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A Monthly Journal of
The Chamber of Tax Consultants

Estd. 1926
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Chamber's CADRE

THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XII | No. 3 | December 2023

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BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

Reimagine

4th - 6th January 2024 | Jio World Convention Centre, BKC, Mumbai

ABOUT THE EVENT

On 6th July 2023, BCAS entered its Platinum Jubilee, marking 75 years of service to the community of Chartered Accountants and Society at large. To celebrate this landmark year, events and initiatives are planned throughout the year. The jewel in the crown will be a grand 3-day mega event on ***Reimagining the Profession*** which will be held at the prestigious Jio World Centre, Mumbai on January 4, 5 and 6 of 2024. Around 1500+ participants are likely to attend the Mega Conference.

TOPICS	THOUGHT LEADERS
Reimagine India - Key note address	Padma Bhushan Shri Kumar Mangalam Birla
One Giant Leap - Start-ups Importance of Professionals in Start up Journey	Startup Founders/ Venture Catalyst/ Investor
Use of Technology & AI Direct and Indirect Taxes	CA Pinakin Desai Adv. Nishith Desai
Digital Infrastructure – A Game Changer How Digitisation is Impacting the Common Man	Fireside Chat with Mr. Ashish Chauhan Trialogue - Mr. Dilip Asbe | Mr. Deepak Sharma CA Ninad Karpe - Moderator
The Future of Audit Profession Technology Revolution – Existential Threat or Game Changing Opportunity	CA Girish Paranjpe CA P R Ramesh CA Akhilesh Tuteja
Reimagine the New Age Professional Firms	CA Jamil Khatri
One World - One Tax (Vasudhaiva Kutumbakam)	Mr. Philip Baker | Mr. Pascal Saint Amans CA Gautam Doshi | Adv. Mukesh Butani - Moderator
The Victorious A Model for Leadership	Padma Vibhushan Viswanathan Anand, Indian Chess Grandmaster
New Age Economic Wars – Future of the World Role of Professional - Currency War, Cyber War, Tech War, Economic War, etc.	Eminent Thought Leader*
Ride the Capital Market Take the Bull by its Horns	CA Nilesh Shah | CA Raamdeo Agarwal Mr. Utpal Sheth | Mr. Mangalam Maloo - Moderator
Changing Corporate Landscape Professional Opportunities	CA Raj Mullick | Mr. Satyam Kumar Eminent Thought Leader*
Interchanging Role Reimagining One's Comfort Zone CA to Nation Building | CFO to Practice | Practice to CFO	Padma Shri T N Manoharan CA Milind Sarwate CA Charanjit Attra

Obliged to Confirmation

CONTENTS

Vol. XII | No. 3 | December 2023

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THE CHAMBER'S JOURNAL

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E Journal Subscription - Non Members (Yearly)	1,000	180	1,180
E Journal Subscription - Single Journal	200	36	236

Editorial

Dear Readers,

Infosys founder Narayana Murthy recently sparked an intense and spirited debate on social media when he said that young people should be working 70 hours a week to boost Country's productivity. He criticized the younger generation and felt they are not working hard enough. According to him India's work productivity is one of the lowest in the world and therefore youngsters are the ones that can build the country with gusto and must say: 'This is my country, I want to work 70 hours a week,'

While many took to social media to express their views saying that 70 hours of working in a week is excessive, the others have expressed support for Murthy's perspective. Some Industry leaders have opposed this notion, while many of them felt that it may be necessary if India wants to compete on the global stage. One of the Industry leader said that "If you want to be No. 1, if you want to be the best, the youngsters have to put in the hard work and more hours into the job. India is truly trying to compete with the U.S. and China. If we want to achieve greatness, then yes, those are the number of hours and the kind of sacrifices we must make."

According to the International Labour Organization, Indians currently work an average of 47.7 hours a week — higher than the U.S. 36.4, the UK 35.9, and Germany 34.4. They also work more than other Asian countries such as China 46.1, Singapore 42.6, and Japan 36.6. Thus average number of working hours put by an Indian is much higher but it is the productivity which matters . Probably what Narayan Murthy intended to convey is the importance of hard work in developing county like ours and the figure of 70 hours,may just be an indicative figure.

For an individual,at the beginning of his career in whatever field he is in, it would be more beneficial to invest more hours because there is so much to absorb and learn in the initial stage of one's career. When one puts in long hours of working, one acquires

knowledge, hones the skills, gains expertise and more importantly there is a thrill and sense of satisfaction in what one does. Also in initial stage of ones career, its important to put in more hours of work regardless of comparative pecuniary benefits.

As they say," There is no substitute to Hard Work" and therefore working 70 hours a week for youngsters in a fast growing economy like ours, is not something which should be taken negatively. The statement which Mr. Murthy made should also be seen in the context of changing working culture of our Country. More than anything else its important that you enjoy your vocation, enjoy what you do and you are so passionate about your work that number of working hours in a day or a week does not really matter ! Isn't it true for we professionals ?

Having discussed so much about hard work, let us remember the Milkman of India, Padma Vibhushan late Dr. Verghese Kurien, a legend and classic example of hard work with passion and vision whose 102nd birth anniversary was on 26th November. Architect of "Operation Flood", the largest dairy development programme in the world, Dr. Verghese Kurien, Father of White Revolution and a man with a rare vision has enabled India to become the largest milk producer in the World.

Through the co-operative movement, he helped to create a model not only for India but also for other developing countries and international agencies concerned with dairy development. In the late 60s, Dr. Kurien drew up a project called Operation Flood, meant to create a flood of milk in India's villages with funds mobilized from foreign food donations. Producers' co-operatives were the central plank of the project that sought to link dairy development with milk marketing.

Operation Flood has emerged as India's largest rural employment programme and unleashed the larger dimension of dairy development institutional, techno-economic, and social. Today, some 14 million farmers in more than 1 lakh villages, federated to nearly 180 milk unions spread across 24 states are assured of a better future. Everyone especially the youth must draw inspiration from this great man.

One major event which drew attention of all the countrymen in November was rescue operation of 41 workers trapped in collapsed Sikyara tunnel. They were successfully rescued after 17 days of ordeal in the tunnel, in one of the superbly coordinated and significant rescue operation by multiple agencies in the recent years .The trapped workers' courage and patience were an inspiration to everyone. Each individual involved in the mission has created an amazing example of human values and teamwork.

We have lost three gems whose contribution to the Society was immense and they are inspiration to all and will be dearly missed.

- Padma Bhushan Dr. S. S. Badrinath, one of India's topmost ophthalmologists and founder of Sankara Nethralaya, the man who had a brilliant academic career and lead an austere life, putting people before profits. In the last half a century, Sankara Nethrayala has provided all kinds of eye care either for free or at low cost (depending upon the affordability of the patients) to millions of people.

- Justice M. Fatima Beevi, the first woman judge of Supreme Court of India, appointed in 1989. This extraordinary achievement served as a beacon of inspiration to countless individuals,proving that women can excel in any field, including law and justice.

- Shri Pradyuman N. Shah, the former President of the Institute of Chartered Accountants of India. A Senior Chartered Accountant with career spanning over seven decades, was epitome of professionalism, ethics and humility. He was a Role Model, a guide and mentor to professionals.

The current issue of the Journal is on Faceless Assessments and Faceless Appeals. Faceless assessments and appeals is in a nascent stage and there are lot of challenges which are faced by the professionals in dealing with it. With the on going time barring assessment season, the issue on the subject is very timely and compliments to the Journal Committee for choosing the same. Shri Vipul Joshi, the Past President and the Past Editor of Chamber has very beautifully given the overall view of the Faceless Assessment Scheme. I express my gratitude to all the authors for sparing their valuable time and sharing their knowledge.

Wishing you and your family a Merry Christmas and a Happy New Year 2024 !

VIPUL K. CHOKSI
Editor

From the President

Dear Members

We deeply mourn the loss of Shri P N Shah, an esteemed past President of ICAI and a distinguished figure in the field of accounting. In a fitting tribute to his remarkable professional journey, Shri P N Shah was honoured with a Lifetime Service Award by the Chamber during the tenure of the respected Past President Shri Kishore Vanjara in 2001-02. This accolade was a recognition of his extraordinary professional achievements and his unwavering dedication to the tax profession. Shri Shah's wisdom, integrity, and unwavering commitment have left an indelible mark on the accounting community. His insights and guidance have been a beacon of inspiration and have significantly shaped the landscape of our profession. As we remember his monumental contributions, we acknowledge the profound void his departure leaves behind. His legacy, however, continues to light our path and enrich our practices. We extend our deepest sympathies to his family and friends during this difficult time. His memory and influence will forever remain a part of our professional ethos.

I, on behalf of the Chamber, extend heartfelt relief and gratitude following the successful rescue of the 41 workers from the Silkyara Tunnel in Uttarkashi. This complex operation, led by dedicated teams, stands as a testament to extraordinary teamwork and resilience. The use of innovative rescue techniques and the continuous supply of essentials to the trapped workers exemplify the commendable coordination and care involved in one of the most remarkable rescue operations in recent times. This incident serves as a powerful reminder of the importance of safety in all sectors and the incredible spirit of our rescue agencies. We are inspired by the courage of the workers and their families and remain committed to advocating for worker safety and well-being.

