After studying this chapter, you would be able to -

- identify the orders appealable before different appellate authorities;
- recall the time limit for filing appeals before different appellate authorities;
- appreciate the powers of different appellate authorities;
- comprehend and appreciate the provision in law for avoiding repetitive appeals;
- appreciate the procedure for appeal by Revenue when an identical question of law is pending before Supreme Court;
- identify the circumstances when an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the Revenue, for initiation of revision proceedings under section 263;
- appreciate the procedure for revision of other orders under section 264;
- recall the time limit for revision of orders;
- identify the cases where doctrine of total merger and doctrine of partial merger are applicable;
- analyse and apply the above provisions to determine whether an order is appealable before a particular appellate authority, the time limit for filing of appeal and address other issues in non-complex to moderately complex scenarios.

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The assessee is given a right of appeal by the Act where he feels aggrieved by the order of the assessing authority. However, the assessee has no inherent right of appeal unless the statute specifically provides that a particular order is appealable. There are four stages of appeal under the Income-tax Act, 1961 as shown hereunder –

![Diagram of appeal process]

### 18.1 APPEALS BEFORE COMMISSIONER (APPEALS)

(1) **Appealable Orders before Commissioner (Appeals) [Section 246A]**: An assessee or any deductor or any collector aggrieved by any of the following orders may appeal to the Commissioner (Appeals) against such orders under section 246A -

(a) (i) an order passed by a Joint Commissioner under section 115VP(3)(ii) refusing to approve the option for tonnage tax scheme; or

(ii) an order against the assessee where the assessee denies his liability to be assessed under this Act; or

(iii) an intimation under section 143(1)(1B) or section 200A(1) or section 206CB(1), where the assessee or the deductor or the collector objects to the making of adjustments; or

(iv) any order of assessment under section 143(3) except an order passed in pursuance of the directions of Dispute Resolution Panel or an order of assessment or reassessment passed by the Assessing Officer with the prior approval of Principal Commissioner or Commissioner, where tax consequences have been determined in the order under the provisions of Chapter X-A relating to General Anti Avoidance Rules] or a best judgement order under section 144, in relation to the income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;
(b) an order of assessment, reassessment or recomputation under section 147 [except an order passed in pursuance of the directions of Dispute Resolution Panel or an order of assessment or reassessment passed by the Assessing Officer with the prior approval of Principal Commissioner or Commissioner, where tax consequences have been determined in the order under the provisions of Chapter X-A relating to General Anti Avoidance Rules or section 150;

(c) an order of assessment or reassessment under section 153A, except an order passed in pursuance of the directions of the Dispute Resolution Panel or an order of assessment or reassessment passed by the Assessing Officer with the prior approval of Principal Commissioner or Commissioner, where tax consequences have been determined in the order under the provisions of Chapter X-A relating to General Anti Avoidance Rules;

(d) an order of assessment or reassessment passed by the Assessing Officer under section 92CD(3) in accordance with the Advance Pricing Agreement pursuant to a modified return filed in accordance with section 92CD(1);

However, with effect from 1.9.2019, an order made under section 92CD(3) would be appealable. This is consequent to the amendment in section 92CD(3) with effect from 1.9.2019 requiring the Assessing Officer to pass an order modifying the total income of the relevant assessment year in accordance with the arm’s length price (ALP) determined as per the Advance Pricing Agreement (APA) entered into.

Prior to 1.9.2019, the Assessing Officer was required to assess or reassess or recompute the total income of the relevant assessment year, due to which the Assessing Officer may start fresh assessment or reassessment of completed assessments of the assessee(s) who have modified the returns of income in accordance with the APA entered into by them, while the legislative intent was to require the Assessing Officer to merely modify the total income consequent to modification of return of income in pursuant to APA.

(e) an order made under section 154 or section 155 having the effect of enhancing the assessment or reducing a refund or an order refusing to allow the claim made by the assessee under either of the said sections except an order of assessment or reassessment passed by the Assessing Officer with the prior approval of Principal Commissioner or Commissioner, where tax consequences have been determined in the order under the provisions of Chapter X-A relating to General Anti Avoidance Rules;

(f) an order made under section 163 treating the assessee as the agent of a non-resident;

(g) an order made under section 170(2)/(3) assessing income of business prior to succession in the hands of the successor;

(h) an order made under section 171 relating to assessment after partition of HUF;

(i) an order made under section 201 deeming a person to be an assessee-in-default for failure to deduct the whole or any part of the tax deductible at source;
(j) an order made under section 206C(6A) deeming a person to be an assessee-in-default for failure to collect or pay tax;

(k) a refund order made under section 237;

(l) an order imposing a penalty under

(i) Section 221; or

(ii) Section 271A, section 271AAB, section 272AA or section 272BB;

(n) an order imposing penalty under section 271B;

(o) an order imposing a penalty under section 271C, section 271CA, section 271D, or section 271E;

(p) an order imposing a penalty under section 272A;

(q) an order imposing a penalty under section 272AA;

(r) an order imposing or enhancing penalty under section 275(1A);

(s) an order imposing a penalty under Chapter XXI;

(t) an order made by an Assessing Officer other than a Deputy Commissioner under the provisions of this Act in the case of such person or class of persons, as the Board may, having regard to the nature of the cases, the complexities involved and other relevant considerations direct.

It is also provided that the aforesaid provision will apply to all orders whether made before or after the appointed date which has been defined in the section as “the day appointed by the Central Government by notification in the Official Gazette.”

It is further provided that every appeal which is pending before the appointed day before the Deputy Commissioner (Appeals) and any matter arising out of or connected with such appeal and which is so pending shall stand transferred on that day to the Commissioner (Appeals) and the Commissioner (Appeals) may proceed with such appeal or matter from the stage in which it was on that day.

It is also provided that an appellant may demand that before proceeding further with the appeal and the matter, the previous proceedings or any part thereof be re-opened or the appellant be re-heard.

(2) Appeal by person denying liability to deduct tax under section 195 [Section 248]: This section provides that where under an agreement or other arrangement, the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.

This section restricts the eligibility of filing an appeal only to cases where the tax is borne by the assessee. Therefore, the cases where the tax is to be borne by the non-resident is outside the scope of section 248 and no appeal can be filed in such cases.
(3) **Form of appeal and prescribed fees [Section 249(1)]:** Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

**Prescribed fees** - In case of an appeal made to the Commissioner (Appeals), irrespective of the date of initiation of the assessment proceedings, the appeal shall be accompanied by a fee of:

<table>
<thead>
<tr>
<th>Case</th>
<th>Prescribed fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>where the total income of the assessee as computed by the Assessing Officer is ₹ 1,00,000 or less</td>
</tr>
<tr>
<td>(ii)</td>
<td>where the total income of the assessee computed as above is more than ₹ 1,00,000 but not more than ₹ 2,00,000</td>
</tr>
<tr>
<td>(iii)</td>
<td>where the total income of the assessee computed as above is more than ₹ 2,00,000</td>
</tr>
<tr>
<td>(iv)</td>
<td>in any case other than (i), (ii) and (iii) above</td>
</tr>
</tbody>
</table>

(4) **Time limit [Section 249(2) & (3)]:** An appeal to the Commissioner (Appeals) against any order which is appealable is to be presented within 30 days from the dates specified below in the particular cases. However, the Commissioner (Appeals) may admit an appeal even after the expiry of the said period of thirty days, if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the specified time. The dates from which the limitation period of 30 days has to be reckoned are as follows:

<table>
<thead>
<tr>
<th>Appeal relating to</th>
<th>30 days to be reckoned from</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Section 248</td>
<td>Date of payment of tax</td>
</tr>
<tr>
<td>2. Assessment/penalty</td>
<td>Date of service of notice of demand</td>
</tr>
<tr>
<td>3. Any other case</td>
<td>Date on which intimation of the order sought to be appealed against is served.</td>
</tr>
</tbody>
</table>

Period to be excluded while computing 30 days in case of appeal relating to assessment/penalty

<table>
<thead>
<tr>
<th>Application</th>
<th>Period to be excluded</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>From</td>
</tr>
<tr>
<td>1. Under section 146 for reopening an assessment</td>
<td>The date on which application is made</td>
</tr>
<tr>
<td>2. Under section 270AA(1)</td>
<td>The date on which the application is made</td>
</tr>
</tbody>
</table>
(5) Exemption in respect of tax to be paid at the time of filing the appeal [Section 249(4)]:
No appeal to the Commissioner (Appeals) shall be admitted for consideration unless, at the time of filing the appeal, the assessee has paid the tax on the amount of income returned by him in cases where a return has been filed by the assessee. If, however, no return has been filed by the assessee and an assessment has been made on him by the Assessing Officer, then, the assessee must pay an amount equal to the amount of advance tax which was payable by him before filing the appeal. The Commissioner (Appeals) is, however, empowered for good and sufficient reasons to be recorded in writing, to exempt an appellant from the operation of the requirement in regard to payment of advance tax, on receipt of an application from the appellant made specifically for this purpose, giving the reasons for the non-payment of the tax. The concerned authority is also required to pass an order in writing while granting the exemption indicating also the reasons on account of which the exemption is granted to the assessee.

(6) Procedure in appeal [Section 250]: On account of an appeal, the Commissioner (Appeals) shall fix a day and place for the hearing of the appeal and shall give notice of the same to the assessee and to the Assessing Officer, against whose order the appeal is made. Both the assessee and the Assessing Officer have the right to be heard at the hearing of the appeal either in person or by an authorised representative. The Commissioner (Appeals) has the power to adjourn the hearing of the appeal from time to time.

The Commissioner (Appeals), before passing an order on an appeal, may make such further enquiries as he thinks fit or direct the Assessing Officer to make further enquiries and report the result of the same to him. He may also allow the appellant to go into any grounds of appeal not specified previously by the appellant if he is satisfied that the omission of that ground was not wilful or unreasonable.

The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision. On disposal of the appeal the Commissioner (Appeals) must communicate the order passed by him to the assessee as well as to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

In every appeal the Commissioner (Appeals), where it is possible, may hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed under section 246A(1).

(7) Powers of the Commissioner (Appeals) [Section 251]: While disposing of an appeal the Commissioner (Appeals) is vested with the following powers viz.,

(i) In an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment.

(ii) In an appeal against the assessment order in respect of which the proceeding before the Settlement Commission abates under section 245HA, to confirm, reduce, enhance or annul the assessment after taking into consideration the following -
(1) all the material and other information produced by the assessee before the Settlement Commission;

(2) the results of the inquiry held by the Settlement Commission;

(3) the evidence recorded by the Settlement Commission in the course of the proceeding before it; and

(4) such other material as may be brought on his record.

(iii) In an appeal against an order imposing a penalty he may confirm or cancel such order or vary it in such a way as to enhance or reduce the penalty.

(iv) In any other case, the Commissioner (Appeals) may pass such orders in the appeal as he deems fit.

The Commissioner (Appeals), however, is not empowered to enhance an assessment or a penalty or to reduce a refund due to the assessee without giving the assessee a reasonable opportunity of showing cause against such an enhancement or reduction. In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed even if such matters were not raised before the Commissioner (Appeals) by the appellant.

18.2 APPEALS TO THE APPELLATE TRIBUNAL
[SECTIONS 252 TO 255]

(1) Constitution [Section 252(1)] - The Central Government shall constitute an Appellate Tribunal consisting of judicial and accountant members to exercise the powers and discharge the functions conferred on the Tribunal by the Act.

Judicial Member – qualification [Section 252(2)]
1. Must have held at least for 10 years a judicial office in the territory of India; or
2. Must have been a member of the Indian Legal Service in Grade II or any equivalent or higher post for at least three years; or
3. Must have been an advocate for at least 10 years.

Accountant Member – qualification [Section 252(2A)]
1. Minimum 10 years in the practice of accountancy as a Chartered Accountant; or as a registered accountant under any law formerly in force; or partly as such registered accountant and partly as a Chartered Accountant; or
2. Must have been a member of the Indian Income-tax Service, Group A and must have held the post of Additional Commissioner of Income-tax or any equivalent or higher post for at least three years.
The Central Government shall appoint –

(i) a person who is a sitting or retired Judge of a High Court and who has completed not less than 7 years of service as a Judge in a High Court; or

(ii) one of the Vice Presidents of the Appellate Tribunal

to be the President thereof [Section 252(3)].

The Government may appoint one or more members of the Tribunal to be the Vice-President or Vice-Presidents thereof. The Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing [Section 252(4) & (5)].

(2) Qualifications, terms and conditions of service of President, Vice President and Member [Section 252A]: Part XIV of Chapter VI to the Finance Act, 2017 contains amendments to certain Acts to provide for merger of tribunals and other authorities and conditions of service of chairpersons, members, etc. Section 184 of the Finance Act, 2017 lays down the qualifications, appointment, term and conditions of service, salary and allowances, etc., of Chairperson, Vice Chairperson and Members, etc., of the Tribunal, Appellate Tribunal and other Authorities.

Section 252A has been inserted in the Income-tax Act, 1961 to provide that the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the President, Vice-President and other Members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017 would be governed by the provisions of section 184 of the Finance Act, 2017.

However, the President, Vice-President and Member appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act i.e., section 252 and the rules made thereunder as if the provisions of section 184 of the Finance Act, 2017 had not come into force.

Section 156 of the Finance Act, 2017 provides the provisions of Part XIV of Chapter VI of the Finance Act, 2017 shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint.

Accordingly, the Central Government has, vide Notification No. SO 1696(E) [F.No.A.-50050/9/2016-Ad1C(CESTAT) Pt. I], dated 26.05.2017, appointed 26.05.2017 as the date on which the provisions of the Part XIV of Chapter VI of the Finance Act, 2017 shall come into force.

