

APPEALS AND ALLIED MATTERS IN DIRECT & INDIRECT TAXES

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FOUNDATIONAL CONCEPT

“IF WE UNDERSTAND THE BASIC
CONCEPTS PROPERLY; THEN WE WILL
KNOW WHERE THE SHOE PINCHES.”

Twinkle Twinkle Little Star




Twinkle, twinkle, little **star**,
How I wonder what you **are**.
Up above the world so **high**,
Like a diamond in the **sky**.
Twinkle, twinkle, little **star**,
How I wonder what you **are**!




When the blazing sun is **gone**,
When there's nothing he shines **upon**,
Then you show your little **light**,
Twinkle, twinkle, through the **night**.



Twinkle, twinkle, little **star**,
How I wonder what you **are**!

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- WONDER- MEANING
 - DESIRE OR BE CURIOUS TO KNOW
 - EXPREESING A TENTATIVE ENQUIRY

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- READ – WONDER – READ– WONDER – READ
WONDER - READ – WONDER – READ– WONDER –
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System for administration of Justice

- All the jurisprudential schools agree that justice is the ultimate and logical necessity of any human society. Therefore, existence of a system for administration of justice is condition precedent and sine quo non for human society.
- Laws are therefore made to provide mechanism to achieve such goals and for such purposes and intent, provide for remedies for redressal of the grievances of the subjects.
- One of such remedy is an Appeal, the topic we will make an attempt to understand.
- As a student of taxation laws or fiscal statutes, we will examine the above topic within the compass of today's deliberation.

Provisions relating to appeals in fiscal statutes

- We will make an attempt to understand the provisions relating to “Appeals” under the following fiscal statutes.
 - The Income Tax Ordinance, 2001
 - The Sales Tax Act, 1990
 - The Customs Act 1969
 - The Federal Excise Act, 2005
 - The Sindh Sales Tax on Services Act, 2011
 - The Punjab Sale Tax on Services Act, 2012
 - The Khyber Pakhtunkhwa Finance Act, 2013

Three distinct types of provision in fiscal statutes

- In a fiscal statute, there are generally three distinct types of provisions.
- The charging provisions, which relate to the levy or charge of the tax, which usually state that tax is to be levied on what property, goods or income and in what manner and at what rate .
- Second, the assessment provisions, which deal with the assessments, calculations or quantifications of the tax for the purposes of determining the amount of tax due and payable or which has escaped collection or has been under assessed at a lower rate or on which excessive relief or refund has been allowed .

Three distinct types of provision in fiscal statutes*continued*

- Third, the collection provisions, which relate to the mode and manner of receipt or collection of the tax.
- (Please see Opinion of Lord Dunrdin in Witney vs (1926 AC 37) approved by Hon'ble Supreme Court of Pakistan in cases reported in PLD 1962 SC 335 and (1990) 62 Tax 74 SC Pak)

Another distinct & fourth type of provision

- Another distinct and fourth type of provision regarding appeals and its procedure, which is relatable to the second category i.e. the Assessment / Adjudication proceedings. This fourth type is my innovation , which does not have any judicial precedent support, however to understand the subject of appeal, I have made this innovation.
- Appeal is continuation of the Assessment proceedings.
Please see 1993 PTD 1108 SC Pak – Chappal Builders’ case.
Please see also 2018 SCMR 1385.

Definition of “Appeal”

- An appeal is an application for the judicial examination by a higher court of the decision of any inferior court . An appeal is the right of entering a Superior Court and invoking its aid and interposition to redress the error of the Court below . Removal of the cause or a suit from an inferior Court to a superior Judge or Court for re-examination or review . A complaint to a higher tribunal, in which the error or injustice is sought to be corrected or reversed .
- It will be seen from the above definitions that it is a right of invoking aid of a Superior Court. This right is granted by Statute. Therefore, it is a statutory right, created by statute defining its limits as well.