As President, I bring to your attention a critical issue concerning the Right to Information (RTI) Act of 2005, an essential pillar of our democracy. Recently, the Supreme Court's distressing observation that the RTI Act is at risk of becoming

a 'dead letter law' reflects a grave situation that demands our collective attention and action. The crux of this issue lies in the significant vacancies in the Central Information Commission, with seven of the eleven posts unfilled, and the potential defunct state of the Commission if replacements are not timely made. The situation in state commissions, such as Jharkhand's, which has been inactive since May 2020, further exacerbates this concern. The RTI Act, which has been instrumental in promoting transparency and accountability in governance, is facing a paradoxical challenge. Despite the government's vocal support for transparency, the practical implementation of the RTI Act reveals a stark contrast. This law, pivotal in unearthing major scams and enhancing service delivery, relies fundamentally on the functionality of the information commissions. Their current underperformance and vacancies pose a direct threat to the efficacy of the RTI Act. This is not a new predicament. The Supreme Court's 2019 judgment explicitly directed prompt filling of vacancies, yet this mandate remains unfulfilled. As we approach the 20th anniversary of this landmark legislation, it is disheartening to witness the weakening of a law that emerged from a grassroots movement for greater transparency. The current state of the RTI Act is a significant concern for us as tax and legal professionals. We understand the importance of robust information systems for ensuring fair governance and justice. The weakening of the RTI framework not only undermines our democratic ethos but also impedes our professional ability to seek accountability and transparency, which are core to our practice. As members of the legal and tax community, it is imperative that we advocate for the strengthening of the information commissions. Ensuring their functionality is not just about preserving a law; it's about upholding the foundations of our democratic process. We must call for urgent action to fill the existing vacancies and empower the commissions to effectively perform their duties. Let us unite in our efforts to ensure that the RTI Act continues to serve as a powerful tool for democracy, maintaining its spirit and purpose.

India's economy is doing really well right now. In the second quarter of 2023, the economy grew by 7.6%, and in November 2023, the country collected a record-breaking Rs 1.68 trillion in GST. This is a big sign that the economy is bouncing back strongly after the pandemic. The manufacturing sector is especially booming, showing a lot of growth and potential. But, like any growing economy, India faces some challenges too. There are global economic ups and downs to deal with, as well as rising prices at home. To keep the economy growing strong, the government needs to keep adapting its plans, especially focusing on things like new technologies, better infrastructure, and economic reforms. Moving forward, the key for India is to find the right balance between these new opportunities and the challenges they bring. By making strategic policymaking and focusing on growth that includes everyone, India can continue to grow and play a big role in the global economy.

Student Committee announced upcoming e-workshop on "Decoding GST Annual Returns and Reconciliation Statement," CA Sumit Jhunjhunwala. As the deadline for GST Annual Returns draws near, this workshop, led by a renowned GST expert, is timely and vital. It will offer students a detailed understanding of GSTR-9 and GSTR-9C, breaking down each clause with practical examples. The session aims to illuminate key aspects of annual compliance, a crucial skill for budding tax professionals. Additionally, attendees will gain insights into reconciliation under GST, enhancing their acumen in this intricate domain. This workshop is not just an educational endeavour but a strategic initiative to equip our future tax experts with the knowledge and skills necessary for navigating the complexities of GST.

The Study Circle and Study Group Committee to organize a significant virtual study circle meeting on “Issues in Faceless Assessment – Section 144B of the Income Tax Act, 1961.” Scheduled for December 21, 2023, and led by the esteemed CA Pramod Shingte from Pune, this session promises to delve into the nuances and challenges of faceless assessments under the Income Tax Act. It's a timely and crucial discussion, especially as faceless assessments become increasingly prevalent in our tax system. This meeting will not only provide clarity on the procedural aspects but also offer strategic insights into dealing with potential complexities. It's an invaluable opportunity for our members to stay abreast of the latest developments and enhance their expertise in this evolving area of tax law.

It is with immense pride and joy that I share the exceptional response to our announcement of the 47th Residential Refresher Conference (RRC) on Direct Taxes. The conference, set against the majestic backdrop of the Taj Mahal in Agra, has surpassed all our previous records in early registrations, reflecting the unwavering commitment and enthusiasm of our members. The RRC Committee deserves all the compliments for its stupendous efforts. This overwhelming response is a testament to the quality and relevance of the conference's content, covering contemporary topics and offering analytical studies in taxation. The speakers, renowned in their fields, promise to provide deep insights into intricate tax matters, ensuring a comprehensive learning experience. Furthermore, the unprecedented demand led us to arrange additional accommodations at a nearby hotel, ensuring we can include as many participants as possible in this enriching experience. This level of participation highlights the unique value our Chamber provides – a platform not only for professional growth and knowledge sharing but also for fostering friendships and camaraderie among our members, irrespective of age. As we prepare for this much-anticipated event, I extend my heartfelt gratitude to all our members for their enthusiastic support. Your participation and engagement are the driving forces behind

the success of our events. Thank you for being an integral part of this journey. I eagerly look forward to joining you at the RRC for an unforgettable experience of learning, networking, and professional growth.

In this issue, we focus on a crucial topic: "Faceless Assessments & Appeals – Facing the Last Mile and Next Steps," especially pertinent as we near scrutiny assessment deadlines. I commend the Journal Committee for adeptly addressing this important subject, offering our readers vital insights as they navigate these complex processes. Their timely and informative work is invaluable for our community, equipping us with essential knowledge and strategies for the challenges ahead.

As you receive this issue, we are just about to step into 2024. Every new year brings new hopes and plans, and 2024 is no different. I wish all our readers a very happy, healthy, peaceful, and successful New Year. May 2024 bring you lots of opportunities and joy.

I wish all are readers a very Merry Christmas and happy, healthy, peaceful and prosperous year 2024.

With best wishes,

HARESH KENIA
President

A *Tribute* to Late Shri P. N. Shah

A TRIBUTE TO A DOYEN

SHRI PRADYMUNA NATWALAL SHAH
(SHRI P. N. SHAH)
(JANUARY 01, 1929 – NOVEMBER 15, 2023)

Late Shri P.N. Shah was respected as Bheesma-Pitamah in the accountancy and tax profession, known for his integrity, ethics and above all, immense simplicity – A role model for the tax and accountancy profession.

When I joined the profession, my senior Shri V. H. Patil used to share with all of us the great personal and professional qualities of Shri P. N. Shah and how he was actively participating in the weekly Thursday study circle meeting and sharing his knowledge with fellow professionals.

I was very fortunate to have blessing of the Shri P. N. Shah, whenever he visited our office.

I had the opportunity to travel with Shri. P. N. Shah for attending the seminars and conferences organised by professional organisations across the country and sharing dais with him.

I also had the privilege of associating with Shri P. N. Shah on a good number of professional matters before the High Court and the Income Tax Appellate Tribunal.

In earlier days, Shri. P. N. Shah used to appear regularly before the Income Tax Appellate Tribunal, Commissioners, Commissioner of Income-tax (Appeals). Shri P. N. Shah was one of the highly respected members of the Income Tax Appellate Tribunal Bar Association Mumbai. Whenever he used to appear before the ITAT, the Honourable Members of the ITAT had shown the highest respect for him and they used to listen to him with great admiration.

Whenever we members of the ITAT Bar Association Mumbai had any issues with accounting principles, he gave us the privilege that any professional can seek his guidance. He used to listen to the query and after a few days, he used to send the answer in writing with supporting documents.

On completion of 50 years of his practice, then Senior Judge of Bombay High Court, Honourable Justice Shri A. P. Shah honoured him at a function organised by the All India Federation of Tax Practitioners (AIFTP) at Mumbai. At the request of the professionals, he shared his 50 years of experience in the profession, which is worth reading, to understand the great qualities of this doyen. He had stated that his firm has trained more than 300 articled trainees. In the publication of the Chamber of Tax Consultants titled "Vision 2000 - Tax laws and Administration (Income-tax Review – August – September 1996 -P. 117, Shri P. N. Shah wrote an article on the subject of "Role of Professionals in Tax practice" His interview and article are hosted on **www.itatonline.org**.

It is heartening to note that the Chamber of Tax Consultants which was established as far back as in the year 1926 and is considered one of the oldest professional organisation of the country was founded by the late Shri Bhogilal C. Shah, who was the uncle of Shri P. N. Shah. Shri P. N. Shah after completing his Chartered Accountancy course was looking after the Accounts and he was one of the professional who was instrumental in the development of the Chamber of tax Consultants. He was honoured with the **"Life Time Service Award"** by the Chamber of Tax Consultants in 2002. Shri P. N. Shah was President of, the South Asian Federation of Accounts (SAFA(1984-85), President of the Institute of Chartered Accountants of India (1983-84) and President of the Bombay Chartered Accountants' Society (1968-69). Shri P. N. Shah was not after any post in any of the professional organisations. In the year 2000, the National Executive Committee of the All India Federation of Tax Practitioners (AIFTP), then headed by Shri. N. M. Ranka Senior Advocate Jaipur, requested Shri P. N. Shah to accept the responsibility as National President of the All India Federation of Tax Practitioners. Shri P. N. Shah politely refused and stated that he would serve as a committee member, contribute articles, attend the conferences and that he was not interested in any post. This shows his great qualities. One great quality which all professionals across the country will admire of Shri P. N. Shah is, that wherever he has accepted the invitation as a speaker, one will not find a single instance wherein after commitment he has not attended. Another great quality is commitment and punctuality. Associating with various professional organisations, we witnessed that once Shri P. N. Shah agrees to write an article or paper, and commits to deliver it on a particular day, the association would surely receive it one day before hand. These are the great qualities that made him one of the finest and loved professionals in our country. There is so much to write about Shri P. N. Shah I have restricted myself to only a few thoughts which are as under:

- Shri P. N. Shah followed the Gandhian philosophy of simple living and high thinking.
- Shri P. N. Shah was a great luminary of the tax and accountancy profession who illuminated the path of integrity and wisdom.