Accordingly, the Central Government had notified “Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017”, to specify the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the President, Vice-President and other Members of the Tribunal. Qualifications for appointment of President, Vice-President and other Members of the Tribunal are same as specified in section 252(1).
(3) **Orders appealable before the Appellate Tribunal [Section 253]**: Section 253(1) provides that an assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order –

<table>
<thead>
<tr>
<th>Order passed by</th>
<th>Section</th>
<th>Particulars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessing Officer</td>
<td>115VZC(1)</td>
<td>Power of Assessing Officer to exclude a tonnage tax company from the tonnage tax scheme if such company is a party to any transaction or arrangement which amounts to an abuse of such scheme.</td>
</tr>
<tr>
<td></td>
<td>143(3)/147/153A/153C</td>
<td>An order of assessment passed by an Assessing Officer in pursuance of the directions of Dispute Resolution Panel or an order passed under section 154 in respect of such order.</td>
</tr>
<tr>
<td></td>
<td>143(3)/147/153A/153C</td>
<td>An order of assessment passed by an Assessing Officer with the approval of Principal Commissioner or Commissioner as referred to in section 144BA(12), where tax consequences have been determined under the provisions of Chapter X-A relating to general anti-avoidance rules, or an order passed under section 154 or section 155 in respect of such order.</td>
</tr>
<tr>
<td>Commissioner (Appeals)</td>
<td>250</td>
<td>Order of the Commissioner (Appeals) disposing of the appeal</td>
</tr>
<tr>
<td></td>
<td>270A</td>
<td>Order levying penalty for under-reporting and misreporting of income.</td>
</tr>
<tr>
<td></td>
<td>271A</td>
<td>Order imposing penalty for failure to keep, maintain or retain books of account, documents etc.</td>
</tr>
<tr>
<td></td>
<td>271J</td>
<td>Order imposing penalty for furnishing incorrect information in any report or certificate by an accountant, merchant banker or registered valuer.</td>
</tr>
<tr>
<td></td>
<td>272A</td>
<td>Order imposing penalty for failure to answer questions, sign statements, furnish information returns or statements, allow inspections etc.</td>
</tr>
<tr>
<td></td>
<td>154</td>
<td>Order rectifying a mistake</td>
</tr>
<tr>
<td>Principal Commissioner or Commissioner</td>
<td>12AA</td>
<td>Order refusing/canceling registration of trust or institution</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>------</td>
<td>-------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>80G(5)(vi)</td>
<td>Refusal to grant approval to the Institutions or Fund</td>
</tr>
<tr>
<td></td>
<td>263</td>
<td>Revision of erroneous order passed by Assessing Officer</td>
</tr>
<tr>
<td></td>
<td>270A</td>
<td>Order imposing penalty for under-reporting of income and mis-reporting of income.</td>
</tr>
<tr>
<td></td>
<td>272A</td>
<td>Order imposing penalty for failure to answer questions, sign statements, furnish information returns or statements, allow inspections etc.</td>
</tr>
<tr>
<td></td>
<td>154</td>
<td>Amending the order passed under section 263</td>
</tr>
<tr>
<td>Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Director or Director</td>
<td>272A</td>
<td>Order imposing penalty for failure to answer questions, sign statements, furnish information returns or statements, allow inspections etc.</td>
</tr>
<tr>
<td>CIT (Exemptions)</td>
<td>10(23C)(iv)/(v)/(vi)/(via)</td>
<td>Order passed by the prescribed authority refusing approval of a fund/ institution for charitable purposes or trust or institution for public religious purposes or wholly for public religious and charitable purposes, university or other educational institution solely for educational purposes and not for purposes of profit or hospital or other institution solely for philanthropic purposes and not for purposes of profit under section 10(23C)(iv)/(v)/(vi)/(via).</td>
</tr>
</tbody>
</table>

Section 253(2) provides that the Principal Commissioner or Commissioner may, if he objects to any order passed by the Commissioner (Appeals) under section 154 or section 250, direct the Assessing Officer to appeal to the Appellate Tribunal against such order.

(4) Time limit for filing appeal or memorandum of cross objection under section 253(1) & (2) [Section 253(3), (4) & (5)]

(i) Every appeal to the Appellate Tribunal has to be filed within 60 days from the date on which
the order sought to be appealed against is communicated to the assessee or the Principal Commissioner or Commissioner, as the case may be.

(ii) Further, on receipt of notice that appeal against order of Commissioner (Appeals) has been preferred by the Assessing Officer or the assessee, as the case may be, the other party can file memorandum of cross objections within 30 days of receipt of notice against any part of the order of Commissioner (Appeals). The Appellate Tribunal has to dispose of the memorandum of cross objections as if it were an appeal filed within the given time limit.

(iii) However, the Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross objection even after expiry of the prescribed time limit, if he is satisfied that there was sufficient cause for not presenting it within that period.

(5) Fees

<table>
<thead>
<tr>
<th>Case</th>
<th>Prescribed fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Where the total income of the assessee as computed by the Assessing Officer in the case to which the appeal relates is ₹ 1,00,000 or less</td>
<td>₹ 500</td>
</tr>
<tr>
<td>(ii) Where the total income exceeds ₹ 1,00,000 but is not more than ₹ 2,00,000</td>
<td>₹ 1,500</td>
</tr>
<tr>
<td>(iii) Where the total income is more than ₹ 2,00,000</td>
<td>1% of the assessed income, subject to a maximum of ₹ 10,000.</td>
</tr>
<tr>
<td>(iv) In any other case</td>
<td>₹ 500</td>
</tr>
<tr>
<td>(v) Where appeal is filed to the Appellate Tribunal by an Assessing Officer on the direction of the Commissioner or Principal Commissioner, against the order of the Commissioner (Appeals) under section 154 or 250</td>
<td>No fees</td>
</tr>
<tr>
<td>(vi) Filing of memorandum of cross-objections.</td>
<td>No fees</td>
</tr>
<tr>
<td>(vii) Application for stay of demand</td>
<td>₹ 500</td>
</tr>
</tbody>
</table>

The Appellate Tribunal may, after giving both the parties to the appeal a reasonable opportunity of being heard, pass such orders on any appeal as it thinks fit. Such orders passed by the Appellate Tribunal shall be final unless appeal is made to the High Court under section 260A.

(6) Rectification: The Appellate Tribunal may, at any time within 6 months from the end of the month in which order is passed, with a view to rectifying any mistake apparent from records, amend any order passed by it. However, if the mistake is brought to its notice by the assessee or the Assessing Officer, the Tribunal is bound to rectify the same. In cases where the amendment has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the assessee, the Tribunal shall not pass any order of amendment unless it has given notice to the assessee of its intention to do so and has allowed him a reasonable opportunity of being heard. The
Tribunal must send a copy of any orders passed by it to the assessee and to the Principal Commissioner or Commissioner.

(7) **Fees for rectification:** Any application for rectification filed by the assessee shall be accompanied by a fee of ₹ 50.

(8) **Time limit:** In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1)/(2) of section 253.

Under section 254(2A), the Appellate Tribunal can grant stay of demand of tax which can extend only up to 180 days from the date of granting such stay. If the appeal is not disposed of within 180 days, the stay order shall stand vacated after the expiry of the said period.

Where an order of stay has been passed and the appeal has not been disposed of within the specified period of 180 days from the date of such order, the Appellate Tribunal may extend the period of stay or pass an order of stay for a further period or periods, as it thinks fit, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee.

However, the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed 365 days, even if the delay in disposing of the appeal is not attributable to the assessee. If the appeal is not disposed of within such period or periods, the order of stay shall stand vacated after the expiry of such period or periods.

(9) **Cost of appeal:** The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

(10) **Final authority on facts:** On all questions of fact the orders passed by the Appellate Tribunal on appeal shall be final and binding on the assessee as well as the Department [Section 255].

(11) **Benches:**

(i) Section 255(1) provides that the powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President of the Appellate Tribunal among the members thereof.

(ii) As per section 255(2), a Bench should normally consist of one judicial member and one accountant member.

(iii) However, section 255(3) provides for constitution of a single member bench and a Special Bench.

(iv) Section 255(3) provides that the President or any other member of the tribunal authorized by the Central Government in this behalf may dispose of any case which pertains to an assessee whose total income as computed by the Assessing Officer in the said case does not exceed ₹ 50 lakh.

(v) The President may, for the disposal of any particular case constitute a special Bench
consisting of three or more members, one of whom must necessarily be a judicial member and one an accountant member.

Where members differ - If the member of a Bench differ in opinion on any point the point shall be decided according to the opinion of the majority, if there is a majority. However, if the members are equally divided, they should state the points on which they differ and the case shall be referred by the President of the Tribunal for hearing on such point by one or more of the other members of the Tribunal: then, such points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it.

Regulating power - The Appellate Tribunal is empowered to regulate its own procedure and the procedure of its Benches in all matters arising out of the exercise of its power of the discharge of its functions, including the places at which the Benches shall hold their sittings. The Tribunal is vested with all the powers which are exercisable by Income-tax authorities under section 131 for the purpose of discharging its functions. Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding for the purpose of the Income-tax Act, 1961 and the Indian Penal Code and that Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of the Income-tax Act, 1961 and the Code of Criminal Procedure, 1898.

18.3 APPEALS TO HIGH COURT [SECTIONS 260A & 260B]

Section 260A provides for direct appeal to the High Court against the orders of the Appellate Tribunal.

(1) Appeal - Section 260A(1) provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. If the High Court is so satisfied, it shall formulate that question.

The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court under this section.

(2) Form for appeal - The appeal shall be in the form of a memorandum of appeal, precisely stating in it the substantial question of law involved.

(3) Time limit for appeal - The appeal shall be filed within 120 days from the date on which the order appealed against is received by the assessee, or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

The High Court has and always had the power to condone the delay and admit an appeal after the expiry of the period of 120 days, if it is satisfied that there was sufficient cause for not filing the appeal within that period.

(4) Matters on which appeal can be heard - The appeal shall be heard only on the question formulated. However, the respondent shall at the hearing of appeal, be allowed to argue that the case does not involve such question. Further, the Court shall also have power to hear the appeal on
any other substantial question of law not formulated by it, if it is satisfied that the case involves such question. However, such power shall be exercised by the Court only after recording the reasons for hearing such other question.

Further, the High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in section 260A(1).

(5) Delivery of judgment - After the appeal is heard, the High Court shall decide the question of law so formulated and deliver such judgment thereon, but such judgment should contain the grounds on which such decision is founded.

(6) Award of costs - The High Court is empowered to award such costs as it deems fit.

(7) Code of Civil Procedure - Unless otherwise provided in this Act, the Code of Civil Procedure, 1908, relating to appeals to the High Court, shall apply to appeals under this section.

(8) Case before High Court to be heard by not less than two judges [Section 260B]

Strength of the bench hearing the appeal - The appeal shall be heard by a bench of not less than 2 judges of the High Court.

Decision of the majority - The appeal shall be decided in accordance with the opinion of the judges or the majority, if any.

Where there is no such majority, the point of law upon which the judges differ shall be referred to one or more of the other judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it.

18.4 APPEAL TO THE SUPREME COURT [SECTION 261]

According to section 261, an appeal shall lie to the Supreme Court from any judgment of the High Court, in a case which the High Court certifies to be a fit one for appeal to the Supreme Court. The provisions of the Code of Civil Procedure, 1908 in regard to appeal shall apply in the case of all appeals to the Supreme Court in the same manner as in the case of all appeals from decrees of a High Court. The cost of appeal shall be decided at the discretion of the Supreme Court. Where the judgment of a High Court is varied in the appeal, effect should be given to the order of the Supreme Court in the same manner as provided in the case of a judgment of the High Court.
Note: The above time period can be extended by the Appellate Authority if the appellant shows sufficient cause for not presently the appeal within the specified time.

18.5 PROVISION FOR AVOIDING REPETITIVE APPEALS [SECTION 158A]

(1) Identical question of law pending before High Court/Supreme Court: Section 158A makes provision for avoiding repetitive appeals when identical question of law is pending before High Court or Supreme Court. This is applicable to a situation where an assessee claims that any question of law arising in his case for an assessment year which is pending before the Assessing Officer or any appellate authority is identical with a question of law arising in his case for another assessment year which is pending in appeal under section 260A before the High Court or in appeal under section 261 before the Supreme Court.

(2) Assessee to furnish declaration: In such a situation, notwithstanding anything contained in the Act, the assessee may furnish a declaration in the prescribed form that if the Assessing Officer
or the appellate authority, as the case may be, agrees to apply in the present case, the final decision passed on the other case, the assessee shall not raise again the same question of law in appeal before any appellate authority or in appeal before the High Court under section 260A or in appeal before the Supreme Court under section 261.

(3) **Assessing Officer’s report on correctness of claim:** Where such a declaration is furnished by the assessee to an appellate authority, the appellate authority shall call for a report from the Assessing Officer on the correctness of the claim. Where the Assessing Officer makes a request to the appellate authority to give him an opportunity of being heard, it shall allow him such opportunity.

(4) **Admission or rejection of claim by order in writing:** The Assessing Officer or the appellate authority, as the case may be, may, by order in writing –

(i) admit the claim if satisfied that the question of law is identical in the present as well as the other case; or

(ii) reject the claim, if not so satisfied.

(5) **Consequences where claim is admitted:** Where a claim is admitted, -

(i) the Assessing Officer or appellate authority, as the case may be, may make an order disposing of the present case without waiting for the final decision on the other case.

(ii) the assessee would then not be entitled to raise in relation to the relevant case, such question of law in appeal before any appellate authority or in appeal before the High Court under section 260A or the Supreme Court under section 261.

(6) **Final decision of Supreme Court/High Court to be applied to the case:** When the final decision on the question of law is passed in the other case, the Assessing Officer or the appellate authority, as the case may be would apply it to the present case and amend the order passed, if necessary, in order to conform to such decision.

(7) **Finality of the order:** An order admitting or rejecting the claim of the assessee, as the case may be, would be final. Such order cannot be called in question in any proceeding by way of appeal, reference, revision under the Act.