Definition of “Appeal” *Cont’d*

- It is settled proposition of law that if a statute doesn’t confer a right of appeal it doesn’t exist. It is a vested substantive statutory right inhering in a party from commencement of an action in the court of first instance. It is governed by law prevailing at that time. Such right cannot be taken away except by express provision or by necessary implication .
- Court is at liberty to consider any event subsequent to the filing of appeal which can be of fact or amendment in law and decide the case accordingly .(Please see PLD 1991 Kar 1, PLD 1966 Lah 684, PLD 1965 SC 339, PLD 1995 SC 418 and 2010 PTD 657)

Definition of “Appeal” *Cont’d*

- In the Islamic polity and system of dispensation of justice, the importance of the right of appeal cannot be overstated. It has been held to be the natural right vesting in an individual, which cannot be taken away except by a provision in an enactment. It is ordained by the **Holy Quran** and **Sunnah** of **Holy Prophet (Peace be upon him)** that an affected person must have a right to go in appeal. Barring the right of appeal is against injunctions of Islam.

Justice (A Process)

- Justice is not something which can be captured in a formula once for all. It is a process, a complex and shifting balance between many factors, including equality. As Friedrich observed “Justice is never given, it is always a task to be achieved. It is true that persons with grievances are those who raise the question of justice”.
- *Judex bonus nihil ex arbitrio suo faciat, nec propositione domesticae voluntatis, sed juxta leges et jura pronunciet.*
- A good judge may do nothing from his own judgment, or from a dictate of private will; but he will pronounce according to law and justice.

Concept of Fair Trial and Due Process

- It will not be out of place to mention that after the Eighteenth amendment made in the Constitution of Islamic Republic of Pakistan, 1973 earlier implied fundamental right has been expressly provided which is a Right to a fair trial Article 10A so added reads as under:
- **ARTICLE 10A:** Right to fair trial: For the determination of his Civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

Stages of Appeal in fiscal statutes

1	First Appeal	BEFORE THE COMMISSIONER(APPEALS)
2	Second Appeal	BEFORE THE APPELLATE TRIBUNAL
3	References	BEFORE THE HIGH COURT ON QUESTION OF LAW ARISING OUT OF ORDER OF THE APPELLATE TRIBUNAL
4	Appeal before Supreme Court	AGAINST JUDGMENT OF HIGH COURT UNDER ARTICLE 185(3) OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN

- In strict sense, the Reference before the High Court and Supreme Court are not appeals, and would have been outside the scope of present deliberations, however in view of latest judgment of Hon'ble Supreme Court, now it can be considered as appellate jurisdiction on the question of law arising out of the order of a Tribunal.

First Appeal

CONFERMENT OF A RIGHT OF APPEAL TO A PERSON AGAINST DESIGNATED ACTIONS.

Such provisions identify the actions against which an aggrieved person can file an appeal.

- **Under Income Tax Ordinance, 2001**

(SECTION 127) such right has been given against following actions taken by the Commissioner or Office in land Revenue.

- **Under Section 121**

Assessment of person who have not furnished return / statement (Assessment)

- **Under Section 122**

Amendment of assessment (Assessment)

- **Under Section 143**

Non-resident ship owner or charterer (Assessment)

- **Under Section 144**

Non-resident aircraft owner or charterer (Assessment)

First AppealCont'd

- **Under Section 162**
Recovery of tax from the person from whom tax was not collected/deducted (Order)
- **Under Section 170**
Dissatisfaction with decision or refund application (Order)
- **Under Section 182**
Offences and penalties (Order)
- **Under Section 161(1)**
Assessee in default (Order)
- **Under Section 172(3)(f)**
Person treated as a representative of non-resident (Order)
- **Under Section 221**
Rectification of mistake (Assessment) AND
- **Under Section 124**
Assessment giving effect to an order.(Note about none mention of such section but please see amendment made through Finance Act,2009)

First AppealCont'd

The **SALES TAX ACT, 1990** (Section 45B) provides right of appeal against following actions taken by Office Inland Revenue: -

- **Under Section 10**
Refund of Input tax
- **Under Section 11**
Assessment of Tax and recovery of tax not levied or short levied or erroneously refunded.(it includes section 33 and 34)
- **Under Section 25**
Access to record, documents, etc.
- **Under Section 36**
Recovery of Tax not levied or short levied or erroneously refunded. (This Section is no more in the statute, omitted by Finance Act,2012.
- **Under Section 66**
Refund to be claimed within one year.