- Shri P. N. Shah was not merely a true professional, he was a beacon of ethics and virtue. His commitment to upholding the highest standard of integrity earned him not only the respect of his peers, but also the admiration of the entire profession and tax administration.
- Shri P. N. Shah's notable contributions were his prolific writings on various subjects related to taxation, accounting and ethics. Every year he used to write on the Finance Act and share it with the Library of the ITAT Bar Association Mumbai for the benefit of the tax professionals.
- For the Chartered Accountants and Tax Practitioners across the country Shri P. N. Shah was not only a leader but a mentor and guide to countless aspiring chartered Accountants. He was the former National President of ICAI. His passion for nurturing the next generation was evident in his willingness to share knowledge, provide guidance and foster an environment where ethical principles were not just taught but embodied.

Shri P. N. Shah is no more with us but his smiling face, affectionate look and blessings will always remain in our hearts. His memory will continue to inspire us to strive for excellence in our professional and ethical endeavours.

I appeal to the Core Groups of the Chamber of Tax Consultants and Bombay Chartered Accountants Society to publish a publication of his selected writings, which will be an inspiration to young professionals across the country. The Chamber will be celebrating the centenary in the year 2026, and when they pen down the history of the Chamber the contribution of the Shri P. N. Shah deserves to be written in golden words, mainly because Late Shri P. N. Shah has contributed to the educational activities of the Chamber for more than 60 years without accepting any honorary post of the Chamber.

May his soul rest in peace and glory. We pray that God gives strength to the family members to bear the irrecoverable loss suffered by them.

Dr. K. Shivaram,
Senior Advocate

TRIBUTE TO LATE SHRI P. N. SHAH

It is said that a person comes across about 80,000 people during his journey of life and not many of them you remember and very few of them leaves a long-lasting impression on the other person and even among such persons there are just few whom you would never like to forget. Pradyumanbhai was one such person who will be remembered for his great qualities of humanity, humility, morals and values besides his knowledge and sincerity. He stood as the beacon of integrity and precision; his contribution to the profession was remarkable and his professional career was illustrious. I'm sure that like me most of the readers without exception would concur with my views of Pradyumanbhai. To write about him and his qualities and achievements would be like attempting to write about the sun who continuously illuminates our lives. I can at the best remember him by narrating a few instances out of the many good things, like;

- One of his best contributions to the profession is seeding and germinating the idea of the residential refresher course. In 1969 or thereabout, he pioneered the idea of holding residential refresher courses that demanded active participation of the residents and at the same time facilitated a great camaraderie amongst the participants. The idea became overwhelmingly successful that today no organization, worth its salt, can continue without conducting such courses in one or other manner.

- To know about the roots of Accountancy and many things relating to accountancy has always been the quest of many students and even professionals. This vacuum was dutifully filled by Pradyumanbhai by authoring the book titled '**History of Accountancy Profession in India**' published by ICAI in two volumes.

- His knowledge of history, otherwise, and the willingness to share the same was amazing. Few years back when there were a lot of blanks that were required to be filled in the history of the Chamber, itself, he was the one who was the great source of information, who precisely informed us about the year of constitution of the

Chamber and the persons who were at the helm of affairs over a period of more than 50 years.

- His eagerness to learn and keep learning has always been unparallel and was inspirational for many of us; this was evident from the fact that he participated by enrolling in many of the programs of the Chamber, especially during the period of Covid-19 and thereafter. Not only he would participate but raise pertinent questions and will seek and provide great clarity on the subjects for the benefits of the participants as also the presenters. His commitment to academic excellence was unparallel and his ability to successfully navigate a client on intricate issues was well recognized.

- There are numerous examples of his unwavering commitment to the ethical standards. He was one of the moving forces behind the adoption of the value statement and the Code of Conduct for fellow professionals at Taxcon in the year 2001 or thereabout where five leading professional organizations joined together to organize Taxcon for the first time.

We will remember him best in the words of Robert Louis Stevenson **- "A beautiful soul is never forgotten, just remembered with great love."**

CA Pradip Kapasi

Overview of Faceless Assessment Scheme

Vipul B. Joshi
Advocate

Overview

The Article seeks to broadly highlight some of the issues arising from the Faceless Assessment Scheme as incorporated in section 144B of the Income tax Act, 1961 and as revised by Finance Act, 2022, some of which are also under litigation before the courts. It covers the issues and litigations involved around, the omission of sub-section (9) of section 144B of the Act, identification / non-identification of the 'Faceless Assessing Officer', implication of non-obstante clause in section 144B, insertion of section 151A regarding faceless reassessment proceeding, the aspect of communications issued / served under the Scheme. It also covers some further issues that require consideration, like confronting the report of verification unit / technical unit / review unit, shift from draft assessment order to income or loss determination proposal, role of NaFAC, importance of service of Notice of Demand, discretion given under sub-section (2) and (8) for exclusion of cases from faceless assessment. The article also covers some of the pitfalls of the Scheme.

It is said that a task well begun is half done. Alas, this does not apply to a mere intention to begin well, it would apply only when a task *actually* begins well.

The advent of the Faceless Assessment Scheme ['FAS'] under the Income tax Act, 1961 ("the Act") has a checkered history. Launched as a pilot project in 2015 by a letter, then issuance of Instruction, thereafter in the form of notified Schemes and ultimately codified into the Act as section 144B, which again was reinserted in 2022 within one year only of its incorporation, the FAS has endured various avatars. For ready reference, the long legislative history of the FAS up to the present avatar is succinctly summarised in an article elsewhere in this Special Story. Some of the practical aspects arising from the FAS are also analyzed by other authors in this issue. It should be appreciated that a comprehensive analysis of FAS merits a detailed analysis of many aspects – a mammoth task by itself. Also, as will be evident from the long legislative history, there has been an onslaught of various 'extraneous' documents, like Letters, Internal Instructions, FAQs, SOPs, Instructions, Circulars, Notifications, Rules, Orders, etc. originating from the Government / CBDT / Department, which seek to add, supplement, expand, restrict, clarify or modify the provisions of FAS as contained in section 144B of the Act from time to time - at times becoming overlapping, contradictory

or irreconcilable. Even otherwise legality or binding precedent of some of these are also not free from doubt. In this Overview, therefore, an attempt is made to highlight some of the aspects for consideration that emerge from the analysis of the present FAS as incorporated in section 144B substituted by Finance Act, 2022. Though there may not be a definite answer available for such aspects, since the present scheme is at a nascent stage, it is hoped that some such issues are addressed suitably. Then again, some of the aspects are sub judice before the courts.

Needless to say, these aspects are not exhaustive, considering the constraint of the space. Consequently, a review of the Faceless Appeal Scheme – which can be a Special Story by itself - is left open to be analyzed at an appropriate time. Further, controversial issues, many of which are the subject matter of litigations, concerning the earlier avatars of the FAS are not dealt with, for the same reason and also as having rather academic/ historical value except for the cases where such litigations are pending.

Interestingly, the Chamber of Tax Consultants ['CTC'] can very well claim a part credit for the FAS. About more than a decade back, in its yearly one-to-one interactive meeting with the senior officers of the Ministry of Finance (including Chairmen of CBDT/CBEC) at North Block, the CTC had suggested reducing/ eliminating physical interaction – interface - between the assessees and the officers of the Department, at least at the assessment stage, to control undesirable practices - arising from such interactions. The core purpose for the move towards e - assessment is based on this very premise, as also echoed in the Budget Speeches as well as in the write-up on Faceless Scheme by the Department itself as available on its website.

At the outset, it must be appreciated that the launch of FAS was a unique and challenging project, by all standards; especially keeping in mind various limitations and constraints that are inherent in India, including on the part of the stakeholders - the Tax Administration and the Tax Payers. It also must be conceded that the intention behind the introduction of FAS to cause far-reaching effects at the ground level is quite laudable especially when one is reminded about prevalence of the rampant undesirable practices – corruption, harassments, lack of transparency & accountability, delays, et al - that had rotten the entire system, spreading like a cancer where no amount of moral/ethical sermons or various measures to control them were found effective. The classical carrot and stick approach having miserably failed, the only option left was to cut the very root cause – the cancerous tumor - from its base; that is, the interaction between the assessees and the officers. Conceded also is the fact that this was also a huge technological challenge – hardware and software as well as the requisite talent.

However, a well - seasoned taxpayer/ tax professional would always be wary of exercise of such nature, based upon past experiences. One has often witnessed that to win immediate acceptability of a new onerous provision, such provision is introduced with a "soft launch", presenting it to look like an innocuous and insignificant provision. However, having gained a small foothold in the door just left opened, gradually, the full-scale invasion takes place - slowly but certainly. On the other hand, in the case of a beneficial provision/scheme, the provisions are introduced with much fanfare but afterward are gradually diluted – again slowly but certainly. Though so far, the present FAS has not witnessed drastic adverse modifications.