(8) **Meaning of certain terms:**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appellate authority</td>
<td>The Deputy Commissioner (Appeals), the Commissioner (Appeals) or the Appellate Tribunal.</td>
</tr>
<tr>
<td>Case</td>
<td>Any proceeding under the Act for assessment of the total income of the assessee or for the imposition of any penalty or fine on him.</td>
</tr>
</tbody>
</table>
18.6 PROCEDURE FOR APPEAL BY REVENUE WHEN AN IDENTICAL QUESTION OF LAW IS PENDING BEFORE SUPREME COURT [SECTION 158AA]

(1) Assessing Officer to make an application within prescribed period: Section 158AA provides that irrespective of anything contained in the Act, where any question of law arising in the case of an assessee for any assessment year is identical with a question of law arising in his case for another assessment year which is pending before the Supreme Court, in an appeal or in a special leave petition under Article 136 of the Constitution filed by the revenue, against the order of the High Court in favour of the assessee, the Commissioner or Principal Commissioner may, instead of directing the Assessing Officer to appeal to the Appellate Tribunal under section 253(2) or section 253(2A), direct the Assessing Officer to make an application to the Appellate Tribunal in the prescribed form within sixty days from the date of receipt of order of the Commissioner (Appeals) stating that an appeal on the question of law arising in the relevant case may be filed when the decision on the question of law becomes final in the earlier case.

(2) Application to be made only if assessee accepts that the question of law is identical: The Commissioner or Principal Commissioner shall direct the Assessing Officer to make an application under section 158AA(1), only if an acceptance is received from the assessee to the effect that the question of law in the other case is identical to that arising in the relevant case. However, in case no such acceptance is received, the Commissioner or Principal Commissioner shall proceed in accordance with the provisions contained in section 253(2) or section 253(2A). Accordingly, the Commissioner or Principal Commissioner may, if he objects to the order passed by the Commissioner (Appeals), direct the Assessing Officer to appeal to the Appellate Tribunal.

(3) Consequences where CIT(Appeals) order is not in conformity with Supreme Court’s decision: Where the order of the Commissioner (Appeals) is not in conformity with the final decision on the question of law in the other case (if the Supreme Court decides the earlier case in favour of the Department), the Commissioner or Principal Commissioner may direct the Assessing Officer to appeal to the Appellate Tribunal against such order within 60 days from the date on which the order of the Supreme Court is communicated to the Commissioner or Principal Commissioner.

Unless otherwise provided in section 158AA, all other provisions of Part B of Chapter XX “Appeals to Appellate Tribunal” shall apply accordingly.

18.7 REVISION BY THE PRINCIPAL COMMISSIONER OR COMMISSIONER [SECTIONS 263 AND 264]

(1) Revision of Orders prejudicial to the Revenue [Section 263]

(i) Under section 263(1), if the Principal Commissioner or Commissioner considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial...
to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry, pass an order enhancing or modifying the assessment made by the Assessing Officer or cancelling the assessment and directing fresh assessment.

(ii) An order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the Revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the CBDT under section 119;

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

(iii) The term ‘record’ shall include and shall be deemed always to have included all records relating to any proceedings under the Act available at the time of examination by the Principal Commissioner or Commissioner.

(iv) Where any order referred to in section 263(1) passed by the Assessing Officer had been the subject-matter of any appeal, the powers of the Principal Commissioner or Commissioner under section 263(1) shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(v) No order shall be made after the expiry of 2 years from the end of the financial year in which the order sought to be revised was passed.

(vi) In computing the period of 2 years, the time taken in giving an opportunity to the assessee to be reheard under section 129 and any period during which the revision proceeding is stayed by an order or injunction of any court shall be excluded.

(vii) The time limit, however, does not apply in case where the Principal Commissioner or Commissioner has to give effect to a finding or direction contained in the order of the Appellate Tribunal, High Court or the Supreme Court.

(2) Revision of other orders [Section 264]

(i) In the case of any other order (not being an order prejudicial to the Revenue) passed by any subordinate authority including the Deputy Commissioner (Appeals), the Principal Commissioner or Commissioner may either on his own motion or on receipt of an application from the assessee, call for the record of any proceedings under the Act in the course of which the order was passed. After making such enquiries as may
be necessary the Principal Commissioner or Commissioner may pass such order as he thinks fit.

(ii) The Principal Commissioner or Commissioner is not empowered to revise any order on his own motion if a period of more than one year has expired from the date of the order sought to be revised.

(iii) If the application for revision is made by the assessee, it must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise comes to know of it, whichever is later.

(iv) However, the Principal Commissioner or Commissioner may admit an application even after the expiry of one year, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period.

(v) The application to the Principal Commissioner or Commissioner for revision must be accompanied by a fee of ₹ 500.

(vi) If an order is passed by the Principal Commissioner or Commissioner declining to interfere in any proceeding, it shall not be deemed to be an order prejudicial to the assessee.

(vii) However, the Principal Commissioner or Commissioner is not empowered to revise any order in the following cases, viz.,

(a) where an appeal against the order lies to the Commissioner (Appeals) or the Tribunal but has not been made and the time within which the appeal may be made has not expired or in the case of an appeal to the Tribunal the assessee has not waived his right of appeal;

(b) where the order is pending on an appeal before the Commissioner (Appeals);

(c) where the order has been made subject to an appeal to the Commissioner (Appeals) or the Appellate Tribunal.

(3) Limitation of time for revision of orders by Principal Commissioner or Commissioner of Income-tax under section 264

Under section 264, the Principal Commissioner or Commissioner of Income-tax is empowered to revise an order passed by the subordinate authority where no appeal has been filed. There is a limitation of one year for filing the application.

(a) It shall be obligatory on the Principal Commissioner or Commissioner to pass an order within a period of one year from the end of financial year in which such application is made by the assessee for revision.

(b) In computing the above referred period of limitation, the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any
period during which any proceeding under this section is stayed by an order or injunction of any Court shall be excluded [Explanation to section 264(6)].

(c) The aforesaid time limit shall not apply to any order which has been passed in consequence of or to give effect to any finding or direction contained in an order of the Appellate Tribunal, High Court or the Supreme Court.

The assessee is bound to pay the tax due from him in accordance with the assessment made on him irrespective of the fact that a reference to the High Court or an appeal to the Supreme Court has been made to him [Section 265]. The High Court may, on a petition made to it for the execution of the order to the Supreme Court in respect of any costs awarded, thereby transmit the order for execution to any Court subordinate to it [Section 266]. Where as a result of an appeal under section 246 or section 246A or section 253, any change is made in the assessment of a body of individuals or an association of persons or a new assessment of a body of individuals or an association of persons is ordered to be made, the Commissioner (Appeals) or the Appellate Tribunal, as the case may be, shall pass an order authorizing the Assessing Officer either to amend the assessment made on any member of the body or association or make a fresh assessment on any member of the body or association [Section 267].

Section 268 - In computing the period of limitation prescribed for an appeal under this Act, the day on which the order complained of was served and, if the assessee was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order, should be excluded.
Time Limit for Revision of Orders

Revision of orders prejudicial to the interests of the revenue [Section 263]
- 2 years from the end of the Financial Year in which the order sought to be revised was passed

Revision of other orders [Section 264]
- 1 year from the date of the order, in case of *suo moto* revision by the PC/Commissioner; where the assessee submits an application for revision, the time limit is 1 year from the end of the FY in which the application is made.

Time to be excluded in both cases

Non-applicability of Time Limit

Order in consequence of or to give effect to any finding or direction contained in an order of the ITAT/HC/SC

Time taken in giving an opportunity to the assessee to be reheard

Period during which any proceeding is stayed by an order or injunction of any court
(4) Consequence of non-filing of appeal in respect of cases where the tax effect is less than the prescribed monetary limit [Section 268A]

(i) As per section 268A(1), the CBDT is empowered to issue orders, instructions or directions to other income tax authorities, fixing such monetary limits as it may deem fit. Such fixing of monetary limit is for the purpose of regulating filing of appeal or application for reference by any income tax authority.

(ii) Where an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, due to abovementioned order/instruction/direction of the CBDT, such authority shall not be precluded from filing an appeal or application for reference on the same issue in the case of –

(1) the same assessee for any other assessment year; or

(2) any other assessee for the same or any other assessment year.

(iii) Further, in such a case, it shall not be lawful for an assessee to contend that the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

(iv) The Appellate Tribunal or Court should take into consideration the above mentioned orders/instructions/directions of the CBDT and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case.

(v) Every order/instruction/direction which has been issued by the CBDT fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) and all the provisions of this section shall apply accordingly.

18.8 MONETARY LIMITS FOR FILING OF APPEALS BY THE DEPARTMENT BEFORE INCOME TAX APPELLATE TRIBUNAL, HIGH COURTS AND SLPs/APPEALS BEFORE SUPREME COURT


It has been decided by the CBDT that departmental appeals may be filed on merits before Income Tax Appellate Tribunal and High Courts and SLPs/ appeals before Supreme Court keeping in view the monetary limits and conditions specified below.
Monetary Limits specified:

Appeals/ SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Appeals/ SLPs in Income-tax matters</th>
<th>Monetary Limit (₹)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Before Appellate Tribunal</td>
<td>50,00,000</td>
</tr>
<tr>
<td>2.</td>
<td>Before High Court</td>
<td>1,00,00,000</td>
</tr>
<tr>
<td>3.</td>
<td>Before Supreme Court</td>
<td>2,00,00,000</td>
</tr>
</tbody>
</table>

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

Meaning of Tax Effect:

<table>
<thead>
<tr>
<th>Case</th>
<th>Tax Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>i. In case not covered in ii, iii and iv below</td>
<td>The tax on the total income assessed (-)</td>
</tr>
<tr>
<td></td>
<td>The tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (“disputed issues”).</td>
</tr>
<tr>
<td></td>
<td>Note – However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute.</td>
</tr>
<tr>
<td>ii. In case the chargeability of interest is the issue under dispute</td>
<td>The amount of interest</td>
</tr>
<tr>
<td>iii. In case where returned loss is reduced or assessed as income</td>
<td>The tax effect would include notional tax on disputed additions</td>
</tr>
<tr>
<td>iv. In case of penalty orders</td>
<td>Quantum of penalty deleted or reduced in the order to be appealed against</td>
</tr>
</tbody>
</table>

Note – Tax effect shall be tax including applicable surcharge and cess.

Computation of tax on the total income assessed where income is computed under the provisions of section 115JB or section 115JC:

In such case, tax on the total income assessed would be computed as given below -

\[(A - B) + (C - D)\]
Where,

A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (i.e., the general provisions)

B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of the disputed issues under general provisions

C = the total income assessed as per the provisions contained in section 115JB or section 115JC

D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC was reduced by the amount of the disputed issues under said provisions

However, where the amount of disputed issues is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.

**Manner of calculation of tax effect of different assessment years:**

The Assessing Officer has to calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the specified monetary limit. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified. Further, even in case of a composite order of any High Court or 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 prescribed monetary limit. In case where a composite order/judgement involves more than one assessee, each assessee shall be dealt with separately.

**Department not precluded from filing an appeal against disputed issues for subsequent assessment years if the tax effect exceeds the specified monetary limits in those years**

In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Principal Commissioner or Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in the Circular". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.
Cases in respect of which appeal is not filed due to tax effect being less than specified monetary limit not to have any precedent value

In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value and also bring to the notice of the Tribunal/ Court the provisions of section 268A(4) of the Act. As the evidence of not filing appeal due to this Circular may have to be produced in courts, the judicial folders in the office of Pr CsIT/ CsIT must be maintained in a systemic manner for easy retrieval.

Cases where adverse judgments should be contested on merits even if tax effect is less than the specified monetary limits

Adverse judgments relating to the issues enumerated hereunder should be contested on merits notwithstanding that the tax effect entailed is less than the specified monetary limits or there is no tax effect:

(a) Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or
(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or
(c) Where Revenue Audit objection in the case has been accepted by the Department, or
(d) Where addition relates to undisclosed foreign income/undisclosed foreign assets (including financial assets)/undisclosed foreign bank account.
(e) Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI/ED/DRI/SFI/O/Directorate General of GST Intelligence (DGGI).
(f) Cases where prosecution has been filed by the Department and is pending in the Court.

Specified monetary limit not to apply to writ matters and direct tax matters other than income-tax

Filing of appeals in other direct tax matters shall continue to be governed by the relevant provisions of statute and rules. Further, filing of appeal in cases of income-tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A/ 12AA, filing of appeal shall not be governed by the specified monetary limits and decision to file appeal in such cases may be taken on merits of a particular case.
Retrospective applicability of specified monetary limits

This Circular would apply to SLPs/appeals/cross objections/reference to be filed henceforth in SC/HCs/Tribunal and it shall also apply retrospectively to pending SLPs/appeals/cross objections/reference. Pending appeals below the specified tax limits may be withdrawn/ not pressed.

Non-applicability of specified monetary limits in case involving bogus LTCG/ STCG through penny stocks

However, in exercise of power conferred by section 268A, CBDT has clarified that the above monetary limits shall not apply in case of assessee claiming bogus LTCG/ STCG through penny stocks and appeals/ SLPs in such cases shall be filed on merits.

18.9 DOCTRINE OF PARTIAL MERGER AND DOCTRINE OF TOTAL MERGER

The third proviso in section 147, provides that the doctrine of partial merger shall apply to reopening in a case where an assessee has filed an appeal etc. for an assessment year. It has been provided that the Assessing Officer may assess or reassess such income, other than income which has been the subject matter of any appeal or reference or revision, which is chargeable to tax and has escaped assessment. The doctrine of partial merger also holds good for section 154 and section 263.