First Appeal*Cont'd*

The Customs Act 1969 (SECTION 193) provides right of appeal against following actions:

- **Under Section 79**

Declaration and Assessment for home consumption or warehousing

- **Under Section 80**

Checking of goods declaration by the Customs.

- **Under Section 179**

Power of adjudication.

- **The Federal Excise Act, 2005** (SECTION 33) provides right of appeal against following actions:

Any decision or order passed under the Federal Excise Act 2005 or the rules made there under by a Officer of Inland Revenue up to the rank of Additional Commissioner Inland Revenue other than a decision or order or notice given or action taken for recovery of the arrears of the duty under the Federal Excise Act, 2005 or rules made there under.

First Appeal*Cont'd*

- **The Sindh Sales Tax on Services Act, 2011** (Section 57) provides right of appeal against following actions taken by Officer of the Sindh Revenue Board.
- **Under Section 22** Liability of payment of tax in the case of private companies or business enterprises.
- **Under Section 23** Assessment of Tax
- **Under Section 24B** Compulsory Registration
- **Under Section 43** Offences and Penalties
- **Under Section 44** Default Surcharge
- **Under Section 47** Recovery of tax not levied or short levied
- **Under Section 68** Liability and Obligation of Agents
- **Under Section 76** Corrections of Clerical errors

First AppealCont'd

The Punjab Sale Tax on Services Act, 2012 (SECTION 63) Provides right of appeal against actions taken by an Officer of Punjab Revenue Board Other than Commissioner.

- Against Order passed under Section 60 (Power of adjudication)

In respect of cases involving determination of tax liability, assessment of the tax, charging of default surcharge, imposition of penalty and recovery of amount erroneously refunded or any other contravention or violation including tax fraud under the said Act and Rules made there under.

The Khyber Pakhtunkhwa Finance Act, 2013 (SECTION 79) Provides right of appeal against actions taken by an Officer of the Khyber Pakhtunkhwa Revenue Authority Other than Collector.

- Section 76 (Power of adjudication)

In respect of cases involving determination of tax liability, assessment of the tax, charging of default surcharge, imposition of penalty and recovery of amount erroneously refunded or any other contravention or violation including tax fraud under this Act or the rules.

First AppealCont'd

- **Balochistan Sales Tax on Services Act 2015** (Section 63)
Provides right of an appeal to any person other than the Authority or any of its employees, aggrieved by any decision or order passed under section 60 by an Officer of the Authority other than Commissioner.
- **Islamabad Capital Territory (Tax on Services) Ordinance, 2001** (Sub-section (3) of Section 3, provides of right of appeal as per clause (f) of sub-section 3 of Section 3 by referring to the Sales Tax Act 1990.
- Clause (f) all other allied and ancillary matters

Who can file Appeal & Condition to file or prefer Appeals

- Any person dissatisfied / aggrieved with any orders enumerate in previous slides under First Appeal.

Conditions to file or prefer Appeals include:

- In the case Income Tax, the tax due to be paid with the return of income.
- In other statutes examined by us, there appears to be no such condition.

Documents to be submitted mandatorily with Appeal

- Prescribed form and manner of verification thereof as prescribed under the relevant Rules including brief of the issues and matters.
- Precise grounds of appeals upon which the appeal is preferred.
- Prescribed appeal fee and the limitation to file the appeal before the Appellate Fora.
- Original of documents such as Demand Notice/ Impugned Order
- Copy of Order appealed against
- Certificate to the effect that copy of form of appeal has been sent to the relevant authorities
- Power of Attorney / Letter of Authority/ Vakalatnama

Drafting of Grounds of Appeal


- The techniques for drafting grounds of appeal.
- Reading of the facts and knowing the law.
- Three kinds of knowledge i.e. knowing the facts, knowing the law available to the facts and the just way of applying the law on the facts and circumstances of the case.
- Knowing the law also means judicial precedents and all related statutes including principles of jurisprudence, interpretation of statutes and legal maxims.
- Knowing the process of the transaction or business.
- Challenging the jurisdiction and limitation.
- Grounds to be precise, comprehensive and not argumentative.
- Grounds should not mention the citation of the decisions.
- Legal as well as factual challenge / objection should be made in clear terms.