However, in view of the dilution of some key beneficial provisions and absence of inclination to improvise the FAS and remove some lacunae, one cannot be blamed for holding one's breath anxiously, with fingers tightly crossed!

Omission of Sub-Section (9)

One classic example, in this regard, is the withdrawal of the most beneficial provision/ safeguard of the entire scheme – sub-section (9) to section 144B – which was omitted through the Finance Act, 2022, which occurred within one year only after its introduction and that too with the retrospective effect from the very date of inception of the FA Scheme, that is, 01-04-2021. For ready reference, this sub-section (9) is reproduced herein below:

"*(9) Notwithstanding anything contained in any other provision of this Act, assessment made under sub-section (3) of section 143 or under section 144 in the cases referred to in sub-section (2) [other than the cases transferred under sub-section (8)], on or after the 1st day of April, 2021, shall be non est if such assessment is not made in accordance with the procedure laid down under this section.*"

In fact, taxpayers/tax professionals were pleasantly surprised to see this sub-section (9) as a part of the FA Scheme – a very bold and one-of-its-kind initiative by the Department to introduce accountability. The fact that it was rather unprecedented presupposes that much thought must have gone into it before introducing it, including analyzing the likely consequences. Not totally unexpected, this section opened Pandora's Box for the Department, throwing open floodgates for thousands of writ petitions filed across India challenging assessment orders framed under section 144B of the Act as non est, having framed in breach of the provisions of that section. This resulted in the Courts, including the Bombay High Court, quashing some such assessment orders. Some issues, however, arose as regards the appropriate relief that the aggrieved assessees deserved in such cases. In the initial stage, in some cases, such assessment orders were quashed completely holding them null and void. However, in some cases such orders were quashed but set aside, with further remark to the effect that it was open to the assessing authority/ liberty was granted to the assessing authority, to take such action as permissible under the Act or with specific direction to the assessing authority to make fresh assessment. In some cases, the National Faceless Assessment Centre ['NaFAC'] was directed to examine whether to withdraw the impugned assessment order on the grounds of having passed in violation of the principles of natural justice. Incidentally, when some of the matters where the high courts had granted full relief traveled to the Supreme Court, in some cases the Court took a rather lenient view by setting aside the orders of the High Courts, by considering the fact that the Faceless Assessment Scheme has been introduced recently, the Revenue ought to have been given some leverage to correct themselves and take corrective measures. However, in some cases, no specific direction was given to the assessing authority. Besides, as, by that time, this sub-section (9) was omitted with retrospective effect, in some cases the Supreme Court sent the matters back to the concerned High Courts to decide the legal implication of such retrospective omission on the concluded assessments . In some cases, the Court allowed the matter to be remitted back to the assessing authority to decide on merit, reserving liberty to the assessee to revive his challenge before the Court if the assessee was unsuccessful on

merit. Mercifully, the Court itself did not hold the omission as having retrospective effect even on the completed assessments.

In such later types of cases, the concerned assessee, having succeeded in getting the assessment order held as non est or bad in law, paradoxically, found himself in a worse position than before, as this gave the assessing authority second inning, giving it further time to improve its assessments, to remove the laches/lacunae and to bring on record further material on record, which the authority had plainly failed to do in the first instance. This put a premium on inefficiency and illegality, at the cost of the helpless assessee who was, in fact, the sufferer/victim/complainant. The last laugh was of course of the assessing authority. Though it is generally understood that in a case of breach of natural justice, the matter should normally be relegated back to the stage at which the breach had occurred, it is equally a well-settled legal position that in case of a gross and flagrant breach of the principles of natural justice, the impugned order needs to be quashed completely and no second inning needs to be provided to the erring officer who so passed the order, so as to allow him to capitalize on his own lethargy and mistakes.

Then again, one witnessed a considerable number of assessment orders that were passed in so cryptic, callous, brazen, and abject manner, reeking with utter perversity, that one was left wondering whether this was predetermined and pre-intended for some extraneous considerations.

In such a situation, it was really a test case for the Government to demonstrate its earnest sincerity and strong will to uphold the rule of law and its commitment to have fair assessment; by taking the adverse orders of the courts sportingly and in true spirit on one hand, and by taking strict action against the concerned assessing officers on the other hand. The so-called grievance redressal mechanism formed for coming to aid the victimized assessees against such high-pithed and arbitrary orders – Local Committees to deal with Taxpayers' Grievances from High-Pitched Scrutiny Assessment ('Local Committees') – has proved ineffective and has failed to alleviate the misery. Unfortunately, however, the Government succumbed to the pressure and took the retrograde step by opting for the easy way out - by getting rid altogether of this 'irritant' – the only safeguard that was available to the assesses against such arbitrary orders; that too from retrospective effect. And the reason given? "*…whereas a large number of disputes have been raised under this sub-section involving technical issues arising due to use of information technology, leading to unnecessary litigation*." Need to say anything more? It is very sad to witness a very bold initiative getting stillborn.

In any case, the legal effect of such retro-effective amendment on the assessments that were already concluded and, consequently, already stood non est before the amendment was made is sub judice before the Courts.

However, an issue may still arise. De hors the omission of sub-section (9), can't an assessment order so framed in violation of the statutory mandate of sec. 144B be still independently challenged as bad in law? Parallel can be drawn from the catena of judicial precedence concerning reassessment proceedings.

An issue also arises with respect to the assessments framed prior to section 144B coming into effect but prior, under Faceless Assessment Scheme, 2019, where under a provision similar to sub - section (9) of 144B existed and which earlier Scheme / such specific provision has not been withdrawn /

made non - operational. This issue is not yet fully concluded.

Some of the specific aspects are highlighted, very briefly, below.

1. Faceless Assessment

Interestingly, right from the beginning till 2019, the scheme for digital assessment was referred to as 'e-assessment'. However, the revised scheme launched in 2020 was in the name of "Faceless Assessment". This, presumably, might have been because by that time the last leg of face-to-face assessment was eliminated, thereby making it possible to have a totally faceless assessment – end to end. Interestingly, in a way, it may not still be regarded as a 100% faceless assessment, in as much as, at the time of virtual hearing via video conferencing, the assessee and (presumably) the assessing officer who is supposed to be handling the assessment come face to face. However, it appears that at least now, as far as the Department side is concerned, the screen is kept blank (perhaps, taking clue from the observation/ suggestion of the Delhi Court while countering the Department's argument that grant of personal hearing through video conferencing to the assessee would frustrate and defeat the concept of faceless assessment). However, as far as the assessee's side is concerned, it is not necessarily so – in fact, the assessee and or his legal representative is required to be visible for identification purpose. It was clarified that this was to ensure that nothing gives an indication about the officer's identity or location leading to compromising of facelessness. However, where the face from the side of the assessee is not blurred, the assessment is faceless only in one way, not two ways.

Still, a couple of interesting issues arise. At the core, an issue may arise whether a faceless assessment u/s 144B of the Act is framed by a team-based assessment unit – 'AU' (as defined and comprising of various individuals of different ranks) or ultimately it is framed by an individual. This has very serious legal implications. Taking into account the amendment in the definition in this regard in the revised FAS of 2022, it may be safe to presume that, ultimately, a faceless assessment is framed by an identified individual, though his identity is not required to be revealed to the public, including to the assessee.

Still, going further, another issue arises as to who ultimately is responsible, and thereby accountable, for the assessment. If, for any reason, the assessee wishes to complain or seek action against the framer of the assessment, who he should complain against? In a writ filed against a faceless assessment order, who should file the Affidavit-in-Reply? If a Court decides to take action against the erring framer of the assessment order, including for contempt of court or for awarding cost by way of punishment, against whom the court should pass such an order? Incidentally, in cases where the courts have passed such orders directing to recover the cost from the salary of the erring officer, in the report to be submitted to the court for proof of such payment, details of the bank account of the erring officer, from whose salary the cost is recovered, get reflected, with the Department loosely referring such officer as Faceless Assessing Officer ['FAO']. Surely, there has to be someone who can be held responsible/accountable. The buck has to stop somewhere. Then again, another issue is whether an assessee has the right to know the name of the officer who framed his assessment; especially when he intends to take some action against the officer. Or, at least after an assessment is over, otherwise also, does keeping the name of the officer hidden still remain relevant or logical?

2 Non-obstante clause:

It is to be appreciated that section 144B starts with the non - obstante clause, "Notwithstanding anything to the contrary contained in any other provision of this Act…". In other words, the provisions of section 144B override all other provisions of the Act.

One of the controversial aspects arising from the present FAS - and, consequently, the subject matter of litigation - is the apparent conflict or overlapping of jurisdiction of the Jurisdictional Assessing Officer ['JAO'] and of the NaFAC / Assessment Unit under FAS.

