

Direct Tax Course for CA Students, WIRC

Drafting for appellate procedures



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06th July 2021

The purpose of the first draft is not to get it right, but to get it written.

John Dufresne

Drafting 101:

- o Aim of writing to authorities.
- o A B C of drafting.
- o Know your audience.
- o Be organised.
- o Care about your final outcome.
- o Thought process while drafting.
- o Editing & fine tuning.

Basics and Check list before drafting:

- o Drafting of appeals is an Art.
- o Check whether appeal lies or not
- o Do not file frivolous appeals
- o Carefully study the appealable orders and find anomalies and differences from facts.
- o Ascertain the limitation period within which appeal is to be filed.
- o Check computation of income and tax and interest computation thereof.
- o Hairsplit which errors are to be appealed and which errors are required to be rectified.

Essentials while drafting:

- o Appeal against penalty can be filed even if appeal not filed against the assessment order.
- o Ensure whether authority passing the order had jurisdiction to file the order.
- o Ensure whether assessment/appeal order was passed within limitation period.
- o Note that whether if any claim had remained to be raised fresh plea can be raised
- o Ensure that fees for appeal is paid under the appropriate head and sub head.
- o Certified copy of challan evidencing payment and other attachments to be filed.

Points to be taken care in drafting grounds:

- o Grounds should be precise, concise, simple and without any ambiguity.
- o Should be wide and not restrictive.
- o Should not be argumentative.
- o Avoid multiple grounds for single issue unless every ground is distinct.
- o Always add prayer at the end with specific requests.
- o Last ground should be to grant leave to add, amend, withdraw any ground.
- o Never add decisions to grounds unless absolutely essential.
- o Use of clear and simple language and avoid jargons.
- o Nature of dispute and relief expected should be highlighted.

Points to be taken care in drafting grounds:

- o Expected relief should be clearly mentioned.
- o In case of more than one issues involved, preference of grounds should be decided.
- o Avoid using long sentences.
- o In case of opportunity of being heard not granted, the same should be clearly taken in grounds
- o Decide order in which grounds should appear.
- o All grounds needs to be adjudicated in the order so ensure that the grounds are not repetitive or too many.
- o Read order carefully to take hidden grounds.

Points to be taken care in drafting statement of facts (SOF):

- o SOF should be descriptive and detailed.
- o Should not be argumentative
- o Ensure to add only those facts which are disclosed in the assessment proceedings.
- o SOF should be just facts and not be turned in submissions.
- o Add every minute details and facts with dates and sequence of how it happened in earlier proceedings.
- o Basic details should be always given like ROI filed date, returned income ,heads of income , about the assessee.
- o If too many grounds, better to classify SOF based on each ground taken up.

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Drafting of Submissions before CIT(A) 1 :

- o Belief in the case
- o Be thorough with the assessment order and facts
- o Collect all evidences and documents
- o Always accompany the written submissions with paper book of documentary evidences.
- o General facts of the case and assessment history needs to reproduced first.
- o Specific facts to each grounds to be written with submissions.
- o Submissions should first mention facts and than judicial reference.
- o Previous assessment years history if relevant to be mentioned.

Drafting of Submissions before CIT(A)2 :

- o Submissions to be made grounds wise and without prejudice submissions to follow the main ground.
- o One needs to bifurcate between what is additional ground and additional submissions.
- o Any new facts to be given in form of additional evidences.
- o Make specific comments and submissions towards AO's allegations
- o Formatting and presentation very pertinent.
- o Sequence your arguments from best to less weighted.
- o Perfect balance of writings- should be firm but at the same time not abusive.

Some unwritten rules :

- o Cross referencing in submissions.
- o Page numbering or annexure numbering.
- o Use of covering letter.
- o Always maintain continuity by making reference to last letter or hearing.
- o Seek adjournment whenever required.
- o Request for Video conference facility.

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Practical tips:

- o Data backup.
- o Maintain screen shots if uncertainties.
- o Avoid delaying the submissions till fag end.
- o Always reply to all notices.
- o When system error in ITBA, always email the AO about the technical issues.
- o Never submit attachments without a forwarding letter or written note.
- o Keep clients informed.

Drafting of Affidavits:

- o First person should be used in drafting.
- o Should be in points or paras which are specifically numbered.
- o Each para should be on specific subject.
- o Should mention the name, age, current residential address, occupation of deponent.
- o Affidavit is always on oath so only true facts to be given.
- o No assumptions or arguments.
- o Affidavit can be affirmed by any judge, executive magistrate, commissioner on oath or any authorised notary
- o Authorised person only can sign affidavit.
- o Affidavit is an evidence as per section 3 of Indian Evidence Act, 1872
- o Its binding on deponent.

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Drafting of Condonation of delay:

- o Sequentially lay out all facts with dates.
- o Reasons to condone should be accurate and not vague.
- o No arguments.
- o Request and pleas is a crucial part of condonations
- o A good legal track record can be provided.
- o Should be accompanied by a duly stamped and signed affidavit.
- o Point out how not granting would be unfair and create undue hardship
- o Can make points on natural justice.
- o Avoid case laws unless squarely covered.

Doctrine of Precedents:

- o When the principle/law laid down by the Supreme Court or the High Court in any case is applicable to the issue in the existing case then that is a **doctrine of precedents**.
- o **Ratio decidendi** is the reasoning on which the judgement is based
- o **Obiter dicta** is an observation or finding of the court in any judgement
- o A judgment is said to be **per incuriam** when it is rendered without appreciating certain relevant provisions of law which are important but not brought into the notice of Court by any of the parties.
- o A judgment of the Supreme Court is binding on all the authorities
- o In case of two contrary decisions by the Supreme Court, the judgment of a larger bench is binding.
- o In absence of any decision by the Supreme Court, the judgment of the jurisdictional High Court would be binding.
- o In absence of any decision by the Supreme Court and the jurisdictional High Court, the decision rendered by the High Court of any other state would be binding, only if there are no contrary decisions by High Courts of other states.

How to read an order:

- o Read the full judgment.
- o No judgment is in favour of against- the ratio laid down is relevant.
- o Avoid Cherry picking of words and sentences
- o Use search engines only to locate the judgments not for analysis.
- o The Supreme court in the case of **CIT vs M/s. Sun Engineering Works Pvt Ltd [1992] 198 ITR 297 (SC)** has held that
“It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court.”
- o Speed reading.

How to do Legal Research:

- o Research facts first.
- o Read relevant sections.
- o Refer commentaries.
- o Use search engines to locate relevant judgments.
- o Legal softwares.
- o Use of reported judgments,
- o Use of online articles.
- o Circulars, notifications etc.
- o Budget speech, memorandum and legislative history.
- o Use of judgment.

“If you are not confused you have not learned enough”

- Nani Palkhiwala

Q & A ?



THANK YOU !!!

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