However, the concept of total merger would apply in the case of section 264. The Principal Commissioner or Commissioner of Income-tax has no power to revise any order under section 264, if the order has been made subject to an appeal to the Appellate Tribunal, even if the relief claimed in the revision is different from the relief claimed in the appeal and irrespective of the fact whether the appeal is by the assessee or by the Department as the concept of total/complete merger is applicable for section 264.
**Doctrines of Merger**

- **Partial Merger**
  - Reassessment under section 147
    - The A.O. may assess or reassess such income, other than income which has been the subject matter of any appeal or reference or revision, which is chargeable to tax and has escaped assessment.
  - Rectification under section 154
    - Amendment of order for rectification of mistake apparent from the record, in relation to a matter other than the matter considered and decided in any proceeding by way of appeal or revision relating to such order.
  - Revision under section 263
    - Where the order passed by the A.O. has been the subject matter of any appeal, the powers of the PC/Commissioner under section 263 shall extend to such matters as had not been considered and decided in such appeal.

- **Total Merger**
  - Revision under section 264
    - The PC/Commissioner cannot revise any order which has been made the subject of an appeal to the Commissioner (Appeals) or the Appellate Tribunal.
EXERCISE

Question 1

"SVS Propcon" did not make a claim of ₹20 lacs in the return of income filed for A.Y. 2020-21 which was disallowed in the previous assessment year under section 43B. However, the said claim was also not considered by the Assessing Officer during assessment proceedings on the ground that no revised return was filed. Can the assessee now make such claim before the appellate authority?

Answer

Yes, the assessee is entitled to raise additional claims before the appellate authorities. The restriction that an additional claim has to be made by filing a revised return applies only in respect of a claim made before the Assessing Officer. An assessee cannot make a claim before the Assessing Officer otherwise than by filing a revised return. It was so held by the Supreme Court in Goetze (India) Ltd v. CIT (2006) 284 ITR 323.

However, this restriction does not apply to an additional claim made before an appellate authority. The appellate authorities have jurisdiction to permit additional claims before them, though, the exercise of such jurisdiction is entirely the authorities’ discretion. It was so held by the Bombay High Court in CIT v. Pruthvi Brokers & Shareholders (2012) 349 ITR 336.

Thus, an additional claim can be raised before the Appellate Authority even if no revised return is filed.

Question 2

Examine the correctness or otherwise of the following statements with reference to the provisions of the Income-tax Act, 1961:

(i) An appeal before Income-tax Appellate Tribunal cannot be decided in the event of difference of opinion between the Judicial Member and the Accountant Member on a particular ground.

(ii) A High Court does not have an inherent power to review an earlier order passed by it on merits.

Answer

(i) The statement given is not correct. As per the provisions of section 255, in the event of difference in opinion between the members of the Bench of the Income-tax Appellate Tribunal, the matter shall be decided on the basis of the opinion of the majority of the members. In case the members are equally divided, they shall state the point or points of difference and the case shall be referred by the President of the Tribunal for hearing on such points by one or more of the other members of the Tribunal. Such point or points shall be decided according to the opinion of majority of the members of the Tribunal who heard the case, including those who had first heard it.
(ii) The statement given is not correct. The Supreme Court, in *CIT v. Meghalaya Steels Ltd.* (2015) 377 ITR 112, observed that the power of review would inhere on High Courts, being courts of record under article 215 of the Constitution of India. There is nothing in article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. The Supreme Court further observed that section 260A(7) does not purport in any manner to curtail or restrict the application of the provisions of the Code of Civil Procedure. Section 260A(7) only states that all the provisions that would apply qua appeals in the Code of Civil Procedure would apply to appeals under section 260A. The Supreme Court opined that this does not in any manner suggest either that the other provisions of the Code of Civil Procedure are necessarily excluded or that the High Court’s inherent jurisdiction is in any manner affected.

**Question 3**

**Does the Income-tax Appellate Tribunal have the following powers?**

(i) Power to allow the assessee to urge any ground of appeal which was not raised by him before the Commissioner (Appeals);

(ii) Power to recall its own order.

**Answer**

(i) The Income-tax Appellate Tribunal has the power to entertain question raised for the first time. The Tribunal is not confined only to the issues arising out of the appeal before the Commissioner (Appeals). It has the power to allow the assessee to urge any ground not raised before the Commissioner (Appeals). However, the relevant facts in respect of such ground should be on record. The decision of the Supreme Court in the case of *National Thermal Power Company Limited vs. CIT* (1998) 229 ITR 383 (SC) supports this view.

(ii) The Delhi High Court, in *Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT* (2011) 330 ITR 243 (Delhi)(FB) observed that the justification of an order passed by the Tribunal recalling its own order is required to be tested on the basis of the law laid down by the Apex Court in *Honda Siel Power Products Ltd. v. CIT* (2007) 295 ITR 466, dealing with the Tribunal’s power under section 254(2) to recall its order where prejudice has resulted to a party due to an apparent omission, mistake or error committed by the Tribunal while passing the order. Such recalling of order for correcting an apparent mistake committed by the Tribunal has nothing to do with the doctrine or concept of inherent power of review. It is a well settled provision of law that the Tribunal has no inherent power to review its own judgment or order on merits or reappreciate the correctness of its earlier decision on merits. However, the power to recall has to be distinguished from the power to review. While the Tribunal does not have the inherent power to review its order on merits, it can recall its order for the purpose of correcting a mistake apparent from the record.
When prejudice results from an order attributable to the Tribunal’s mistake, error or omission, then it is the duty of the Tribunal to set it right. The Delhi High Court observed that the Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal’s mistake, error or omission and the error committed is apparent.

**Question 4**

Can a rectification order under section 254 of the Income-tax Act, 1961 be passed by the Income-tax Appellate Tribunal beyond 6 months from the end of the month in which the order sought to be rectified was passed?

**Answer**

The issue as to whether a rectification order can be passed by the Income-tax Appellate Tribunal under section 254 beyond six months from the end of the month in which order sought to be rectified was passed, has been addressed in *Sree Ayyanar Spinning and Weaving Mills Ltd. v. CIT (2008) 301 ITR 434 (SC)*. Section 254(2), dealing with the power of the Appellate Tribunal to pass an order of rectification of mistakes, is in two parts. The first part refers to the *suo motu* exercise of the power of rectification by the Appellate Tribunal, whereas the second part refers to rectification on an application filed by the assessee or Assessing Officer bringing any mistake apparent from the record to the attention of the Appellate Tribunal.

If Income-tax Appellate Tribunal, *suo moto*, makes the rectification of its order, then the order has to be passed within 6 months from the end of the month in which the order sought to be rectified was passed. Where the application for rectification is made by the Assessing Officer or the assessee within 6 months from the end of the month in which the order sought to be rectified was passed, the Appellate Tribunal is bound to decide the application on merits and not on the ground of limitation i.e. order can be passed after expiry of 6 months from the end of the month in which the order sought to be rectified was passed. However, the application for rectification cannot be filed belatedly after 6 months from the end of the month in which the order sought to be rectified was passed. *[Ajith Kumar Pitaliya vs ITO (2009) 318 ITR 182 (M.P.)*]

**Question 5**

What do you mean by substantial question of law? Examine.

**Answer**

The expression “substantial question of law” has not been defined anywhere in the Act. However, it has acquired a definite meaning through various judicial pronouncements. The tests are:

1. whether directly or indirectly it affects substantial rights of the parties; or
2. the question is of general public importance; or
3. whether it is an open question in the sense that issue is not settled by the pronouncement of the Supreme Court or Privy Council or by the Federal Court; or
(4) the issue is not free from difficulty; or
(5) it calls for a discussion for alternative view.

Question 6

Examine the correctness of the following statement:

“The Appellate Tribunal is empowered to grant indefinite stay for the demand disputed in appeals before it.”

Answer

Section 254(2A) provides that the Appellate Tribunal, where it is possible, may hear and decide an appeal within a period of four years from the end of the financial year in which such appeal is filed.

The Appellate Tribunal may, on merit, pass an order of stay in any proceedings relating to an appeal. However, such period of stay cannot exceed 180 days from the date of such order. The Appellate Tribunal has to dispose off the appeal within this period of stay.

Where the appeal has not been disposed off within this period and the delay in disposing the appeal is not attributable to the assessee, the Appellate Tribunal can further extend the period of stay originally allowed. However, the aggregate of period originally allowed and the period so extended should not exceed 365 days even if the delay in disposing of the appeal is not attributable to the assessee. The Appellate Tribunal is required to dispose off the appeal within this extended period. If the appeal is not disposed of within such period or periods, the order of stay shall stand vacated after the expiry of such period or periods.

Therefore, the statement given in the question is not correct.

Question 7

Is Commissioner (Appeals) empowered to consider an appeal filed by an assessee challenging the order of assessment in respect of which the proceedings before the Settlement Commission abates? Examine.

Answer

Section 251(1) lists the powers of the Commissioner (Appeals) in disposing of an appeal. Clause (aa) of section 251(1) empowers the Commissioner (Appeals), in an appeal against the assessment order in respect of which the proceeding before the Settlement Commission abates under section 245HA, to confirm, reduce, enhance or annul the assessment after taking into consideration the following:

(1) all the material and other information produced by the assessee before the Settlement Commission;
(2) the results of the inquiry held by the Settlement Commission;
(3) the evidence recorded by the Settlement Commission in the course of the proceeding before it; and
(4) such other material as may be brought on his record.
Question 8

An Income-tax authority did not file an appeal to the Income-tax Appellate Tribunal against an order of the Commissioner (Appeals) decided against the Income-tax department on a particular issue in case of one assessee, Alpi for assessment year 2019-20 on the ground that the tax effect of such dispute was less than the monetary limit prescribed by CBDT. In assessment year 2020-21, similar issue arose in the assessments of Alpi and her sister Palki, which was decided by the Commissioner (Appeals) against the Department. Can the Income-tax department move an appeal to the Tribunal in respect of A.Y. 2020-21 against the orders of the Commissioner (Appeals) for Alpi and her sister Palki?

Answer

Under section 268A(1), the CBDT is empowered to issue orders, instructions or directions to the other income-tax authorities, fixing such monetary limits, as it may deem fit, to regulate filing of appeal or application for reference by any income-tax authority.

Under section 268A(2), where an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, due to above-mentioned order/instruction/direction of the CBDT, such authority shall not be precluded from filing an appeal or application for reference on the same issue in the case of the same assessee for any other assessment year or any other assessee for the same or any other assessment year. Further, in such a case, it shall not be lawful for an assessee to contend that the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

In view of above provision, it would be in order for the Income-tax Department to move an appeal to the Tribunal against the orders of the CIT(A) in respect of A.Y. 2020-21 both for Alpi and Palki.

Question 9

A petition for stay of demand was filed before ITAT by XYZ Ltd. in respect of a disputed demand for which appeal was pending before it, on which stay was granted by the ITAT vide order dated 1.1.2019. The bench could not function thereafter till 1.2.2020 and therefore, the disputed matter could not be disposed off. The Assessing Officer attached the bank account on 16.2.2020 and recovered the amount of ₹15 lacs against the arrear demand of ₹25 lacs. The assessee requested the Assessing Officer to refund back the amount as it holds stay over it. The Assessing Officer rejected the contention of the assessee. Now the assessee seeks your opinion.

Answer

The Appellate Tribunal may, on merit, pass an order of stay in any proceedings relating to an appeal. However, such period of stay cannot exceed 180 days from the date of such order. The Appellate Tribunal has to dispose off the appeal within this period of stay. Where the appeal has not been disposed off within this period and the delay in disposing the appeal is not attributable to the assessee, the Appellate Tribunal can further extend the period of stay originally allowed. Section 254(2A) provides that the aggregate of the period originally allowed and the period or periods so
extended or allowed shall not, in any case, exceed 365 days, even if the delay in disposing of the appeal is not attributable to the assessee. If the appeal is not disposed of within such period or periods, the order of stay shall stand vacated after the expiry of such period or periods.

Accordingly, even if an appeal is not heard by the bench, say, due to the bench not functioning or due to the department seeking adjournment, the stay granted by the Appellate Tribunal shall stand vacated after the period of 365 days, inspite of the assessee having taken all steps to ensure speedy disposal of the appeal and having a good prima facie case.

In the present case, the period of 365 days has expired on 31.12.2019, after which date the order of stay stands vacated. Accordingly, the recovery of ₹ 15 lacs against the arrear demand of ₹ 25 lacs made by the Assessing Officer on 16.2.2020 is in order.

Question 10

An assessee who had been served with an order of assessment passed under section 143(3) on 1.1.2020 had filed an application against this order before the CIT as per section 264 on 11.1.2020. However, the CIT refused to entertain the application on the pretext of premature application. Assessee seeks your opinion.

Answer

An assessee, who is aggrieved by the order of the Assessing Officer under section 143(3) passed on 1.1.2020, had moved an application for revision of order under section 264 on 11.1.2020. The order passed by the Assessing Officer under section 143(3) is an order appealable before the Commissioner (Appeals). The time limit for filing an appeal is 30 days from the date of order i.e., upto 31.1.2020. This time limit had not expired on 11.1.2020 and the assessee had also not waived his right of appeal while filing the application for revision on 11.1.2020 before the Commissioner of Income-tax. The application filed before the Commissioner of Income-tax for revision under section 264 by the assessee will only be considered when the conditions specified under section 264(4) have been complied with. One of the conditions is that the Commissioner shall not revise any order where an appeal against the order lies to the Commissioner (Appeals) or Appellate Tribunal and the time within which such appeal may be made has not expired, unless the assessee has waived his right of appeal. In the present case, the time limit had not expired on 11.1.2020 and the assessee had also not waived the right of appeal while filing the application for revision before the Commissioner of Income-tax on 11.1.2020 under section 264. Therefore, the Commissioner’s refusal to entertain such application is correct.

Note: In practical situations, the Commissioner could have kept the proceedings in abeyance till the expiry of the time prescribed for filing appeal by the assessee and thereafter, could have assumed jurisdiction for making revision besides taking an undertaking from the assessee for waiving his right of appeal. In reality, taxpayers usually will not prefer revision in such short time period nor would the Commissioner reject the application, the moment it is received by him.
Question 11

(a) The Commissioner of Income-tax issued notice to revise the order passed by an Assessing Officer under section 143. During the pendency of proceedings before the Commissioner, on the basis of material gathered during survey under section 133A after issue of the first notice, the Commissioner of Income-tax issued a second notice, the contents of which were different from the contents of the first notice. Examine whether the action of the Commissioner is justified as to the second notice.