An issue arises about the apparent overlapping between the procedure of assessment as prescribed u/s 143(3) of the Act and as prescribed u/s 144B of the Act. Then again, though section 144B now covers reassessment u/s 147, still there exists a separate section 151A which was brought in 2020 to enable the Central Government to notify a scheme covering faceless reassessment proceedings. As such, the procedure starting from the initiation of reassessment proceeding till final assessment, reassessment or re-computation u/s 147 is now governed by e-Assessment of Income Escaping Scheme, 2022 formulated u/s 151A. Incidentally, this scheme is not yet codified into the Act, unlike the Faceless Assessment Scheme for regular assessment, which is now codified u/s 144B. Though sec. 151A has empowered the Central Government to notify a scheme for reassessment covering right from the first point of initiation of reassessment proceeding (by the issuance of notice for making inquiry u/s 148A(a)) till the final reassessment, the scheme notified under this power, as it appears, covers only the stage starting from issuance of the notice u/s 148 of the Act till passing of final order, which are to be conducted in faceless manner to the extent provided in section 144B of the Act. As such, the proceeding up to passing of the order u/s 148A(d) of the Act is not yet part of the faceless assessment scheme and, consequently, is governed by general provisions of the Act. A grey area, however, still remains as regards the jurisdiction to issue notice u/s 148 of the Act – whether to be issued by JAO or by the NaFAC. While two High Courts have taken divergent views, the issue is sub - judice before other Courts, including before the Bombay High Court.

3. Report of Verification Unit / Technical Unit / Review Unit:

It is unfortunate that there is no provision to confront the concerned assessee with a copy of the report of the Verification Unit ['VU'] / Technical Unit ['TU']. Such reports may be favorable or unfavorable to the assessee. In either case, the concerned assessee has the right to be confronted with the same, so as to enable him to make meaningful representation and, more importantly, to have his tax determined in accordance with the law and in a fair manner. The issue becomes serious as the concerned assessee may not be aware at all of the existence of such reports and, more importantly, how far they have influenced the mind of the assessment unit ['AU'] while preparing its income and loss determination proposal. The same applies to the report of Review Unit as well ['RU'].

It should be noted that even if the report of TU / VU / RU is favorable (partly or fully) to an assessee, the AU can still reject/ignore the same (partly or fully). In the circumstances, this aspect of the assessee being made aware of such a report becomes more relevant. This aspect applies to all other and such material that is gathered by the AU, especially when sought to be relied upon by the AU to frame a faceless assessment.

Therefore, not confronting the assessee with such vital documents amounts to not providing a proper, fair, and reasonable opportunity of being heard to the assessee before finalizing his assessment, apart from being against the finer principles of justice, equity, and fairness.

In any case, it is a very well-settled legal position under the Act that any evidence or document that is not confronted to the concerned assessee but is still relied upon while passing an order has no evidentiary value and, consequently, is required to be ignored altogether while adjudicating legality or otherwise of such order. As such, an issue may arise regarding the legality of a faceless assessment order in which the documents that have been relied upon or that had some bearing, including the report of TU/VU/RU, are not confronted to the concerned assessee. Another issue may arise as regards the very right of the aggrieved assessee to have a copy of such report of TU /VU / RU or any material relied upon. Whether the assessee can obtain a copy of such documents under the Right to Information Act, 2005?

4. Draft Assessment Order

Another unfortunate retrograde step is amending the earlier provision concerning the draft assessment order. Under the earlier scheme, the concerned assessee was confronted with a draft assessment order, in the form of making it as a part of the show cause notice. This had served a very useful purpose. Now, unfortunately, the assessee is required to be served with only a show cause notice. It should be appreciated that there is a subtle but fine distinction between an assessee being confronted with the entire draft assessment order and simply with a show-cause notice of the proposed variation. Even assuming a show cause notice is a detailed one (a sample format of which is provided in the SOPs), still, the subtle distinction vis-à-vis a draft assessment order remains. A draft assessment order covers many more aspects, apart from merely the aspect of variation of income. The assessee may feel aggrieved with such other aspects or may still like to respond/clarify such other aspects. Then again, certain observations/findings in an order may not have an impact on the total income for that year and, consequently, may not necessitate making any variation but, still, such findings /observations may have repercussions for other years or for other assesses and, therefore, the assessee would like to be heard in that respect as well. Some observations may have a bearing on collateral proceedings like penalty and prosecution. It should be appreciated that section 144B in its earlier avatar – as prevailing between 1975 and 1989 – did specifically provide for the supply of draft assessment order to the concerned assessee covered by that section. As such, discontinuation of such yet another good practice is one more pointer to the Government rolling back beneficial provisions for the reason best known to it.

5. Income or Loss Determination Proposal ['ILDP']

A modified procedure is introduced in the present scheme, in section 144B (1) (xii). In effect, as per the previous scheme, an assessee was required to be confronted with draft assessment order if some variation prejudicial to his interest was proposed. In the new scheme, now, instead of draft assessment order what is to be served is 'income or loss determination proposal'. First of all, it is surprising that this phrase, which is very crucial to the entire assessment proceeding, is not defined or clarified. Though the SOPs (dated 03.08.2022) stipulates that a ILDP

should contain all the essential ingredients of the assessment order, and should be speaking, fair and judicious, still, it does not match a draft assessment order, as can be inferred from the SOPs itself. In any case, it is not understood why a shroud of mystery is created around this phrase, especially as to what it contains, and is not defined in the section 144B itself. It is not clear what does 'containing all the essential ingredients' mean; whether it includes some basic /elaborate reasons in support thereof or includes other important aspects as well.

6. Variation prejudicial to assessee

This is another important phrase that is also not defined or clarified. The immense significance of this is that the concerned assessee will be confronted with a show cause notice only if any variation prejudicial to (the interest of) the assessee is proposed and, that too, in the opinion of the AU – not otherwise. First of all, it is not clear whether the "variation' is only vis-à-vis final income tax liability or otherwise. Secondly, how can it be left to the AU to determine which variation is prejudicial to the assessee and which is not? An assessee may find many other variations / "aspects" that ultimately get incorporated in the final assessment order as prejudicial to its interest. The seriousness of this is also because an assessee now becomes entitled to seek personal hearing only if some variation prejudice to him is proposed by the AU. As such, this is yet another instance of the assessee not being given a fair opportunity of being heard.

7. The Role of NaFAC

As it appears, the role of the National Faceless Assessment Centre ['NaFAC'] now is simply to act – so to say – as a postman, routing the communication between the AU and the assessee through it. It has no discretion to be exercised in any manner, except to decide whether the income or loss determination proposal sent by AU requires to be sent to the Review Unit (RU) or not, based on the guidelines issued in this regard.

8. Service of Notice of Demand

A small issue is regarding the service of Notice of Demand, along with the faceless assessment order. There exists a separate section 156 in the statute book, independent of the provision regarding framing of assessment as contained in section 143(3), for service of 'notice of demand' in the prescribed form to the assessee. Rule 15 prescribes From No. 7 for this purpose. Courts have held service of Notice of Demand u/s 156 as a statutory mandate, independent of service of the assessment order, and, in fact, as the foundation for subsequent actions by and against the concerned assessee. Now, even after the advent of the FAS regime in terms of section 144B, there is no corresponding change/amendment in section 156, Rule 15, or Form 7, giving reference to the FAS under section 144B. They are not withdrawn and all remain alive and kicking! However, clause (xxiii) / (xxx) of section 144B (1) also provides for the service of a 'demand notice' along with the assessment order by NaFAC; that too, with no reference to section 156, Rule 15, or Form 7. Then again, it is not clear who has to prepare such a 'demand notice' - AU or NaFAC. This is because, as it appears, the mandate to AU stops at framing assessment order in terms of clause (xxii) / (xxix), with no further stipulation/provision to prepare a 'demand notice'.

9. Coverage of FAS

Sub-section (2) of section 144B empowers the Central Board of Direct Taxes ['CBDT']

to specify the territorial area, or persons or class of persons, or incomes or class of incomes, or cases or class of cases which are to be governed by the faceless assessment procedure as contained in section 144B (1) of the Act. By virtue of this power, the CBDT has been issuing various orders from time to time under section 119/144B (2), more in the nature of excluding from the purview of the faceless regime the cases falling under certain provisions of the Act or the cases falling under certain eventualities. It is pertinent to note that so far no guideline or objective parameter has been laid down for this purpose. However, so far, the cases specified to be excluded have been under objective parameters. Importantly, this power does not include the power to specify a person or an income or a case - it has to be a group of persons/income/cases. Interestingly, for the reverse purpose, that is, to de-specify, subsection (8) gives power to the Principal Chief Commissioner/Principal Director General in charge of NaFAC to transfer an individual case pending with an AU to the assessing officer having jurisdiction over such case, with the prior approval of the CBDT. Here, apart from there being no guideline/objective parameter specified - with the power to so transfer can be exercised by such authority at its sole discretion - such transfers do not require to be notified/made public, much less the concerned assessee be confronted prior with such proposal and be allowed to give his say. In any case, interestingly, it is the CBDT who has been issuing Orders invoking this section, for example, to transfer time barring assessments from NaFAC to JAO.

10. Communication

This is also a complex and one of the most litigation prone aspects of FAS. Complex because it is closely connected with the provisions of the Information Technology Act, 2000, and entails rather deeper scrutiny. Added to this are various decisions of High Courts touching this aspect. This aspect, in fact, merits couple of dedicated articles!

