firm and a Limited Liability Partnership.

ATTRIBUTES	PARTNERSHIP FIRM	LLP
Governing Law	Indian Partnership Act, 1932 **("Partnership Act")**	Limited Liability Act, 2008 **("LLP Act")**
Incorporation	The Partnership Act does not mandate compulsory registration of a Partnership Firm. However, the State of Maharashtra requires that a Partnership Firm be registered. A Partnership Deed is required to be signed by the Partners and registered with the Registrar of Firms.	Registration is compulsory. All Partners are required to possess a DPIN (Designated Partner Identification Number) or a DIN (Director Identification Number) along with a Digital Signature Certificate. The Partners are required to execute a LLP Agreement, which is required to be filed within 30 days of incorporation of the LLP.
Separate legal Entity	A partnership firm is not a separate legal entity as the partners are collectively known as the firm.	An LLP is a separate legal entity and therefore can sue and be sued in its name.
Nature of Liability	Every partner is liable, jointly and severally along-with all other partners for all acts of the firm done while he is a partner.	Liability of a partner is limited to his agreed contribution in the LLP. No partner is liable on account of the independent or un-authorized acts of other partners.
Eligible Partners	Only an individual can be a Partner	A Company or a LLP can also be a Partner

ATTRIBUTES	PARTNERSHIP FIRM	LLP
Foreign Investment	NRIs can invest on non-repatriable basis subject to conditions. Investment by foreign residents requires RBI approval.	Eligible to receive FDI (Foreign Direct Investment)
Conversion	— LLP e-Form 17 to be filed on the MCA Portal along with supporting prescribed documents. — Once the LLP is registered, Form 14 is required to be filed with relevant Registrar of Firm intimating the conversion.	— Form URC 1 to be filed on the MCA Portal along with prescribed supporting documents in order to convert a LLP into a Private Limited Company.

For more information about Partnership Firms and LLPs you may write to us at solutions@bridgeheadlaw.com.

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Views expressed are personal to the authors and do not constitute as legal advice.

■■■

Partition of a Hindu undivided family

CA. Haridas Bhat

Hindu udivided family (HUF) is treated as a person U/s2(31) of the Income tax Act, HUF is a separate entity for the purposes of Assesssement under Income Tax Act.

Under Hindu Law, an HUF is a family which consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. An HUF cannot be created under a contract, it is created automatically in a Hindu Family. Jain and Sikh families even though are not governed by the Hindu Law, but they are treated as HUF under the Income tax Act.

Partition is **the severance of the status of Joint Hindu Family.** In total partition all the members cease to be members of the HUF and all the properties cease to be properties belonging to the said HUF.

The amendment in the Hindu Succession Act, 1956 through the Hindu Succession Act, 2005 (Act No. 39 of 2005) substituting old section 6 of the Succession Act provides that a daughter shall be a coparcener of a joint Hindu family governed by Mitakshara law in the same manner as a son i.e. she will have same rights in the coparcenary property as she would have held if she had been a son.

As it stands now, where a Hindu dies, his interest in the property of a joint Hindu family governed by the Mitakshara law shall devolve by testamentary or intestate succession, as the case may be, not by survivorship but the coparcenary property shall be deemed to have been divided as if partition had taken place and the daughter is allotted the same share as is allotted to a son.

Further, the Explanation to the amended section clearly provides that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if partition had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Mitakshara school of Hindu law prevails in most parts of Western and Northern India, while Dayabhaga school prevails in Eastern India.

The Hindu Succession Act originally came into force with effect from 17th June, 1956. It amended and codified the law relating to intestate succession amongst Hindus of both schools. It laid down uniform and comprehensive system of inheritance and now applies throughout India. It abrogated all previous rules of law of succession. Accordingly any Hindu dying intestate after 17th June, 1956 is now governed by universal set of general rules of succession for both males and females (vide section 8 onwards of the Act of both schools of Hindu law).

The special meaning assigned to the word “partition” under Income-tax Act is in direct variance with that indicated in the Hindu Succession Act.

In fact if Explanation to section 171(9) of Income-tax Act is read between the lines, it even does not recognize partition effected through decree of Court. It requires actual physical division of property.

Under the Hindu law, members of a joint family may agree to partition of the joint family property by a private settlement, agreement, arbitration or through Court’s decree. Members of the family may also agree to share the income from the property according to their respective shares. In all such eventualities, the joint status of the family may be disrupted but such disruption of family status is not recognised by the legislature for purpose of income-tax.

Partition under Hindu law can be only of coparcenary property; separate property cannot be partitioned. It may be gifted. With the decognition of partial partition after 31st December, 1978 under Income-tax Act, the question which requires enlightenment is what is “full” partition, how it can be effected and the most important is how it is different from the provisions of Hindu law after Finance (No. 2) Act, 1980 with effect from 1st April, 1980?

Partition is a severance of joint status and accordingly it is a matter of individual volition. As per Mulla's Hindu Law 17th Edition Vol. 1 (one) page 517 "to effect a partition all that is necessary is to have a definite and unequivocal indication by a member of a joint family to separate himself from the family and enjoy his share in severalty". Accordingly, under Hindu Law, an item of property need not in every case be partitioned by metes and bounds or physically into different portions in order to effect a partition and disruption of status can be brought about by one of the several modes. Even a member of Hindu undivided family (HUF) without there being partition can sale part of his undivided share in the HUF property. This is recognized by several Courts.

Thus Hindu Succession Act refers to deemed partition on death of a coparcener but the Income-tax Act accepts partition only and only if it takes place on actual physical division of property by metes and bounds, otherwise it treats it as mere severance of status and such status is not referred to in Hindu Succession Act.

The Supreme Court in the case of Kallomal Tapeswari Prasad HUF vs. CIT (1982) 26 CTR (SC) 415 : (1982) 133 ITR 690 (SC) : TC 37R.319 further stated as under :

"Though under the Hindu Law an item of property need not in every case be partitioned by metes and bounds or physically into different portions in order to effect a partition and disruption of status can be brought about by one of several modes, income-tax law introduces certain conditions of its own to give effect to the partition under section 171 of the Income-tax Act.

The Supreme Court, therefore, held that section 171 of the Income-tax Act, 1961, applied to all partitions total or partial effected after 1st April, 1980 and unless finding was recorded under section 171, the income from such properties has to be included in the total income of the family by virtue of sub-section (1) of section 171. The Court further advised :

"If a large number of items of property are there, they are usually apportioned on an equitable basis having regard to all the relevant factors and if necessary by asking the parties to make payments of money to equalise the shares. Such apportionment is also a kind of physical division of the properties contemplated in the Explanation to section 171."

Accordingly, where there is no claim made that a partition total or partial had taken place or where it is made and disallowed an HUF which is hitherto being assessed as such will have to be assessed as such notwithstanding the fact that a partition had in fact taken place as per Hindu law.

The Supreme Court reiterated the same views in its next judgment in the case of ITO vs. Smt. N.K. Sarda Thampatty (1990) 89 CTR (SC) 154 : (1991) 187 ITR 696 (SC) : TC 37R.309.

The relevant observations read as under :

"The definition of "Partition" in the Explanation to section 171 of the Income-tax Act, 1961, does not recognise the partition of an HUF even if it is effected by a decree of Court, unless there is a physical division of the property of the family and if the property is not capable of being physically divided then unless there is division of the property to the extent it is possible; otherwise the severance of status will not amount to partition.

The above two Supreme Court decisions were again followed by the same Court in a different context in the case of R.B. Tunki Shah Baidyanath Prasad vs. CIT (1995) 126 CTR (SC) 262 : (1995) 212 ITR 632 (SC) : TC 37R.427.

From the aforesaid discussion it is more than clear that although severance of status of the family may tantamount to partition under Hindu law of joint family (even by Court decree) the requirement of the Income-tax Act is little more.

A partition to be recognized under Income-tax Act must lead to physical division of the joint properties in view of the definition of expression "partition" contained in clause (a) of the Explanation to section 171. Therefore, mere severance in status is not sufficient to establish partition for the purpose of recognition under Income-tax law.

Hindu law, therefore, has ceased to be operative for recognizing "partition" full or partial after 1st April, 1980, for income-tax purposes unless provisions of Explanation to section 171 are strictly followed. These deeming provisions created under section 171 are not affected even by overriding the liberal provision of Hindu Succession Act

Section 171 of the Income tax refers about the taxation on partition of the HUF.

The partial partition of HUF though recognised as per Hindu Law, the Income tax does not recognise a partial partition which has taken place after the 31st day of December, 1978, among the members of a Hindu undivided family hitherto assessed as undivided. Therefore such family shall continue to be liable to be assessed under this Act as if no such partial partition had taken place;

The following are not considered as partition.

i) a physical division of the income without a physical division of the property producing the income.

ii) a mere severance of status shall not be deemed to be a partition;

Further Section 10(2) exempts any sum received by an individual as a member of a Hindu undivided family, where such sum has been paid out of the income of the family. Therefore mere distribution of income does not become a partition of HUF.

A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given U/s 171 of the Income Tax Act, in respect of the Hindu undivided family.

During the assessement if it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, has taken place among the members of such family, the Assessing Officer shall make an inquiry there into after giving notice of the inquiry to all the members of the family. Further On the completion of the inquiry, the Assessing Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

On the partition, Where a finding of total or partial partition has been recorded by the Assessing Officer under this section, and the partition took place during the previous year,—

(a) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

(b) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in clause (2) of section 10, be jointly and severally liable for the tax on the income so assessed.

If the Assessing Officer finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the Assessing Officer shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed. The several liability of any member or group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition. The similar rule shall apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to date of the partition.

■■■

Family Arrangements and Agreements: Principles and drafting

Rahul Sarda, Advocate

A. Introduction

Traditionally, businesses in India have been family-run with different members participating in the business or management of family assets and properties. Members of the family often either hold properties & assets jointly or bequeath the same from a common ancestor. As the size of businesses/ assets and the family sizes increase, disputes and litigation regarding management of business or ownership of properties commonly arise. While an adjudication of disputes results in a decree or judgement of a Court or an arbitral tribunal, a family arrangement, as the name suggests, involves the coming together of the family members and agreeing for an amicable resolution of their inter se disputes as opposed to a judicial adjudication.

While there is no fixed format or prescribed manner in which a family arrangement is to be made, before preparing a family arrangement, one needs to understand what they are (and more importantly what they are not), the principles that govern them, their legal effect, enforceability and other aspects which determine the manner in which a family arrangement is to be arrived at, and if need be, drafted and executed.

B. What is a family arrangement?

A family arrangement, also called as family agreement or family settlement, is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour[1].

Families often see sense in resolving their disputes amicably through private negotiations rather than through expensive, tedious and protracted adjudication process. The object of such arrangements is to protect the family from long drawn litigation or perpetual strife which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family[2].

C. Principles applicable to family arrangements

As opposed to most commercial dealings, a family arrangement is not possible in case of strangers, but only in case of family members. While there is no strict definition of 'family' or which members can be regarded as family members for the purpose of family arrangements, the expression 'family' for this purpose is not to be construed narrowly as being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute, but broadly[3]. Even if it settles a dispute between near relations, then the settlement of such a dispute can be called a family arrangement.

Since the purpose of a family arrangement is to attain family peace and security, Courts would try to sustain them on broadest considerations, except when the same is not voluntary or is induced by fraud or coercion[4]. A family arrangement does not lose its binding effect only because of matters which could be fatal to the validity of similar transactions between strangers[5]. E.g. absence of consideration for a particular member of a family is not per se a ground to regard the family arrangement as void even as absence of consideration in an agreement between strangers would be regarded as void under section 25 of the Indian Contract Act, 1872.

1 Halsbury's Laws of England, 3rd Edition, Vol 17.

2 Ravinder Kaur Grewal v. Manjit Kaur (2020) 9 SCC 706.

3 Ram Charan Das v. Girjanandini Devi and Ors. AIR 1966 SC 323.

4 Kale and Ors. v. Deputy Director of Consolidation and Ors. (1976) 3 SCC 119.

5 Maturi Pullaiah and Ors. v. Maturi Narasimham and Ors. AIR 1966 SC 1836.

In one case[6], an agreement entered into between two brothers to partition the family property in certain shares was sought to be questioned on the ground that one of the parties had taken undue advantage of the youth and inexperience of the other. But, the Court observed that the principles applicable to the case of ordinary compromise between strangers, did not equally apply to the case of compromises in the nature of family arrangements and that family arrangements were governed by a special equity peculiar to themselves. The Court further observed that family arrangements, if honestly made, will be enforced.

Therefore, it is apt that the family arrangement must be one concluded with the object of setting a bona fide dispute arising out of conflicting claims to property, which were either existing at the time or were likely to arise in future[7]. Disputes or claims may be present or anticipated to arise in the future. Thus, pendency of a dispute before a judicial forum is not sine qua non for a valid family arrangement; a likelihood of it arising in the future is also sufficient.

Family arrangements are based on the assumption that there is an antecedent title of some sort in the parties and the family arrangement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them[8].

In other words, a bona fide dispute, present or possible, resolved through an agreement between members of a family, some or all of who have an antecedent right in the family business or property, passes the muster to be regarded as a family arrangement. Courts would lean in favour of upholding such a family arrangement instead of disturbing the same on technical or trivial grounds[9].

D. Oral family arrangements

It is not necessary that a family arrangement must be in writing only. There is no bar in a family arrangement being arrived at orally. The members of a family may orally agree to divide businesses or properties orally and not execute a written document to that effect. Such a course is permissible[10].

The terms of the family arrangement may be recorded in writing as memorandum of what had been agreed upon. The memorandum need not be prepared for the purpose of being used as a document on which future title of parties is to be founded but as a record of what had been agreed upon in order that there are no hazy notions about it in future[11].

However, one needs to be very careful at the time of taking a decision to keep a family arrangement oral. Though where Courts find that the family arrangement suffers from a legal lacuna or a formal defect, the Rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute[12], a written agreement would, in many cases, prevent family members from reneging from the family arrangement or at least make it difficult for them to do so.

Furthermore, demonstrating a bona fide family arrangement before authorities, if required, is easier if it is in writing. Generally, aspects such as complexity of the case, the nature of assets & properties being divided, whether the family arrangement is related to business or personal property, cordiality of and cooperation amongst relations, statutory charges are some factors that are taken into account while taking this decision.

6 Ram Nirunjun Singh v. Prayag Singh ILR (1881) Cal 138.

7 Basantakumar Basu v. Ramshankar Ray AIR 1932 Cal 600.

8 Sahu Madho Das v. Mukand Ram AIR 1955 SC 481.

9 Kale and Ors. v. Deputy Director of Consolidation and Ors. [1976] 3 SCC 119.

10 Kale and Ors. (supra).

11 Tek Bahadur v. Debi Singh AIR 1966 SC 292.

12 Kale and Ors. (supra).

E. Registration of, and stamp duty implications on, family arrangements

Registration is required to be done only of a written document. If there is no written document, obviously, registration is neither possible nor required by law. It is well settled that registration of a family arrangement is necessary only if the terms thereof are reduced into writing[13].

Even if the terms of a family arrangement are reduced into writing, there is a distinction between a document containing the terms & recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. If the memorandum itself does not create or extinguish any rights in immoveable properties but only records a past transaction, it does not fall within Section 17(1)(b) of the Registration Act, 1908, and is, therefore, not compulsorily registrable[14]. Similarly, a mere list of properties allotted at a partition is not an instrument of partition and does not require registration[15]. If on the other hand, the memorandum operates or purports to operate to create or declare some right in immovable property, it is compulsorily registrable.

However, contrary to popular belief, the mere use of the past tense in a family arrangement does not necessarily indicate that it is merely a recital of a past transaction[16]. When the family arrangement is reduced into writing with the purpose of using it as proof of what they had arranged and where the arrangement as such is brought about by that writing, the document requires registration, because it would amount to document of title declaring for future what rights and in what properties the parties possess. But a document which is no more than a memorandum of what had been agreed to between the parties does not require compulsory registration[17].

Therefore, the true test whether the document of family arrangement is compulsorily registrable or not, is whether the arrangement is subsequently reduced in writing into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain. If it does so, it is registrable, and if not, then, its registration is not mandatory. Thus, the document must be read as a whole and its true purport must be ascertained for determining whether it is required to be registered as per law or not.

F. Income-tax aspects regarding family arrangements

Typically, under a family arrangement, certain members of a family get some property while the other members relinquish their rights in that property. Therefore, the Income-tax authorities have often regarded the transaction as a 'transfer' under section 2(47) of the Income-tax Act, 1961 and levied capital gains tax thereon. However, the Karnataka High Court held that a partition effected in a family settlement cannot be regarded as a 'transfer' so as to levy capital gains tax[18]. This position is true even for exchange/ sale/ transfer of shares in companies under a family arrangement[19].

Also, sums received under a family arrangement from a family member are not taxable under section 56(2)(v) of the Income-tax Act, 1961[20].

In another case, the Bombay High Court held that merely because dispute involved some family members and such dispute was ultimately settled by filing consent terms, the same could not be styled as a family arrangement so as to hold that the consideration received as a result of such settlement did not constitute capital gain[21]. Thus, the existence of a pre-existing right is relevant in deciding whether the family arrangement constituted a 'transfer' or not.

13 Kale and Ors. (supra); Ramgopal v. Tulshi Ram and Ors. AIR 1928 All 641.
14 Kale and Ors. (supra).
15 Roshan Singh and Ors. v. Zile Singh and Ors. AIR 1988 SC 881.
16 Roshan Singh and Ors. v. Zile Singh and Ors. (supra).
17 Tek Bahadur (supra).
18 CIT v. R. Nagaraja Rao [2012] 21 taxmann.com 101 (Karn.).
19 CIT v. Kay Arr Enterprises [2008] 299 ITR 348 (Mad.); Mrs. P. Sheela v. ITO [2009] 120 ITD 159 (Bang.).
20 DCIT v. Paras D. Gundecha [2015] 155 ITD 880 (Mum.).
21 P.P. Mahatme v. ACIT [2019] 112 taxmann.com 253 (Bom.). SLP dismissed and reported at [2021] 126 taxmann.com 176 (SC).

Amounts and assets received by a person pursuant to a family arrangement from a company in which he had substantial interest have been held to be not taxable under the provisions of section 2(22)(e) of the Income-tax Act, 1961[22]. However, in one case, the Bombay High Court held that transfer of shares by a family managed company, even if through a family arrangement, is liable to capital gain tax[23]. The Court, in this case, held that a company was a separate legal entity and could not be regarded as a family member. On the basis of this judgement, it can be said that the exemption from tax to transactions under a family arrangement generally available to family members cannot be extended to separate juridical entities owned and controlled by different members of the family.

Immovable properties often have different values and it is not possible to equally divide properties amongst the different family members. To equalise this inequality, amounts are often exchanged to compensate for the difference in values of properties coming to the respective shares of family members. Such amounts received by family members to equalise the inequalities in a partition are referred to as 'owelty', and are not taxable[24].

G. Drafting family arrangements

The parties to a family arrangement and the draftsman must keep the following aspects in mind while drafting and implementing a family arrangement:

- The family arrangement must be dated and the place of execution must be mentioned.
- The parties to the family arrangement and their inter se relationship must be clearly identified. If there are minors in the family whose interest is sought to be represented, the person representing their interest must also be clearly identified and named.
- Attempt must be made to include all family members having attained the age of majority as parties to the family arrangement even if no business/ asset/ property is coming to their individual share, so as to minimise the possibility of future challenges to the validity of the family arrangement.
- Attempt must be made to resolve all disputes, present or possible, through the family arrangement, rather than to leave some issues or contingencies open, so as to bring a quietus to all issues that the family may inter se face.
- A brief background of the family, its businesses or assets & properties must be given.
- The purpose of executing the family arrangement must be mentioned i.e. to settle present disputes or avoid possible disputes in the future. If there is any pending dispute or litigation which gets settled as a result of the family arrangement, reference must be made to that dispute or litigation. Legal advice must be sought in the matter of bringing the family arrangement on record of the Court so that a decree and judgement can be made by the Court in terms of the family arrangement.
- If it is the intention of the parties to keep certain issues between them outstanding, an appropriate carve-out clause must be incorporated. If a certain family business or property is kept out of the arrangement, the same must be expressly mentioned to avoid ambiguity.
- The properties/ assets/ liabilities to be divided must be clearly identified and there should not be any scope for confusion regarding which property/ asset/ liability is being referred to as well as the person to whose share the property/ asset/ liability is coming. If required, appropriate plans or drawings of immovable property with suitable colour coding ought to be made part of the document for clear identification.

22 SKM Shree Shivkumar v. ACIT [2014] 48 taxmann.com 346 (Chennai).
23 B.A. Mohota Textiles Traders (P.) Ltd. v. DCIT [2017] 397 ITR 616 (Bom.).
24 CIT v. Ashwani Chopra [2013] 352 ITR 620 (P&H).