(b) Examine the circumstances where the appellant shall be entitled to produce additional evidence, oral or documentary, before the Commissioner of Income-tax (Appeals) other than the evidence produced during the proceedings before the Assessing Officer.

Answer

(a) The action of the Commissioner in issuing the second notice is not justified. The term “record” has been defined in clause (b) of Explanation to section 263(1). According to this definition “record” shall include and shall be deemed always to have included all records relating to any proceeding under the Act available at the time of examination by the Commissioner. In other words, the information, material, report etc. which were not in existence at the time the assessment was made and came into existence afterwards can be taken into consideration by the Commissioner for the purpose of invoking his jurisdiction under section 263(1). However, at the same time, in view of the express provisions contained in clause (b) of the Explanation to section 263(1), such information, material, report etc. can be relied upon by the Commissioner only if the same forms part of record when the action under section 263 is taken by the Commissioner,

Issuance of a notice under section 263 succeeds the examination of record by Commissioner. In the present case, the Commissioner initially issued a notice under section 263, after the examination of the record available before him. The subsequent second notice was on the basis of material collected under section 133A, which was totally unrelated and irrelevant to the issues sought to be revised in the first notice. Accordingly, the material on the basis of which the second notice was issued could not be said to be “record” available at the time of examination as emphasized in Explanation (b) to section 263(1).

(b) As per Rule 46A(1) of the Income-tax Rules 1962, an appellant shall be entitled to produce before the Commissioner (Appeals), evidence, either oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, only in the following circumstances -

(a) where the Assessing Officer has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or
(c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; or

(d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

Further, no evidence shall be admitted unless the Commissioner (Appeals) records in writing the reasons for its admission.

Question 12

Examine the correctness or otherwise of the following propositions in the context of the Income-tax Act, 1961:

(a) The powers of the Commissioner of Income-tax (Appeals) to enhance the assessment are plenary and quite wide.

(b) At the time of hearing of rectification application, the Income-tax Appellate Tribunal can re-appraise the evidence produced during the proceedings of the appeal hearing.

(c) The High Court cannot interfere with the factual finding recorded by the lower authorities and the Tribunal, without any valid reasons.

Answer

(a) The proposition is correct in law. The Supreme Court has, in CIT vs. McMilan & Co. (1958) 33 ITR 182 and CIT vs. Kanpur Coal Syndicate (1964) 53 ITR 225, held that in disposing of an appeal before him, the appellate authority can travel over a whole range of the assessment order. The scope of his powers is co-terminus with that of the Assessing Officer. He can do what the Assessing Officer can do and can also direct him to do, what he has failed to do. He can assess income from sources which have been considered by the Assessing Officer but not brought to tax. He can consider every aspect of the assessment order and give appropriate relief.

The Allahabad High Court has, in CIT v. Kashi Nath Chandiwala (2006) 280 ITR 318, held that the appellate authority is empowered to consider and decide any matter arising out of the proceedings in which the order appealed against was passed notwithstanding the fact that such matter was not raised before him by the assessee. The Commissioner (Appeals) is entitled to direct additions in respect of items of income not considered by the Assessing Officer.

Further, the Apex Court has, in the case of Jute Corporation of India Ltd. vs. CIT (1991) 187 ITR 688, held that the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter.

Thus, the powers of the Commissioner of Income-tax (Appeals) in enhancing the assessment are very wide and plenary.

(b) The proposition is not correct as per law. This is because section 254(2) specifically
empowers the Appellate Tribunal to amend any order passed by it, either *suo-moto* or on an application made by the assessee or Assessing Officer, with a view to rectify any mistake apparent from record, at any time within 6 months from the end of the month of the order sought to be amended.

The powers of the Tribunal under section 254(2) relating to rectification of its order are very limited. Such powers are confined to rectifying any mistake apparent from the record. The mistake has to be such that for which no elaborate reasons or inquiry is necessary. Accordingly, the re-appraisal of evidence placed before the Tribunal during the course of the appeal hearing is not permitted. It cannot re-adjudicate the issue afresh under the garb of rectification [*CIT vs. Vardhman Spinning (1997) 226 ITR 296 (P & H), CIT v. Ballabh Prasad Agarwalla (1998) 233 ITR 354 (Cal.) & Niranjan & Co. Ltd. v. ITAT (1980) 122 ITR 519 (Cal.).*]

(c) The proposition is correct in law. A finding of fact cannot be disturbed by the High Court in exercise of its powers under section 260A. The Income-tax Appellate Tribunal is the final fact finding authority and the findings of fact recorded by the Tribunal can be interfered with by the High Court under section 260A only on the ground that the same were without evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between conclusion of fact and the primary fact upon which that conclusion is based.

In *CIT vs. P. Mohanakala (2007) 291 ITR 278* and *M. Janardhana Rao v. Joint CIT (2005) 273 ITR 50*, the Apex Court observed that the High Court had set aside the factual findings of the lower authorities and the Tribunal without any valid reason. The Apex Court held that the findings of fact could not be interfered with by the High Court without carefully considering the facts on record, the surrounding circumstances and the material evidence. There is no scope for interference with the factual findings, unless the findings are *per se* without reason or basis, perverse and/or contrary to the material on record.

Hence, only if the issue gives rise to a substantial question of law, an appeal shall lie before the High Court.

**Question 13**

**Answer the following in the context of provisions contained in the Income-tax Act, 1961:**

The assessment for A.Y. 2016-17 was completed as per section 143(3) considering the various claims so made by the assessee on 23.12.2017. Subsequently, this was reopened under section 147 on certain issues, but excluding the claim of the assessee as to “Lease Equalisation Fund”. The order of reassessment was passed on 18.11.2018. The Commissioner within the powers vested under section 263 passed an order on 11.4.2020 rejecting the claim of assessee as to “Lease Equalisation Fund”. The assessee challenges that the action of the CIT is not sustainable because the same was barred by limitation.

**Answer**

This issue was settled by the Supreme Court in *CIT v. Alagendran Finance Ltd. (2007) 293 ITR 1.*
The Supreme Court observed that though there was no doubt that once an order of assessment is reopened, the previous assessment will be held to be set aside and the whole proceedings would start afresh, however, it would not mean that even when the subject-matter of reassessment is distinct and different, the entire proceeding would be deemed to have been reopened. The doctrine of merger would apply only in a case where the subject-matter of reassessment and the subject-matter of assessment are the same. However, in this case, the revision proceedings related to Lease Equalisation Fund, which was not the subject matter of reassessment. Therefore, the doctrine of merger does not apply in this case.

Section 263(2) provides no order shall be made under section 263(1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. The period of limitation as referred to in section 263(2) relates to the assessment in which the claim of the assessee as to Lease Equalisation Fund was considered by the Assessing Officer. This issue was not the subject matter of reassessment proceedings.

Accordingly, the period of limitation shall be reckoned with reference to the original assessment order and not from the date of the order of reassessment. Therefore, in this case, the revision proceedings are barred by limitation since the original assessment order was made on 23.12.2017 and the revision should have been made by 31.3.2020.

Question 14

An assessee, who is aggrieved by all or any of the following orders, is desirous to know the available remedial recourse and the time limit against each order under the Income-tax Act, 1961:

(i) passed under section 143(3) by the Assessing Officer.
(ii) passed under section 263 by the Commissioner of Income-tax.
(iii) passed under section 272A by the Director General.
(iv) passed under section 254 by the ITAT.

Answer

(i) An assessee, aggrieved by the order passed under section 143(3) by the Assessing Officer, can file an appeal before the Commissioner of Income-tax (Appeals) under section 246A(1) within 30 days of the date of service of the notice of demand relating to the assessment. However, where the assessee does not want to prefer an appeal, then he can move a revision petition before the Principal Commissioner or Commissioner of Income-tax under section 264 within a period of one year from the date of on which the order was communicated to him or the date on which he otherwise came to know of it, whichever is earlier.

(ii) An assessee, aggrieved by the order passed under section 263 by the Commissioner of Income-tax, can file an appeal to Income-tax Appellate Tribunal under section 253(1)(c) within 60 days of the date on which the order sought to be appealed against is communicated to the assessee.
(iii) An assessee, aggrieved by the order passed under section 272A by the Director General, can file an appeal before the Income-tax Appellate Tribunal under section 253(1)(c) within 60 days of the date on which the order sought to be appealed against is communicated to the assessee.

(iv) An assessee, aggrieved by the order passed under section 254 by the Income-tax Appellate Tribunal, can file an appeal before the High Court under section 260A within 120 days from the date of receipt of order of Income-tax Appellate Tribunal, only where the order gives rise to a substantial question of law.

**Question 15**

*Who can file memorandum of cross-objections before the Income-tax Appellate Tribunal? What is the time limit? What is the fee for filing memorandum of cross objections?*

**Answer**

Section 253(4) of the Income-tax Act, 1961 gives the respondent (assessee or the Assessing Officer), in every appeal filed before the Income-tax Appellate Tribunal, a right to file a memorandum of cross-objections against any order of the Commissioner (Appeals). This right of filing a memorandum of cross-objections is an independent right given to the respondent in an appeal and is in addition to the right of appeal which may or may not be exercised by the assessee or the Assessing Officer under section 253(1) or section 253(2). The memorandum of cross-objections has to be in the prescribed form and verified in the prescribed manner and has to be filed within 30 days of the receipt of notice of the appeal. The Tribunal is empowered to permit filing of memorandum of cross-objections after the expiry of the prescribed period if sufficient cause is shown. Such memorandum of cross-objections will be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in section 253(3). There is no fee for filing a memorandum of cross-objections.
SIGNIFICANT SELECT CASES

1. Does the CIT (Appeals) have the power to change the status of assessee?

*Mega Trends Inc. v. CIT (2016) 388 ITR 16 (Mad).*

**Facts of the case:** The assessee filed its return of income as a partnership firm for the relevant assessment year admitting a total income of ₹ 174.36 lakhs. The firm consisted of thirteen individuals and two firms. The return of income was selected for scrutiny which led to disallowance of certain deductions to the tune of ₹ 262.50 lakhs. The assessee preferred an appeal. The CIT (Appeals) invoked section 251 and issued a show cause notice proposing to change the assessee’s status to AOP on the reasoning that a partnership firm cannot be a partner in another firm. The assessee filed writ of *certiorari* to quash the show cause notice.

**Note:** ‘Certiorari’ is “a writ issued by a superior court calling up the record of a proceeding in a lower court for review”.

**High Court’s Observations:** The Revenue contended that the CIT(Appeals) has power to modify assessee’s status, since a partnership firm is a relationship between persons who have agreed to share the profits of the business carried on by all or any of them acting for all, and the term persons only connotes natural persons. Since some of the partners are other firms, the assessment cannot be carried out as a firm. They relied on the Supreme Court’s ruling in *Dhulichand Laxminarayan v. CIT (1956) 29 ITR 535 (SC)* to argue this point.

The High Court observed that, under section 251(1), the powers of the first appellate authority are coterminous with those of the Assessing Officer and the appellate authority can do what the Assessing Officer ought to have done and also direct him to do what he had failed to do. If the Assessing Officer had erred in concluding the status of the assessee as a firm, it could not be said that the Commissioner (Appeals) had no jurisdiction to go into the issue. The appeal was in continuation of the original proceedings and unless fetters were placed upon the powers of the appellate authority by express words, the appellate authority could exercise all the powers of the original authority.

**High Court’s Decision:** The High Court held that the power to change the status of the assessee is available to the assessing authority and when it is not used by him, the appellate authority is empowered to use such power and change the status. The Court relied on a full bench decision of the Madras High Court in *State of Tamil Nadu v. Arulmurugan and Co. reported in [1982] 51 STC 381* to come to such conclusion.
2. Can an assessee make an additional/new claim before an appellate authority, which was not claimed by the assessee in the return of income (though he was legally entitled to), otherwise than by way of filing a revised return of income?

_CIT v. Pruthvi Brokers & Shareholders (2012) 349 ITR 336 (Bom.)_

**High Court's Observations:** While considering the above mentioned issue, the Bombay High Court observed the decision of the Supreme Court, in the case of _Jute Corporation of India Ltd. v. CIT (1991) 187 ITR 688_ and _National Thermal Power Corporation. Ltd v. CIT (1998) 229 ITR 383_, that an assessee is entitled to raise additional claims before the appellate authorities. The appellate authorities have jurisdiction to permit additional claims before them, however, the exercise of such jurisdiction is entirely the authorities’ discretion.

Also, the High Court considered the decision of the Apex Court in the case of _Addl. CIT v. Gurjargravures (P.) Ltd. (1978) 111 ITR 1_, wherein it was held that in case an additional ground was raised before the appellate authority which could not have been raised at the stage when the return was filed or when the assessment order was made, or the ground became available on account of change of circumstances or law, the appellate authority can allow the same.

The Supreme Court, in the case of _Goetze (India) Ltd v. CIT (2006) 157 Taxmann 1_, held that the assessee cannot make a claim before the Assessing Officer otherwise than by filing an application for the same. The additional claim before the Assessing Officer can be made only by way of filing revised return of income.

The decision in the above mentioned case, however, does not apply in this case, since the Assessing Officer is not an Appellate Authority.

**High Court's Decision:** Therefore, in the present case, the Bombay High Court, considering the above mentioned decisions, held that additional grounds can be raised before the Appellate Authority even otherwise than by way of filing return of income. However, in case the claim has to be made before the Assessing Officer, the same can only be made by way of filing a revised return of income.

3. Does the Appellate Tribunal have the power to review or re-appreciate the correctness of its earlier decision under section 254(2)?