However, one aspect that may require little clarification is the option with the NaFAC in the matter of delivery / transmission of the electronic communication to the assessees under FAS of section 144B. Sub-section (6) (ii), as it appears, gives an option to NaFAC to deliver such communication by way of either placing such communication to the account of the assessee in the portal or sending it to the registered email address of the assessee or uploading on the Mobile App of the assessee; either of these to be followed by a real-time alert. Interestingly, such additional safeguard by way of real-time alert can be sent, at the option of NaFAC again, at the same e-mail options / mobile phone options! As such, as it appears, a communication (maybe a statutory notice or even an assessment order) can be delivered by NaFAC by merely uploading on the Mobile App of the assessee and need not be placed in the portal - registered account of the assessee. Further, the additional alert can be sent to the same 'address' at which the original communication was delivered. Even with respect to e-mail address, even here as it appears, the communication may be delivered at any of the six e-mail addresses, at the option of NaFAC, as specified in Explanation (t) to section 144B, and not necessarily at the specific/separate e-mail address made available by the assessee for such purposes. No wonder, therefore, that cases galore with complaints of assessees not receiving / not knowing issuance or receipt of communication from the Department and, consequently, the assessment being passed *ex parte*.

In any case, thankfully, the Standard Operating Procedure ['SOP'] issued by the Department (for example, dated 03.08.2022) mandates that in all cases where the assessee is not responsive to the notice u/s 142 (1), NaFAC has to send a physical letter at the latest known address through Speed Post.

In this regard, reference may be made to decisions of various High Courts in which this issue of communication has been examined in detail. For example, in one case before the Delhi High Court, the Court has observed, among other, that in case of failure to give real time alert, the date of service of notice would be the date of viewing of the notice by the assessee on his e - filing portal. Though some of the judgements are rendered in the context of the Faceless Assessment Scheme, 2019, some of the observations may still be relevant under the present FAS.

An issue may arise whether there arises overlapping or conflict between the two parallel provisions of section 282 and section 144B in the matter of service of various notices, etc. Though in view of the non - obstinate clause, the provisions of section 144B override other provisions of the Act, still, is it so that section 282 has become totally redundant as far as FAS is concerned?

Summation

Undoubtedly, the FAS is a very bold and innovative initiative taken by the Government. Apart from helping to rein in undesirable practices that were raging at the assessment stage, it has helped in improving and improvising the tax administration and its services, besides ushering in transparency, efficiency, and some degree of accountability. At the same time, the gradual dilution of the beneficial provisions, reluctance to finetune the FAS based on feedback received from the taxpayers & other stakeholders may not help achieve the avowed objectives.

Then again, howsoever the laudable object and the best hardware/software that there may be, if the will and the spirit of the people involved in administering the Scheme at the ground level are not up to the desired level, the Scheme cannot be successful. It is a fairly common experience to come across cases where the procedure for doing an assessment, including in the matter of giving a personal hearing via video conferencing, is conducted in a very causal manner/approach. This is notwithstanding quite elaborate SOPs having laid down to ensure that the entire assessment procedure is conducted in a just and fair manner, avoiding inconvenience to the assessees. The much-publicized grievance machinery having failed miserably and the courts rather reluctant to do much except setting aside the impugned assessment orders, thereby subjecting the assessees to go back to square one, the hapless affected assessees really have - so to say - no face to save in the faceless regime!

Lastly, as it is said in India, the law violators are always one step ahead of the law enforcers. In a typical Indian penchant for finding "jugaad" for everything, ways and means have already been invented to make a mockery of this "faceless" assessment. It is given to understand that despite the elaborate safeguards, the assessees are still approached / contacted by middlemen in the matter of their ongoing assessments. A very strict view of this is required to be taken by the Government, as such practice strikes at the very root of the concept/purpose of faceless assessment.

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SS-III-10

Legislative History of Faceless Proceeding

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Overview

The Article seeks to broadly highlight the entire time line of the faceless assessment proceeding right from the date on which electronic record was introduced as one of the modes of service of communications to finally finding its practical implementation in the phase - wise execution of the pilot project of e - assessment and, thereafter, implementation of E - proceeding module – Income Tax Business Application ['ITBA']. It also covers the entire transition from the introduction of a full - fledged detailed E - Assessment Scheme, 2019 to the amended Faceless Assessment Scheme, 2019 to its insertion in the Act under section 144B w.e.f. 01.04.2021 to further amendments in section 144 in 2022. Efforts have also been made to cover all possible circulars, notifications, orders, instructions, SOPs, etc. brought in for effective implementation of the faceless assessment. The Article also briefly touches upon the timeline of various other faceless proceedings and the various schemes introduced in this regard.

Substitution of section 282 of the Act	01.10.2009	The seed for moving from traditional method of doing assessment can said to have been sown by virtue of the amendment made in section 282 of the Income tax Act, 1961 ['the Act], concerning service of notice, by Finance (No. 2) Act, 2009 w.e.f. 01.10.2009, moving ahead from the traditional method of service of notices, etc. to the electronic method of 'transmission' of notices, etc. *Sub-section (1) -* *The service of a notice or summon or requisition or order or any other communication under this Act … may be made by delivering or transmitting a copy thereof, to the person herein named -* *(a)* *(b)*

		(c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or ***(d) by any other means of transmission of documents as provided by rules made by the Board in this behalf.*** *Sub-section (2) -* *The Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in Sub-section (1) may be delivered or transmitted to the person therein named.* The scope of the substituted section was extended to 'any communication' under the Act as opposed to service of only 'notice or requisition' prior to substitution of the section. Further, the manner of service was also extended to transmission in the form of electronic record or any other means of transmission as notified by rules apart from the modes as were existing prior to the substitution of the section. However, no Rules were notified by the Board in this regard till 2015.
CBDT's letter to PCITs of five metro cities as part of pilot project for use of E-mail based communication for paperless assessment proceeding	19.10.2015	However, the real push for moving towards e - proceeding of doing assessment was given by making it a part of the larger e-governance initiative by the government. Accordingly, the Central Board of Direct Taxes ('CBDT'), vide its Letter dated 19.10.2015, introduced a pilot project in five metro cities of using E-mail for corresponding with one hundred cases of non - corporate taxpayers, including sending questionnaires, notices, etc. at the time of scrutiny assessment proceeding and also getting responses from the taxpayers through E – mail, with the aim of improving the taxpayer services, enhancing the efficiency and ushering in a paperless environment, apart from eliminating the necessity of visiting the income - tax offices by the taxpayers - particularly in smaller cases involving limited issues and where taxpayer were able to provide the details as required by the assessing officer without necessitating the physical presence of the taxpayer. Providing flexibility to the taxpayers, the officers of the Department, through their official E-mail IDs, ***could interact with the taxpayers at their E-mail IDs as mentioned in their respective returns of income, only after obtaining prior consent of the willing taxpayers.***

Rule 127 notified [Notification No. 89/2015]	02.12.2015	After more than six years of bestowing power under Sub-section (2) of section 282, on 02.12.2015, CBDT notified Rule 127 for service of a notice or summon or requisition or order or any other communication under this Act. Sub-clause (a) of sub-rule (2) provides for the addresses at which the communications can be delivered in case the service is by post, courier or as provided under the Code of Civil Procedure, 1908, which are as under: (i) PAN database (ii) Income tax return to which communication relates (iii) Last income tax return furnished (iv) Address of registered office on MCA website If any other address furnished by the assessee in writing - then such address Sub-clause (b) of sub-rule (2) provides for service of communications delivered or transmitted electronically at following address - (i) Income tax return to which communication relates (ii) Last income tax return furnished (iii) Address of registered office on MCA website (iv) any e-mail address made available by the addressee Pertinently, the permitted more of electronic transmission did not include the e-mail address as available in the PAN database or Aadhar database. Sub-rule (3) of Rule 127 delegated power to Pr. DGIT (S) or DGT (S) to specify the procedure, formats and standards in this regard. Although this Rule expanded the scope of mode of delivery, it also ***led to confusion amongst the taxpayers as the choice/discretion of opting for physical/ electronic service of communications was left with the Department.***

Notification No. 2/2016 issued by Directorate of Income Tax (Systems) ['DIT(S)'] in exercise of sub-rule (3) of Rule 127, prescribing procedure, formats, standards for ensuring secured transmission of electronic communication	03.02.2016	This confusion was addressed, to an extent, in this Notification. As per this notification {was applicable in respect of select non-corporate assessee as a part of pilot project), if an assessee furnished a letter to the assessing officer providing any other e-mail address, only such e-mail address was to be considered as the primary e-mail address for electronic communication. Importantly, in case of non - delivery of e-mail on the primary e-mail address or any other e-mail address as provided under sub-rule (2) due to any reason - including technical reason such as e-mail failure or mailbox full, etc. - the assessing officer was still required to deliver such communications through any other valid mode of service as prescribed under the Act and record in writing the reasons for not serving notice by e-mail, with an obligation to send such error on the specified e-mail address 'e-assessment@incometax.gov.in. Conversely, if the taxpayer could not send his reply by e-mail due to technical reasons, he could still send it physically to the assessing officer. All e-mails received or sent were to be stored in ITD database and communication status were to be displayed in the assessee's 'My account' on e - filing portal.
CBDT's letter	23.05.2016	Pending full development of a dedicated module for comprehensive e-scrutiny, the e-mail based communication scheme for paperless assessment proceeding was further extended to two more cities and to all assessees at the option of the assessee to opt for the same. It was also provided that in cases that require submission of voluminous documents and it was not practical to submit the scanned copies thereof through e-mail, the documents could be received by the assessing officer in physical form, by recording the reasons. Proper note sheet was required to be maintained for recording the entire proceeding.
Definition of hearing inserted under section 2(23C) of the Act	01.06.2016	"Hearing" includes communication of data and documents through electronic mode.