- If any act is done by the parties in furtherance of the family arrangement prior to the execution of the family arrangement, the same must be specifically mentioned as having been performed with reference to the family arrangement.
- If assistance of any valuer or a third-party expert is taken, their findings must be shared with the parties and reference thereof may be made in the family arrangement.
- Every attempt must be made to use simple and clear language throughout the document. Each matter must be divided into separate paragraphs and sub-paragraphs depending on the facts of each case.
- Any possibility of disputes arising in future regarding interpretation of the terms of the family arrangement or its implementation must be pre-empted, and the manner of resolution of the same may be provided. Legal advice may be sought on the suitability of an arbitration clause in a family arrangement.
- The family arrangement must be signed by all the parties (not being minors) concerned. A minor whose interest has been represented in the family arrangement may ratify the family arrangement after attaining age of majority.
- While having a witness to a family arrangement (not being a Will or a Codicil) is not mandatory, the presence of witnesses and their signatures on the family arrangement would lend further credibility to the document and the fact that the family has indeed entered into that arrangement.
- Section 49(c) of Registration Act, 1908 prohibits the admitting of a compulsorily registrable document as evidence of any transaction affecting immovable property unless it has been registered[25]. Also, if a family arrangement on which stamp duty is required to be paid is not duly stamped, then the document of such a family arrangement cannot be received in evidence or looked into by Courts[26]. Therefore, to ensure that a document of family arrangement withstands judicial scrutiny, it is advisable to ensure that if the family arrangement is, based on the principles above, liable to be registered and stamped, is in fact registered and stamped. It is advisable to seek legal advice on this aspect.

H. Epilogue

There is no straight-jacket formula as to how a family arrangement ought to be drafted. But, a family arrangement, like any other agreement, is meant to express the will of the parties which it must unfailingly do with precision that is demanded of a legal document. More than any particular type of format, a correct understanding of the legal position applicable to family arrangements and the consideration of the abovementioned aspects at the time of drafting would make a family arrangement more comprehensive and beyond reproach.

25 Korukonda Chalapathi Rao and Ors. v. Korukonda Annapurna Sampath Kumar – Supreme Court of India by its judgement dated 1st October 2021 in Civil Appeal No. 6141 of 2021 (arising out of SLP (C) No. 25745 of 2016).

26 A.C. Lakshmipathy and Ors. v. A.M. Chakrapani Reddiar and Ors. AIR 2001 Mad 135; Malti Bai v. Khilona Bahu & Ors. ILR [2013] MP 2904.

Gift deed (laws applicable to Hindus, Muslims, Parsis, Christians, etc)

CA. Ashok Mehta

Gifts.

India is a hub of festivals which are celebrated at regular intervals. The exchange of Gifts is an integral part of these festivals. Gifts are exchanged on numerous occasions like Diwali, Holi, New year, Christmas, Eid, Raksha-bandhan, ETC. In certain cultures giving gifts is seen as a status symbol. These gifts exchanged are taxable beyond a monetary limit prescribed and one needs to be aware and account for the same with proper documentation for gift to be valid. Gifts also need to be compliant with various other applicable laws to be enforceable in a court by the donee.

The term 'Gift' is defined under The Transfer Of Property Act 1882. The section 122 to 129 of The Transfer Of Property Act 1882 deals with gifts. Section 122 defines gifts as

" A Gift is the transfer

- Of certain **existing** movable or immovable property
- Made voluntarily and without consideration
- By one person (called the donor) to another (called the donee) and
- Accepted by (or on behalf of) the donee
- Such acceptance must be made during the life time of the donor and while he is still capable of giving.
- If the donee dies before acceptance, the gift is void.

The mode of effecting and executing of a gift is provided under section 123 of The Transfer of Property Act 1882.

Sr. No.	Description of asset	Conditions
(a)	Immovable Property	Must be effected by a registered instrument ➢ Signed by (or on behalf of) the donor and attested by atleast two witnesses.
(b)	Moveable Property	Either by a registered instrument signed and attested as above or by delivery (such delivery may be made in the same way as the goods sold may be delivered)

The provisions of the Transfer of Property Act are not applicable to gifts in contemplation of death also termed as "donatio mortis causa" as the same are covered by the provisions of Section 191 of the Indian Succession Act of 1925, which provides that such a gift stands revoked on recovery of the donor.

The gift requires two parties, it is voluntary transfer of an existing movable or immovable property without valuable consideration. It is made by one party and accepted by the other party. There cannot be any transfer without acceptance of the gift. If the donor expires before the acceptance of the gift by donee the gift is void. The acceptance may be made either orally or implied by conduct or in writing. The best and the safest course is to make the donee a party to the gift deed and take his endorsement of acceptance of gift on the gift deed.

A minor may be a donee but if the gift is onerous then he has the choice to accept the gift on his becoming major with the onerous liability or to reject the gift.

Under the Hindu law the karta is allowed to make a gift of the Joint Hindu property for the sake of maintenance of karta's daughter or on occasion of marriage of daughter or for her upkeep. The quantum of gift would depend on the financial and other relevant conditions of the family. The explanation to section 30 of the Hindu Succession Act allows the interest of the male person to be disposed by will, however the gift of the family property can only be done for a legal necessity or for the benefit of the family members.

A gift should be about existing property only. Gift of future property is void. If there is gift of a existing and a future property then to the extent of the later the gift is invalid

A gift is ordinarily irrevocable and without any conditions. However, a condition of revocation on the happening of a specified event not depending on the will of the donor is valid as per section 126 of Transfer Of Property Act. A gift with the condition that the donee shall not sell or alienate the gifted property is a condition which shall normally be void and the gift cannot be revoked on the ground of its breach.

The gift of a Movable property can be made by mere delivery. However, if a document of gift is made for a movable property then the same is liable to be registerd under Section 17(1)(a) of the Registration Act (I.G.Registration v. Tayyaba Begum, A 1962 AP 109(FB), also in Chota Uddanda Saheb v. Mastan Bi, A 1757 PAT 271)

The fixed deposit is not a movable asset but an actionable claim and requires a deed of gift. The mere delivery of the fixed deposit receipt is not a valid gift. (Maiyan Dalip Rajeswari Devi v. Mohan Vikram Saha, A 1945 ALL 409)

Onerous gifts

Gifts can be onerous also and not purely of a beneficial character, e.g when shares in a company subject to heavy calls are gifted. Where the gift is in the form of a single transfer to the same person of several things, of which one item is burdened with onerous liability and others are not, the donee has to either accept the entire gift or nothing at all. However if the gift in the form of two or more separate and independent transfers to the same person of several things, then the donee has the choice of accepting one and rejecting the other.

Gift under the Mohamedan Law.

The section 129 of TOPA provides that the provision would not apply to gifts made under the Mahomedan Law. The gift under the Mahomedan law can be made orally and requires to satisfy the ensuing conditions :1) declaration of gift by the donor, 2) Acceptance of the gift by the donee and 3) delivery of possession. Thus, a registered deed of gift is not effectual under the Mahomedan law, if it is not accompanied by delivery of possession.

The Mahomedan law provides for four types of gifts also known as "Hiba". However, all the types may not be gifts in the normal course and some of them are barter or sale.

1. Sadaquah(where the object of the donor is to acquire merit in the eyes of the lord and a recompense in the next world)
2. Hiba-bil-iwaz (a gift for a consideration, it resemble a sale)
3. Hiba-ba-shart-ul-iwaz (gift is made with a stipulation that the gift will be returned if the "iwaz" or stipulated amount or thing or act is not given)
4. Areeat (grant of a license, revocable at the grantor's option, to take and enjoy the usufruct of a thing)

We will be discussing only the normal concept of "Hiba" or gift in this article.

It is also worth noting that the Muslim person is not allowed to dispose of through "will"(testamentary Instrument) an amount of more than 1/3rd of the total assets bequeathed to a person of his choice. However, there is no restriction on him to gift the entire holding by way of a gift to a third person or a person of his choice during his lifetime. Similarly, a Muslim person is allowed to gift his entire holdings through the formation of a trust to a person of his choice.

Under the Mohamedan law the delivery of the property of gift is important and unless the delivery of the property to the donee is done, the gift is not valid except in certain exceptions. The Mohamedan law does not require

registration of gift deed of immovable property and mere oral gift by delivery is enough for the transfer of property. (Hafiza Bibi and others vs Shiefk Farid(dead) SC civil appeal N 1714 of 2005:(2011)5 SCC 654)

However, it is advisable to register the same. It should be noted that the documents which are not properly stamped as per the Stamp Act of the state are not admissible in the court of law. The registration process generally ensures that the documents are duly stamped thus leading to quick enforceability of the same.

However, the stamp duty cannot be levied on an oral gift of immovable property under the Mohameddan law (Mohd. Yusul S.O. of Mohamed Ibrahim vs State of Maharashtra and others 2015,(1) BOM CR 740)

Taxation of gifts under Income tax Act of 1961.

The gifts are subject to two types of taxation in India. The state levies Stamp duty (though certain states give exemptions to gift to certain types of gifts among relatives) and the Income Tax under the Income Tax Act of 1961.

The Gift Tax Act of 1958 was introduced for purpose of taxing the donor for the gifts distributed by him wherein the donor of the gift was required to pay the necessary gift tax, however the same was repealed from 1st October 1998. There was no tax on gifts from 1998 to 2004.

The gifts were once again bought under the tax net though in a limited form vide section 56(2) of the Income tax Act 1961 as an anti-tax avoidance measure, but this time the tax was levied on the donee (receiver). The intention and purpose was to tax non genuine gifts. However, the Income Tax Act 1961 scope was increased through various amendments so as to tax gifts received in any form including even genuine gifts under section 56(2). The current form under section 56(2)(x) introduced from Assessment year 2017-18 is attempting to cover almost everything.

However, the section gives exemption from tax in case of gifts received in following cases

1. receipt from relatives;
2. receipt on the occasion of marriage;
3. receipt under a will;
4. receipt by way of inheritance;
5. receipt in contemplation of death of the donor; or
6. receipt by a trust created solely for the benefit of the relative.

For the purposes of this section, the term “relatives” has been defined to mean spouse, brother, sister, any lineal ascendant or descendant of the individual; brother/ sister of the spouse; brother/ sister of either of the parents of the individual; any lineal ascendant or descendant of the spouse; and spouse of such specified relatives. One should verify the definition of relative under this section for the purpose of offering income to tax as a strict interpretation shall be considered by the tax department this being an anti avoidance law.

Section 56(2)(x) taxes receipt of any money, immovable property or other specified property received without consideration or inadequate consideration. “Other specified property” has been defined to mean eight items in addition to immovable property viz. shares and securities, jewellery, archaeological collections, drawings, paintings, sculptures, any work of art or bullion.

The definition of property under the section leaves a lot of scope for interpretation and there could be items which are not covered e.g. share in a LLP, right to litigate, etc.

Taxability will be on the whole of the value of the asset in case of no consideration. In case of inadequate consideration, the income liable to tax shall be the difference between the fair market value and the consideration paid.

Thus, gift from a non relative of “property” as defined in the section 56(2) will be taxable as income from other sources in the hands of the recipient.

Stamp Duty.

Now we come to the taxation of gifts by way of the payment of stamp duty under the state act. According to the Maharashtra Stamp Act, all instruments chargeable with stamp duty in Maharashtra and executed in Maharashtra, should be stamped before or at the time of execution, or on the next working day following the date of execution.

The stamp papers evidencing the payment of stamp duty must be in the name of one of the either parties to the transaction and not in the name of the chartered accountant or lawyer of the parties. Moreover, the date of issue of the stamp paper must not be more than six months prior than the date of the transaction.

Stamp duty payable in Maharashtra depends upon several criteria including whether the property is located in urban or rural areas, total cost of the transaction, whether the property is residential or commercial, what is the gender of the purchaser, etc.

Cities	Stamp duty rates applicable (w.e.f. April 1, 2021)	Stamp duty rates applicable from September 1, 2020 till December 31, 2020	Stamp duty rates applicable from January 1, 2021 till March 31, 2021
Mumbai	5% (includes 1% metro cess)	2%	3%
Pune	6% (includes local body tax and transport surcharge)	3%	4%
Thane	6% (includes local body tax and transport surcharge)	3%	4%
Navi Mumbai	6% (includes local body tax and transport surcharge)	3%	4%
Pimpri-Chinchwad	6% (includes local body tax and transport surcharge)	3%	4%
Nagpur	6% (includes local body tax and transport surcharge)	3%	4%

Earlier in April 2020, the Maharashtra government has reduced stamp duty on properties for the next two years, in the areas falling under the Mumbai Metropolitan Region Development Authority (MMRDA) and municipal corporations of Pune, Pimpri-Chinchwad and Nagpur.

The Stamp act of Maharashtra provide for concession in stamp duty of 3% instead of mandatory 5% (4% in rural area), for gifts from relative as defined in the circular issued by the state government.

The Stamp act further provides (Article 34 of schedule 1 of the Bombay stamps Act 1958 read with Article 25 with effect from 24-4-2015) that if immovable property being residential or agricultural land is gifted to a family member (husband, wife, son or daughter, grand son or grand daughter, wife of diseased son) the amount of stamp duty charged will be restricted to Rs. 200/-. However there is an interpretation that the person will be required to pay 1% cess in cases where the same is levied in addition to the stamp duty of Rs. 200/-)

The state government also provides concession of 1% of stamp duty for properties registered solely in the name of women.

Gifts tO / from Non resident - FEMA Regulations.

While making gift to Non Residents and receiving gifts from Non Residents, one would also be required to take in to account the provision of FEMA as to their permissibility or otherwise. If a transaction is not permissible one can approach the RBI for special permission in a deserving case.

The gifts received by a non resident persons from their relatives in India are tax neutral and have no tax impact under Income Tax Act as discussed above, however stamp duty would be applicable.

As per the FEMA regulation for Liberalized Remittance Scheme(LRS), a resident is allowed to remit in each financial year upto UD$ 2,50,000 for permissible current and capital account transactions. This includes gift to a NRI or a person of Indian Origin(POI). As per the FAQ's on LRS scheme a resident can also give gift by crediting the NRO account of the NRI /POI. However, this has to be within the limit of US $2,50,000/- per annum. The definition of relative under the FEMA regulations is narrower than that of the Income tax Act under section 56(2). The definition of relative is adopted from the Companies Act 2013 (spouse, father, mother, son, son's wife, daughter, daughter's husband, brother and sister of the individual). Therefore a gift from a relative of the wife may not be taxable under the Income Tax Act but would not be permissible under the FEMA Regulation.

FEMA regulations applicable to transfer of immovable property permit a PIO to acquire an immovable property in India by way of gift from a person resident in India provided the property is not agricultural land/ farm house/ plantation property.

The FEMA regulations do not prohibit the gifting of immovable property to a NRI who is not a relative, however such transaction though permitted under FEMA but is taxable to the NRI in India under the Income tax Act Section 56(2)(x).

Gift of Shares and securities (equity shares, debentures, preference shares and share warrants in an Indian company) to a NRI/ PIO requires permission from Reserve Bank of India and fulfillment of the following conditions

- The gift does not exceed 5% of the paid-up capital of the Indian company;
- The applicable sectorial cap in the Indian company is not breached;
- The donor and the recipient are 'relatives' within the meaning in section 2(77) of the Companies Act, 2013; and
- The NRI recipient is eligible to hold such securities under the regulations and the value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD 50,000.

However, the above restrictions do not apply to the amount receipt as an inheritance by a NRI or a PIO.

Receipt of Gift from a NRI/PIO.

It is important to note that the Foreign Contribution and Regulation Act (FCRA) restricts receipt of gifts by any person from a foreign citizen or a company or a corporation.

However, the gifts from NRI or PIO is not restricted by FCRA. Further, gift from relatives is allowed as per section 4(e) of the FCRA, subject to conditions.

The basics requisites of a valid gift are summarized hereunder,

i. There should be a donor and donee

ii. The subject of the gift must be certain and existing and capable of transfer.

iii. The gift shall be made voluntarily and without consideration

iv. Gift should be a transfer on the part of the donor, who is competent person and must also be competent to make the gift.

v. There must be an acceptance by or on behalf of the donee during his lifetime.

vi. The acceptance must be at a time when the donor is alive and capable of giving

vii. Therefore, it is necessary that both donor and donee must be living persons

viii. When the property is immovable, there must be a registered instrument properly attested.

ix. In case a movable property, there must be either a registered instrument properly attested or delivery of possession(in case of Mohamedan person).

The following gifts are void viz:-

a) Gift made for an unlawful purpose.

b) Gift depending on a condition, the fulfillment of which is impossible or forbidden by law.

c) Where donee dies before acceptance.

d) Gift by a person imcompetent to contract, e.g. a minor, lunatic, etc,

e) A gift consisting of existing and future property is void as to the future properties.

Drafting a gift Deed

If the essential elements of the gift are not implemented properly it may become revokable or void by law. It is therefore imperative that the gift deed be drafted in a manner which is incompliance with above discussed legal provisions of law.

A gift deed should in the normal circumstances include the following aspects:

1. The title

2. The names of the parties, who is giving the gift (donor) and who is receiving the gift the donee. There has to be a donor and a donee who are properly identified with their name, age, religion, address and their PAN / Aadhar numbers.

3. The property of the gift has to be specified and described properly. It is generally seen that a schedule is added to describe the property properly even if only one property is being donated. The gift can be done only of an existing property and hence any property which is not in existence at the time of gift is void.

4. The ownership of the donor, the history of the ownership of the property and the specific mention of the conveyance deed or mode by which the donor became owner should be mentioned in the deed. This is to prove the capacity of the donor to donate the property. The donor cannot gift what he does not own. With regard to a Mohameddan person it is important that the gift is handed over to the donee for the gift to be valid. However, the courts have accepted transfer of possession in cases where the effectual possession was given by payment of dues with regards to the property were made by the donee.

5. There needs to be a clear declaration by the donor of the fact that he is gifting the specified property to the donee on an irrevocable basis and without any consideration. It could be mentioned that it is out of natural love and affection for the donee in appropriate cases where such circumstances exist with a brief description of the relation if possible.

6. If the gift is made subject to certain conditions then the same need to be specified in clear and uncertain terms. The agreement will be read as a whole while interpreting it by the courts and hence use of appropriate and clear language which explain the transaction is important.

7. Acceptance by the donee is an important step towards completing a gift transaction. The donee has to accept the gift and hence most of the gift deeds would have a clause where the donee would accept the gift deed. The gift is incomplete till the gift is accepted by the donee. The donor is not restricted from making the gift deed without this clause but the same would be complete only on the acceptance of the gift by the donee.

8. In case of donor it is important that there are two witnesses who see him sign and put their counter signature to confirm that the signature is done before them as attestation.

9. In case of gift of an immovable property it is invalid unless the same is registered and hence it is important to complete this step in case of gift of an immovable property.

FORMATS

Deed of Gift of Immovable Property

THIS DEED OF GIFT executed at Mumbai, this day of two thousand and two BETWEEN ABC of Mumbai, Indian Inhabitant, residing at _____hereinafter called "THE DONOR" (which expression shall unless it be repugnant to the context or meaning thereof mean and include his heirs, executors and administrators) of the One Part;

AND

XYZ of Mumbai, Indian Inhabitant, residing at ____ hereinafter called "THE DONEE" (which expression shall unless it be repugnant to the context or meaning thereof, mean and include his heirs, executors, administrators and assigns) of the Other Part:

WHERE AS:

(a) The Donor is absolutely seized and possessed of or otherwise well and sufficiently entitled to the plot of land bearing Survey no.___, C.S.No./C.T.S. Nos._____ admeasuring approx.___ sq.yds. equivalent to ____sq.mts. or thereabouts situate at ____together with structures standing thereon and more particularly described in the Schedule hereunder written and delineated on the plan thereof hereto annexed and shown with red colour boundary line thereon and hereafter referred to as "the said property".

(b) The DONEE is the son of the DONOR.

(c) In consideration of natural love and affection which the DONOR bears towards the DONEE, the DONOR is desirous of making a gift of the said property unto the DONEE in the manner hereinafter appearing.

(d) The DONEE has accepted the said gift by executing these presents in testimony hereof;

NOW THIS INDENTURE WITNESSETH that for effectuating his said desire and in consideration of natural love and affection which the Donor bears towards the Donee, the Donor doth hereby grant, convey, transfer and assure unto the Donee ALL. THAT piece or parcel of land or ground with the messuages hereditaments and premises in fee simple situate at____ bearing

Survey No____and C.S.No./C.T.S. Nos.___ admeasuring about ____sq.yds equivalent to___ sq mts and more particularly described in the Schedule here under written and delineated on the plan thereof hereto annexed and thereon shown surrounded by red coloured boundary line TOGETHER WITH all and singular the structures, houses, outhouses, fencing, compound walls, edifices, buildings, court yards, areas, compounds, sewers drains ditches , fences trees plants, shrubs ,ways paths, passages commons gullis ,wells waters water-courses lights liberties privileges easements profits advantages rights members and appurtenances whatsoever to the said land or ground hereditaments and premises or any part thereof belonging or in any wise appurtenant to or with the same or any part thereof now or at or any time hereto before usually held, used ,occupied or enjoyed or reputed or known as part or member thereof and to belong or be appurtenant thereto

AND ALL THE ESTATE right, title, interest, claim and demand whatsoever at law and in equity of the Donor in to out of or upon the said land hereditaments and premises or any part thereof TO HAVE AND TO HOLD all and singular the said hereditaments and premises hereby granted conveyed, transferred and assured or intended or expressed so to be with their and every of their rights members and appurtenances (all which are hereinafter called "the said premises") UNTO AND TO THE USE and benefit of the Donee, his heirs, executors, Administrators and assigns for every SUBJECT' TO the payment of all future rates assessments taxes and dues now chargeable upon the same or hereafter to become payable to the Government or to the Mumbai Municipal Corporation or any other public body or local authority in respect thereof.

AND the Donor doth hereby for himself and his heirs, executors and administrators covenant with the Donee THAT notwithstanding any act, deed, matter or thing whatsoever by the Donor or any person or persons lawfully or equitably claiming by from through under or in trust for them made done committed omitted or knowingly or willingly suffered to the contrary, the Donor now hath in himself good right full power and absolute authority to grant convey transfer and assure the said premises hereby granted conveyed transferred and assured or intended so to be unto and to the use of the Donee in manner aforesaid.