Prescribed time for filing Appeal

- Procedure in case of time barred appeal and significance of term “sufficient cause”.
- What is “sufficient cause” is not capable of connotation with exactitude and would differ from case to case. According to Chamber’s Dictionary the term “sufficient” means “adequate” or “effective”. According to the Oxford Dictionary, it means of a quantity, extent or scope adequate to a certain purpose or object. In Black’s Law Dictionary 4th Edition word “sufficient” means, adequate, enough, as much as may be necessary . Filing of appeal in a wrong court on account of mistaken advice tendered by the counsel by itself would not attract the provisions of limitation but when the litigant and the counsel have acted with due care and caution and their conduct does not smack of negligence, the institution of appeal in wrong forum may constitute a “sufficient cause” .

Prescribed time for filing Appeal ..*Continued*

- The term “sufficient cause” includes any honest just, fair due or lawful cause which in the circumstances of given case, a court regards as sufficient to explain the absence or default on the part of a party to the proceedings . Court have been lenient and have been condoning some negligence, to the extent to which it is regarded as human though they have never condoned gross negligence. The Courts have always been strict in demanding proof of sufficient cause . Each case is to be judged upon its own peculiar circumstances. It is a question of fact and varies from case to case and ultimately it rests on the satisfaction of the Court . There are numerous decisions on this point. No preferential treatment is given by the appellate authorities to the government departments in the case of limitation. There are plethora of judgments of Hon’ble Supreme Court on this subject.

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- The terms of law used in the same sense are
 - Not willful
 - Unreasonable
 - Default
 - All these terms in substance means some thing more than non compliance- deliberate act – breach of due-negligence.
 - For default please see judgments of Hon'ble Supreme court reported in PLD 1967 sc 530 & PLD 1997 SC 564

Procedure in Appeal

- Notice to the parties (addressing of the Respondent).
- The statute has conferred discretionary powers to entertain new grounds of appeal not taken up earlier before the hearing of the appeal.
- The satisfaction of the Appellate authority that the omission of the said ground was not will full or unreasonable.
- Pure question of law can be raised at any stage.
- Discretionary powers conferred on the Appellate authority to call for such particulars of the case or matters arising in appeal or cause further inquiry to be made by the Appellate authority.

Procedure in Appeal

.....Continued

- Powers conferred not to consider documentary material or evidence, which was not placed / produced before the Adjudicating authority unless the Appellate authority is satisfied that the Appellant was prevented from sufficient cause from producing such material or evidence before the authority. Since the language is in negative, it is always considered to be mandatory – significance of the term “sufficient cause” reiterated.

Drafting of written arguments

- So far as first appeal is concerned, or if permitted by the Appellate Tribunal.
- Facts to be narrated clearly. (To be remembered Law applies on the facts not vice versa)
- Grievance to be narrated clearly.
- Relevant Statutory Provisions to be highlighted. Get help from the rules of interpretation.
- How the order is wrong to be precisely explained on factual and legal plane. In case of facts, submission of the evidence which was earlier submitted in the Adjudication / Assessment proceedings.
- Judgments to be relied should be relevant.
- The relief to be sought be explained and prayed for.

Decision in Appeal

- Under the Income Tax Ordinance, 2001 the powers have been conferred on the Commissioner (Appeals) to make an order to confirm, modify or annul the assessment order after examining such evidence as required by him representing the matter arising in appeal or causing such further inquiries to be made as he deem fit or in other cases (other than Assessment Order) make such order as the Commissioner (Appeals) think fit. [See Section 127(1)(a)(b)].
Power of Enhancement.
- Under the Sales Tax Act, 1990 the Appellate Commissioner has been empowered to pass such orders as he thinks fit confirming, varying, altering, setting aside or annulling the decision or order appealed against. However, the Appellate Authority has been refrained from not to remand the case for de novo considering. [See Section 45(B)(2)(3)].