Notification No. 17/2017 to notify Rule 127A for authentication of notices and other documents	23.03.2017	By Finance Act, 2016, an amendment was made in section 282A of the Act (instead by Finance Act, 2008 w.e.f. 01.06.2008) concerning authentication of notices and other documents, giving power to the Government to prescribe procedure for signing and issuing notices, etc. communicated in electronic form. By virtue of such power, Rule 127A was notified by CBDT for authentication of notices and other documents.
Notification No. 4/2017 issued by DIT (S), prescribing procedure, formats, standards for ensuring secured transmission of electronic communication pursuant to introduction of E - proceeding	03.04.2017	Upon E - proceeding module – Income Tax Business Application ['ITBA'] - getting fully developed by the DGIT (S) offering functionality to the Department, revised procedure, formats and standards were issued by DGIT (S), shifting from e-mail-based assessment to web based/ portal based assessment. As per this notification it was provided that all notices, etc. '*will be visible to Assessee……and may also be sent …. to the registered e-mail address of the Assessee*' and '*A text message alerting the Assessee may also to be sent to the mobile number registered on the E-filing website.*' Further, the option was given to the Assessee to opt out of the E – proceeding, even in the middle of e-proceeding, to be conducted/continued further manually. Manual mode could also be adopted for those Assessees who were not registered on the E-filing website or if the Income Tax Authority so decides, with the specific reasons recorded and approved by the immediate supervisory authority. '*In order to facilitate a final date and time for E-submission*', it was provided to auto close the facility 7 days prior to the Time – Barring (TB) date and in case there was no TB date, the Income Tax Authority was given power to close the E – submission on his own volition; albeit with the power to re-enable the facility.
Instruction No. 8 of 2017	29.09.2017	Various aspects of conducting scrutiny assessments electronically in cases which were getting barred by limitation during the financial year 2017-2018 were covered. In this, clear instructions were given to the Department that the manual issue and service of departmental communications should be invoked only where for any reason it was not possible to get the communication served electronically under intimation (giving reasons) to the Range Head in ITBA.

Insertion of sub – section (3A), (3B) and (3C)	01.02.2018	(3A)The Central Government may make a scheme, by notification 93 in the Official Gazette, for the purposes of making assessment of total income or loss of the assessee under sub-section (3) 94 [or section 144] so as to impart greater efficiency, transparency and accountability by— a. eliminating the interface between the Assessing Officer and the assessee in the course of proceedings to the extent technologically feasible; b. optimizing utilization of the resources through economies of scale and functional specialisation; c. introducing a team-based assessment with dynamic jurisdiction. Section (3B) gave power to the Central Government to direct that any provisions of the Act relating to assessment shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified.
Budget Speech 2018		Stated that 'we had introduced e - assessment in 2016 on a pilot basis and in 2017, extend to 102 cities with the objective of reducing the interface between the department and the taxpayers. With the experience gained so far, we are now ready to roll out the E - assessment across the country, which will transform the age - old assessment procedure of the income - tax department and the manner in which they interact with taxpayers and other stakeholders. Accordingly, I propose to amend the Income - tax Act to notify a new scheme for assessment where the assessment will be done in electronic mode which will almost eliminate person to person contact leading to greater efficiency and transparency.
As per Memorandum explaining the provision		*"It is proposed to prescribe a new scheme for the purpose of making assessments so as to impart greater transparency and accountability, by eliminating the interface between the Assessing Officer and the assessee, optimal utilization of the resources, and introduction of team – based assessment."*

Instruction No. 1 of 2018	12.02.2018	Board further widened scope of 'E-Proceeding' for conduct of assessment proceedings to all proceeding except for search related assessments and where assessee objects to the conduct of the proceeding electronically. All department orders, communications or notices were to be signed digitally by the assessing officer.
Instruction No. 3 of 2018	20.08.2018	Board further widened scope of 'E-Proceeding' for conduct of assessment proceedings conducted u/s 143(3) for A.Y. 2018 - 2019 to all proceeding except for proceeding listed out in Para 5. All departmental communications and notices as far as feasible were to be generated through ITBA.. Earlier existing mode of service should be utilised only when it is not possible to serve the communication electronically in e - filing account of the concerned assessee. Circumstances where personal hearing may take place were also enlisted.
Circular No. 19/2019	14.08.2019	Circular was issued by the CBDT for mandatory allotment of Document Identification Number (DIN) to all communications under various proceeding issued after 01.10.2019 and quoting in the body of communication except under exceptional circumstances as provided in the Circular.
Notification No. 61 & 62 of 2019 notifying the E-Assessment Scheme 2019	12.09.2019	In pursuance to the power given under section 143(3A) to (3C), with a view to transforming the age-old conventional methods of manual assessments and to ensure greater transparency, efficiency and accountability and curbing undesirable practices in the tax administration system, the "E-Assessment Scheme 2019", was launched. The scope of this scheme was only covering assessments under section 143(3) of the Act. The distinction and the comparison is separately made. Phase I of the Faceless Assessment Scheme was inaugurated 07.10.2019 with 58,320 assigned cases for A.Y. 2018 - 2019, with the setting up of National e-Assessment Centre, in New Delhi. The Board was also required to set up Regional E - assessment centres, assessment units, verification units, technical units, review units and specify their respective jurisdictions. All communication among the assessment unit, review unit, verification unit or technical unit or with the assessee or any other person were required to be made through NeAC.

Circular No. 27 of 2019	26.09.2019	CBDT issued circular directing the department to conduct all the proceeding for A.Y. 2019 - 2020, except for the proceeding covered under the E - Assessment Scheme, 2019, electronically subject to exceptions provided in the circular and the circumstances in which personal hearing may take place.
The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions), Act, 2020	26.09.2020	Sub-section 143(3D) was inserted as as sunset clause to sub-section (3A) and sub-section (3B) upto 31.03.2021 and section 144B was inserted w.e.f. 01.04.2021 to incorporate the Faceless Assessment Scheme, 2019 under the Act with certain modifications like transfer of case to the JAO only after approval of board (Sub-section 8), provision of non - est (Sub-section 9), provision regarding verification unit (Sub-section 10), etc. Further, various sections and Sub-sections were inserted w.e.f.. 01.11.2020 to shift to faceless proceeding delegating the power to the Central Government to notify appropriate scheme [other than assessment, including best judgement assessment, for which the Faceless Assessment Scheme, 2019 has been duly codified in the Act itself (section 144B)], which are tabulated separately 'Other provisions covering faceless proceeding'.
Finance Act 2020	01.04.2020	Once the infrastructure was in place and with the success of Phase I of faceless assessment, the scope of section 143(3A) giving powers to the Central Government was also extended to assessments under section 144 of the Act by Finance Act, 2020. Further, amendment in section 144C was also made to define the stage at which the eligible assessee can file objection before the Dispute Resolution Panel pursuant to the E - Assessment Scheme, 2019. Seeing the success of faceless assessment, the powers were given to the Central Government to make scheme for faceless appeal and penalty by inserting new Sub-sections (6A) and (2A) in section 250 and section 274 respectively by Finance Act 2020, w.e.f. 01.04.2020.
Notification No. 60 & 61 of 2020	13.08.2020	Considering the various representations made, amendments were made in the E - Assessment Scheme, 2019 vide Notification dated 13.08.2020, calling it Faceless Assessment Scheme, 2019. The scope of the Scheme was extended to the proceeding u/s. 144 of the Act also apart from the proceeding u/s. 143(3) of the Act.

Order u/s 119 issued by CBDT	13.08.2020	Exceptions to the assessment to be carried out under the Faceless Assessment Scheme, 2019 were enlisted and directions wee issued that any assessment order not passed in terms of such scheme shall be treated as non - est and shall be deemed to have never been passed.
Order u/s Para 3 of the Faceless Assessment Scheme, 2019 specifying the scope of cases covered under the Scheme	13.08.2020	The relevant order is reproduced *'In pursuance to Para 3 of the Faceless Assessment Scheme, 2019 ('the Scheme'), the Central Board of Direct Taxes (hereinafter referred to as Board) hereby specifies that with effect from the date of this order, all assessments pending or initiated on or after 13th August, 2020, in all the cases (other than those in the Central Charges and International Taxation charges) which fall under the following class of cases shall be completed under the Scheme:-* *a. where the notice under section 143(2) of the Income - tax Act, 1961 (hereinafter referred as the Act) was issued by the (the NeAc);* *b. where the assessee has furnished his return of income under section 139 or in response to a notice issued under sub- section (1) of 142 or sub-section (1) of section 148; and a notice under sub-section (2) of section 143 has been issued by the Assessing Officer or the prescribed income-tax authority, as the case may be;* *c. where notice u/s 142(1) of the Act, has been issued and the assessee has not furnished his return of income in response to a notice issued under sub-section (1) of section 142 by the Assessing Officer;* *d. where the assessee has not furnished his return of income under sub-section (1) of section 148 and a notice under sub-section (1) of section 142 has been issued by the Assessing Officer. …'*
Launching of Faceless Appeal Scheme	13.08.2020	Hon'ble PM Shri. Narendra Modi on 13.08.2020, while launching the new platform for transparent taxation, "Honoring the Honest", announced launching of the Scheme for Faceless Appeals on 25.09.2020, on the birth anniversary of Pt. Deen Dayal Upadhayay.
Faceless Appeal Scheme, 2020 notified	25.09.2020	In pursuance to such powers given under section 246(6A), Faceless Appeal Scheme, 2020 was notified.