AND THAT it shall be lawful for the Donee from time to time and at all times hereafter peaceably and quietly to hold enter upon use occupy possess and enjoy the said premises hereby granted conveyed transferred and assured with their appurtenances and receive the rents issues and profits thereof and of every part thereof to and for his own use and benefit without any suit or lawful eviction, interruption, claim and demand whatsoever from or by the Donor or his heirs, executors and administrators or its successors and Assigns or any of them from or by any person lawfully or equitably claiming or to claim by from under or in trust for them

AND THAT free and clear and freely and clearly and absolutely acquitted exonerated released and forever discharged or otherwise by the Donor well and sufficiently saved defended kept harmless and indemnified of from and against all former and other estates title charges and encumbrances whatsoever had made executed occasioned or suffered by the Donor or by any other person or persons lawfully or equitably claiming or to claim by from under or in trust for them.

AND FURTHER that he the Donor and all persons having or lawfully or equitably claiming any estate, right, title or interest at law or in equity in the said premises hereby granted conveyed transferred and assured or any part thereof by from under or in trust for them the Donor shall and will from time to time and at all times hereinafter at the request and cost of the Donee do and execute or cause to be done and executed all such further and other lawful and reasonable acts, deeds, matters and things conveyances and assurances in law whatsoever for the better further and more perfectly and absolutely granting unto and to the use of the Donee in manner aforesaid as shall or may be reasonably required by the Donee his heirs, executors, Administrators or assigns or their Counsel in law for assuring the said premises and every part thereof hereby granted conveyed transferred and assured unto and to the use of the Donee in manner aforesaid.

AND the Donor doth hereby declare that the premises hereby conveyed are fully built upon and occupied and are not vacant land under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 and no permission is required from Competent Authority or any other Authority under the provisions of the said Act or any other Act for transfer of the said premises in favour of the Donee AND the Donor doth hereby confirm and record that he has on execution hereof put the Donee in quiet, peaceful and vacant possession of the said property as owners thereof.

THE SCHEDULE ABOVE REFERRED TO:

ALL THAT plot of land together with structures thereon bearing Survey No.___, C.S.NO8./C.T.S. No.___&____

admeasuring approx.____ sq.yds equivalent to.____sq Mtrs situate at_____

in the___,___, in the Registration Sub-district of_____,

District and bounded as follows:

On or towards EAST:

On or towards WEST:

On or towards SOUTH:

On or towards NORTH:

IN WITNESS WHEREOF the DONOR as well as the DONEE by way of acceptance of the said gift, have put their respective hands on the day and year first hereinabove written.

SIGNED AND DELIVERED by)

the withinnamed ABC,

the DONOR abovenamed, in the presence of_____

(1)

(2)

SIGNED, AND DELIVERED by the withinnamed

XYZ.

the DONEE abovenamed,

in the presence of ____

(1)

(2)

NOTE: To be adapted to suit particular circumstances

Gift Deed of a Flat in Co-operative Housing Society

THIS DEED OF GIFT executed at___, this___ day of___ Two thousand and two BETWEEN ABC of Mumbai, Indian Inhabitant, residing at_____ hereinafter called "THE DONOR" (which expression shall unless it be repugnant to the context or meaning thereof, mean and include his heirs, executors and administrators) of the One Part, and XYZ of Mumbai, Indian Inhabitant, residing at ____hereinafter called "THE DONEE" (which expression shall unless it be repugnant to the context or meaning thereof, mean and include his heirs, executors, administrators and assigns) of the Other Part:

WHEREAS:

(a) The DONOR is seized and possessed of or otherwise well and sufficiently entitled to Flat bearing no. 1 admeasuring 650 sq. ft. of carpet area on the ____ floor of the PQR APARTMENT belonging to PQR Co-operative Housing Society Ltd. (hereinafter referred to as "the said Flat"). floor of the building known as situate at ____

b) The DONOR is also the registered member and shareholder of "PQR Co-operative Housing Society Limited" a society registered under the Maharashtra Co-operative Societies Act, under Registration no.___(hereinafter referred to as "the said Society") and as such member is the registered holder of 5 (five) shares of face value of Rs. 50 (Rupees fifty) each, of the aggregate value of Rs. 250/- (Rupees Two hundred fifty) bearing distinctive Nos. 301 to 305 issued by the said Society (hereinafter referred to as "the said Shares") and bearing Certificate No. 10 of the said society relating to the ownership of the said Flat. The said Flat and the said shares are more particularly described in the Schedule hereunder written and are hereinafter collectively referred to as "the said premises".

(c) The said flat was originally purchased by the DONOR from the Builders M/s. _____under the agreement dated _____The DONOR has paid the full consideration to the said Builders and complied with all his obligations under the aforesaid agreement and since then he is in lawful occupation of the said flat as absolute owner thereof. All the flat Purchasers of the said "PQR APARTMENT" including the Donor have collectively formed the said society.

(d) The DONEE is the son of the DONOR.

(e) In consideration of natural love and affection which the DONOR bears towards the DONEE, the DONOR is desirous of making a gift of the said premises unto the DONEE in the manner hereinafter appearing.

(f) The DONEE has accepted the said gift by executing these presents in testimony hereof;

NOW THIS INDENTURE WITNESSETH THAT for effectuating the aforesaid desire and in consideration of natural love and affection which the DONOR bears towards the DONEE, the DONOR doth hereby grant, transfers, convey

and assign all and singular his right, title and interest in the said Flat No. 1 (admeasuring 650 sq. ft. of carpet area) on the 6th floor of the building known as "PQR Apartment" situated at _____belonging to PQR Co-operative Housing Society Limited together with all his right, title and beneficial interest in the said five fully paid up shares of the face value of Rs. 50/- each aggregating to Rs. 250/- and bearing Certificate No. 10 of the said Society and more particularly described in the Schedule hereunder written unto the DONEE TOGETHER with all his rights, credits, advantages, appurtenances whatsoever of and in the said premises or in any part thereof AND ALL his estate, right, interest, claim and demand whatsoever of the DONOR in to and upon the said premises as aforesaid AND TO HOLD the same unto and to the exclusive use of the DONEE forever absolutely SUBJECT NEVERTHELESS to the payment of all assessments, rates, taxes, cesses, dues and other outgoing hereafter to become payable to the said society and/or to any other local or public body or authority in respect thereof AND the DONOR doth hereby represent, warrant and covenant with the DONEE THAT he the DONOR has good right, full power and absolute authority to grant, release, convey and assure the said premises hereby granted, released, conveyed, and assured or intended so to be unto and to the use of the DONEE in manner aforesaid AND the DONOR doth hereby further represent, warrant and covenant with the DONEE THAT the DONOR has not at any time hereto fore done or executed or knowingly suffered or been party or privy to any act,deed or thing whereby or by reasons or means whereof the said premises hereby assured or any part thereof may be encumbered or affected in any manner whatsoever or whereby the DONOR is in anywise prevented from transferring, granting, conveying and assuring the said premises or any part thereof in the manner aforesaid

AND FURTHER THAT the DONOR and every person having or lawfully or equitably claiming any estate, right, title or interest in the said Premises under or in trust for the DONOR shall and will from time to time and at all times hereafter, at the request and cost of the person or persons requiring the same, execute or do or cause to be executed and done all such assurances, acts, deeds, matters and things whatsoever as may be reasonably required for the further and more perfectly and effectually assuring the said premises and every part thereof unto and to the use of the DONEE AND IT IS DECLARED THAT on execution of this Deed of GIFT the DONEE has become the absolute owner of the said premises and the Donor has ceased to have any beneficial right, title or interest in the said Premises.

IN WITNESS WHEREOF the DONOR as well as the DONEE by way of acceptance of the said gift, have put their respective hands on the day and year first hereinabove written.

SCHEDULE ABOVE REFERRED TO:

(The detailed description of the flat and of the said shares along with C.T.S. number of the property/plot

in which the building is situate)

SIGNED, SEALED AND DELIVERED by)

the withinnamed ABC,)

the DONOR abovenamed, in)

the presence of _____-)

SIGNED, SEALED AND DELIVERED by)

the withinnamed XYZ,)

the DONEE abovenamed,)

in the presence of _____)

Memorundum of Gift for Movables

Be it known to ALL CONCERNTED that the undersigned _____son of _____ by caste _____ by occupation _____having PAN NO/ AADHAR NO _____ residing at _____(the DONOR) do hereby declare and confirm that the donor on the _____day of _____ 20__in consideration of the natural love and affection which the DONOR had and bears for _____son of _____ residing at _____ by caste_____by occupation_____ having PAN / AASHAR NO (the done)intended for and actually gave by words of moth and also expressed himself to give unto and to the use of the DONEE freely and voluntarily, absolutely and forever the several properties mentioned in the schedule below with all the beneficial interest therein and delivered possession thereof simultaneously and a view to divest himself of all ownership therein and pass the title thereof unto and in favour of and/or otherwise therein and pass title thereof unto and in favour of and /or otherwise vest them in the DONEE to all intents and purposes AND THAT the DONEE doth hereby declare that the DONEE did at the same time accept the gift as aforesaid and took in to possession and control the same.

The Schedule above referred to

Serial No.	Discription	Valuation	Remarks

IN WITNESS WHEREOF the parties to these presents have hereunto set and subscribed their respective hands and seals this _____day of _____2000

Signed sealed and Delivered by the

Within named DONOE at _____

In the presence of

(1)

(2)

Executed by the DONEE at _____

In the presence of :

Deed of gift for a particular purpose

THIS GIFT is made on the ___ day of_____ 20__ BETWEEN

ABC son of _____ residing at _____having PAN NO / AADHAR NO_____(hereinafter called the donor) of the one part

AND

XYZ , a society / trust registered under the Societies Registration Act / Bombay Public Trust Act vide registration NO _____ (hereinafter called “the done”) on the other part;

Whereas the donee has requested the donor to grant to it a building for the accommodation of a school or other educational institution for girls at _____;

AND WHEREAS the donor has agreed to transfer to the donee the building described in the schedule hereto and the site thereof for the purpose above mentioned and only for as long as the premises are used for educational purposes of girls under the control of the donee.

NOW THIS DEED WITNESSES as follow;

1. In pursuance of said agreement the donor hereby transfers to the donee the building and the fitments thereto including the adjacent land more specifically described in Schedule 1 and marked in red in the map attached

herewith as Schedule 2, TO HOLD the same to the donee and its successors so long as the donee shall use the said site and building for the purpose of education of girls at _____.

2. The donee hereby accepts the said gift and agrees with the donor that if and whenever the donee ceases to use the said site and building premises for the purposes of a school for girls or any other educational institution for the education of girls under the control of the donee the same shall revert to the donor or his heir.

3. The donee (Society/ Trust) accepts the above gift through its secretary / managing trustee, who is authourised to accept the gift by the Managing committee / Board of trustees vide resolution passed by the committee/ board on _____. The copy of the said resolution is attached herewith as Schedule3.

IN WITNESS WHEREOF the parties to these presents have hereunto set and subscribed their respective hands and seals this _____day of _____2000

Signed sealed and Delivered by the

Within named DONOE at _____

In the presence of

(1)

(2)

Executed by the DONEE at _____

In the presence of :

(1)

(2)

Schedule 1

ALL THAT plot of land together with structures thereon bearing Survey No.___, C.S.NO8./C.T.S. No.___&____

admeasuring approx._____ sq.yds equivalent to.____sq Mtrs situate at_____, along with the building having buildup area of ____square feet.

in the___,___, in the Registration Sub-district of_____,

District and bounded as follows:

On or towards EAST:

On or towards WEST:

On or towards SOUTH:

On or towards NORTH:

■■■

Affidavits

CA. Sheel Bhanushali

1. Jurisprudence:

In a given circumstance or in a particular matter or case, a person wants to make a statement voluntarily or a person is called upon to make a statement by other person, organisation or authority. Such a statement may be necessary for the furtherance of the cause of the matter or the case at hand.

Once the person makes his statement, there is always a possibility that he might disown it. Thus a mechanism was required whereby the person making the statement is prevented from going back on his statement or in other words, put a compulsion on him to stay firm on his statement.

Consequently a concept was introduced having the jurisprudence, that the person making the statement should make it in a particular form before a person or authority, who can recognise such person's identity and contents which creates an estoppel on that person. Resultantly, there came into being a written statement of facts or beliefs wherein the person who states them, assures its truth and correctness and thereby accepting to bear the consequences if his statement turns out to be false or invalid.

Such a written statement is referred to as 'Affidavit'.

2. Basic Structure of an Affidavit:

The word Affidavit is derived from the Latin word "Affidare", which means "to entrust". It signifies that a person has declared under oath to pledge one's faith.

When one refers the Black's Law Dictionary, it defines affidavit as " a written declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath."

2.1 Aspects fundamental to Affidavit – an Analysis.

Affidavit is a Written Statement, made by a person, about a Specific Information, Declaring it to be True, Valid, Existing and which is Verifiable by others.

2.1.1Affidavit is a Written Statement:

Affidavit cannot be oral. The very purpose of affidavit is to reduce in writing, the matter which the person wants to state so that he is prevented from disowning what he stated. Further it is to create an estoppel on his statement, so that it can be evaluated as an evidence or invoked as a deposition, legally.

Such a written statement has to be made voluntarily by the person. Whether he is making it suo motu or in response to directions from any authority or court, he has to depose the facts as being made voluntarily. It has to be his version of the information stated by him.

The factual information has to be deposed with clarity, particularity and definitively. There should not be any ambiguity, casualness or unstableness of the information that is being stated.

2.1.2 Affidavit must be about a Specific Information:

The main ingredient of affidavit is the specific information which is being stated to be true, valid, existing and verifiable about which the person assume responsibility and binds himself to be subjected to consequences, if found to be otherwise. The specific information takes various forms, couple of them are:

a) Specific Information in a legal proceeding:

When a party to a suit, claims relief or presents defence in court proceedings or makes interlocutory applications therein, all the factual information which support the claims or defence should be mentioned in the affidavit. These facts must be evidenced by way of real verifiable evidences containing information having direct relation to the extent it proves the truth, validity and existence of the facts.

For instance, in a suit for breach of contract for non-delivery of goods the party presenting the defence must mention the day, date, time, mode of transport, vehicle or conveyance registration number, the transporter's and the carrier's name, the acknowledgement on the document to title of goods by the person receiving the goods. In absence of such specific information, the court will not be convinced cannot grant the claim or defence.

b) Specific Information in case of a 'Will'.

The testator must mention that he is making the will on his own volition and free will and is not under pressure or undue influence of any other person to make a testament. The testator must also mention the list of family members with whom he is residing with. Further it is necessary to mention the detailed specific description of his property being movable or immovable and whether it is owned solely or jointly with other person. The testator has to very specifically name the person to whom his property is bequeathed. Any deficiency or ambiguity even a minute one would make it difficult for any authority to get convinced for the hand over or transfer of the property according to the terms of the Will.

2.1.3Affidavit should make a Declaration:

The information in the affidavit must be in the nature of a claim made.

The person should make a declaration in a solemn and emphatic manner thereby proclaiming the information in the affidavit to be authentic and verifiable.

As per given a circumstance or in a particular matter or case, declaration in an affidavit should be made in the following manner:

a) Affirmation:

It is the act of voluntarily Validating or Confirming or Upholding or Ratifying the information that is being proclaimed by the person. Here the person claims that the information is in existence and reliable.

b) Undertaking:

It is an act of voluntarily Accepting, Admitting or Abiding to a particular information. Here the person claims that he is a party to the information in some manner and also agrees to abide by it in true and full spirit. Such act is to be done with a proclamation of sincerity and conviction about the information. Further the undertaking should be expressed in a way which demonstrates that the person is laying stress and pressing upon the information, to convince the reader that what is proclaimed is believable and reliable. In short information is expressed solemnly and emphatically with a rigor.

c) Assertion

It is an act of denying the allegations as being incorrect, which are made against a person. Here the person claims that the he is innocent or he has no mens rea and actus rea which are thrust upon him.

In suits, the plaintiff makes allegations on the defendant, for the cause of action in his plaint. In response, the defendant puts forward his defence in his written statement. Both the pleadings have to be supported by affidavits wherein they have to depose their allegations and the defence.

A good example of all the three declaration can be seen in case when a candidate files an election petition, against the rejection of their application for candidature. An affidavit has to be given wherein he may be required to simultaneously:

- Affirm certain facts about himself, his assets, his income,
- Undertake certain information by accepting or admitting facts which he wants to solemnly and emphatically state to clarify his position.
- Assert by way of denials the allegations made against him by the persons who have objected his candidature.

2.1.4 Claims made must on the premises of Evidence.

The basic necessity and a mandatory requirement of any factual information is that it should be supported by a sufficient and appropriate evidence. Abiding by this evidentiary doctrine, the claims made in affidavit must be based on the premises of Evidence. Consequently and necessarily the person making the affidavit, must specify the sources on which he has relied for making his claims.

A tabulation would make it clear as to what evidence to mention corresponding to the claims made:

If Claim is made based on Evidence	**Affidavit must necessarily state**
• Being Documents	The Details of such documents
• Being Other Person's statement	The Name of that person and the capacity in which he is being relied upon
• Being Events or transactions	The Date, Venue, the name of the parties involved and a relevant description of the event or transaction
• Being Personal Knowledge, Opinion	The Grounds of such knowledge or opinion

3. Legal Recognition of Affidavit.

The discussion till now was about the minute details which go to make the affidavit. This detailing is the first phase of affidavit. Since there is no fixed format of an affidavit, care has to be taken to include all the aspects which will build up its legal acceptability and thereby can be used for furthering the judicial process and achieve justice. The affidavit thus prepared till now as per the aforesaid discussion is statement of facts which is ready to be submitted to any authority or court.

3.1 Verification of Affidavit:

The next requirement is that the person making it must own the responsibility of each and every information stated by him and be bound to any consequences arising from it.

This aspect is to be given effect to by the act of "Swearing". Swear means a promise, an assurance about the truth, validity, existence of what is being said. In personal life we often use the custom of swearing upon God or on our Parents or Holy Scriptures or Self-honor and the like. This is done to establish the sanctity, believability and reliability of the information stated for those to whom the information may be material and may influence their decisions.

Based on the same analogy, the information stated in an affidavit has to be subjected to swearing to make the claims in it, to be reliable and acceptable for legal and judicial purposes.

This is the most basic form of swearing whereby the person making the statement, promises, that the proclamations made by him are authentic and reliable. This generally take the form of a "Verification" paragraph in the affidavit.

It is now a part and parcel of almost all the pleadings, appeal memorandums, interlocutory applications, miscellaneous applications, tax returns, wherein this clause is incorporated at the end of all the written submissions. This clause ensures that the person making the statement is swearing regarding the affirmations, undertakings and the assertions about the information alongwith the supporting evidence to be true and correct to best of his knowledge.

Verification is a declaration made by the deponent disclosing the source on which he has relied upon about the facts mentioned in the affidavit. The verification should be signed by the person making it and state the date on which and place at where it was signed.

For instance,

"Verification

I _____, do hereby verify on the ____day of _____, at Mumbai that the contents of para 1 to 3 of the affidavit are true to my knowledge and those of paras 4 to 6 are true on information received and believed to be true and those of para 7 to 10 are true and correct as per my knowledge and derived from records and nothing material has been concealed therefrom."

3.2 Attestation of an Affidavit:

Though affidavit contains verified (self-sworn) factual information it is nonetheless a unilateral declaration. It will only have a persuasive effect but not convincing. Moreover there is no surety that the signatory to the affidavit (deponent) has himself verified and signed the affidavit. The credibility and probative value for being accepted as valid evidence, has not been established as yet.

Thus regulation to get such affidavit attested by an independent authority was enacted by way of The Notories Act, 1952.

Affidavits have to be notarized by a notary public. "Notarized" means that person have sworn under oath that the facts in the Affidavit are true, the document has been signed in front of a notary public, and a notary public has signed and put a seal on the Affidavit.

Attestation conditions:

a) Deponent must have signed the affidavit in the physical presence before the Notary for proper witnessing. The deponent cannot priorly sign it and thereafter bring it for being witnessed.

b) The witnessing Notary will direct the deponent as to which words are to be recited for taking the oath or affirmation, based on the option selected by the deponent. The deponent has to select whether he wants to make an oath or affirmation.

c) Their name, address and qualification must be legibly written below their signature.

d) In India, an Affidavit can be sworn or affirmed before:

   i) Any Judge or any Judicial Magistrate or Executive Magistrate (A Judicial/ Executive Magistrate are officers who are invested with specific powers under both the Criminal Procedure Code and the Indian Penal Code);

   ii) Any Commissioner of Oaths appointed by a High Court or Court of sessions;

   iii) Any Notary appointed under the Notaries Act, 1952.

4. Parties to an Affidavit:

Following parties are involved in preparing the Affidavit:

a) Deponent:

The person who prepares the affidavit for various reasons.

b) The Notary Public or the Oath commissioner:

The person who testifies the signature of the deponent and affixes his seal and signature on the Affidavit in order to authenticate it.

c) The Court or the Statutory Body:

The authority to whom the Affidavit is being submitted for being sworn where the law requires it to be so.

5. Elements essential in an Affidavit:

The following details require necessary compliance to make the Affidavit valid & legal:

a) Must be in writing;

b) Must be voluntarily made by the deponent;

c) Must be a declaration by way of affirmation, undertaking, assertion of factual information;

d) Only Facts must be disclosed. There should be not mention about facts which are to happen or take place in future.

e) Must be made by an individual expressing himself in the First person.

f) Must be sworn in before a Notary, Officer, and Magistrate who are authorised to administer Oaths.