_CIT v. Earnest Exports Ltd. (2010) 323 ITR 577 (Bom.)_

**High Court's Observations:** In this case, the High Court observed that the power under section 254(2) is limited to rectification of a mistake apparent on record and therefore, the Tribunal must restrict itself within those parameters. **Section 254(2) is not a carte blanche for the Tribunal to change its own view by substituting a view which it believes should have been taken in the first instance.** Section 254(2) is not a mandate to unsettle decisions taken after due reflection.
**High Court’s Decision:** In this case, the Tribunal, while dealing with the application under section 245(2), virtually reconsidered the entire matter and came to a different conclusion. This amounted to a reappreciation of the correctness of the earlier decision on merits, which is beyond the scope of the power conferred under section 254(2).

4. Can the Tribunal exercise its power of rectification under section 254(2) to recall its order in entirety, where there is a mistake apparent from record?

*Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) 330 ITR 243 (Delhi)(FB)*

**High Court’s Observations:** On this issue, the Delhi High Court observed that the justification of an order passed by the Tribunal recalling its own order is required to be tested on the basis of the law laid down by the Apex Court in *Honda Siel Power Products Ltd. v. CIT* (2007) 295 ITR 466, dealing with the Tribunal’s power under section 254(2) to recall its order where prejudice has resulted to a party due to an apparent omission, mistake or error committed by the Tribunal while passing the order. Such recalling of order for correcting an apparent mistake committed by the Tribunal has nothing to do with the doctrine or concept of inherent power of review. It is a well settled provision of law that the Tribunal has no inherent power to review its own judgment or order on merits or reappreciate the correctness of its earlier decision on merits. However, the power to recall has to be distinguished from the power to review. While the Tribunal does not have the inherent power to review its order on merits, it can recall its order for the purpose of correcting a mistake apparent from the record.

The Apex Court, while dealing with the power of the Tribunal under section 254(2) in *Honda Siel Power Products Ltd.*, observed that one of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. When prejudice results from an order attributable to the Tribunal’s mistake, error or omission, then it is the duty of the Tribunal to set it right. In that case, the Tribunal had not considered the material which was already on record while passing the judgment. The Apex Court took note of the fact that the Tribunal committed a mistake in not considering material which was already on record and the Tribunal acknowledged its mistake and accordingly, rectified its order.

The above decision of the Apex Court is an authority for the proposition that the Tribunal, in certain circumstances can recall its own order and section 254(2) does not totally prohibit so. In view of the law laid down by the Apex Court in that case, the decisions rendered by the High Courts in certain cases to the effect that the Tribunal under no circumstances can recall its order in entirety do not lay down the correct statement of law.

**High Court’s Decision:** Applying the above-mentioned decision of the Apex Court to this case, the Delhi High Court observed that the Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety if it is satisfied that prejudice has
resulted to the party which is attributable to the Tribunal’s mistake, error or omission and the error committed is apparent.

**Note** - In deciding whether the power under section 254(2) can be exercised to recall an order in entirety, it is necessary to understand the true principle laid down in the Apex Court decision. A decision should not be mechanically applied treating the same as a precedent without appreciating the underlying principle contained therein. In this case, the Apex Court decision was applied since prejudice had resulted to the party on account of the mistake of the Tribunal apparent from record.

5. **Does the High Court have an inherent power under the Income-tax Act, 1961 to review an earlier order passed on merits?**

*CIT v. Meghalaya Steels Ltd. (2015) 377 ITR 112 (SC)*

**Facts of the case:** In this case, the High Court had considered whether deduction is allowable under section 80-IB on transport subsidy and interest subsidy and on the central excise duty refund received by it. Finally, after stating that two substantial questions of law arose under section 260A, the High Court proceeded to answer the two questions. Against this judgement, the assessee filed a review petition whereupon the Division Bench of the High Court recalled its entire order for adjudication on the ground that it had not formulated the substantial questions of law before hearing of the appeal and had not invited the parties to have their say in the matter which amounted to denial of opportunity of effective hearing to the parties concerned, particularly, the review petitioners. Further, it had on an earlier occasion prior to passing the order, reserved the judgement on whether substantial questions of law in fact existed at all.

**Revenue’s contention vis-à-vis Assessee’s contention:** The Revenue contended that, by virtue of section 260A(7), only those provisions of the Civil Procedure Code could be looked into for the purposes of section 260A as were relevant to the disposal of appeals, and since the review provision contained in the Code of Civil Procedure is not so referred to, the High Court would have no jurisdiction under section 260A to review such judgment. The assessee-petitioner, however, contended that High Courts being courts of record under article 215 of the Constitution of India, the power of review would in fact inhere in them.

**Supreme Court’s Observations:** The Supreme Court concurred with the assessee’s submission that High Courts being courts of record under article 215 of the Constitution of India, the power of review would inhere in them. Further, it noted that in another case¹, in a slightly different context while dealing with power of review of writ petitions filed under article 226, the Supreme Court had observed that there is nothing in article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of

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¹ Shivdeo Singh v. State of Punjab  AIR 1963 SC 1909
plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. In that case, the High Court had entertained the second petition since the interested parties were not given an effective opportunity of being heard, before passing the judgement; therefore, keeping in mind the requirement of the principles of natural justice, the High Court had exercised its inherent power of review.

**Supreme Court’s Decision:** The Supreme Court went ahead to further observe that it is clear on a cursory reading of section 260A(7), that it does not purport in any manner to curtail or restrict the application of the provisions of the Code of Civil Procedure. Section 260A(7) only states that all the provisions that would apply qua appeals in the Code of Civil Procedure would apply to appeals under section 260A. That does not in any manner suggest either that the other provisions of the Code of Civil Procedure are necessarily excluded or that the High Court’s inherent jurisdiction is in any manner affected.

6. Whether delay in filing appeal under section 260A can be condoned where the stated reason for delay is the pursuance of an alternate remedy by way of filing an application before the ITAT under section 254(2) for rectification of mistake apparent on record?

*Spinacom India (P.) Ltd. v. CIT [2018] 258 Taxman 128 (SC)*

**Facts of the Case:** The appellants have approached the Supreme Court under a special leave petition. There has been a delay of 439 days in filing the appeal under section 260A for which reason the appellants requested for a condonation of delay under section 14 of Limitation Act, 1963. The appellants submitted that the delay was on account of pursuing an alternate remedy of filing a miscellaneous application before the Income-tax Appellate Tribunal (ITAT) under section 254(2).

**Issue:** The issue under consideration is whether delay in filing appeal under section 260A can be condoned where the stated reason for delay is the pursuance of an alternate remedy by way of filing an application before the ITAT under section 254(2) for rectification of mistake apparent on record.

**Supreme Court’s Observations:** The Court rejected the question of invoking section 14 of the Limitation Act 1963 which allows condonation of delay on demonstration of sufficient cause. The Court refused to accept the submission that the application before the ITAT under section 254(2) was an alternate remedy to filing of the application under section 260A. The former is an application for rectifying a ‘mistake apparent from the record’ which is much narrower in scope than the latter. Under section 260A, an order of the ITAT can be challenged on substantial questions of law. The Court stated that the appellant had the option of filing an appeal under section 260A while also mentioning in the Memorandum of Appeal that its application under section 254(2) was pending before the ITAT. The time period for filing an appeal under section 260A does not get suspended on account of the pendency of an application before the ITAT under section 254(2) of the Act.
Supreme Court’s Decision: Since no satisfactory reason has been provided by the Appellant for the extraordinary delay of 439 days in filing the appeal, the Supreme Court dismissed the application for condonation of delay.

7. Can High Court exercise its inherent power to recall its order by exercising jurisdiction under section 260A(7) read with the relevant Rule of the Code of Civil Procedure, 1908 even if that order is not an ex-parte order?

CIT v. Subrata Roy (2016) 385 ITR 570 (SC)

Facts of the case: In the present case, the High Court of Allahabad has recalled its final order dated August 27, 2013 by exercising jurisdiction under section 260A(7) read with the relevant rule of the Code of Civil Procedure, 1908. The High Court, while recalling its order, took note that section 260A(7) inserted by the Finance Act, 1999 provides that the provisions of the Code of Civil Procedure, 1908 relating to appeals to the High Court shall apply in the case of appeal under section 260A of the Income-tax Act, 1961. The relevant rule of the Code of Civil Procedure, 1908 provides that where an appeal is heard ex-parte and the judgment is pronounced against the respondent, he may apply to the court to re-hear the appeal. Also, where the notice is not served or the defendant was prevented by the sufficient cause from appearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

The High Court contended that it is empowered to exercise this inherent power. Therefore, vide order dated 21.2.2014, the High Court had recalled its order dated August 27, 2013, on the ground that it had passed its order rejecting the request of the assessee for a day’s adjournment since the senior advocate on behalf of the assessee, was to come from Mumbai next day and thus, the applicant could not advance any argument.

Supreme Court’s Observations and Decision: The Apex Court noted that the assessee had participated in the hearing of the appeals before High Court which is apparent from the various parts of the order dated 27.08.2013.

The Apex Court held that the order passed by the High Court is not an ex-parte order for invoking the provisions of the Code of Civil Procedure, 1908, since the order of the High Court contains the submissions of the counsel of the assessee (though not that of the senior counsel for whose presence a short adjournment was prayed). Therefore, the High Court did not have the jurisdiction to recall the order passed by it previously. The inherent power under the Code of Civil Procedure, 1908 is hedged by certain pre-conditions and unless the pre-conditions are satisfied the power thereunder cannot be exercised. Accordingly, the Supreme Court set aside the order dated 21.2.2014 of the High Court.
8. **Can revision under section 263 be made on the ground that the order is passed without making inquiries or verification which should have been made?**

*CIT v. Amitabh Bachchan (2016) 384 ITR 200 (SC)*

**Facts of the case:** The assessee filed his return of income and subsequently, filed a revised return in which he claimed 30% of gross professional receipts amounting to ₹ 3.17 crore as expenditure towards his personal security. When the Assessing Officer asked for the details of expenditure, the assessee replied that the expenses were for security for the personal safety of the assessee and the payments were made out of cash balances. Thereafter, by way of a letter, the assessee informed the Assessing Officer that the claim was made on a belief that it was allowable but as it is not feasible to substantiate the claim, the revised return may be taken to be withdrawn. The Assessing Officer had proposed to treat the expenditure claim as unexplained expenditure under section 69C but after considering the assessee’s reply, did not pursue the matter.

After the assessment was finalized, the Commissioner issued show cause notice under section 263 containing the grounds on which the assessment order was proposed to be revised. On getting the replies to the show cause notice, the Commissioner set aside the order of assessment and directed a fresh assessment on the principal ground that requisite and due enquiries were not made by the Assessing Officer prior to finalization of the assessment. On this basis, the Commissioner came to the conclusion that the assessment order in question was erroneous and prejudicial to the interests of the Revenue warranting exercise of power under section 263. In his order, the Commissioner of Income-tax did not record any finding on the several issues mentioned in the show cause notice whereas he recorded conclusions adverse to the assessee in respect of issues which were not specifically mentioned in the show cause notice. However, few of the issues, including the claim of additional expenses in the revised return were common to the show cause notice as well as the revisionary order.

**Appellate Authorities’ view:** The Tribunal opined that in respect of the issues not mentioned in the show-cause notice, the findings as recorded in the revisional order under section 263 would be considered as breach of principles of natural justice, since the Commissioner of Income-tax cannot go beyond the issues mentioned in the show-cause notice. Accordingly, the Tribunal reversed the order of the *suo motu* revision of order under section 263.

The High Court also dismissed the appeal of the Revenue holding that as the Commissioner had gone beyond the scope of the show cause notice and had dealt with issues not covered or mentioned in the notice the revisional order which was in violation of the principles of natural justice. The Court also observed that the question whether the Assessing Officer had made sufficient enquiries about the assessee’s claim made in the revised return was a pure question of fact and cannot be examined under section 260A.
Supreme Court’s Observations: The Apex Court noted that to exercise jurisdiction under section 263 the requirement is that the order passed by the assessing authority is erroneous and prejudicial to the interests of the revenue. Section 263 does not require any specific show cause notice to be served on the assessee. What is required is granting of opportunity to the assessee of being heard before making the revision order. Failure to give such an opportunity would render the revisionary order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice.

The Supreme Court observed that the Tribunal had not recorded any finding that in course of the suo moto revisionary proceedings, the opportunity of hearing was not afforded to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the Commissioner had come to the conclusions as recorded in the order under section 263.

In the course of revision, the documents and books of accounts overlooked in the assessment proceedings were considered and at every stage of revisionary proceeding, the authorized representative of the assessee had appeared and had full opportunity to contest the basis on which the revisionary authority was proceeding in the matter.

Where the Commissioner had come its conclusions on the basis of the record of the assessment proceedings which was open for scrutiny by the assessee and available to his authorized representative at all times, there is no breach of the requirement to give a reasonable opportunity of being heard as required under section 263.

Further, it also observed that when the Assessing Officer has dropped the investigation of the claim of expenses, it does not preclude the Commissioner of Income-tax from looking into the same. Making a claim which would prima facie disclose that the expenses in respect of which deduction had been claimed had been incurred and thereafter, withdrawing the claim gave rise to the necessity of further enquiry in the interests of the Revenue. The notice issued under section 69C of the Act could not have been simply dropped on the ground that the claim had been withdrawn.

Supreme Court’s Decision: The Apex Court, accordingly, held that the order of the Tribunal setting aside the revisional order on the ground that it went beyond the show cause notice was not sustainable. It further held that the High Court having failed to fully deal with the matter, its order was not tenable.

Note – As per Explanation 2 to section 263(1), inserted by the Finance Act, 2015, with effect from 01.06.2015, an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of the Principal Commissioner or Commissioner, the order is passed without making inquiries or verification which should have been made. The rationale of the above court ruling is, thus, also in line with Explanation 2 to Section 263(1).
9. Can mere non-mention or non-discussion of enquiry made by the Assessing Officer in the assessment order justify invoking revisionary jurisdiction under section 263?