Decision in Appeal

.....Continued

- Under the Federal Excise Act, 2005, similar provisions are appearing i.e. the Appellate Authority has been empowered to pass such order as he thinks fit confirming, varying, altering, setting aside or annulling the decision or order appealed against. However, the Appellate Authority has been refrained from not to remand the case for de novo considering. [See Section 33(2) & (3)].
- Under Sindh Sales Tax on Services Act, 2011, the powers have been conferred upon to pass an order to confirm, vary, alter, set aside or amend the decision appealed against but shall not be empowered to remand the case for de novo consideration.
- Similar is the position under Section 64 of the Punjab Sales Tax on Services Act, 2012 and Khyber Pakhtoon Khawa Finance Act, 2013.

Decision in Appeal

.....Continued

- The word “set aside” is synonyms with the word “annul”, however, it may be noted that if an order impugned in the appeal is annulled on the ground of violation of principles of natural justice, the lower authorities are not precluded to issue fresh notices or to initiate fresh proceedings of the same subject matter if the limitation permits them.
- Since in the statutes considered herein above, other than Income Tax Ordinance, 2001, permit an Appellate Authority to set aside the action, it may be noted that if such set aside is with specific directions, the adjudicating officer while examining the set aside issues cannot in law go beyond these directions. He has to confine himself with such directions and in case while examining the said issue, he discovers a infinity in the record, only course available with him to invoke such provisions which permit him to re-open an assessment.

Appeal to the Appellate Tribunal

- Normally under fiscal statutes, the appeal before the Appellate Tribunal arises against any order passed by the Commissioner (Appeals), which may include the order for non-grant of stay.
- The appeal before the Appellate Tribunal to be filed almost in the similar manner as described in preceding paragraph subject to the condition that the conditions prescribed under the statutory provisions relating to the appeals be filed before the Appellate Tribunal including respective Appellate Tribunal Rules.

- The Income Tax Ordinance 2001 Section 131
- The Sales Tax Act 1990 Section 46
- The Sindh Sales Tax on Services Act 2011 Section 61
- The Punjab Revenue Authority Act 2012 Section 66
- The Khyber Pakhtunkhwa Finance Act 2013 Section 84
- The Balochistan Sales Tax on Services Act, 2015 Section 66
- The Islamabad Capital Territory
(Tax on Services) Ordinance, 2001 Section 46 of
the Sales Tax Act 1990

Limitation. In all above statutes, appeal to be preferred within 60 days

Presentation of arguments before Appellate Tribunal

- Dress Code.
- Arguments be started with the permission of the Court.
- Relevant statutory books.
- Copies of the judgments and documents relied upon.
- Narration of facts in concise manner. Arguments be started with the permission of the Court.
- Relevant statutory books.
- Copies of the judgments and documents relied upon.
- Narration of facts in concise manner with identification of the places in the impugned orders.
- The facts to be narrated first then the law. (Law applies on the facts)

Presentation of arguments before Appellate Tribunal

.....Continued

- Preliminary objections if any should be taken with the permission of the Appellate Tribunal at earliest possible opportunity.
- Full attention to the points and queries raised by the Appellate Tribunal.
- If there is difference of opinion on any points, same may be pointed out to the Appellate Tribunal with at-most humility and respect and also addressing the other side with respect.

Filing of miscellaneous application & Limitation for retention of record

Filing of miscellaneous application of stay or rectification

Same procedure to be adopted as in filing of an appeal and also the application be supported with an Affidavit.

Limitation for retention of record

Every fiscal statute provide for retention of record. It is very necessary to keep in mind that till the appeal or any proceeding is pending, such record relevant to such appeal to be preserved and retained till the culmination of the proceedings.

Reference to High Court & Civil Petition before the Hon'ble Supreme Court

REFERENCE TO HIGH COURT: -

- It is akin to an appeal wherein; in application, the applicant seeks answer to the question of law arising out of the impugned order of the Tribunal.
- Limitation is generally 90 days from the date of receipt of the Appellate Order.
- Where Reference has been made, the tax is payable in accordance with the order of the Appellate Tribunal.
- The Hon'ble High Court has the powers to stay the recovery of tax for Six months.
- The prescribed fee as per respective statute.
- Normally the Reference Application is filed in triplicate.