Any element missing, will render the Affidavit illegal and will be invalid in the court and will not be admissible as an evidence.

It is pertinent to note here that an affidavit cannot operate to create, declare, assign, limit or extinguish in present or in future any right, title or interest whether vested or contingent in any movable or immovable property.

The affidavit can at the most undertake to abide by a particular course of action which enables the custodian of the property to initiate execution proceedings which will cause its transfer. In substance and effect what can be undertaken in an affidavit, is to preserve the properties intact for being proceeded against is a given eventuality and deliver peaceful possession of the property in the event of such action becoming necessary.[1]

In cases where the affirmations made by a person are not reasonably supported documentarily but more so by oral observations, it would be prudent for the person affirming the affidavit that he should give an undertaking in the affidavit that he will appear before the concerned authority in person to depose in support of the affirmations or the declarations made in the affidavit. This would be instrumental in assuring the authority or the court regarding the acceptability of the affirmations made.

6. Period of Validity of Affidavit.

Affidavit once made remains valid for an infinite period of time. However its infinity can be restricted if it is superseded by another affidavit to that extent or the contents of the affidavit are negated by new or other evidences which render the earlier affidavit null and void.

1 Western Press Pvt. Ltd. Mumbai v. Custodian, AIR 2001 SC 450

7. Withdrawal of Affidavit:

Affidavits which are submitted to the appropriate authority or court cannot be withdrawn. If it is allowed to do so then the very purpose of creating an esstopel will get defeated. It would be as good as disowning what was deposed which against the principle of prevention of going back on one's claim or declaration.

Where a person realises an error in an affidavit, he is entitled to lead another evidence or file another evidence. But the court cannot order or allow to delete any portion of the affidavit already filed.

8. Rectification of Errors in Affidavit:

If there is a clerical error in an affidavit which is sworn and submitted, it can be rectified in the same affidavit by a legible correction and putting an initial on it. A new affidavit is not required.

If there is a major miss out of information or a new information has emerged which requires a mention in the affidavit, it can be included only by way if a completely new Affidavit to explain the same.

New affidavits do not replace the previous affidavits. They are like an appendment to the already existing evidence in the court. Every new information relating to the prior affidavit needs a new affidavit. However it should be ensured that the new affidavit to continue the old affidavit must contain a reference to the old affidavit by way of a recital.

9. Consequences of False Affidavit:

The deponent may sign and swear an affidavit, knowingly, which has false and frivolous statements which have been claimed to be true and correct. When a person furnishes a false affidavit, it has the effect of misleading the authority or Court and vitiates the legal and judicial process causing serious delay and injury to justice.

Sometimes the deponent may not concur to the written depositions in an affidavit and may deviate or totally digress from the facts stated in the evidence when he makes his oral evidence in the court. His deposition in the affidavit and his oral evidence are not in congruence. Such affidavits are also considered to be false affidavits.

Filing false affidavit triggers section 191 of the Indian Penal Code. If a person voluntarily files a false affidavit, punishment under section 193 of Indian Penal Code will follow for giving false evidence and shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend for a term which may extend to three years, and shall also be liable to fine.

When Plaintiff submits an Affidavit stating facts, in support of an application for the arrest or attachment of the Property belonging to the Defendant. If the Defendant proves that the plaintiff field the false Affidavit, the plaintiff may be punished under the Contempt of Court Act, 1971. Swearing to false in an Affidavit is a Contempt of court. Further, the plaintiff is also liable for punishment with imprisonment of either description for a term which may extent to Seven years, and shall be liable to fine for producing the false evidence before Court.

10. Stamp Duty payable on Affidavits:

For any document, instrument or deed to be legally executed and binding, Stamp duty has is to be paid. Such stamp duty is to be paid by way of purchasing a stamp paper of appropriate value. Adhesive stamps and franking are also eligible methods by which stamp duty can be paid.

10.1 Quantum of Stamp duty:

In India, stamp duty is payable in accordance with the Indian Stamp Act, 1899. The stamp duty may have different quantum from state to state.

In the state of Maharashtra, stamp duty of Rs. 100/- is prescribed for an Affidavit.

Each State has a different quantum of stamp duty to be paid, ranging from Rs. 10/- upto Rs. 100/-.

Government of Maharashtra recently amended its rule stating that stamp papers are not necessarily required for certain kinds of Affidavits, as well as certain certificates.

The waiver of stamp duty is for various certificates including but not restricted to, caste certificates, income certificates, domicile certificate, nationality certificate.

(Source: Economic Times e-publication dated 20.01.2015)

10.2 Types of Stamp papers:

a) Non Judicial Stamp paper:

it is payable under the Indian Stamp Act, 1899, for matters between parties in matters which concern transactional arrangements. For example agreement to sell, lease agreement, affirming affidavits.

b) Judicial Stamp paper:

it is payable under The Court Fees Act, 1870, for matters between matters in a Court matter or Court Suit. For example petitions, applications, affidavits in evidence as required under the Civil Procedure Code and the Criminal Procedure Code.

11. Evidentiary value of Affidavit:

After comprehending the aforesaid discussion on jurisprudence, structure, content, context and consequences regarding Affidavit, a very important aspect needs to be considered:

"Does Affidavit have the status of an Evidence or is it a mere Promise in the form of Affirmations, Admission, Admittance or Assertions".

Prima facie it is a promise, which puts an estoppel on the depositions (affirmations, admission, admittance or assertions) made by the person. Such depositions are the personal versions of the deponent and therefore requires corroboration by way of examination and cross examination by the authority or the Court. Such corroboration is necessary to establish the truth and correctness of the factual information deposed. Once the authority or the Court is satisfied about the truth, validity and existence of the facts deposed, the courts may admit the depositions as an evidence.

Here it is worth mentioning the ratio decidendi of a few cases which cater to this question of the evidentiary value of Affidavit:

a) The application filed by the respondents/defendants before the trial court under Order XIX, Rule 2 of CPC is not maintainable, since an affidavit filed in support of interlocutory application is not evidence for the purpose of Order XIX, Rule 2 of CPC.[2]

Order XIX of the CPC deals with affidavits (refer para 12.4 for bare text). Rule 1 of Order XIX envisages that the Court may order any particular fact or facts to be proved by affidavit. Rule 2 of Order XIX confers power upon the Court to secure attendance of the deponent for cross examination.

A bare reading of Order XIX, Rule 2 of CPC leaves no manner of doubt that the said provision can be invoked when the court requires any particular fact, of facts to be proved by affidavit and such evidence is tendered by way of affidavit, then the court can order at the instance of the either party the presence of the deponent for cross examination. Therefore, in order to invoke jurisdiction under XIX, Rule 2, there must be a proceeding where any fact or facts are being sought to be proved by an affidavit and in difference to the said purpose, evidence is given by either party, by affidavit.

2 Dhanalaxmi v. Karuppayee, (2017) 5 LW 758; V. Baby v. Sekar and another, (2015) 1 MLJ 443; Kannammal v. Bagyammal, 1998 (1) CTC 280 (MAD); P.N. Karuppa Gounder v. Karuppayal and others, (2013) 1 MLJ 814.

The word 'Evidence' is not defined in the CPC but the said expression is defined under section 3 of The Evidence Act, 1872, which reads as follows:-

"Evidence – "Evidence" means and includes –

1. *all statements which the court permits or requires to be made before it by witness, in relation to matters of facts under inquiry, such statements are called oral evidence;*
2. *all documents including electronic records produced for the inspection of the court, such documents are called documentary evidence.*

From a conjoint reading of Order XIX, Rule 2, CPC and the definition of evidence as contained in the Evidence Act, 1872 it is clear that the provisions of Order XIX, Rule 2 can be invoked only when evidence within the meaning of the Act of 1872 is adduced by affidavit with the object of proving any fact or facts.

An affidavit differs from a deposition in this that in the latter the opposite party had always an opportunity to cross-examine the deponent, but affidavit is always taken ex parte.

The Evidence Act does not apply to affidavits presented in any Court or Officer. The matter relating to affidavits as evidence are regulated by the rules in the Code of Civil Procedure.

b) Affidavits are not included in the definition of 'Evidence' under section 3 of the Evidence Act, 1872, and the same can be used as 'evidence' only if, for sufficient reasons, the court passes an under Order XIX of the CPC.

Thus, the filing of an affidavit of one's own favour, cannot be regarded as sufficient evidence for any court or tribunal, on the basis of which it can come to a conclusion as regards a particular fact situation.[3]

12. Laws Governing Affidavits:

In India, Affidavits are governed by various Acts, primarily as follows:

12.1 The General Clauses Act, 1897

12.2 The Oaths Act, 1969

12.3 The Indian Evidence Act, 1872

12.4 The Civil Procedure Code, 1908

12.5 The Supreme Court Rules, 2013

12.6 The Criminal Procedure Code, 1973

12.7 The Indian Penal Code, 1860

12.1 The General Clauses Act, 1897:

Section 3(3): (3) Definition of Affidavit: "Affidavit shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing."

12.2 The Oaths Act, 1969:

Section 2: Saving of certain oaths and affirmations: Nothing in this Act shall apply to proceedings before courts martial or to oaths, affirmations or declarations prescribed by the Central Government with respect to members of the Armed Forces of the Union.

3 Sudha Devi v. M.P. Narayanan, AIR 1988 SC 1381 and Range Forest Officer v. S.T. Hadimani, AIR 2002 SC 1147; Ayaaubkhan Noorkhan Pathan v. State of Maharashtra, AIR 2013 SC 58

Section 3: Power to administer oaths: (1) The following courts and persons shall have power to administer, by themselves or, subject to the provisions of sub- section(2) of section 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:—

(a) all courts and persons having by law or consent of parties authority to receive evidence; (b) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station. (2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf—

(i) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or (ii) by the State Government, in respect of other affidavits.

Section 4: Oaths or affirmations to be made by witnesses, interpreter and jurors:

(1) Oaths or affirmations shall be made by the following persons, namely:— (a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence; (b) interpreters of questions put to, and evidence given by, witnesses; and (c) jurors: Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth. (2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Section 5: Affirmation by persons desiring to affirm: A witness, interpreter or juror may, instead of making an oath, make an affirmation.

Section 6: Forms of oaths and affirmations: (1) All oaths and affirmations made under section 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case: Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation. (2) All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be.

Section 7: Proceedings and evidence not invalidated by omission of oath or irregularity: No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Section 8: Persons giving evidence bound to state the truth: Every person giving evidence on any subject before any court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

12.3 The Indian Evidence Act, 1872:

Affidavit is treated as "evidence" within the meaning of Section 3 of the Indian Evidence Act, 1872 ("Evidence Act").

Section 3: (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence; (2) All documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

12.4 The Civil Procedure Code, 1908:

The law pertaining to affidavits is governed by Section 139 and Order XIX of Code of Civil Procedure, 1908 along with Order XI of Supreme Court Rules.

Section 139 of the Civil Procedure Code, 1908: Analogous power is conferred on the high court by section 139 of the code of Civil Procedure Code, 1908 ("CPC") where under in the case of any Affidavit under that code the high court may appoint any officer or other person to administer the oath to the deponent. The said section has been reproduced herein below:

"139. Oath on Affidavit by whom to be administered. In the case of any Affidavit under this Code-

(a) any Court or Magistrate, or

1[(aa) any notary appointed under the Notaries Act, 1952 (53 of 1952); or]

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf, may administer the oath to the deponent."

Order XIX of the Civil Procedure Code, 1908: This Order deals specifically with the rules governing Affidavits.

"Rule 1: Power to order any point to be proved by Affidavit

Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by Affidavit, or that the Affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by Affidavit.

Rule 2: Power to order attendance of deponent for cross-examination

(1) Upon any application evidence may be given by Affidavit, but the Court may, at the instance of either party, order the attendance for cross- examination f the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs.

Rule 3. Matters to which affidavits shall be confined

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated.

(2) The costs of every Affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same."

Rule 5 of Order XIX states that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated.

12.5 Supreme Court Rules, 2013 (Order XI):

The Supreme Court Rules have been framed as regard to Affidavits. Order XI of the Supreme Court Rules specifically deal with the Notices of Motion and the manner in which the same shall be served upon. The Supreme Court has laid down these rules which shall be followed strictly by the Parties. Rule XI, sub- rule 5 deals with the mandatory requirement of filing an Affidavit along with the notice/ suit and the periods for filing the same.

It is to be noted here that Section 139 and Order XIX of CPC read along with Order XI of Supreme Court Rules empowers the Court to order at any point of time, any particular fact or facts to be proved by Affidavit. The Indian Courts have at many instances upheld the importance of the legitimacy of an Affidavit by the virtue of the above specified rules and sections.

12.6 Criminal Procedure Code, 1973:

Sections 295, 296 and 297 of Chapter XXIII of the Criminal Procedure Code, 1973 (CrPC) deals with an Affidavit as also affidavits as evidence in enquires and trial. The said sections have been reproduced herein below:

"295. Affidavit in proof of conduct of public servants: When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by Affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given

296. Evidence of formal character on Affidavit — (1) The evidence of any person whose evidence is of a formal character may be given by Affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his Affidavit.

297. Authorities before whom affidavits may be sworn

— (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before — (a) any Judge or Judicial or Executive Magistrate, or (b) any Commissioner of Oaths appointed by a High Court or Court of Session, or (c) any notary appointed under the Notaries Act, 1952 (53 of 1952). (2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief. (3) The Court may order any scandalous and irrelevant matter in the Affidavit to be struck out or amended."

12.7 Indian Penal Code, 1860:

Chapter XI in the Indian Penal Code, 1860 ("IPC") deals with 'False Evidence and Offences Against Public Justice'. Filing false Affidavit and perjury comes under Chapter XI of the IPC.

If a person voluntarily files a false Affidavit, then he/ she can be punished under Section 193 of the IPC for giving false evidence. Filing false Affidavit falls within the purview of Section 191 of the IPC.

The said sections have been reproduced herein below:

"191. Giving false evidence.—Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise. Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

193. Punishment for false evidence.— Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either de- scription for a term which may extend to three years, and shall also be liable to fine."

SPECIMEN OF AFFIDAVITS

Affidavit before the Income-Tax Appellate Tribunal to show that facts recorded by the Appellate Assistant Commissioner are not correct

BEFORE THE INCOME-TAX APPELLATE TRIBUNAL, BOMBAY

Affidavit of VSK, aged about 50 years s/o Late RKK, r/o Kalyan, Bombay.

I, the above named deponent solemnly affirm and state as under :

1. That the deponent is the connected person and hence is fully aware of the facts deposed below.
2. That the deponent has been appearing as a partner of the firm named MEDICOS in compliance to notices issued by the Income-tax authorities.
3. That deponent produced various books of accounts as and when required by the Income-tax authorities.
4. That deponent also appeared before the Appellate Assistant Commissioner at the time of the hearing of the appeal alongwith total books of accounts.
5. That deponent preferred the appeal against the appellate order of Appellate Assistant Commissioner before this Hon'ble Court, which is pending.
6. That the Income-tax Officer has noted in his assessment order that the stock book has not been maintained and has not been produced before him at the time of assessment proceedings.
7. That at the time of hearing before the Appellate Assistant Commissioner, it was inquired by the learned AAC, if any stock was maintained regularly during the course of business.
8. That the deponent pointed out that stock book was regularly maintained and the same was produced before the AAC.
9. That the learned AAC was apparently satisfied after perusing the stock book.
10. That the learned AAC has noted in para 6 of his judgment that no account book was produced before the AAC but he has not mentioned anywhere in his long judgment of 13 pages that the stock book was produced before him.
11. That the order of the learned AAC is non-speaking on this important point under dispute before this Hon'ble Court.

Deponent

Verification

I, VSK, the above named deponent do hereby verify that the contents of this affidavit from paras 1 to 11 are true to the best of my knowledge and belief. Nothing material has been concealed.

Dated..../..../.....

Deponent

AFFIDAVIT FOR CONDONATION OF DELAY, IN FILING APPEAL BEFORE THE INCOME TAX APPELLATE TRIBUNAL

Before the Income Tax Appellate Tribunal at .....

In the matter of .....Limited/Private Limited,

Assessment Year .....

Affidavit of Mr./Ms. ....aged..... years, Director of….. .....Ltd/Pvt.Ltd.

That I the above named deponent, am well conversant with the facts deposed below.

1. That the appeal filed by the Assessee Company before the Dy. Commissioner (Appeals) was disposed of by order dated..... passed by Dy. Commissioner (Appeals) .....
2. That the time for filing the appeal before the Tribunal was to expire on.....
3. That the Attorney/Advocate of the Assessee company Mr..... was coming to the office of the Tribunal to file Memorandum of appeal duly signed by the Managing Director of the Company on..... by taxi bearing no. ..... and that due to big procession on the occasion of ….. and consequent traffic blockage on the way, he could not reach the Tribunal Office in time and therefore appeal could not be filed.
4. That the memo of Appeal has been filed on ..... in the Office of the Tribunal.

Deponent

Signed at ..... this .....day of .....,

VERIFICATION

I, ...the above named deponent do hereby verify on oath that the contents of the affidavit above are true to my personal knowledge and nothing material has been concealed or falsely stated.

Deponent

Affidavit, before the Income-Tax Officer

BEFORE THE INCOME-TAX OFFICER, WARD NO. 7, MUMBAI.

Affidavit of Mr. JNS, aged about 51 years s/o Late GPS, r/o Marine Lines, Mumbai.

I, the above named deponent, solemnly affirm and state as under:

1. That the deponent is the practicing advocate and concerning person and hence is fully aware of the facts deposed below.
2. That the deponent is carrying on this legal profession since the year 1972.
3. That the deponent was also engaged as part-time editor of the Law Books with M/s XYZ Publishing Company, since 1973 and was getting a fixed remuneration of Rs. 550/- per month.
4. That because of the occupation with the publisher the deponent was not able to carry on his legal profession, devoting full time in practice.
5. That in order to devote full time in legal profession the deponent resigned the job of editor on 31st March, 1978 and started full time legal practice.

6. That gross income of the deponent from April, 1978 to March, 1979 was Rs. 15,736.00 and net income after deducting expenditure and deductions under Section 80C towards LIC premium was Rs. 12,310.00.

7. That the deponent filed the return of his net income on 15.07.1979, declaring his net income being Rs. 12,310, alongwith treasury challan towards income-tax vide departmental receipt No. 897654 dated 15.07.1979.

8. That during the course of assessment proceedings the Income- tax Officer raised the querry regarding investment in Car, which the deponent was having since 1974.

9. That deponent informed the Income-tax Officer that the Car was purchased out of past saving and sales of ornament of his wife and produced the sale voucher of the ornaments.

10. That deponent's father was an eminent Advocate of his time and an income-tax payee.

11. That since the father of the deponent was dead and the deponent was not in a position to work out the complete bank balance of his father, he surrendered the unexplained investment of Rs. 15,000/- which was spent in purchasing the Car.

12. That the deponent was assured by the Income-tax Officer that no penalty would be imposed on voluntary surrender of unexplained investment.

13. That on the basis of this assurance the deponent agreed to be assessed on this income.

14. That because of assurance, the deponent also did not prefer the petition under Section 271(4A) before the Commissioner of Income-tax.

Deponent.

Verification

I, JNS, the above named deponent, do hereby verify that the contents of this affidavit from paras 1 to 14 are true to the best of my knowledge and belief. Nothing material has been concealed.

Dated.....

Deponent

Affidavit regarding closure of business before the Income Tax Officer.

BEFORE THE INCOME-TAX OFFICER, WARD NO. XX, MUMBAI.

Affidavit of Mr. RR, aged about,.....years S/o Mr. RL R/o.....

I, the above named deponent solemnly affirm and state as under:

1. That the deponent is the partner of the firm M/s....., situated at....., and hence is fully conversant of the facts deposed below.
2. That in the firm there are three partners including the deponent.
3. That one of the partners named PS has shown his intention to retire from the firm on.....
4. That for reconstitution of the firm the deponent has no alternative but to close the firm.
5. That the deponent is therefore, closing the business with effect from.....

Deponent

VERIFICATION

I,....., do hereby verify that the contents of this affidavit from paras 1 to 5 are true to the best of my knowledge and belief. Nothing material has been concealed.

Dated...../...../

Deponent

AFFIDAVIT TO BE FURNISHED TO THE INCOME TAX AUTHORITIES FOR OBTAINING INCOME TAX CLEARANCE CERTIFICATE.

Affidavit of Mr/Ms..... S/o,/D/o Mr..... aged..... years, resident of .....

I, the above named deponent, solemnly affirm and declare as under:

1. That I am fully conversant with the facts deposed to below.
2. That I am holder of Indian Passport bearing No. .....dated .../...../.....
3. That I am permanent resident of India having PAN ……..
4. That my sources of income are Income from Salary, Income from business and Income from House Property.
5. That I am duly filing my income tax returns and have paid all my tax liabilities on my total income till the Assessment Year .....
6. That I have no other source of income.

Deponent

Signed at ..... this .....day of .....,

VERIFICATION

I, ...the above named deponent do hereby verify on oath that the contents of the affidavit above are true to my personal knowledge and nothing material has been concealed or falsely stated.

Deponent

Affidavit before sales tax officer
Objecting for the inclusion of some other business

Before the Sales-tax Officer. .....

In the matter of M/s. ABC for the Year 20 …….-20…..

Affidavit of A, aged about ……..years, S/o …….resident of.....