**Facts of the case:** The assessee filed its return of income declaring total income of ₹ 8.15 lakhs. The return was processed under section 143(1) and later, the case was selected for scrutiny and statutory notice under section 143(2) was issued. During the course of scrutiny, the Assessing Officer raised certain queries which were answered by the assessee. The Assessing Officer, after being satisfied with the replies given, completed the assessment by accepting the declared income. Subsequently, the Commissioner invoked revisionary jurisdiction under section 263 by holding that the Assessing Officer had not made enquiry on certain aspects, such as -

(i) Non-verification of source of investment in respect of addition in fixed assets;
(ii) Non-confirmation of sundry creditors by the assessee;
(iii) Non-enquiry of unsecured loan by the Assessing Officer;
(iv) Not obtaining the copy of bank statements;
(v) Non-verification of genuineness of shareholders;
(vi) Deduction of freight paid without deduction of tax at source.

**Assessee’s contention vis-a-vis Revenue’s Contention:** The assessee contended that all the aspects contested by the Commissioner were enquired by the Assessing Officer. The Revenue took the defence that no enquiry was made by the Assessing Officer in respect of the issues set out in the notice issued under section 263 and hence, revisionary jurisdiction was correctly assumed.

**Tribunal’s view:** The Tribunal noted that all necessary enquiries were made and all the requisite documents were placed in the paper book. Once enquiry was made, mere non-discussion or non-mention in the assessment order cannot lead to the assumption that the Assessing Officer did not apply his mind or that he had not made any enquiry on the subject for invoking section 263.

**High Court’s Observations:** The High Court noted the Bombay’s High Court’s view in *Cellular Ltd. v. DCIT (2008) 301 ITR 407* that if a query is raised during the assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the assessment order would not lead to a conclusion that no mind had been applied to it.

**High Court’s Decision:** The High Court concurred with the decision of the Tribunal and held that since the relevant enquiries and replies are available on ‘record’ (i.e., the paper book), the Commissioner cannot invoke revisionary jurisdiction merely because there was no mention of such enquiry and verification in the assessment order.
Note - The Finance Act, 2015 inserted Explanation 2 to section 263(1) to clarify, inter alia, that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if in the opinion of the Principal Commissioner or Commissioner, the order is passed without making inquiries or verification which should have been made.

The rationale of this ruling would hold good even after insertion of Explanation 2 to section 263(1), since in this case, the Tribunal has recorded a finding of fact that necessary enquiries have been made by the Assessing Officer even though the same was not specifically mentioned in the assessment order. Mere non-discussion or non-mention about the enquiry made by the Assessing Officer in the assessment order cannot be a ground for invoking revisionary jurisdiction under section 263.

10. Can the Commissioner invoke revisionary jurisdiction under section 263, when the subject matter of revision (i.e., whether the manner of allocation of revenue amongst the members of AOP would affect the allowability and/or quantum of deduction under section 80-IB) has been decided by the Commissioner (Appeals) and the same is pending before the Tribunal?

CIT v. Fortaleza Developers (2015) 374 ITR 510 (Bom)

Facts of the case: The assessee, an Association of Person (AOP) consisting of promoters and builders, was constituted by means of an agreement dated April 29, 2003 between M/s Raviraj Kothari and Co. (RRK) and M/s Sanand Properties Pvt. Ltd. (SPPL). The AOP filed its return of income for the assessment year 2007-08 declaring total income of `4.14 lakhs after claiming deduction under section 80-IB(10) of `1454.47 lakhs. The assessment was completed under section 143(3) disallowing fully the claim of deduction under section 80-IB(10). The assessee preferred an appeal before Commissioner (Appeals) who held that the assessee had fulfilled all the conditions laid down in section 80-IB(10) and hence, directed the Assessing Officer to allow the deduction.

The order of Commissioner (Appeals) was challenged before the Tribunal by the Revenue. During the pendency of the appeal before the Tribunal, the Commissioner issued a notice under section 263 asking the assessee to show cause as to why the assessment order should not be set aside. The notice under section 263 specified that the method of allocation of revenue gave the assessee undue benefit by way of a higher claim of deduction under section 80-IB(10) contrary to clause (7) of the AOP agreement.

Clause (7) of the agreement laid down that SPPL shall be entitled to 35% of the amount received from the purchasers of the housing units. Out of the balance 65% of the said receipts, all required and relevant expenditure for the purpose of the business of the AOP shall be met with and whatever net balance remains thereafter, shall be determined as the share of income of RRK.
On perusal of clause (7) of the agreement, the Commissioner contended that share of revenue pertaining to SPPL was not eligible for deduction under section 80-IB(10). Accordingly, the Commissioner set aside the assessment order of the assessee and directed to recompute the income on the basis of the clause (7) of the AOP agreement. The assessee challenged the revision order passed by the Commissioner under section 263 before the Tribunal.

**Appellate Authorities' Views:** The Tribunal observed that the quantum of deduction under section 80-IB(10) will depend upon the income earned from the project in question. The quantum of deduction will not depend on the mode of distribution of shares amongst members of the association of persons as income of association of persons is taxable at the maximum marginal rate. It is also observed by the Tribunal that the allowability or otherwise of deduction under section 80-IB(10) is not dependent upon the manner in which the profit has been distributed amongst the members of the AOP but is dependent upon the income earned from an eligible project and the fulfilment of the conditions laid down in the section. Also, the deduction is available to an undertaking and not to the individual constituent of an undertaking. The Tribunal further held that the Commissioner cannot exercise jurisdiction under section 263 in respect of deduction under section 80-IB, which was the subject matter of appeal.

**High Court’s Views:** The High Court took note of all the facts and sequence of events with regard to the matter in appeal. The Court was of the view that the contract between the two parties was self-explanatory and the interpretation placed by the assessee on clause (7) and claiming deduction under section 80-IB(10) is in order.

**High Court’s Decision:** When the order of the first appellate authority is complete and the appeal is pending before the Tribunal, the Commissioner is precluded from invoking section 263 for revision of the very same matter decided by the first appellate authority since clause (c) of the Explanation 1 to section 263 debars the same. Accordingly, the High Court held that the order passed by the Assessing Officer got merged with the order of the first appellate authority. The very same issue cannot be revised by invoking revisionary jurisdiction under section 263.

11. **Can an assessee, objecting to the reassessment notice issued under section 148, directly approach the High Court in the normal course contending that such reassessment proceedings are apparently unjustified and illegal?**

**Samsung India Electronics P. Ltd. v. DCIT (2014) 362 ITR 460 (Del.)**

**Facts of the case:** In the present case, Samsung Electronics Co. Ltd., the Korean Company was subjected to regular assessment for the assessment year 2006-07. The assessment order was passed, pursuant to the directions under section 144C(5) made by the Disputes Resolution Panel. For the same assessment year, i.e., A.Y.2006-07, assessee was issued a
reassessment notice dated March 30, 2013 under section 148. Against this reassessment notice, assessee filed a writ petition before the High Court.

**High Court’s Observations:** The High Court observed the Apex court ruling in the case of *GKN Driveshafts (India) Ltd. v. ITO [2003] 259 ITR 19 (SC)*, wherein, it was laid down that when a notice under section 148 is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the objections by passing a speaking order.

The High Court noted that the assessee has not filed objections before the Assessing Officer and has directly approached the court by way of the writ petition. On this issue, the assessee contended that they were justified in approaching the High Court directly as the reassessment proceedings *ex facie* were unjustified and illegal. The assessee relied upon the decision of the Delhi High Court in *Techspan India P. Ltd. v. ITO [2006] 283 ITR 212 (Delhi)* in which reference was made to the decision of the Gujarat High Court in *Garden Finance Ltd. v. Asst. CIT [2004] 268 ITR 48 (Guj)*, wherein it was observed that the exercise of the powers under section 148 may be so arbitrary or *mala fide* that the court may entertain the petition without requiring the assessee to approach the Assessing Officer, but such a case was an exception and not a rule. In *Techspan India P. Ltd.*’s case, the High Court had given concurrent reasons and made observations when a writ court should interfere. However, there is no need to go into the said question and controversy in the present case, since it does not occasion or require a different treatment from the procedure followed in other cases in which re-assessment proceedings were/are initiated.

**High Court’s Decision:** The High Court, thus, held that it will not be appropriate and proper in the facts of the present case to permit and allow the petitioner to bypass and forgo the procedure laid down by the Supreme Court in *GKN Driveshafts (India) Ltd. (supra)*, since the said procedure has been almost universally followed and has helped cut down litigation and crystallise the issues, if and when the question comes up before the Court.

12. Should time limit under section 263 to be reckoned with reference to the date of assessment order or the date of reassessment order, where the revision is in relation to an item which was not the subject matter of reassessment?

**Bombay High Court ruling in CIT v. Lark Chemicals Ltd (2014) 368 ITR 655**

**Facts of the case:** The assessee-company, for the assessment year 2002-03, filed its return of income declaring a total income of ₹ 30.98 lakhs. This was accepted and the return was processed under section 143(1). Subsequently, it was reopened by issue of notice under section 148 and the order of reassessment was passed in June, 2006. The Commissioner assumed jurisdiction for revision of order by invoking section
263 in March, 2009. The subject matter of revision, however, was not related to any of the issues dealt with in the reassessment.

**Issue under consideration:** The issue before the High Court was whether the revision under section 263 is barred by limitation in view of the fact that the issues dealt with therein were not the subject matter of reassessment.

**Tribunal's view:** The Tribunal opined that jurisdiction under section 263 cannot be exercised in respect of those issues which were not the subject matter of consideration while passing the order of reassessment but were a part of the original assessment, the time limit for which had since expired. It relied on the Apex Court decision in the case of **CIT v. Alagendran Finance Ltd. (2007) 293 ITR 1,** wherein it was held that in such cases, the doctrine of merger would not apply and the period of limitation would commence from the date of original assessment and not from the date of reassessment.

**High Court’s Opinion:** The High Court observed that if the revision happened to be in relation to issues dealt with in the reassessment proceedings, then, it would not be barred by limitation as the time limit would expire only on 31st March, 2009 i.e., two years from the end of the financial year in which the order sought to be revised under section 263, was passed. However, in this case, the revision proposed under section 263 was in respect of issues, other than the issues dealt with in the order of reassessment. The issues on which the Commissioner sought to exercise jurisdiction under section 263 were concluded by virtue of intimation issued under section 143(1). The time period for revision under section 263 is two years from the end of the financial year in which order sought to be revised was passed [i.e., two years from the end of the financial year in which the intimation was issued under section 143(1)] and that time period has expired long ago.

**High Court’s Decision:** The High Court, thus, held that the jurisdiction under section 263 could not be assumed on issues which were not the subject matter of issues dealt with in the order of reassessment but were part of the original assessment, for which the period of limitation expired long ago.

**II Bombay High Court ruling in CIT v. ICICI Bank Ltd. (2012) 343 ITR 74**

**Facts of the case:** In the present case, an order of assessment was passed under section 143(3) allowing the deduction under section 36(1)(vii), 36(1)(viia) and foreign exchange rate difference. Further, two notices of reassessment were issued under section 148 and an order of reassessment was passed under section 147 which did not deal with the above deductions.

Later, the Commissioner passed an order under section 263 for disallowing the deduction under section 36(1)(vii), 36(1)(viia) and in respect of foreign exchange rate
difference which have not been taken up in the reassessment proceedings under section 147 but which was decided in the original order of assessment passed under section 143(3).

**Assessee’s contention vis-à-vis Revenue’s contention:** The assessee claimed that the order passed by the Commissioner under section 263 is barred by limitation since the period of 2 years from the end of the financial year in which the order sought to be revised was passed, had lapsed. However, the Revenue gave a plea that period of limitation shall be reckoned from the date of order under section 147 and not from the date of the original assessment order under section 143(3), applying the doctrine of merger.

The Revenue pointed out that as per the provisions of *Explanation 3* to section 147, the Assessing Officer is entitled to assess or reassess the income in respect of any issue which has escaped assessment though the reasons in respect of such issue have not been included in the reasons recorded under section 148(2).

**High Court’s Decision:** Considering the above mentioned facts, the Bombay High Court held that the order of assessment under section 143(3) allowed deduction under section 36(1)(vii), 36(1)(viia) and in respect of foreign exchange rate difference. The order of reassessment, however, had not dealt with these issues. Therefore, the doctrine of merger cannot be applied in this case. The order under section 143(3) cannot stand merged with the order of reassessment in respect of those issues which did not form the subject matter of the reassessment. Therefore, the period of limitation in respect of the order of the Commissioner under section 263 with regard to a matter which does not form the subject matter of reassessment shall be reckoned from the date of the original order under section 143(3) and not from the date of the reassessment order under section 147.

13. **Can the original assessment order under section 143(3), which was subsequently modified to give effect to the revision order under section 264, be later on subjected to revision under section 263?**

**CIT v. New Mangalore Port Trust (2016) 382 ITR 434 (Karn)**

**Facts of the case:** The assessee-trust, a government undertaking carrying on commercial activities in one of the major ports was enjoying exemption under section 10(20) since its inception. On March 27, 2006, the assessee applied for registration under section 12A. However, the said application for registration was rejected by the Commissioner. On appeal before the Appellate Tribunal, the Commissioner was directed to grant registration under section 12AA to the assessee w.e.f. 1 April, 2003. To give effect to the order of the Tribunal, the Commissioner granted registration on July 27, 2009. Subsequent to the registration, an assessment order was passed by the Assessing Officer under section 143(3) on December 18.52
27, 2009. The assessee filed a revision petition under section 264 which was allowed and the matter was remanded to the Assessing Officer to compute the income of the assessee in terms of the order of revision under section 264. The Assessing Officer gave effect to the revision order vide order dated May 27, 2011. Thereafter, the original order passed under section 143(3), dated December 27, 2009 was revised by the Commissioner under section 263 on March 22, 2012.

The revision order under section 263 passed by Commissioner was challenged by the assessee before the Appellate Tribunal. The Tribunal set aside the revision order of the Commissioner passed under section 263.