Reference.....Cont'd

- Provisions in respect of Tax Reference under following Statutes.
- The Income Tax Ordinance 2001 Section 133
- The Sales Tax Act 1990 Section 47
- The Sindh Sales Tax on Services Act 2011 Section 63
- The Punjab Revenue Authority Act 2012 Section 20
(No provision in the Punjab Sales Tax on Services Act 2012 but in Punjab Revenue Authority Act 2012)
- The Khyber Pakhtunkhwa Finance Act 2013 Section 86
- The Balochistan Sales Tax on Services Act, 2015 Section 69
- The Islamabad Capital Territory
(Tax on Services) Ordinance, 2001 Section 47 of the Sales Tax Act 1990

For Limitation Please consult and refer to respective Sections of each statute.

Reference.....Cont'd

- CHARACTER OF TAX REFERENCE-
Confined to Question of law not on facts
- KEY POINTS FOR DRAFTING OF TAX REFERENCE
- Statement of facts. Brief facts of the case in chronological order narrating the issues and points arising out of the Order of the learned Tribunal
- Framing of Questions of law arising out of the order of the Tribunal.

ReferenceCont'd

- Following tests are important to be noted.
- (1) When the point for determination is a pure question of law such as construction/ interpretation of a statute or document of title, the decision of the Tribunal is open to reference to the Court.
- (2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final (subject to other points viz. ignoring evidence on record or mis-reading the evidence), its decision as to the legal effect of those finding is a question of law which can be reviewed by the Court.
- (3) A finding on a question of fact is open to attack in Reference as erroneous in law / mis-direction of law if there is no evidence to support it or if it is perverse.
- (4) When the finding is one of fact, the fact that it is itself an inference from other basis facts will not alter its character as one of fact.

Reference.....Cont'd

- JUDICIAL PRECEDENTS – Guide-lines for framing Question of law
- 2017 PTD 1303 SC PAK SQUIBB PAKISTAN PVT LTD VS CIT
- (2000) 82 Tax 3 SC Pak IRUM GHEE MILLS LTD VS ITAT
- (1985) 52 TAX 77 HC SINDH DHANRAJMAL MANUMAL & SONS VS CIT WEST KARACHI
- 1995 PTD 752 HC SINDH LAL MOHAMMAD SATTAR & CO VS CIT
- 2001 PTD 987 HC SINDH MEHRAN GIRLS COLLEGE VS CIT



CIVIL PETITION TO LEAVE TO APPEAL BEFORE THE HON'BLE SUPREME COURT: -

- The procedure, limitation, as per Code of Civil Procedure and the Supreme Court Rules.

Other Remedies

- Federal Tax Ombudsman
 - Maladministration (Section 2(3))
 - Jurisdiction, Power and Functions
 - On a complaint by an aggrieved person
 - On a reference by President, the Senate or the National Assembly
 - On motion of the Supreme Court or High Court
 - Shall not exercise jurisdiction
 - Matters sub-judice before a court, tribunal or board or authority on the date of the receipt of a complaint, reference or motion
 - Disputes in respect of which remedies of appeal , review or revision are available under the relevant statute

Other Remedies

....Continued

- Alternative Dispute Resolution (Section 134 A)
 - Any aggrieved person in connection with any matter before an appellate authority, may apply to FBR for appointment of a committee for the resolution of any hardship or dispute except where prosecution proceedings have been initiated or where interpretation of question of law having effect on identical other cases. Time limitation has been stipulated for such recommendations.
 - There is no prescribed format, however it should be drafted in such a manner that entire issue is clearly described and dispute highlighted.

Other Remedies

.....Continued

- Other Appeals under Schedules and Rules.
- Please see relevant rules of statute (s).

Other Remedies


.....Continued

- Revision
 - Under section 122A by the Commissioner
 - Under section 122B revision by the Chief Commissioner

Other Remedies

.....Continued

- ADVANCE RULING
 - Under section 206 A By FBR
 - On the application of a non resident taxpayer (not applicable to a non resident having Permanent Establishment in Pakistan) in respect of application of the Ordinance to a transaction proposed or entered into by the taxpayer.
 - Such advance ruling shall be binding on Commissioner as envisaged in said section.



**THANK YOU AND
GOOD LUCK FOR THE
FUTURE**