I, A, aged about……..years son of Shri…….resident of.....do hereby solemnly affirm and state as follows:

1. That I am carrying on the business of……..in the name and style of M/s. ABC, the assessee in the captioned case and as such am fully conversant with the facts deposed to below.

2. That I have received a notice dated……from the Sales-tax Officer, Ward No……intimating me that I am also carrying on business at ……under the name and style of M/s. XYZ

3. That I state that the business carried on under the name and style of M/s. XYZ at .....is owned by my friend Shri……..and I have no interest or right in the said business.

4. That the business under the name and style of M/s. XYZ at ……..is being carried on for the last years and the copy of the registration certificate of the said firm dated ……under the Shops and Establishment Act issued by .....is enclosed and marked as Annexure A. The said certificate also indicates the name, description and address of the owner of the said firm.

Deponent

Verification

I, A, the above named deponent do hereby verify that the contents of paras 1 to 4 aforesaid are true to my knowledge, nothing has been concealed and no part of it is incorrect. So help me God.

Signed and verified at……..on the day of ……

Date...../……/…….

Deponent

Affidavit in reply to the notice for non-production of account books to the sales tax inspector

Before the Sales-tax Officer, ...

In the matter of M/s . ..... for the year .....

Affidavit of A, aged about……..S/o…….resident of …….

I, A, aged about ……years, son of Shri……..resident of .....do hereby solemnly affirm and state as under:

1. I am the proprietor of M/s ……and thus acquainted with the facts deposed to below.

2. That I am maintaining all the books of account of business being carried on by me under the name and style of M/s ……..regularly, viz. cash book, ledger, stock book, purchase vouchers, cash memo, 'C' Form register.

3. That on……..at about…….. a.m. I received the news of death of my relative Shri…….. and I went to attend the funeral ceremony at ……leaving my son Shri ……aged about……years on the shop. My son Shri…….. aged about ……years, is a student of …… School and he has no knowledge of the books of account of the firm.

4. That on ……..at about……p.m. the Sales-tax Inspector Shri……had visited the shop and asked my son Shri .....to produce the books of account of the firm . As my son was not aware about the books of account, he could not produce the same to the Sales Tax Inspector and he informed him that my father, who looks after the business has gone for an urgent work and he will come back by……. …p.m.

5. That when I came back and came to know about the fact of survey, I submitted an application to your office vide Receipt No ……..is enclosed herewith and marked as Annexure 1.

6. A copy of death certificate of Shri ……..is also enclosed and marked as Annexure 11.

Deponent

Verification

I, A, above named deponent do hereby verify that the contents of paras 1 to 3 and 5 to 6 are true to my knowledge and that the contents of paragraph 4 are true upon information received by me from my son Shri …….which I believe to be true.

Certified at ……this…….the day of ……..

Date……/……/…… Deponent¬

Affidavit before the Customs Authorities

I, ……., S/o……., aged about…….years, now residing in……., do hereby solemnly affirm and state as follows:-

1. I am the applicant for license as a Clearing and Forwarding Agent in the Port of……..at Sea in……...State. I am well conversant with the facts deposed hereunder and I am fully competent to swear to this affidavit.

2. I say that, I have got the necessary and prescribed qualifications for acquiring the license as a Clearing and Forwarding Agent of the Port.

   Also, I fulfill all the statutory requirements for the purpose.

3. I say that, all the particulars that I have given in the prescribed application form duly filled in and signed and forwarded by me are true to the best of my knowledge, information and belief. Nothing material has been either suppressed or concealed therefrom and no part of it is false.

4. I say that, there has been no attempt whatsoever, on my part, to mislead the concerned authorities.

5. I say that, the requisite application fee of Rs……..has been duly remitted by me through the treasury and the Challan receipt issued by the Treasury Authorities has been produced alongwith the application.

6. I say that, if I am granted the license to operate and function as a Clearing and Forwarding Agent, I shall duly and faithfully abide by the statutory provisions under the Customs Act and the Ports Act, the Rules and Regulations prescribed by the Concerned Authorities from time to time.

Sd./

Deponent.

Verification

Verified at…….on this the……day of……., 20……,that the contents of the above affidavit are true and correct to the best of my knowledge, belief and information and nothing material has been concealed therefrom.

Sd./

Deponent.

Solemnly affirmed and signed before me by the deponent, who is personally known to me, on this the……. day of……., 20……..

Sd./ Notary.

Affidavit for N.O.C. for transfer of deceased father property

Affidavit of ..... S/o ..... Aged.....years, R/o .....

I, the above named do hereby solemnly affirm and declare on oath as under:-

1. That my father Late Shri ..... expired on ..... leaving behind myself, brother Shri ..... and mother Smt. .....as his legal heirs.
2. That my late father Shri ..... has been running a shop under the name and style of M/s ..... at ..... under Corporation Licence No.....
3. That I have no objection if the said business is run by my brother Shri ..... in the existing shop and the licence is transferred in his name.
4. That whatever stated above is true and correct to my knowledge. Verified at .....on this .....

Deponent.

Verification

I, ... S/oShri ..... ,the above named deponent do hereby solemnly affirm and verify that the contents of paras 1 to 4 are true and correct to the best of my knowledge and belief. No part of it is false and nothing material has been concealed there from.

Verified at ..... on .....day of.....

Deponent.

■■■

Deed of Release

— Kirit Hakani, Niyati Mankad

WHAT IS DEED OF RELEASE?

Release is also a specie of transfer of property. It is an instrument whereby a person renounces a claim upon another person or against a specified property.

As per Black's Law Dictionary[1], the word 'release' means the following:

"1. Liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced <the employee asked for a release from the non-compete agreement>. Also termed discharge; sur render.

2. The relinquishment or concession of a right, title, or claim <Benson's effective release of the claim against Thompson's estate precluded his filing a lawsuit. [Cases: Release 1. C.J.S. Release $$ 2-3, 5-8, 19.]

3. A written discharge, acquittance, or receipt; specif., a writing either under seal or supported by sufficient consideration stating that one or more of the worker's contractual or compensatory rights are discharged <Jones signed the re lease before accepting the cash from Hawkins>. Beneficiaries of an estate are routinely required to sign a release discharging the estate from further liability before the executor or administrator distributes the property.

4. ……...

5. The act of conveying an estate or right to another, or of legally disposing of it

6. A deed or document effecting a conveyance. ……"

The description of 'release' is applied when the transfer is not of the whole property but only an interest in it and that also in favour of another who is also interested in the property and is not a stranger. The expression 'release' is also used in case of a document by which one person gives up his right of action against the other or gives up an intangible right like a right of easement and not a right in property.[2] It is an instrument by which one of the co-owner releases or renounces his interest in the specified property and the result of such release would be the enlargement of the share of the other co-owner.[3]

TYPES OF RELEASE DEED:

Releases are of three types namely: -

(1) in the form of conveyance – wherein an interest in land or in goods and chattels is transferred by one person to another person who already has a vested interest, therein

(2) in the form of a discharge or renunciation – wherein one person discharges/ renounces some right of action or claim which he has against another or against another's property.

(3) release of certain powers – i.e. when a person gives a power vested in him like a power of appointment.

The first type is really conveyance or transfer whereas the third type is rarely used. The second type is the most important type. It is sometimes also called 'relinquishment'.

RELEASE V/s. RECEIPT:

A receipt for money is not strictly a document of release. It is an acknowledgment of the amount received and which was payable by the person in whose favour the receipt is used. It results in discharge or release of liability but by itself it is not a document of release.

The distinction between a Receipt and a release is – that the release extinguishes the claim, and, when given, in itself annihilates the debt; but a receipt is only evidence of payment, and if the proof be that no payment was made, it cannot operate as evidence of payment against such proof.

A “release” extinguishes a pre-existing right, while a “receipt” is mere evidence of a fact.

RELEASE V/s. DISCLAIMER:

A disclaimer is a negative form of release and so is renunciation. In a disclaimer, the person disowns his interest in a property though he has an interest in the property, but in a release the releasor admits that he has an interest in property, but he releases it that is he transfers it to the releasee. But even a disclaimer in effect and substance is a release. When a person disclaims his interest in the property, in fact, that interest accrues for the benefit of the person in whose favour he disclaims and the interest of the latter is thereby augmented. It is in substance nothing but a transfer.

A property, particularly immoveable, can never be automatically or notionally transferred without a document of transfer except when the transfer is by a legal fiction, like transfer of property by heirship. A release can be made by all or by one of two or more joint tenants but disclaimer which would amount to a simple renunciation of the beneficial interest under the joint tenancy of the person making the disclaimer with the consequences that the interest would be undisposed of, cannot be made by one joint tenant alone though the purported disclaimer may be construed as a release in favour of the other joint tenants.

RELEASE V/s. CONVEYANCE/ GIFT/ EXCHANGE

A release in fact may amount to a conveyance or a gift or an exchange. If a person releases his vested right or interest in a property for a consideration, it is nothing but conveyance or sale. If he releases his vested interest without consideration but only for natural love and affection it will amount to a gift. If he releases his interest in one property in favour of another in consideration of that other person releasing his interest in another property in favour of the former, the transaction is nothing but an exchange or partition.

To distinguish between a release deed, or a gift deed or a sale-deed, the decisive factor is the actual character of the transaction and precise nature of the rights created by the instrument. The essential ingredients of release deed are that there should already be a legal right in the property vested in the release and the release should operate to enlarge that right into an absolute title for the entire property as far as the parties are concerned. Thus, there can be no release by one person in favour of another, who is not already entitled to the property as a co-owner. A release deed is valid not only when it is gratuitous. Thus, by the release there is no transfer of interest or title to another person, who has no pre-existing right in such property. A release, therefore, can only be made in favour of a person who has a pre-existing right or interest in the property. A release can feed title, but cannot transfer title. On the other hand, 'gift' is the transfer of certain existing movable or immovable property, made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of, the donee. For the said reason, the Hon’ble Rajasthan High Court held that even where one of the co-sharers of the joint agricultural land had simply renounced his claim in favour of another co-sharer in respect of the same agricultural land, the document in question would be release deed and not a gift deed.

For a transaction to assume a character of conveyance, what is necessary is, transfer of interest from one co-owner to another co-owner. As against this, the provision of Art. 52 of Schedule I of the Bombay Stamp Act stipulates that the release is that whereby person renounce a claim upon another person or against any specified property. It is well settled law in this regard that essential ingredients of release are that from the party by a legal right in the property vested in the releasee and the release should operate to enlarge that right into a absolute title for the entire property as far as the parties are concerned. There can be no release by one person in favour of another who is not already entitled in the property as co-owner. A release deed is valid not only when it is gratuitous, as

release deed can be validly executed also for some benefit accruing to the releasor simultaneously.

In the case of co-owners, each co-owner is in theory entitled to enjoy the entire property in part or in whole. It is not therefore necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he released his interest. The result of such a release would be the enlargement of the share of the other co-owner. A release can only feed title and cannot transfer title.

Relying on its this decision in the case of ***Asha Krishinlall Bajaj vs. Sub-Registrar of Assurances and Ors. (supra)*** and some other judgments of various courts, the Hon'ble Bombay High Court in one of its cases further held that it shall make no difference whether a person is having a defined share in the property or an undefined share in the property (as long as the interest is held jointly and there is no partition of the said interest among co-owners) and it can still be released in favour of another person. In such a case, share or interest of the other co-owner will be accelerated and acquire a larger share than what he was originally holding.

In order to classify as a release, the executant of the instrument having common or joint interest alongwith other should relinquish his interest which automatically results in the enlargement of the interest of others. But where he executes the document in respect of his share in favour of a particular co-owner, it cannot be treated as a release and must come within the definition of conveyance. However, contrary view has been consistently taken by the Delhi High Court in the case of ***Srichand Badiani Vs. Govt. of Delhi & Ors***. and in the case of ***Tripta Kaushik vs Sub Registrar VI-A, Delhi & Anr***. Wherein they have held that an instrument will be construed as a release deed even if the relinquishment is in favour of one of the co-owners and not all the remaining co-owners.

The Hon'ble Delhi High Court in the case of ***Tripta Kaushik vs Sub Registrar VI-A, Delhi & Anr*** has laid down the test for determining whether the instrument can be considered as a Release/ Relinquishment Deed. The relevant para. of the said Judgment is reproduced hereinbelow:

> *"30. From a reading of the above judgments, the test to determine whether an instrument can be considered as a Release/Relinquishment Deed can be summarized as under: -*
>
> *a. In determining whether the document is a release or Gift/Conveyance, the nomenclature used to describe the document or the language which the party may choose to employ in framing the document, is not a decisive factor. What is decisive is the actual character of the transaction intended by the executants;*
>
> *b. Determination of the nature of the document is not a pure question of law;*
>
> *c. Where a co-owner renounced his right in a property in favour of the other co-owner, mere use of word like "consideration" and "transfer" would not affect the true character of the transaction;*
>
> *d. What is intended by a Release Deed is the relinquishment of the right of the co-owner;*
>
> *e. Co-ownership need not be only through inheritance, but can also be through purchase;*
>
> *f. Where the relinquishment of the right by the co-owner is only in favour of one of the co-owner and not against all, the document would be one of Gift/Conveyance and not of "release"."*

RELEASE VS. SURRENDER

A surrender is of a nature directly opposite to a 'release' for as that operates by the greater estate's descending upon the less, a 'surrender' is the falling of a less estate into a greater.

A surrender, for example, of a lessee's interest is not considered as a transfer but the falling or merging of the lesser interest into a greater one. Similarly, If the owner of a life estate like a widow under old Hindu Law dies, the estate comes to an end by fiction of law but if a life estate owner voluntarily surrenders his/ her life interest it is not a transfer of the life interest. However, in case of release or relinquishment there will be transfer of title in the property.

POINTS TO KEEP IN MIND WHILE DRAFTING DEED OF RELEASE: -

A deed of release should be drafted either simply as a deed poll, or as a deed to which both the releasor as well as the person in whose favour the release is made are made parties. A deed of release should be drafted generally in the same form as deeds of transfer. However, if a deed is bilateral it may be construed to be a gift, while a unilateral release cannot amount to a gift. One may refer to the points given in Mogha's Indian Conveyancer for drafting a Release Deed, summation of the same is as under:

1. Parties: All persons interested, whether as beneficiaries, or as trustees, or otherwise, in the subject of the release should, as a general rule, be made parties to the deed and should execute the deed. When there are several co-promisees/ co-mortgagees/ co-partners/ co-sharers, all must join while executing a release.

2. Recitals: The recitals in a release deed should extensively and precisely show the circumstances upon which the release is based. This is necessary as the general words of release will be controlled by the recitals.

3. Consideration: As discussed hereinabove, for a deed to be construed as a release deed the presence of consideration is not sine qua non. Unless there is a definite monetary consideration (in which case the same should be mentioned, and its receipt should be acknowledged), it is usual to express a release as made in consideration "of the premises", i.e. of the facts stated in the recitals.

4. Operative Words: No special words are necessary to be stated, so long as the intention is clearly expressed. The words in general used are "release", "discharge" "relinquish". "give up", etc. Release of a per son or his property from "all suits, proceedings. claims and demands", generally extinguishes all rights of action, titles, conditions, etc., then existing.

5. Execution: The deed should be executed by all releasors. If some do not sign, it would ordinarily not be binding on them unless there is anything to indicate that it was intended to bind them. In all cases, in which there is an apprehension that some persons will not execute the deed, it should be provided that non-execution by any party should not affect its operation as against those who execute it. Where there are several co-promisors, a release of one does not discharge the others; therefore, if it is intended to discharge all, the release should be of all the co-promisors, whether they are all made parties to the deed or not.

6. Stamp duty and registration charges: Discussed in detail hereinbelow.

REGISTRATION OF RELEASE DEED

A title once vested can be divested only by a registered conveyance or one or the other means allowed by law. It cannot pass by admission, relinquishment or disclaimer when law requires a deed. Any person who has an interest in any immoveable property cannot release it orally or by an unregistered deed, because such a release would amount to either a conveyance (if it is for consideration) or exchange, or a gift if it attested by two witnesses and which if not so attested itself would be invalid as a gift under the Transfer of Property Act. A release of any interest in any immoveable property is nothing but a transfer of that interest and would fall within one or the other of the transfers recognized by the Transfer of Property Act. A Deed of Release is only a form of document in conveyancing. But it is now established that the document is not to be construed by its name but by its contents or substance.

As per Section 17(1)(b) of the Registration Act, 1908, a release must be registered when the amount of claim to, or interest in, immovable property which is extinguished is of the vlue of Rs.100 or upwards. If the release is of a right in movable property, or from a personal obligation or, is relinquishment of a personal right, it need not be registered.

It is pertinent to note that the fact that a Deed of Relinquishment or Release or Surrender of any interest in an immoveable property requires registration under Section 17(1) of the Registration Act, 1908 (16 of 1908) shows the intention of the legislature to treat such a document as a document of transfer.

Registration Charges in the State of Maharashtra are 1% of the total cost for the properties priced below Rs.30 lakhs and capped at Rs.30,000/- for properties priced above Rs.30 Lakhs

STAMP DUTY ON RELEASE DEED

1. Article 55 of the Schedule I of the **Indian Stamp Act, 1899** deals with stamp duty on the Instrument of Release. The said Article 55 is reproduced hereinbelow:

Description of Instrument (1)	Proper Stamp Duty (2)
55. RELEASE, that is to say, any instruments (not being such a release as is provided for by section 23A) whereby a person renounces a claim upon another person or against any specified property—	
(a) if the amount or value of the claim does not exceed Rs. 1,000;	The same duty as a Bond (No. 15) for such amount or value as set forth in the Release. Five rupees.
(b) in any other case.....	The same duty as a Bond (No. 15) for the amount of the loan secured.

2. In the **Union Territory of Delhi,** Article 55 of the Schedule IA of the Indian Stamp Act, 1899 deals with Release Deed which is as under: -

Description of Instrument (1)	Proper Stamp Duty (2)
55. RELEASE, that is to say, any instruments (not being such a release as is provided for by section 23A) whereby a person renounces a claim upon another person or against any specified property—	
(a) if the amount or value of the claim does not exceed Rs. 1,000;	The same duty as a Bond (No. 15) for such amount or value as set forth in the Release.
(b) in any other case.....	One hundred rupees

3. Similarly, in the **State of Maharashtra,** the stamp duty applicable to release deed is also provided in Article 52 of Schedule I to the Maharashtra Stamp Act, 1958 and the same is as under: -

Description of Instrument (1)	Proper Stamp Duty (2)
52. RELEASE, that is to say, any instrument (not being an instrument as is provided by section 24) whereby a person renounces a claim upon other person or against any specified property, —	
(a) if the release deed of an ancestral property or part thereof is executed by or in favour of brother or sister (children of renouncer's parents) or son or daughter or son of predeceased son or daughter of predeceased son or father or mother or spouse of the renouncer or the legal heirs of the above relations without consideration in any form.	Two hundred rupees.
(b) in any other case.	The same duty as is leviable on a conveyance under clause (a), (b), or as the case may be (c), of Article 25 on the market value of the share, interest, part or claim renounced.

4. In the **State of Gujarat,** the stamp duty applicable to release deed is also provided in Article 49 of Schedule I to the Gujarat Stamp Act, 1958 and the same is as under: -

Description of Instrument	Proper Stamp Duty
49. RELEASE- that is to say, any instrument (not being such a release as is provided for by section 24) whereby a person renounce a claim upon another person or against any specified property-	
(a) if the release deed of an ancestral property or part thereof is executed by or in favour of brother or sister (children of renouncer' s parents) or son or daughter or son of predeceased son or daughter of predeceased son or father or mother or spouse of the renouncer or the legal heirs of the above relations;	One hundred rupees.
(b) in any other case	The same duty as is leviable on a conveyance under article 20 for the amount of consideration or, as the case may be, market value of the share, interest, part or claim renounced in immovable property whichever is greater.

5. In the **State of Karnataka,** Article 45 of Schedule to the Karnataka Stamp Act, 1957 deals with Release Deeds and same is reproduced hereinbelow: -

45. Release, that is to say, any ins-trument (not being such a release as is provided for by section 24,) whereby a person renounces a claim upon another person or against any specified property:	
[(a) where the release is not between the family members	The same duty as a Conveyance under Article No.20(1) on the market value of the property or on the amount or value of claim or part of claim renounced, as the case may be (which is the subject matter of release) or consideration for such release, whichever is higher.
(b) Where the release is between the family members Explanation.- family in relation to a person for the purpose of clause (b) means husband, wife, son, daughter, father, mother, brother, wife / children of predeceased brother, sister, husband/ children of predeceased sister, wife of a predeceased son and children of a predeceased son or predeceased daughter.	(i) If the property is situated within the limits of Bangalore Metropolitan Regional Development Authority or Bruhat Bangalore Mahanagara Palike or City Corporation …… Rupees five thousand; (ii) If the property is situated within the limits of City or Town Municipal Council or Town Panchayat area ……. Rupees three thousand; (iii) If the property is situated within the limits other than the limits specified in items (i) and (ii) …….. Rupees one thousand; Provided that, if the property is situated in any of the combinations of limits, mentioned in items (i), (ii) and (iii) above the duty payable shall be the maximum of the duties specified in items (i), (ii) and (iii) above.
(c)Release of mortgage rights or lien	Same duty as bond (No. 12) subject a maximum of rupees one hundred

6. In the **State of Rajasthan,** Article 48 to the Schedule to the Rajasthan Stamp Act, 1998 and the same is reproduced hereinbelow for ready reference:

48. Release, that is to say any instrument, (not being such a release as is provided for by section 26(2) whereby a co-owner, co-sharer or coparcener renounces his interest, share, part or claim in favour of another co-owner, co-sharer or co-parcener	
(a) If the release deed of an ancestral property or part thereof is executed by or in favour of brother or sister (children of renouncer's parents) or son or daughter or son of predeceased son or daughter of a predeceased son or father's sister or son of predeceased brother or mother's brother or sister's son or sister's daughter or father or mother or spouse of the renouncer	1.5 percent of the amount equal to the market value of the share, interest, part or claim renounced.
(b) in any other case.	The same duty as on conveyance (No 21) for the amount equal to the market value of the share, interest, part or claim renounced.