**Assessee's Contentions:** The assessee contended before the High Court that the order passed by the Assessing Officer under section 143(3) on December 27, 2009 does not exist subsequent to the order of Commissioner passed under section 264, being given effect to by the Assessing Officer vide order dated May 27, 2011. The said order dated December 27, 2009 which no longer subsists, was revised by the Commissioner under section 263. In this case, invoking of *suo motu* revision powers by the Commissioner under section 263 is not justifiable.

**High Court's Observations:** The High Court took note of the sequence of events and undisputed facts that the assessment order dated 27 December 2009 passed by the Assessing Officer was no longer in existence. The High Court concluded that the Tribunal arrived at the conclusion only after considering the factual position that Commissioner had no jurisdiction to revise the order which was not in existence.

**High Court's Decision:** The High Court, accordingly, held that the order passed by the Commissioner under section 263, revising the non-existing order is *void ab initio* and is a nullity in the eyes of law.

14. Can an assessee file a revision petition under section 264, if the revised return to correct an inadvertent error apparent from record in the original return, is filed after the time limit specified under section 139(5) on account of the error coming to the notice of the assessee after the specified time limit?

**Sanchit Software and Solutions Pvt. Ltd. v. CIT (2012) 349 ITR 404 (Bom.)**

**Facts of the case:** The assessee-company had electronically filed its return of income. It committed a mistake by including dividend income [exempt under section 10(34)] in its return of income, though the same was correctly disclosed in the Schedule containing details of exempt income. The return was processed under section 143(1) denying the exemption under section 10 and therefore, intimation under section 143(1) was served on the assessee raising a demand of tax. The assessee, on receiving the intimation, noticed the error committed and filed a revised return rectifying the error. However, the revised return was not sustainable as the same was filed beyond the period of limitation as provided under...
section 139(5). Later, the assessee filed an application for rectification under section 154 and also a revision petition under section 264.

**Commissioner’s contention:** The Commissioner of income-tax, while considering the revision petition, contended that the intimation under section 143(1) was based on the return of the assessee, in which the claims under section 10(34) were not made by the assessee. Hence, it cannot be said that the intimation under section 143(1) was erroneous, since the same was squarely based on the return filed by the assessee. Secondly, the power of Commissioner under section 264 is only restricted to the record available before the Assessing Officer which can be examined by the Commissioner. In the circumstances, the other evidence sought to be brought on record to establish the mistake committed by the assessee cannot be considered by the Commissioner under section 264. The revision petition under section 264 was rejected by the Commissioner on the above grounds.

**High Court’s Observations:** The High Court observed that the entire object of administration of tax is to secure the revenue for the development of the country and not to charge the assessee more tax than which is due and payable by the assessee. In this context, the High Court referred to the CBDT Circular issued as far back as 11th April, 1955 directing the Assessing Officer not to take advantage of the assessee’s mistake. The High Court opined that the said Circular should always be borne in mind by the officers of the Revenue while administering the Act.

The High Court observed that, in this case, the Commissioner of income-tax had committed a fundamental error in proceeding on the basis that no deduction on account of dividend income and long-term capital gains under section 10 was claimed from the total income, without considering that the assessee had specifically sought to exclude the same as is evident from the entries in the relevant Schedule. Therefore, this was an error on the face of the order and hence, the same was not sustainable.

**High Court’s Decision:** The High Court, accordingly, set aside the order of Commissioner and remanded the matter for fresh consideration.

The High Court further directed the Assessing Officer to consider the rectification application filed by the assessee under section 154 as a fresh application received on the date of service of this order and dispose of the rectification application on its own merits, without awaiting the result of the revision proceedings before the Commissioner of Income-tax on remand, at the earliest.

15. While deciding an appeal, is it mandatory for the High Court to frame a substantial question of law or can it decide the case on the basis of the question of law urged by the appellant under section 260A(2)(c)?

*CIT v. A. A. Estate Pvt. Ltd. [2019] 413 ITR 438 (SC)*

**Facts of the case:** The High Court, without itself framing the substantial question of law at
the time of admission of appeal, issued notices, heard both the parties and decided the appeal affirming the order of the Tribunal based on the questions raised by the appellant.

**Relevant provision of the Income-tax Act, 1961:** Section 260A provides that an appeal lies to the High Court from every order passed by the Tribunal, if the High Court is satisfied that the case involves a substantial question of law. In this regard, section 260A(2)(c) requires the appellant to file an appeal before the High Court in the form of a memorandum of appeal precisely stating therein the substantial question of law involved. If the High Court is satisfied that the case involves a substantial question of law, section 260A(3) requires the High Court to formulate such question. Thereafter, section 260A(4) provides that the appeal shall be heard only on the question so formulated; and section 260A(5) provides that the High Court shall decide the question of law so formulated.

**Issue:** The issue under consideration is whether the High Court was justified in not formulating the substantial question of law as required u/s 260A(3) and adjudicating merely on the questions put forth by the appellant under section 260A(2)(c).

**Supreme Court’s Observations:** The Apex Court noted that there lies a distinction between the questions proposed by the appellant for admission of the appeal to the High Court and the questions framed by the High Court. The questions, which are proposed by the appellant, fall under section 260A(2)(c) whereas the questions framed by the High Court fall under section 260A(3). Section 260A(4) provides that the appeal is to be heard on merits only on the questions formulated by the High Court under section 260A(3). In other words, the appeal is heard only on the questions formulated by the High Court and not on the questions proposed by the appellant.

In case if the High Court is of the view that the appeal did not involve any substantial question of law, it should have recorded a categorical finding to that effect that the questions proposed by the appellant either do not arise in the case or/and are not substantial questions of law so as to attract the rigour of section 260A for its admission and accordingly, should have dismissed the appeal in *limine*. However, this was not done in this case. Instead, the appeal was heard only on the questions urged by the appellant u/s 260A(2)(c). The High Court, therefore, did not decide the appeal in conformity with the mandatory procedure prescribed in section 260A.

**Supreme Court’s Decision:** The Supreme Court held it to be just and proper to remand the case to the High Court for deciding the appeal afresh, on merits of the case in accordance with procedure prescribed in section 260A.

16. Can the Appellate Tribunal, while hearing an appeal under section 254(1), in a matter where registration under section 12AA has been denied by the Commissioner, itself pass an order directing the Commissioner to grant registration?
CIT (Exemptions) v. Reham Foundation [2019] 418 ITR 205 (All [FB])

Facts of the case: An appeal was preferred by Revenue to challenge the order of the Appellate Tribunal directing registration of the trust, where registration under section 12AA has been denied by the Commissioner of Income-tax (CIT).

Relevant provision of the Income-tax Act, 1961: Section 12AA sets out the procedure for registration of trusts or institutions. Registration of a trust requires satisfaction of the Principal CIT/CIT. In case the Principal CIT/CIT is not satisfied or refuses registration, then, the appeal lies to the Appellate Tribunal under section 254.

Issue: The issue under consideration is whether the Appellate Tribunal has the power under section 254(1) to pass an order directing CIT to grant registration under section 12AA or should it remand the case to the CIT for deciding the matter afresh.

High Court’s Observations: A perusal of section 254 shows that the Appellate Tribunal has the power to pass such orders, as it thinks fit. The powers under section 254 is to be read along with other provisions of the Act. Section 12AA requires satisfaction about the genuineness of the activities and the object(s) of a trust by the CIT before its registration.

Case where the Appellate Tribunal can direct registration of the trust without remand to the CIT

The High Court opined that the Tribunal can pass an order directing the CIT to grant registration, considering the specific facts of the case, where –

(i) the CIT has refused to accept the application for registration of trust after recording its finding, on the basis of the material on record before him, that the activities and object(s) of the trust are not genuine; and

(ii) the Appellate Tribunal, on the basis of the same material on record, comes to the conclusion that the order of the CIT is perverse since it has been passed ignoring, misconstruing or misinterpreting such evidence.

In such a case, the Appellate Tribunal can direct registration of the trust without remanding the matter to the CIT, since such remand would be an empty formality as the CIT cannot go against the conclusion arrived at and recorded by the Appellate Tribunal.

In view of the unfettered power of the Appellate Tribunal in terms of section 254(1), the Tribunal can very well record its satisfaction on the genuineness of the activities and object(s) of the trust and direct registration of the trust without remand of case to the CIT, in case such satisfaction is recorded on the basis of documents and material already available on record at the stage of examination by the CIT.

Cases where the Appellate Tribunal has to remand the case to the CIT:

In the following cases, however, the Appellate Tribunal has to remand the case to the CIT -
(i) Where the Appellate Tribunal records such satisfaction on the basis of material or documentary evidence which was not available before the CIT while exercising his powers under section 12AA; and

(ii) Where the CIT rejects the application on a technical ground without recording its opinion on facts or genuineness of the activities and object(s) of the trust and such decision is overturned by the Appellate Tribunal, the case has to be remanded to the CIT for recording satisfaction in terms of section 12AA.

The onus on the Appellate Tribunal to remand the matter in cases indicated hereinabove is in view of the strict interpretation of the powers of the CIT under section 12AA; if the Appellate Tribunal is given wide powers to direct registration of trust in all or any circumstance, it would render the provisions of section 12AA ineffective, which again cannot be the intention of the Legislature.

**High Court’s Decision:** The High Court held that the Appellate Tribunal while hearing an appeal under section 254(1) in a matter where registration under section 12AA has been denied by the CIT, can itself pass an order directing the CIT to grant registration, only in case the Tribunal disagrees with the opinion of the CIT as regards the genuineness of the activities and object(s) of the trust, on the basis of material already on record before the CIT. However, the said power is not to be exercised by the Appellate Tribunal as a matter of course and remand to the CIT is to be made where the Appellate Tribunal records a divergent view on the basis of the material which has been filed before the Appellate Tribunal for the first time.

17. **Can the Appellate Tribunal dismiss an appeal, without deciding the case on its merits, solely on the ground that the assessee had not appeared on the appointed date of hearing?**

*Smt. Ritha Sabapathy v. DCIT [2019] 416 ITR 191 (Mad)*

**Facts of the case:** The assessee filed an appeal under section 260A before the High Court against the order of the Appellate Tribunal dismissing the appeal due to non-appearance of the assessee on the appointed date of hearing.

**Relevant provision of the Income-tax Act, 1961:** Section 254 empowers the Tribunal to pass such orders "as it thinks fit" after giving both the parties an opportunity of being heard. Rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963 provides for hearing of appeal *ex parte* in case of the appellant’s failure to appear in person or through an authorised representative when the appeal is fixed for hearing. In such a case, the Tribunal may dispose of the appeal on merits after hearing the respondent.

**High Court’s Observations:** The High Court noted the provisions of section 254, Rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963 and decisions of the Apex Court on the said
issue. Accordingly, the High Court opined that even if the assessee could not appear, the Tribunal could have decided the appeal only on merits, *ex parte*, after hearing the Revenue’s contentions. It reiterates that the fact finding Appellate Tribunal should not shirk its responsibility to decide a case on its merits. Cryptic orders, not touching the merits of the case, would not give rise to any substantial question of law for consideration by the High Court under section 260A. The assessee’s valuable right of getting the issues decided on merits, irrespective of the appearance or otherwise of the assessee or his counsel before it.

**High Court’s Decision:** In view of the decided case laws and the clear provisions of Rule 24, the High Court set aside the impugned order of the Tribunal dismissing the assessee’s appeal due to non-appearance and directed it to decide the appeal on merits afresh in accordance with law.

18. Does the High Court have the inherent power to review its own order to correct a mistake apparent from the record?


**Facts of the case:** A receiver was appointed by the Calcutta High Court in a suit filed in 1957 in respect of properties, including one in New Delhi, owned by the HUF of KL. The property at New Delhi was sold to V by the Income-tax Department for recovery of income-tax dues of the HUF. KL objected stating that no leave was obtained from the Calcutta High Court by the Department for such sale. The Department filed an application in the suit praying for leave to complete the sale of the Delhi property in favour of V. Thereafter, many appeals/applications were preferred by both the respondents and appellants. While passing an order, the Calcutta High Court made an error apparent from record, overlooking section 293 of the Income-tax Act, 1961, in directing a civil suit to be pursued at Delhi. The said order was recalled for review and error apparent was corrected. After review, Calcutta High Court restored the writ to be heard on its own merits.

**Relevant provision of the Income-tax Act, 1961:** Section 293 puts a complete bar on filing suit in any civil court against an income-tax authority in respect of any proceeding under the Income-tax Act, 1961.

**Issue:** The issue for consideration is whether the High Court is justified in recalling and reviewing its order to correct an apparent error, i.e., overlooking the provisions of section 293 of the Income-tax Act, 1961 and directing a civil suit to be pursued.

**Supreme Court’s Observations:** The effect of section 293 of the Income-tax Act, 1961 had been mistakenly omitted by the High Court while passing an order directing pursuance of a civil suit. Accordingly, the said order was recalled for review and error apparent was corrected.
On the issue of whether the High Court can review its own order, the Supreme Court referred to its ruling in *Kamlesh Verma v. Mayawati (2013) 8 SCC 320*, wherein the basic principles for entertaining a review application had been eloquently examined.

As per the said decision, the High Court can review its own order, where the grounds for review were:

(i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) mistake or error apparent on the face of the record;

(iii) any other sufficient reason.

A review will, however, not be maintainable in the following cases:

(i) repetition of old and overruled argument;

(ii) minor mistakes of inconsequential import.

The following observations were also made by the Supreme Court in relation to entertaining a review application:

(i) review proceedings cannot be equated with the original hearing of the case.

(ii) a review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(iii) a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(iv) The mere possibility of two views on the subject cannot be a ground for review.

(v) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(vi) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(vii) A review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

**Supreme Court's Decision:** The Supreme Court held that section 293 puts a complete bar on filing suit in any civil court against the Income-tax authority. If the civil suit was not maintainable in view of section 293 of the Act and this was the purported defence of the respondents and of the Department, there was no error committed by the High Court in its judgment rendered in exercise of its review jurisdiction calling for interference..