As per Section 29 of the Indian Stamp Act, in absence of a Contract, stamp duty is payable by the person making or executing the deed i.e. the Releasor.

RELEASES & RELINQUISHMENTS FORMATS

Form No.1

Release or Relinquishment of an Interest in Immovable Property

This DEED OF RELEASE/ RELINQUISHMENT is made and entered into at _____ on this ….. day of..... 20.... between

Mrs. ABC, W/o _____, age ___ years, Indian Inhabitant, residing at _____, hereinafter referred to as the **"Releasor"** (The expression shall unless it be repugnant to the context or meaning thereof, be deemed to mean and include her heirs, legal representatives, administrators, successor, executors, nominees and assigns) of the One Part

and

Mr. XYZ, S/o _____, age ___ years, Indian Inhabitant, residing at _____, hereinafter referred to as the **"Releasee"** (The expression shall unless it be repugnant to the context or meaning thereof, be deemed to mean and include her heirs, legal representatives, administrators, successor, executors, nominees and assigns) of the Other Part.

WHEREAS

A. The Releasor and the Releasee, who are mother and son by relation, are joint owners of the immovable property situate at _____, hereinafter referred to as the **"said Property"** and more particularly described in the Schedule hereunder written. The Releasor and the Releasee have inherited the said Property from their husband/ father, Late Mr. _____.

B. The Releasor does not desire/ wish to have interest or share in the said Property as she is married, well placed in life and she has already received sufficient amounts in different forms from her father and therefore, the Releasor desires to release all her share, right, title and interest in the said Property so as to enable the Releasee to enjoy the same alone or deal with it as he likes.

NOW THIS DEED WITNESSETH that in the premises and out of natural love and affection for her son i.e. the Releasee, the Releasor hereby renounces/ releases and quits claim to all her share, right title and interest claim and demand in the said Property described in the Schedule hereunder written unto and in favour of the Releasee to the intent and purposes that the Releasee will be sole owner of the said Property.

IN WITNESS WHEREOF the Parties hereto put their respective hands the day and year first hereinabove written.

THE SCHEDULE ABOVE REFERRED TO
X X X X X

Signed and delivered by the)

withinnamed Releasor…)

Mrs. ABC)

In the presence of…)

1.

2.

Signed and delivered by the)

withinnamed Releasee...)

Mr. XYZ)

In the presence …)

1.

2.

Form No. 2

Release-Deed or Relinquishment-Deed of share in Immovable Property

This **Release Deed/ Relinquishment Deed** is made & executed at Mumbai on this ____ day of _____, 20... by Smt. ABC, W/o _____, age ___ years, Indian Inhabitant, holding PAN: _____, residing at _____, (having 1/4th Share), hereinafter called the **"Releasor"**

IN FAVOUR OF

(1) Shri. _____, S/o _____, age ___ years, Indian Inhabitant, holding PAN: _____, residing at _____, and (2) Shri. _____ S/o _____, age ___ years, Indian Inhabitant, holding PAN: _____, residing at _____, (having 3/4th Share) hereinafter called the **"Releasees".**

The expressions the RELEASOR and the RELEASEES, herein used, shall unless it be repugnant to the context or meaning thereof be deemed to mean and include their legal heirs, legal representatives, administrators, successor executors, nominees and assigns of their respective Part.

WHEREAS the Releasor (having 1/4th Share) and the RELEASEES (having 3/4 Share) are the joint owners of Plot of land bearing CTS No. _____, area admeasuring ___ Sq. Mtrs. Situated in _____ (hereinafter referred to as the "said Property") and more particularly described in the schedule hereunder written.

AND WHEREAS the Parties hereto are related to each other as Mother and Sons.

AND WHEREAS the Releasor wants to relinquish and release, disclaim and give up all her right, titles and interests in her entire 1/4th Share in the said Property in favour of the Releasees out of her natural love and affection towards the Releasees being her real sons and without any monetary consideration.

NOW THIS RELEASE DEED WITNESSETH AS UNDER: -

1. That the Releasor do hereby release, relinquish, disclaim and give up all her right, titles and interests in respect of the said Property in favour of the Releasees absolutely and forever.
2. That the Releasor hereby assures the Releasees that the said share in the said Property, hereby released, is free from all sorts of encumbrances viz. sale, gift, mortgage, dispute, court stay, acquisition, notification etc.
3. That the Releasor now admits that she has been left with no right, title, interest or concern of any nature in the said Property, and the Releasees have become the absolute owner of the same with right to transfer the same by way of sale, gift, mortgage, release, lease or otherwise to the prospective buyers.
4. That this Release Deed shall be binding upon the legal heirs and successors of the Releasor.
5. That the Releasor have executed this Release Deed voluntarily and free will, without any coercion or outside pressure in his/her full sense.
6. That it is agreed by the Parties that it shall be responsibility of the Releasees to bear and pay stamp duty and registration charges on this Deed.

IN WITNESS WHEREOF, the Releasor and the Releasees have executed this Release Deed at the place, day, month and year, first mentioned above, in the presence of following witnesses:

WITNESSES: -

RELEASOR

1.

2.

RELEASEE

Form No. 3

Release of a Claim for Maintenance out of a bequeathed Property.

This **DEED OF RELEASE** is made at _____ on this ____ day of _____ 20___ between

Smt. ABC, age ___ years, Indian Inhabitant, holding PAN _____, residing at _____, hereinafter referred to as **"the Releasor"** (which expression shall unless it be repugnant to the context or meaning thereof, be deemed to mean and include her heirs, legal representatives, administrators, successor, executors, nominees and assigns) of the One Part

and

(1) Shri. XYZ, S/o _____, age ___ years, Indian Inhabitant, holding PAN: _____ and (2) Shri. EFG, S/o _____, age ___ years, Indian Inhabitant, holding PAN _____, both residing at _____, hereinafter jointly referred to as, **"the Releasees"** and individually be referred to as **"the Releasee No.1"** and **"the Releasee No.2",** respectively (which expression shall unless it be repugnant to the context or meaning thereof, be deemed to mean and include their respective heirs, legal representatives, administrators, successors, executors, nominees and assigns) of the Other Part;

WHEREAS-

1. The Releasor is the widow of a deceased son, Shri. _____ of the late father of the Releasees.
2. By his Last Will and Testament dated _____ the father of the Releasees, the Late Mr. ..... had provided for a monthly payment out of his property of sum of Rs. ..... by way of maintenance to the Releasor and the said claim for maintenance is a charge on the Property being _____ situated at _____ (hereinafter referred to as the **"said Property")** and more particularly described in the Schedule hereunder written.
3. That the said Property has been bequeathed to the Releasees under the said Last Will and Testament dated _____.
4. To the satisfaction of the Releasor, the Releasees have made a separate provision for annuity under which the Releasor will be entitled to receive the monthly sum by way of maintenance during her lifetime and in consideration thereof the Releasor has agreed to release the charge on the said Property on the terms and conditions mentioned hereinafter.

NOW THIS DEED WITNESSETH that in the premises the Releasor hereby releases and quits claim to and charge over the said Property, more particularly described in the Schedule hereunder written, freed and absolutely discharged of and from all her right to claim and recover maintenance from the said Property and all her right, title and interest by way of charge or otherwise in or to the said Property whatsoever.

IN WITNESS WHEREOF the Parties hereto put their respective hands the day and year first hereinabove written.

THE SCHEDULE ABOVE REFERRED TO

X X X X X

Signed and delivered by the)

withinnamed Releasor….)

Smt. ABC)

In the presence of....)

1.

2.

Signed and delivered by the)

withinnamed Releasee No.1)

Shri. XYZ)

In the presence of....)

1.

2.

Signed and delivered by the)

withinnamed Releasee No.2)

Shri. EFG)

In the presence of....)

1.

2.

Form No. 4

Release of a Life Estate created by Trust-Deed

This **DEED OF RELEASE** is made at _____ on this ____ day of _____, 20__ between

Mrs. ABC, W/o/ Wd/o _____, age ___ years, Indian Inhabitant, holding PAN: _____, residing at _____, hereinafter referred to as **"the Releasor"** (which expression shall unless it be repugnant to the context or meaning thereof, be deemed to mean and include her heirs, legal representatives, administrators, successor, executors, nominees and assigns) of the One Part

and

Mr. XYZ, S/o _____, age ___ years, Indian Inhabitant, holding PAN: _____, residing at _____, hereinafter referred to as **"the Releasee"** (which expression shall unless it be repugnant to the context or meaning thereof, be deemed to mean and include his heirs, legal representatives, administrators, successor, executors, nominees and assigns) of the Other Part

WHEREAS

A. By a Deed of Trust dated the ____ day of _____, _____ made by and between Mr. EFG therein called 'the Settlor' of the One Part and (1) Mr. LMN and (2) Mr. PQR therein called 'the Trustees' of the Other Part and registered under Document No./ S. No. …. by the Sub-Registrar of Assurances at …….. on _____ (hereinafter referred to as the **"said Trust Deed"**), the said Settlor granted unto the Trustees his immovable property described in the Schedule thereunder written (being the same as described in Schedule hereunder written) To Hold the same unto the said Trustees upon the Trust namely that the net income of the Property shall be paid to his wife (i.e. the Releasor), during her life time and until her death and on her death the said property shall be transferred to the Releasee (Son) absolutely and thereupon the Trust will come to an end.

B. The Releasor desires to surrender her life interest in the said Property created by the said Trust Deed for several considerations moving unto her and on her doing so the said Trustees have agreed to transfer the said property to the Releasee who is the Son of the Releasee.

NOW THIS DEED WITNESSETH THAT in the premises aforesaid, the Releasor hereby releases, quits, surrenders and/ or assigns all that life interest of the Releasor in the said Property described in the Schedule hereunder written, created by the hereinbefore said Trust Deed as aforestated and the income therefrom, to the intent that such interest and claim shall merge and be extinguished and that her entire interest in such property as beneficiary or otherwise shall become immediately vested in title and possession of the Releasee

The Releasor requests/ directs the Trustees under the said Trust deed to act upon this Release Deed.

The Releasor has executed this Release Deed voluntarily and at her own free will.

IN WITNESS WHEREOF the Parties hereto put their respective hands the day and year first hereinabove written.

THE SCHEDULE ABOVE REFERRED TO

X X X X X

Signed and delivered by the)

withinnamed Releasor)

Mrs. ABC)

In the presence of)

1.

2.

Signed and delivered by the)

withinnamed Releasee)

Mr. XYZ)

In the presence of)

1.

2.

Form No. 5

Mutual Releases (General Clause)

The Parties hereto mutually release each other from all sums of money accounts, actions, proceedings, claims, and demands whatsoever which either of them at any time had or has till this date against the other for or by reason or in respect of any act, cause matter or thing.

WILLS and CODICIL

Ms. Nidhi Gajkumar Dotiya, *Advocate*

In this discussion, I intend to throw an insight into the concept of basics underlying “Will”, laying emphasis on certain important aspects one should keep in mind while preparing a Will.

A “Will” is a document executed by a person bequeathing his estates as per his choice.

It is worth quoting Ralph Emerson, ***“When it comes to divide an estate, the politest men quarrel.”*** It is apt. The battle is fought royally by the surviving heirs and it is at this stage one realizes what are the safeguards to be taken while drafting a Will. It is true, a Will can be scribbled on a piece of paper, it is also true in certain circumstances Will could be Oral but with their own conditions.

A person, male/female, during his/her lifetime acquires/purchases immovable and/or movable property, for his/her and family’s needs and after his/her death, the same property is required to be vested in someone, as per his desire and this act of transmission of the property, known as “Succession”, is not often going to be easy for the successors. It’s a process through which the ownership of the property is bequeathed from the deceased person to the beneficiaries mentioned in the Will. There may arise many ifs and buts before the formalities are to be completed. A Will could be challenged on various grounds.

I would take this opportunity to give a brief outline on various precautions that are necessary to be taken while preparing a “Will”, which, while prepared during lifetime comes into life after the death of the testator.

DEFINITION OF WILL

Section 2 (h) of the Indian Succession Act, 1925 defines the expression 'Will' as under:

> *"'Will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."*

The essential characteristics, thus of a Will are:

- disposition must operate after the death of the testator and
- it should be revocable during the life of the testator.
- A document which is plainly intended to operate immediately on it's execution can never be construed as a Will.

Will is thus basically a legal document whereby the person writing it expresses his/her strong desire to hand over his self acquired property to the person/people he wishes to gift/bequeath it. Wills can be written in any language and also on any piece of paper. It need not be written on any stamp paper and/or legal paper and need not be stamped or registered. Will does not require any expert drafting, save and except the fact that the intention of the testator is clear as how the property needs to be divided which should be spelt out in clear terms. A person making the will is called the testator or testatrix as the case may be.

The Law of Testamentary Succession (both testate and intestate), i.e. law relating to Wills, of the Hindus, Christians, Parsis, Jews and others (other than Muslims) is almost uniformly contained in the “Indian Succession Act, 1925”, with some modifications in respect to Hindus. For the purposes of Law, the word Hindus also includes Sikhs, Buddhists and Jains besides the Hindus and a Will made by them is governed by the provisions of the Indian Succession Act, 1925. In case of Mohammedans, Mohammedan personal law would apply to both testate as well as intestate succession, except under certain circumstances.

CONTENTS OF WILL

The main contents of a valid Will are:

1. The writing; a Will can be handwritten on any piece of paper or can be typed.
2. Marital status of the testator;
3. Revocation of all previous Wills and codicils executed by the testator;
4. The testator, who is of sound mind and has adequate legal and mental capacity to execute the Will;
5. signature of the testator who is major and of sound mind;
6. Legal heirs
7. List of properties;
8. Disposition of his property/ies, movable and/or immovable, to be bequeathed and to whom.
9. Signed and attested by two witnesses who have witnessed the testator signing the Will though they need not know the contents of the Will;
10. Full name and address of the attesting witnesses;
11. Appointment of two or more executors jointly or in the alternative;
12. The beneficiaries, the testator wishes to hand over his property, can either be his legal heirs or can also be any other person apart from legal heirs.
13. However, the beneficiaries can't attest the Will; else bequest will be termed void;
14. Any scoring or corrections made in the Will has to be signed by the testator along with the 2 witnesses to show the authenticity of the scoring and the corrections made in the Will;
15. The residuary clause mentioning all the residuary bequest of all left out properties.
16. Registration of the Will is not mandatory under the law. One may register his Will under the provisions of the Indian Registration Act, 1908, though registration is not mandatory.
17. It is at the discretion of the testator, if he wishes to register the will at the sub registrar office after which it is kept in the custody of the Registrar. The document of Will does not require to be stamped.
18. Medical certificate of such doctor - It is generally a safe practice that, the 'document of Will' is to be appended with the medical certificate of such doctor, who, after the physical examination of such testator, certifies that, such person is in 'good and sound state of mind', although he may not be in 'physically sound condition' as the case may be.

MANDATORY REQUIREMENTS IN A WILL

Under Section 63 of the Indian Succession Act, 1925, the following are the mandatory points to be complied with while making a Will:

a) The testator shall sign or affix his mark to the Will, or it shall be signed by some other person (on his behalf) in his presence and by his direction; b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark; and each of the witnesses will sign the Will in the presence of the testator, but it is not necessary for more than one witness to be present at the same time, and no particular form of attestation will be necessary.

The beneficiaries of the Will should not be attesting witnesses of the Will (otherwise the bequest in their favour would be void).

The wording of the Will must be such that the intentions of the testator can be known.

IMPORTANCE OF A WILL

Law grants the owner 'full freedom' to bequeath his property, after his death, to any person, such as, to his wife, daughter, servant, friend, a school, a hospital, a temple, a private/public institution, organisation, charitable institutes, trusts etc. Many a times a person for reasons better known to him does not wish to bequeath his hard earned property or self-acquired property to any of his relatives, he may resort to exercise his choice as to whom to bequeath who may include friends or third party not related to the testator in any manner. Such Will cannot be challenged as unreasonable or arbitrary even if it excludes the testator's legal heirs, but such Will may be open to challenge in the court of law on the ground of coercion or undue influence or mental incapacity or that it is forged.

Thus the question that immediately comes to one's mind is, who are the persons capable of making Will. This aspect has been dealt with in Section 59 of Indian Succession Act, which reads as under :

> *59. Person capable of making Wills.-- Every person of sound mind not being a minor may dispose of his property by Will.*
>
> *Explanation 1. - A married woman may dispose by Will of any property which she could alienate by her own act during her life.*
>
> *Explanation 2. - Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.*
>
> *Explanation 3. - A person who is ordinarily insane may make a Will during interval in which he is of sound mind.*
>
> *Explanation 4. - No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.*
>
> *Illustrations (ii) and (iii) of the said Section is worth reproducing.*
>
> *(ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.*
>
> *(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a Will. This is a valid Will."*

The capability to understand the nature of the instrument at the time of making the instrument assumes importance.

Section 61 is worth mentioning as it discusses the effect of Will obtained by fraud or coercion or importunity.

> *61. Will obtained by fraud, coercion or importunity. - A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.*
>
> The illustrations to the said section guides a person better to understand the above intricacies.

At this stage it is necessary to refresh one's mind by inviting the attention to Section 11 of Indian Contract Act, 1872, which reads as under:

> *11. Who are competent to contract — Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.*

Having seen the above provisions, the question that comes to one's mind is what happens if the person dies without making the Will, his or her property shall devolve by effect and operation of Law i.e. as per the Rules of

Inheritance, upon his own (all) legal heirs. If Hindus, the line of succession is laid down as class of heirs u/s. 8 of The Hindu Succession Act, for Parsis, Chapter III from section 50 to 56 of Indian Succession Act 1925 and for Christians, chapter II from section 31 to 49 of Indian Succession Act 1925. Mohammedans are governed by the Mohammedan law and as per their personal law, they can make a Will with respect to only 1/3 of their estate and rest 2/3 of their estate will be distributed to the legal heirs as per their personal law.

A testator is at the liberty to execute different Wills for different properties and the same shall be valid Wills but it is always desirable to execute only one Will pertaining to all the properties, movable and immovable to avoid legal complications. Further, a testator may make many Wills as many times, as he desires, but it is the last Will which shall be considered as a valid Will, revoking all the earlier Wills. Normally, when a Will is drafted, it starts with the express recital that all the previous Wills are revoked, even if this express recital is not mentioned in the Will, it is implied that all the earlier Wills executed by the testator shall stand revoked with the making of the new Will if the new Will deals with the same properties differently than as dealt with in earlier Wills.

TESTAMENTARY AND INTESTATE SUCCESSION:

The law of succession is divided into two parts - Testamentary and Intestate succession: When a testator makes a Will bequeathing his property to the beneficiaries, it is governed by the Testamentary Laws and when there is no Will made by the deceased person, Intestate Laws come into force i.e. the Rules of Inheritance and the property of the deceased person is distributed to his legal heirs as per the Indian Succession Act or Hindu Succession Act or the relevant personal laws applicable to the testator subject to any restrictions on disposing of the property by Will under any other law such as Tenancy Law, etc.

TYPES OF WILL

Unprivileged and privileged wills: Privileged Wills are those Wills that can only be made by members soldiers employed in expedition or engaged in actual warfare or an airman or any mariner being at sea. Such Wills can be made orally or if written, need not be signed or attested. Any other Will, which is not a privileged Will is an Unprivileged Will which can be made by the testator.

Joint Will: A joint Will is a Will that is jointly executed by two or more persons, usually a married couple, which combines the parties' last will and testament, generally in a single document disposing of their separate property to the same or different legatees. A Joint Will is a legal contract that cannot be changed or revoked by one party alone. The testators may revoke the will during their lifetime through mutual consent. However, once one of the testator passes away, the Joint Will cannot be revoked. Even if the surviving spouse remarries after the death of the other spouse, the terms of the Joint Will remains unchanged and the surviving spouse must comply with them, this being one of the biggest potential problem of making a Joint Will. Therefore nowadays joint Will is not preferable.

For example, when the surviving spouse remarries another person and wants to leave some of the assets to his or her stepchild, the Joint Will prevents the surviving spouse to leave any part of the estate to that stepchild. Another problem may arise if the surviving spouse wants to disinherit the child. Even if the spouses' child abandons the family and stays disconnected with the surviving spouse, the surviving spouse still cannot disinherit the child without an approval of the deceased spouse. Moreover, the surviving spouse/testator may be bound with the terms of the Joint Will for a long time. Say that one of the spouses dies soon after their marriage. Now, the surviving spouse/ testator will be bound with the terms of their Joint Will forever as the surviving testator cannot revoke the Joint Will.

Typically, a Joint Will provides that, when one spouse dies, the survivor will inherit everything, and when the second spouse dies, everything will go to the children. Most Joint Wills also contain a provision stating that neither spouse can change or revoke the Will alone, which means that the Will cannot be changed after the first spouse dies. A conventional Will is always revocable. But a Joint Will is a binding legal contract, which cannot be revoked or changed after one spouse has died. However, a Joint Will appears to fulfil both, many couples' wishes and address some of their key concerns. First, as many couples want, it provides that the survivor will inherit all the property of the first spouse. Second, it's then assured that no matter what happens after that, the children will eventually inherit everything. For example, if the survivor remarried, the children wouldn't have to worry that their inheritance would go to their new stepparent. Instead, because the terms of the Joint Will would be locked in, they would be guaranteed to inherit.

The advantage of Joint Will is that a Joint Will allows for the property to pass first to the other spouse and then to the children and thereby prevents the property from passing to someone unrelated to the family. Spouses can mutually consent to revoke a Joint Will during their lifetime.

The disadvantages of a Joint Will are that it is considered a legally binding contract. When one spouse dies, the surviving spouse, under the contract, remains bound by the terms of the Will and cannot alter or revoke it. The surviving spouse may not be able to alter the Will even to leave an inheritance to a spouse they remarry, or to the spouse's children. The surviving spouse also may not be able to remove any property in the Joint Will and put that property into a new or different Will. Nor will the surviving spouse be able to sell any Joint Will property, since that property, by law, is to go to the couple's children.

Void Bequest – section 112 of the Indian Succession Act very clearly defines void bequest as *"where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void."* If the testator bequeaths a property to his grandson but at the time of the death of the testator, such grandson is not born, the bequest is void.

Onerous Bequests - Section 122 of the Indian Succession Act 1925 defines Onerous bequests as "where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully." The Will cannot deal with the liability simplicitor. The testator, along with bequeathing the property may saddle the legatee with the liabilities like mortgages, debts etc. too which he had incurred during his life time. Such a Will is called onerous bequest and the legatee cannot refuse to accept the liabilities along with the legacy. However, if two bequests are distinct and independent, one with the liabilities and one without obligations, then the legatee has the liberty to refuse the one with the liabilities and obligations and accept the legacy, which is dealt in section 123 of the Act which reads as *"where a Will contains two separate and independent bequests to the same person, the legatee is at the liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous."*

WHO CAN BE WITNESS:

Any person is competent to attest the Will as witness or the eye witness who sees the testator sign the Will. Witnesses should be an adult, above 18 years of age. The only purpose of getting the Will attested by the witness is to ensure that the testator is of sound mind and in mental capacity to make the Will and thereby later can testify if ever the intention and or the state of mind is questioned. The witness merely witnesses the signature of the testator, is required to sign the Will in the presence of the testator after the testator signs and may and may not know the contents of the Will.

An executor is also competent to attest the will. However, section 67 of the Indian Succession Act 1925, provides that if the bequest if made to the witness attesting the Will or to his wife or husband, the bequest shall be void but the attestation will be valid. Further, a legatee (beneficiary) under a Will does not lose his legacy by attesting codicil which confirms the Will.

It is pertinent to note that while selecting the witness, the testator should keep in mind that the witness should 'outlive' the testator as the witness is required to verify the authenticity of the Will after the death of the testator. Further it is important that the witness should be 'trustworthy', not complete stranger, and does not have any vested interest or conflict of interest and whose name is not mentioned in the Will.

It is mandatory to have "minimum two witnesses" to attest the Will, however there is no upper limit to the same, for the best interest in case there is a doubt on the survival of any of the witnesses.

The 'execution of a Will' includes its attestation by witnesses, and so, if there is no attestation, the Will is not validly executed. It is absolutely necessary that, the 'attesting witness' should sign the document of Will.

LEGATEE/BENEFICIARY:

Is a person, organisation etc. to whom the property shall pass under the 'Will'. The testator can bequeath his property either to his legal heirs, friends or any third party/organisation etc he wishes to. Thus, the beneficiary/ legatee can be either the legal heirs of the testator or any other person or body/organisation the testator wishes to give his property to, including in the form of charity to any institutions etc.

BEQUEATH: THE ACT OF MAKING BEQUEST.

Bequest/Legacy: The property or benefits that is handed down, endowed or conveyed to someone under the Will, from the testator's estate to the beneficiary.

WHO IS AN EXECUTOR:

As per section 2(c) of Indian succession Act 1925, *an Executor means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided.* Thus, an executor is the one who is put in charge of the estate of the testator to carry out various directions and bequests contained in the Will. Further, an Executor is the one who, after the death of the testator, gets the Will probated from the concerned court, generally High Court, and administers the property to the bequeathed person.

Any person who is competent to contract and of sound mind can be appointed as an executor. However, the executor/s can also be the beneficiary of the Will. Generally wife and children are made the executors in the Will. There is no bar against a beneficiary becoming an executor. A person not residing in India can also be appointed as executor.

LAPSE OF LEGACY:

When the legatee or the beneficiary, does not survive or predeceases the testator, the legacy of such a legatee lapses on the death of the legatee also known as failure of legacy. Bequest under the Will only takes effect upon the death of the testator, which means that no one can claim any bequest till the testator dies. Therefore, if, at the time of the death of the testator, the legatee is not alive, then the legacy/bequest, given to such legatee lapses or fails.

In such circumstances, the subject property of the lapsed legacy will form the part of the residuary estate of the testator which will be included in the residuary clause of the Will. But when the Will does not contain the residuary clause, then such property shall be distributed within the legal heirs of the testator as per the rules of inheritance thereby treating that the testator died intestate pertaining to only that property which falls under the lapsed legacy.

If the testator, during his life time disposes of the property bequeathed to the legatee, and no longer owns such an asset, in such case also the legacy lapses or fails.

However, such legacy wont lapse on the death of the legatee, if the testator clearly mentions in his Will that such property shall devolve upon substituted legatee on the death of the original legatee during his lifetime, then such substitute legatee would take the bequest. This is called "bequest in alternative".

REVOCATION OF WILL:

The most outstanding feature of the Will is that it can be revoked at any time by the testator. Section 69 and 70 of the Indian Succession Act 1925 deals with the revocation of the Will wherein as per section 69, *every Will shall be revoked by the marriage of the maker of the Will, and as per section 70, no unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is required to be executed, or by burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.*

Thus, a Will can be revoked with the making of the subsequent Will subject to a separate clause stating to that effect that all the previous Wills, if any, shall stand revoked. However, if the subsequent Will does not revoke earlier Will, and when it is 'not' inconsistent with 'earlier Will', then any number of such Wills, whatever be their dates or form, can be admitted to probate, because 'all together' shall constitute the 'last Will' of the testator. Here, it is to be noted that, any 'invalid' subsequent Will cannot revoke earlier 'valid Will'.

Further, it is not necessary that the previous Will must be revoked with subsequent Will, if the testator does not intend to dispose of or bequeath his property by testamentary succession, then he can revoke his Will by a written declaration expressing his intention of revoking his earlier Will/s. Such a written declaration must be properly executed by such a person and attested by at least two witnesses

The other means of revoking his previous Will/s, in case the testator is in the custody of his original Will, is by simply burning, tearing or otherwise destroying' said original document.

LIVING WILLS:

A testamentary Will, aka a traditional last will and testament, is a legal document used to transfer a person's assets to beneficiaries **after his or her death.** However, A Living Will, also known as an 'advance directive', is a legal document that **specifies the type of medical care that an individual does or does not want in the event they are unable to communicate their wishes.**

For example an unconscious person suffering from a terminal illness or a life-threatening injury, has left behind a Living will, the doctors and hospitals will then consult the Living Will to determine whether or not the patient wants life-sustaining treatment, such as assisted breathing or tube feeding. But in the absence of a Living Will, a decision about medical care becomes the responsibility of the spouse, family members, or other third parties. These individuals may be unaware of the patient's desires, or they may not wish to follow the patient's unwritten, verbal directives. It is at this time that the Living Will comes into play.

Thus, **A Living Will is a legal document that empowers people to express their desire, in advance,** on how they want to spend the last days of their life. **It is an advanced directive** by an individual stating that they should not be put on artificial life support, if they slip into an incurable comma in the future.

The Living Will also gets activated when a patient/testator is no longer in a position to communicate his or her wish due to being in a vegetative state or a coma and is diagnosed with the condition as being irreversible. Making a Living Will ensures that an individual's right to die with dignity is protected. It saves the patient from going through futile treatments that only prolongs life, not saves it. It paves the way for a smooth and painless exit from the world with loved ones around. The Living Will also helps the family make a decision without any guilt, since the maker of the Living Will would have already decided for himself. Moreover, it protects the family from having to pay huge hospital bills on treatments. Thereby, saving them from living under financial burden for years to come.

Please note that the Living Wills and Advance Directives come into play only when one faces a "life-threatening condition" and is unable to communicate their desires for treatment. A living will addresses many of the medical procedures common in life-threatening situations, such as resuscitation via electric shock, ventilation, and dialysis. One can choose to allow some of these procedures or none of them. One can also indicate whether they wish to donate organs and tissues after death.

A Living Will only stipulates the type and levels of medical care one receives if incapacitated and for how long. It does not serve as the last Will and Testament whereby the property is bequeathed after the death. The Living Will only details the goals and wishes of a person in the event they can no longer care or make decisions for themselves.

In March 2018, the Supreme Court of India, passed a law on the right to die with dignity as a fundamental human right. This was materialized by allowing individuals to make their own LIVING WILL.

GUIDELINES SET BY THE SUPREME COURT TO MAKE THE LIVING WILL:

The Indian Supreme Court in the case of *"Common Cause (A registered society) Vs. Union of India and Another" [(2018 5 SCC 1]* had held to the effect that:

1. Who can execute the Advance Directive and how?

    1.1. The Advance Directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document.

    1.2. It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information.

    1.3. It should have characteristics of an informed consent given without any undue influence or constraint.

1.4. It shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

2. What should it contain?

2.1. It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.

2.2. It should be in specific terms and the instructions must be absolutely clear and unambiguous.

2.3. It should mention that the executor may revoke the instructions/authority at any time.

2.4. It should disclose that the executor has understood the consequences of executing such a document.

2.5. It should specify the name of a guardian or close relative who, in the event of the executor becoming incapable of taking decision at the relevant time, will be authorised to give consent to refuse or withdraw medical treatment in a manner consistent with the Advance Directive.

2.6. In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect to.

3. How should it be recorded and preserved?

3.1. The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC) so designated by the District Judge concerned.

3.2. The witnesses and the jurisdictional JMFC shall record their satisfaction that the document has been executed voluntarily and without any coercion or inducement or compulsion and with full understanding of all the relevant information and consequences.

3.3. The JMFC shall preserve one copy of the document in his office, in addition to keeping it in digital format.

3.4. The JMFC shall forward one copy of the document to the Registry of the jurisdictional District Court for being preserved. Additionally, the Registry of the District Judge shall retain the document in digital format.

3.5. The JMFC shall cause to inform the immediate family members of the executor, if not present at the time of execution, and make them aware about the execution of the document.

3.6. A copy shall be handed over to the competent officer of the local Government or the Municipal Corporation or Municipality or Panchayat, as the case may be. The aforesaid authorities shall nominate a competent official in that regard who shall be the custodian of the said document.

3.7. The JMFC shall cause to hand over copy of the Advance Directive to the family physician, if any.

4. Revocation or inapplicability of Advance Directive

4.1. An individual may withdraw or alter the Advance Directive at any time when he/she has the capacity to do so and by following the same procedure as provided for recording of Advance Directive. Withdrawal or revocation of an Advance Directive must in writing.

4.2. An advance Directive shall not be applicable to the treatment in question if there are reasonable grounds for believing that circumstances exist which the person making the directive did not anticipate at the time of the Advance Directive and which would have affected his decision had he anticipated them.

Having said this, we think it appropriate to cover a vital aspect to the effect the life support is withdrawn, the same shall also be intimated by the Magistrate to the High Court. It shall be kept in a digital format by the Registry of the High Court apart from keeping the hard copy which shall be destroyed after the expiry of three years from the death of the patient.

2.1. Our directions with regard to the Advance Directives and the safeguards as mentioned hereinabove shall remain in force till Parliament makes legislation on this subject."

CODICIL:

Section 2(b) of the Indian Succession Act defines codicil as *"an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will".*

Codicil, as defined, is an instrument made in relation to a Will. It has the effect of explaining, altering or adding to the dispositions made by a Will. By fiction of law, the codicil, though it may have been executed separately and at a place or time different from the Will, forms part of the related Will.

Thus codicil is nothing but a document amending or adding or altering the Will. It is executed in the same manner as the Will, i.e. attestation by two witnesses on the written document known as codicil signed by the testator. A codicil may revoke the Will, similarly a subsequent Will or codicil may revoke the codicil. The codicil does not repeat all the clauses mentioned in the previously executed Will but only makes alterations or additions to the earlier Will.

REGISTRATION OF THE WILL:

Registration of the Will is not mandatory. Even if the Will is registered, there is no stamp duty required to be paid. Even if, through the Will, immovable property is bequeathed, registration is not mandatory. The non-registration of the Will does not create a doubt on the genuineness of the Will. Registration of the Will only raises a strong presumption of the validity of the Will, where only a nominal registration fees is paid.

When the Will is registered under the Indian Registration Act 1908, the testator **MAY** keep the custody of the registered Will with the Registrar in a sealed cover. When so deposited, the Registering Officer will make a note of it and keep the envelop in a fire proof box. However, if the testator wishes to withdraw the sealed cover containing the Will from the Registrar, he has to make an application to the concerned Registrar under section 44 of the Registration Act. It is the testator's discretion to deposit the registered Will with the Registrar or not. He may keep the original Will in any bank or in a sealed cover with himself or with a person of his confidence.

WILL BY THE PARSI

The Indian Succession Act is applicable to Parsi, for both testate and intestate succession. For the testate succession, the same rules apply to Parsi. However, the rules in the case of intestate succession are governed under Part V chapter III. A Parsi intestate's property is distributed among his heirs in accordance with sections 51-56 of the Act.

In case of a Parsi dying after the commencement of the Act, a probate is necessary if the Will in question is made or the property bequeathed under the Will is situated within the "ordinary original civil jurisdiction" of Calcutta, Madras and Bombay.

WILL BY THE CHRISTIAN

Indian Christians, for both testate and intestate succession, are governed by the Indian Succession Act. However, the property of an intestate devolves upon his/her heirs, in the order and according to rules laid down under Chapter II, part V, sections 31 to 49 of the Indian Succession Act.

Sections 37 to 40 of the Succession Act, lays down the rules of distribution of the property of an intestate (after deducting the share of a widow, if the intestate has left a widow), where the intestate had died leaving lineal descendants.

Where the intestate has left no widow, his property shall go entirely to his lineal descendants and in the absence of lineal descendants, to those who are kindred to him (not being lineal descendants) in proportions as laid down in sections 41 to 48 of the Indian Succession Act.

However, it is not mandatory for a Christian to obtain probate of his Will.

Section 118 of the Indian Succession Act applies to only Christians but not Parsis.

WILL UNDER THE MUSLIM LAW

The principles of Mohammedan law remains mostly uncodified and thus there exists no statute or legislation that governs succession for Mohammedans.

Under the customary Muslim Personal law, a person cannot bequeath more than one-third of his property by Will and the balance two third of the property of the testator devolves according to the Shariat Law upon the legal heirs. If the bequest is in excess of one third, it would be void unless the heirs consent thereto after the death of the testator. But if the testator has married under Special Marriage Act, then he can Will away his entire property, and succession is governed by Indian Succession Act 1925, and not Muslim personal law. Once a Muslim comes into purview of Indian Succession Act, by virtue of marriage under Special Marriage Act, all rigours of Indian Succession Act would apply.

As per section 213(2) of the Indian Succession Act, a will made by a Muslim need not be probated if he/she is governed by the Indian Succession Act as an exception carved out for Muslims.

However, matters such as power to make the Will, nature of the Will, execution and attestation thereof, are governed by the Muslim Personal Law. Under the personal law, a Muslim can make a Will orally or in writing and no particular form is required for such writing. If the Will by a Muslim testator is in writing, it need not be attested by the witnesses. The intention of the Testator to make a Will must be clear and explicit and form is immaterial.

A Muslim woman can also make a Will.

A Khoja Mohammedan and Cutchi Menon may dispose of the whole of his property by Will. The construction of a Khoja Will is governed by Hindu Law. Similarly a Muslim married under the Special Marriage Act can also bequeath his or her entire property through Will.

FURTHER NOTES

Probate is obtained from the High Court where there is a Will involved.

Letters of Administration is obtained when no Will is made and the properties involved are movable and immovable properties. However, if no executor is appointed by the testator in his Will, then the beneficiary shall apply for Letters of Administration in the High Court.

Succession certificate is obtained only where there are movable properties.

CONCLUSION

Basically there are different stages concerning the Will, firstly, preparation which I have discussed above, death of the testator, enforcement of the Will and contesting the Will (Section 61 of the Act). I am sure the above discussion shall benefit the readers a lot at least to the effect that basic requisites in making a will are made to understand without any ambiguities.

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Leave and License Agreement

Advocate Loshika Bulchandani

A leave and license agreement is a legal document that enables one party to allow another party to use their immovable assets, i.e., property for a specific period without any change in the ownership of the asset. Leave and license agreements are commonly used among landlords and occupants in India especially in the housing segment. In the commercial realty segment, the use of Leave and License agreements is more common.

Leave and License Agreement: The legal definition

While various courts have from time to time elaborated on the legal concept, the basis of the leave and license agreement is found in the Indian Easements Act, 1882.

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would in the absence of such right be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license," reads Section 52 of the Indian Easements Act, 1882.

Under Section 53 of the Indian Easements Act, 1882, any person having a transferable interest in immovable property can grant a license consistent with his powers over the property. Under Section 54 of the Indian Easements Act, 1882, grant may be express or implied from the conduct of the grantor.

It is not only an owner who can grant a license but even a person who can transfer his interest in the property is also competent to grant the license.

The effect of a license by A to permit B to enter upon A's land or to use his premises for some purpose is in effect an authority which prevents B from being regarded as a trespasser when he avails himself of the license. Such a license may fall into one of the various classes. It may be a purely gratuitous license in return for which A gets nothing at all, e.g. a license to B to walk across A's field. Such a gratuitous license would be revocable by notice given by A to B.

There is yet a third variant of a license for value in which B gives consideration for the permission he obtains from A and which also constantly occurs as in the sale of a ticket to enter premises and witness a particular event, such as a ticket for a seat at a particular performance at a theatre or for entering a private ground to witness a sport. In this last class of cases, the implication of the arrangement is that the ticket entitles the purchaser to enter the premises and if he behaves himself to remain on the premises until the end of the event for which he has paid money to witness. The license in such a case is granted under contractual conditions, one of which is that a well behaved licensee shall not be treated as a trespasser until the event for which he has paid money to see is over and until he has reasonable time thereafter to depart from the premises.

The above classification of licenses into gratuituous licenses and licenses for value has been replaced by the new classification of mere licenses and contractual licenses. A mere license may be gratuitous or for value which does not create any legal interest in the property and is revocable by efflux of time as agreed upon or if earlier then by notice at any time and is revoked by the death of either party or by an assignment of the land over which the license is granted. A mere license is not assignable by the licensee.

Contractual licenses are governed by the terms of the contract and may create an interest in the property to the extent provided for by the terms of the contract. This may occur in cases where the subject matter of license is not capable of being given on lease or where the intention of the parties in fact restricts the operation of the rights to be enjoyed by the licensee to the actual terms of the contract. Again, the contractual license may be gratuitous or for value and is established by a promise which is intended to be binding and is either supported by consideration

or is intended to be acted upon and is infact acted upon. A contractual license may be revocable or irrevocable according to the express or implied terms of the contract between the parties.

Hence, if a document gives only a right to use the property in a particular way or under certain terms, while it remains in the possession and control of the owner thereof, it will be a license. Basically, no interest in the property is transferred to the licensee. The legal possession thereof, continues to be with the owner of the property but the licensee is permitted to make use of the premises for a particular purpose. But for this permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property.

Leave and License Agreement is regulated by the following Acts :

(1) Indian Contract Act,

(2) Indian Registration Act,

(3) Stamp Act of the State

(4) Indian Easements Act, 1882

(5) Rent Control Act of the State.

Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee, but save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents (Section 56). A license is not annexed to the property in respect of which it is enjoyed, nor it is transferable or a heritable right but is a right purely personal between the grantor and the licensee.

Difference between Lease and Leave and License Agreement :

- A lease creates an interest in the property, unlike a leave and license agreement.
- A lease grants a tenant exclusive possession, while a leave and license agreement grants only a permission to occupy the property.
- Licenses are revocable; leases are subject to the contract.
- Leases are transferable subject to the contract to the contrary, while licenses are not.
- A lease creates an inheritable right, unlike licenses, which are personal.

The following propositions may therefore be taken as well established (as laid down by the Hon'ble Supreme Court in the case of *Associated Hotel of India vs. R. N. Kapoor* (A.I.R. 1959 SC 1262) : (1) to ascertain whether a document creates a license or a lease, the substance of the document must be preferred to the form ; (2) the real test is the intention of the parties – whether they intended to create a license or a lease ; (3) if the document creates an interest in the property, it is a lease but if it only permits another to make use of the property of which the legal possession continues with the owner, it is a license ; and (4) if under the document, a party gets exclusive possession of the property, prima facie, he is considered to be a tenant but circumstances may be established which negative the intention to create a lease.

Easement and License :

In *Mathai v. Jordi Poulose @ Jordi and Others,* the Hon'ble Kerala High Court summed up the **difference between an Easement and a License** as follows:

1. An easement is a right appertaining to property while a license is only a personal right.
2. An easement is a *right in rem* and is enforceable by all and against all into whose hands the servient and the dominant tenements respectively may come, while a license is only a *right in personam* and therefore, not so enforceable.
3. An easement can be assigned with the property to which it is annexed but a license cannot be assigned at all, except where it is a license to attend a place of public entertainment.

4. A right of easement is not revocable at the will of the grantor while a license is so revocable, except where the grantor is estopped by his conduct from exercising the power of revocation conferred by law.

5. A license is a permissive right traceable to a grant from the licensor either expressly or impliedly. But an easement is acquired either by assertive enjoyment by the dominant owner or by a negative covenant between the parties or by grant or by statute.

6. An easement may be positive or negative in character, a license is invariably positive and cannot be negative in character. It may be that there are cases in which a negative obligation might be cast on the licensor with the object of protecting Licensor coupled with a grant but such obligation is due to the grant accompanying the license and not to the license per se.

Purpose of the Leave and License Agreement with relevant Law :

Under this agreement, the owner gives mere permission to the licensee (the holder of a license) to use the premises for a specific period of time without transfer of any interest in property by the owner.

When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license (Section 59). This is because when the licensor conveys away the property affected by a mere license, he ceases to be bound by the license and the assignment operates as an implied revocation of the license. Therefore, it only lasts so long as the grantor's proprietary or occupancy rights (as the case may be) over the land continues; as soon as he parts with those rights by sale, lease or other transfer, with the extinction of his right over the land must necessarily extinguish the license, except when new owner accepts the Licensee or if the Leave and License Agreement so provides.

A license may be revoked by the grantor, unless (a) it is coupled with a transfer of property and such transfer is in force; (b) the licensee, acting upon the license has executed a work of permanent character and incurred expenses in the execution (Section 60). The first exception is based on the principle that one cannot derogate from his own grant and the second on the principle of estoppel by acquiescence. The revocation of a license may be express or implied (Section 61). Implied revocation results even from the acts and conduct which is inconsistent with the continuance of the license.

Section 63 of the Easements Act provides that where a license is revoked, the licensee is entitled to a reasonable time to leave the property and to remove any goods which he has been allowed to place on the property. This means that the licensee does not become a trespasser. The moment the license expires or is revoked, he has a reasonable time to leave the place with the goods brought in the licensed premises.

Further Section 64 of the Easements Act provides that in cases where a license has been granted for a consideration and the licensee without any fault of his own is evicted by the grantor before he has fully enjoyed under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

If the license is revoked before efflux of time, without a reasonable notice, the remedy is by way of damages/ compensation and not by way of injunction or seeking possession as laid down in Section 64, as a licensee is a person without any title and has no interest in the licensed premises.

Essential Clauses :

The main essential clauses to the leave and license agreement are as follows:

1. Party clause:

   A clause identifying the parties to the agreement is mandatory. Party name clause is an important clause where the names of the licensor and licensee with their address & identity proof are mentioned in the clause. License will not include his legal heirs and assigns as it is personal.

2. The Definitions clause:

   This clause gives meaning to the specific and various terms/words mentioned /used in the agreement for getting clarity about it in the agreement. This clause is a self-explanatory clause. Like "Premise", means wherever the word premise is mentioned it will be understood the same throughout the agreement.

3. Premise/the place of use:

   The place used/occupied for residence or commercial use shall be mentioned in detail with full address describing the location with specifics. There is a need to ensure that the business of the licensee be identified, if license is in respect of commercial premises.

4. Compensation and Security deposit:

   This clause states the security amount and compensation payable for the use of the premises. Compensation is the consideration which is mutually decided by both parties and payable every month or quarterly as agreed upon by the licensee to the licensor on a mutually agreed date. The security deposit is paid in the context of any dispute/default arising out of the agreement between the parties or any damage caused to the property while in occupation of the licensee. The Security Deposit is made to the Licensor at the time of execution of the Leave and License Agreement between the parties to be returned on the Licensee vacating the licensed premises in the same condition as at the time of induction of the Licensee, subject to normal wear and tear.

5. Tenure of the Agreement:

   The tenure is mostly fixed for 11 months or in the multiples of eleven months preferably for 5 years at a time to avoid the Leave and License Agreement from being construed as a Lease Agreement.

6. Duties and Obligations of both parties:

   The covenants merely relate to obligations of licensee. Both parties are legally bound to follow the terms. The duty of the licensee is to take care of the property while in occupation, use the premises as agreed to be licensed, pay the compensation on time, etc. The duty of the licensor is to ensure uninterrupted use of the premises for the period of the license.

7. Termination:

   The termination clause provides for licensee to vacate in case of breaching of license terms. On termination, both parties may mutually decide for the extension/renewal of the agreement. If termination is effected, the licensor shall refund the Security Deposit subject to permissible deductions, if applicable.

Other relevant provisions governing Leave and License :

Under Section 17 of the Registration Act, 1908, it is mandatory to register a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent. Hence, to avoid stamp duty and registration charges, Leave and License agreements are usually for 11 months. But the registration part varies from state to state.

Section 49 of the Registration Act, 1908 sets out that no document which is required to be registered under Section 17 of the Act shall (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered *provided that* an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1963 or as evidence of any collateral transaction not required to be effected by registered instrument.

Under Section 55 of the Maharashtra Rent Control Act, 1999, it is mandatory that any agreement for Leave and License entered into between the landlord and the licensee, after the commencement of the Maharashtra Rent Control Act, 1999 shall be in writing and shall be registered under the Registration Act, 1908.

This condition of compulsory registration in the State of Maharashtra is irrespective of the tenure/duration of the Leave and License agreement. The stamp duty of 0.25% of the total sum of the license fee or rent payable under the agreement is as mutually agreed upon. The responsibility of getting such an agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the licensee about the terms and conditions subject to which the premises have been given to him by the landlord on leave and license, shall prevail, unless proved otherwise.

Any landlord who contravenes the provisions of Section 55 of the Act shall on conviction, be punished with imprisonment which may extend to 3 months or with a fine not exceeding ₹ 5000/- or with both.

In the case of *Vimalaben Gosalia and others vs. Veena Dushyant Malgonnkar* decided on 6th July, 2018, the Hon'ble Bombay High Court held that Leave and License agreement was executed by the parties on 3.4.2001, the agreement was lodged for registration by the respondent on 31.12.2002, obviously beyond the period of eight months prescribed under the Registration Act, 1908. In paragraphs 11 to 14, it was observed that registration of the Agreement is compulsory and it is the responsibility of the licensor/landlord to get it registered on time or he may be liable for punishment.

Further, under Section 24 of the Maharashtra Rent Control Act, 1999 (in respect of a license which was granted prior to 31st March, 2000 and where the licensee continued to remain in possession on or after the Maharashtra Rent Control Act, 1999 came into force) if the licensee in possession or occupation of premises given to him on license for residence purpose, fails to deliver the possession of such premises and/or handover possession of the premises to the licensor/landlord on the expiry of the license period, the licensor/landlord shall be entitled to recover possession of such premises from the licensee on the expiry of the period of license, by making an application for eviction to the Competent Authority under Section 42 of the Maharashtra Rent Control Act, 1999 and the Competent Authority on being satisfied that the period of license has expired, shall pass an order for eviction of the licensee after following the due procedure laid down under Section 43 of the Maharashtra Rent Control Act, 1999.

Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of license and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licensee fee or compensation fixed for the premises under the Leave and License agreement. Further, the Competent Authority shall not entertain any claim of whatever nature from any other person who is not a licensee according to the Leave and License agreement.

Significantly, the Amendment Act of 1973 had provided that all licensees created by landlords or by the tenant before 1st February, 1973 and who were in actual occupation of a premises which was not less than a room as licensee on 1st February, 1973 would be the licensees of the landlord or tenant and whether there be any term in the original agreement for tenancy permitting creation of such tenancy or licences or not they would become tenant (deemed tenant) and enjoy the rights granted under the Rent Control Act. This is a saving clause and still holds good.

Conclusion :

License is thus a personal right granted to a person to do something upon the immovable property of the grantor and does not amount to creation of any interest in the property itself. It is purely a permissive right and is personal to the grantee, non-transferable and not heritable. It creates no duties and obligations upon the person making the grant and is therefore revocable. The license has no other effect than to confer a liberty upon the licensee to go upon the premises which would otherwise be unlawful. Only entry in the premises is made legal. It does not create any title in favour of the licensee. A license is nothing but a mere grant of a personal privilege to do something upon without conferring an estate in the premises. It does not create any right to possession in favour of the licensee. The title is always with the licensor.

The legal possession therefore continues to be vested in the owner of the property but the licensee is permitted to make use of the premises for a particular period of time. But for the permission, his occupation would be unlawful.

Precautions and Key Words :

1. Word 'licensee' is to be used and not word 'lessee'.
2. Words 'use' and 'occupy' for personal use only is to be made use of instead of 'possession' and 'ownership' as no right, title and interest is transferred in the premises on execution of leave and license agreement.
3. License is neither transferable nor heritable, hence right to occupy is not transferred to heirs and legal representatives and remains with the licensee only.

4. Words ‘compensation’ or ‘licensee fee’ is to be used and not word ‘rent’ which is used in case of a lease deed.
5. In case of a company in respect of change in shareholdings and management, license granted comes to an end.
6. A leave and license agreement can be made for maximum 60 months (5 years).
7. License is granted or premises is let out for a temporary period and particular purpose only.

DRAFT OF LEAVE AND LICENSE AGREEMENT

THIS AGREEMENT OF LEAVE AND LICENSE made at _____ on this ____ day of _____ 2021, BETWEEN MS. _____, aged ___ years, an adult Indian Inhabitant residing at _____hereinafter called the **"LICENSOR"** (which expression shall unless repugnant to the context or meaning thereof include his/her successors-in-title and assigns) of the One Part,

AND

MR. _____, aged ____ years, an adult Indian Inhabitant residing at _____ _____, hereinafter called the **"LICENSEE"** of the Other Part;

WHEREAS:

(i) The Licensor is a widow of_____, who was the sole owner and/or otherwise well and sufficiently entitled to the ownership rights in Flat No._____ situated on _____ _____, admeasuring about _____ Sq. Ft. built-up area more particularly described in Schedule-I hereto and marked in red on the Plan annexed hereto(hereinafter referred to as "the said flat").

(ii) The Licensor along with her daughter, Ms. _____ and her mother-in-law, Mrs. _____ are the only surviving legal heirs of _____.

(iii) The Licensor has filed a Testamentary Petition in the Bombay High Court for Letters of Administration in her favour, being Testamentary Petition No. _____with the consent of the other legal heirs of her late husband Mr. _____. The said Testamentary Petition is pending, compliances made and the grants are expected in very near future in favour of the Licensor.

(iv) The Licensor is thus entitled in law to enter into this Leave and License Agreement in respect of the said flat.

(v) The Licensee being in temporary need of a residential accommodation for his self use for residential purposes for a limited period of 24 (twenty four) months only has approached the Licensor for permission to use the said flat temporarily together with the installations as set out in Schedule-II hereto, on leave and license basis for a period of 24 (twenty four) months.

(vi) The Licensor has agreed to allow the Licensee to occupy the said flat on leave and license basis on the terms and conditions set out hereunder.

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The Licensor do hereby grants unto the Licensee permission to enter upon, use and temporarily occupy the said flat being flat No._____ on _____, admeasuring about _____ Sq. Ft. built-up area more particularly described in Schedule-I hereto and marked in red on the Plan annexed hereto (hereinafter referred to as "the said flat") for a limited period of 24 (Twenty Four) months on "Leave and License" basis, commencing from _____ to _____ (hereinafter referred to as "the said flat" and co-operative housing society referred to as "the said society") more particularly set out in Schedule-I hereto and marked in red on the Plan annexed hereto.

2. The Licensee shall keep with the Licensor, interest free refundable security deposit of ₹_____/- (Rupees _____ only) before execution of this leave and license agreement, which deposit shall be refunded by the Licensor, without interest, within 10 days to the Licensee handing over vacant and peaceful possession of the said flat, after deducting the arrears of compensation, if any, and after adjustment of any claim of Licensor on the Licensee.

3. The Licensee shall pay the Licensor, license fee of ₹_____/- (Rupees _____only) **plus parking charges** per month as billed by the society from time to time for the period of first 12 months, that is, for the period from _____ to _____in advance as license fee/compensation for user of the said flat by 5th day of every month in the Savings Bank Account of the Licensor by NEFT/RTGS details whereof shall be given by the Licensor to the Licensee.

4. It is agreed between the parties that the monthly compensation for the next term of 12 months shall be ₹ _____ /- (Rupees _____ only) **plus parking charges** per month as billed by the society from time to time and accordingly the Licensee shall remit the monthly compensation of ₹_____/- (Rupees _____ only) plus parking charges for next 12 months from _____ to _____ by NEFT/ RTGS as aforesaid.

5. If Licensee fails to transfer by way of NEFT/RTGS any monthly compensation, Licensee shall pay the same with interest @24% per annum from 6th of every month till payment and such breach if continued beyond 15th of any month, the Licensee shall be deemed to have committed breach of terms and conditions of this license and in that event, Licensor shall be entitled to terminate this leave and license agreement and forfeit the interest free deposit of ₹_____/- (Rupees _____ only) kept by the Licensee with the Licensor.

6. It is specifically agreed between the parties that neither party shall terminate this Leave and License Agreement at least for first 12 months from the date of its commencement of this agreement provided that Licensee performs the terms and conditions of this license. In case of any breach of the terms and conditions of this license, Licensor shall be entitled to terminate the license granted hereunder by giving 30 days written notice to the Licensee and on such termination, the Licensee shall hand over vacant and peaceful possession of the said flat on or before the expiry of 30 days of notice period. In case this license is required to be terminated within the lock-in-period as aforesaid, the Licensee shall be liable to pay the Licensor the monthly compensation as fixed herein for the balance remaining lock-in-period. The Licensor shall be entitled to adjust the amount of compensation due against the Security Deposit of ₹_____/- (Rupees _____ only).

7. It is agreed between the parties hereto that after expiry of 12 months lock-in period as aforesaid, if any party desires to terminate this leave and license agreement he or she, as the case may be, shall give 15 days' written notice in advance to the other party by registered A.D. as well as by email at the address mentioned in the respective clause of the 'Notice' hereunder or by hand delivery to the parties hereto at the address mentioned herein.

8. The Licensee shall not without the written consent of Licensor use the address of the said flat to take any landline telephone/internet connection. Licensee shall not make any application for Ration Card/ Passport, PAN Card, Aadhaar Card, etc. on the address of the said flat nor shall give the address of the licensed premises of the said flat to any government or semi government authorities as his official address and/or permanent address and if such address is given the same shall be treated as breach of terms and conditions of this license. In such an event, this license shall be treated as terminated forthwith and thereupon the Licensee shall hand over quiet, vacant and peaceful possession of the said flat within 30 days to the Licensor of the happening of such breach and the interest free deposit of ₹_____/- shall be treated as forfeited. It is specially agreed by the Licensee that if the Licensee uses the address of the said flat as aforesaid and if the Licensor suffers any loss or damage of whatsoever nature, the Licensee shall compensate the damages to the extent of loss or damage suffered in addition to the interest free deposit being forfeited by the Licensor.

9. It is expressly agreed that the Licensee shall not claim any right by way of adverse title to the said flat or any sub-tenancy or any other right in any manner whatsoever in the said flat to the prejudice of rights of Licensor to the said flat. The Licensee hereby admits and acknowledges that it is the express intention of the parties to this leave and license agreement that the relationship of the landlord and tenant shall not be deemed to be created hereby or otherwise between them under any circumstances whatsoever. This agreement merely confirms bare temporarily permission of leave and license and does not create any interest into or upon the said flat or any part thereof in favour of the Licensee. It is not intended by this Agreement to create any lease/s or any part thereof in favour of the Licensee. It is not intended by this agreement to create any lease, sub-lease or any other rights, titles and interests into or upon the said flat in favour of the Licensee and the Licensee hereby agrees that under no circumstances, the Licensee shall claim any right to tenancy, sub-tenancy or any other right of any nature into or upon the said flat.

10. The license hereby granted to the Licensee is personal and non transferable license, which shall stand terminated on the expiry of 24 (twenty four) months or earlier as aforesaid in case of any breach of any term and condition of this leave and license agreement, unless renewed by Licensor on same or revised terms as deemed fit by the Licensor.

11. The Licensee shall not sublet or create any license, tenancy or sub-tenancy in respect of the said flat to any person, nor shall the Licensee create any third party rights in respect of the said flat. The Licensee shall not create any mortgage on the said flat.

12. It is expressly agreed that the Licensee shall use the said flat only for his own personal residential use with his immediate family members and not for any other purpose and/or not for storing any unauthorized goods or material and/or for any illegal purpose/s. The Licensee shall not store any narcotic such as liquor, bhang, RDX, crackers or any type of fire arms etc. which are prohibited by any law, rule and regulation of the Government or any statutory authority and the Licensee shall not allow any person to carry out any illegal or immoral business from the said flat. The Licensee shall not use the said flat for any commercial purpose.

13. It is also agreed that the Electricity Bills, telephone bills, Mahanagar Gas Nigam Bills and all other outgoings for any installations in the said flat shall be paid by the Licensee before the due date and after the payment, the original copy of the bills shall be handed over to the Licensor within a week from the date of payment thereof. However, the outgoings of the said society/B.M.C. dues and property taxes shall be paid by the Licensor only.

14. This leave and license agreement and the use of the said premises hereby allowed is and shall always be construed as per and governed by the provisions of section 24 read with Chapter VII of the Maharashtra Rent (Control) Act, 1999 as amended upto date.

15. The Licensee shall not make any structural alterations/repairs/modifications in the said flat whatsoever. All interior changes shall be carried out by the Licensee only with the prior written permission of the Licensor and statutory authority, if so required.

16. That the Licensee shall not do anything which is not permissible or is prohibited under any law or is in contravention of bye-laws, rules and regulations of the said society or of any orders of Central/State Government/s or local authorities.

17. The Licensee, his family members, servants and agents will abide by the rules and regulations for the time being in force of the said society/B.M.C. and of any statutory authority.

18. That the Licensor has got every right to inspect the said flat at reasonable time after giving Licensee 24 hours intimation to that effect for which the Licensee or his agent and representative shall have no objection whatsoever.

19. That the day to day minor repairs such as fuses, bulbs, leakage of water taps, maintenance, etc. shall be done by the Licensee at his own cost. The Licensee further hereby agrees and confirms that in case of any breakage, damage, loss to existing fittings/fixtures in the said flat, the same shall be made good by the Licensee by way of compensation, which if not paid on demand by Licensor, the same shall be adjusted against interest free deposit.

20. The Licensee shall not create any nuisance of whatsoever nature either for the society or any member to the society and if any claim has been made either by the society or by one of the member of the said society either against the Licensee or any of his family member, the Licensee shall rectify the same immediately and desist from such acts. Licensee shall indemnify and shall keep indemnified the Licensor from any claim, damages and expenses to which the Licensor may be held liable.

21. The Licensor shall not be held responsible for any damage that may be caused to the Licensee or their servants or other invitees or his property/properties or to the furniture, fixtures and materials stored in the said residential flat by fire, rain, breaking or bursting of water pipe or electricity or wire installation or by any other cause or causes.

22. Notwithstanding anything hereinabove contained, if the Licensee fails to use the said flat for bonafide residential purposes and/or commits any breach of the terms and conditions of this leave and license agreement, then on happening of any such event, the Licensor shall have the right to terminate and revoke this leave and license agreement forthwith, whereupon the Licensee with his family members, employees and servants vacate the said flat immediately.

23. That the Licensee hereby undertakes to vacate and handover peaceful and vacant possession of the said flat to the Licensor, on expiry of this leave and license agreement or within 30 days in case of early termination of this agreement as provided herein. If Licensee fails to vacate and handover the said flat to the Licensor on expiry of this leave and license period and/or on earlier termination thereof, Licensee agrees to pay ₹_____/- (Rupees _____only) per day in addition to the monthly compensation payable to the Licensor. This payment/penalty however, does not absolve the Licensee from his obligation to vacate the said flat promptly on the termination of this license.

24. Stamp duty and registration charges in respect of this leave and license agreement shall be borne equally by both the parties. The original agreement will remain with the Licensor and the photocopy of the same duly signed by both the parties shall remain with the Licensee.

25. For the purpose of the issuance of the 'notice' as stated in this leave and license agreement, the address as well as the email address of the parties are as under:

LICENSOR

Ms. .....

.....

.....

.....

Email ID: .....

LICENSEE

Ms. .....

.....

.....

.....

Email ID: .....

IN WITNESS WHEREOF, the parties hereto have hereunto set and subscribed their respective hands on the day and the year first hereinabove written.

SCHEDULE-I

All that flat No._____, _____, admeasuring _____ Sq. Ft. situated on_____ constructed on the piece or parcel of land or ground on _____.

SCHEDULE-II

FIXTURE AND FITTINGS

1. .....
2. .....
3. .....

SIGNED AND DELIVERED by the)

Within named “LICENSOR”)

Ms. _____)

in the presence of :)

SIGNED AND DELIVERED by the)

Within named “LICENSEE”)

MR._____)

in the presence of :)

RECEIPT

RECEIVED from the within named Licensee, a sum of ₹_____/- (Rupees _____only) by NEFT/ RTGS being the Interest free Security Deposit to be returned to the Licensee within 30 days from the date of handing over vacant and peaceful possession of the said premises.

I SAY RECEIVED

(Ms. .....)

Licensor

Witnesses:

1.

2.

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Western India Regional Council of
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)