SOP for personal hearing through video conferencing under the Faceless Assessment Scheme, 2019	23.11.2020	CBDT laid down circumstances under which personal hearing was to be granted.
Faceless Penalty Scheme, 20201 notified	12.01.2021	In pursuance to such powers given under section 274(2A), Faceless Penalty Scheme, 2021 was notified.
Finance Act, 2021		
As per Memorandum		Amendment in section 142(1) "The Central Government is following a conscious policy of making all the processes under the Act, where physical interface with the assessee is required, fully faceless by eliminating person to person interface between the taxpayer and the Department. In line with this policy, and in order to enable centralized issuance of notices etc. in an automated manner, it is proposed to amend the provisions of clause (i) of the sub-section (1) of the section 142 to empower the prescribed income-tax authority besides the Assessing Officer to issue notice under the said clause." New sub-section in section 255 have been inserted giving power to the Central Government to make scheme for disposal of appeals by the Appellate Tribunal.
Notification No. 6 & 7/2021 notifying amendments in the Faceless Assessment Scheme, 2019	17.02.2021	In the meantime, till section 144B came into operation from 01.04.2021, further amendments were made in the Faceless Assessment Scheme, 2019 by Faceless Assessment (First Amendment) Scheme, 2021 w.e.f. 17.02.2021 to include specific procedure for dealing with the draft order passed in the case of an eligible assessee.
Order under Sub-section 2(2) of section 144B specifying scope/cases to be done under the act	31.03.2021	Same as Order u/s Para 3 dated 13.08.2021 above except that the Faceless Assessment Scheme, 2019 was replaced by section 144B of the Act.
Circular with specific directions	08.04.2021	All notices, communications, order after 01.04.2021 are to be deemed to have been issued by National Faceless Assessment Centre and section 143(3A) and/or section 143(3B) would be read as section 144B of the Act.

Order under Sub-section 2(2) of section 144B specifying scope/cases to be done under the act	06.09.2021	In addition to the cases excluded from faceless assessment (central charge and international taxation charge), cases where pendency could not be created on ITBA because of technical reasons or cases not having PAN, as the case may be, were excluded from the purview of section 144B of the Act.
Order u/s. 119 providing exclusion	22.09.2021	Further exclusion was added regarding the assessment in cases transferred by PCCIT or PDGIT in charge of NFAC under section 144B(8). Further, where cases were getting time barred on 30.09.2021, under certain circumstances, assessment was to be completed by JAO and excluded from 144B.
Order u/s. 119 providing exclusion	16.12.2021	Provided further exclusion to section 144B, where assessment proceedings were pending/initiated pursuant to action u/s 133A of the Act and all cases where action u/s 133A of the Act is conducted in ongoing assessment proceedings were to be transferred to the Central Charges under order u/s 127 of the Act, regardless of presence/ absence of impounded material in the cases. Assessment in such cases shall be completed by Central Charges only.
Finance Act, 2022	01.04.2022	A new scheme of FAS was substituted under section 144B-
As per Memorandum		*"The Central Government has undertaken a number of measures to make the processes under the Act electronic, by eliminating person to person interface between the taxpayer and the Department to the extent technologically feasible, and provide for optimal utilisation of resources and a team-based assessment with dynamic jurisdiction. As part of this policy, vide Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, section 144B was inserted in the Act to provide the procedure for faceless assessment with effect from 01.04.2021 and the Faceless Assessment Scheme, 2019 ceased to operate from that date.* *However, various difficulties are being faced by the administration and the taxpayers in the operation of the faceless assessment procedure. In view of the above, it is proposed that the existing provisions of the section 144B of the Act may be amended to streamline the process of faceless assessment in order to address the various legal and procedural problems being faced in the implementation of the said section.*

		Therefore, it is proposed to substitute section 144B of the Act so as to provide that….."
Order u/s. 119 providing exclusion	17.03.2022	Direction for exclusion of cases to section 144B where cases were getting time barred on 31.03.2022, under certain circumstances, assessment was to be completed by JAO.
Finance Act, 2022	03.11.2022	Date of issuing directions for the purposes of section 92CA, 144C, 253 and 255 extended to 31.03.2024.
Finance Act, 2023	01.04.2023	Amendments made in sections 135A, 245MA, 245R, 250 and 274 to enable the Central Government to amend any direction issued for the purpose of giving effect to the faceless scheme under the respective section before the expiry of limitation under the respective scheme.

OTHER PROVISIONS COVERING FACELESS SCHEME

Amendments made to shift to faceless proceeding, delegating the power to the Central Government to notify appropriate scheme [other than assessment, including best judgement assessment, for which the Faceless Assessment Scheme, 2019 which has been now duly codified in the Act itself (section 144B)]

Sr. No.	Section [F.A.]	Particular - Purpose of Scheme	Time line to make scheme	Whether scheme notified or not	Date of notification of the Scheme	Name of the Scheme
1.	250(6B) [F.A#. 2020 w.e.f. 01.04.2020]	For disposal of appeal by Commissioner (Appeals)	31.03.2022	Yes	25.09.2020	Faceless Appeal Scheme, 2020
					28.12.2021	Faceless Appeal Scheme, 2021
2.	274(2A) [F.A. 2020 w.e.f. 01.04.2020]	For imposing penalty under the Chapter 'Penalties imposable'	31.03.2022	Yes	12.01.2021	Faceless Penalty Scheme, 2021
3.	92CA(8) [TOLA*, 2020 w.e.f. 01.11.2020]	For determination of the arm's length price under sub-section (3) of section 92CA	31.03.2022 [extended up to 31.03.2024]	No		

Sr. No.	Section [F.A.]	Particular - Purpose of Scheme	Time line to make scheme	Whether scheme notified or not	Date of notification of the Scheme	Name of the Scheme
4.	130 [TOLA*, 2020 w.e.f. 01.11.2020]	For - (a) exercise of all or any of the powers and performance of all or any of the functions conferred on, or, as the case may be, assigned to income-tax authorities by or under this Act as referred to in section 120; or (b) vesting the jurisdiction with the Assessing Officer as referred to in section 124; or (c) exercise of power to transfer cases under section 127; or (d) exercise of jurisdiction in case of change of incumbency as referred to in section 129	31.03.2022	Yes	29.03.2022	Faceless Jurisdiction of Income-tax Authorities Scheme, 2022
5.	135A [TOLA*, 2020 w.e.f. 01.11.2020]	For calling for information under section 133, collecting certain information under section 133B, or calling for information by prescribed income-tax authority under section 133C, or exercise of power to inspect register of companies under section 134, or exercise of power of Assessing Officer under section 135	31.03.2022	Yes	13.12.2021	e-Verification Scheme, 2021

Sr. No.	Section [F.A.]	Particular - Purpose of Scheme	Time line to make scheme	Whether scheme notified or not	Date of notification of the Scheme	Name of the Scheme
6.	142B [TOLA*, 2020 w.e.f. 01.11.2020]	For issuing notice under sub-section (1) or making inquiry before assessment under sub-section (2), or directing the assessee to get his accounts audited under sub-section (2A) of section 142, or estimating the value of any asset, property or investment by a Valuation Officer under section 142A	31.03.2022	Yes	30.03.2022	Faceless Inquiry Valuation Scheme, 2022
7.	144C(14B) [TOLA*, 2020 w.e.f. 01.11.2020]	For issuance of directions by the dispute resolution panel	31.03.2022 [extended up to 31.03.2024]	No		
8.	151A [TOLA*, 2020 w.e.f. 01.11.2020]	For assessment, reassessment or recomputation under section 147 or issuance of notice under section 148 or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A or sanction for issue of such notice under section 151	31.03.2022	Yes	29.03.2022	e-Assessment of Income Escaping Assessment Scheme, 2022
9.	157A [TOLA*, 2020 w.e.f. 01.11.2020]	For rectification of any mistake apparent from record under section 154 or other amendments under section 155 or issue of notice of demand under section 156, or intimation of loss under section 157	31.03.2022	No		Time limit not extended
10.	231 [TOLA*, 2020 w.e.f. 01.11.2020]	For - (i) issuance of certificate for deduction of income-tax at any lower rates or	31.03.2022	No		Time limit not extended

Sr. No.	Section [F.A.]	Particular - Purpose of Scheme	Time line to make scheme	Whether scheme notified or not	Date of notification of the Scheme	Name of the Scheme
		(ii) no deduction of income-tax under section 197, or (iii) deeming a person to be an assessee in default under sub-section (1) of section 201 or (iv) sub-section (6A) of section 206C, issuance of certificate for lower collection of tax under sub-section (9) of section 206C or (v) passing of order or amended order under sub-section (3) or sub-section (4) of section 210, or (vi) reduction or waiver of the amount of interest paid or payable by an assessee under sub-section (2A), or (vii) extending the time for payment or allowing payment by instalment under sub-section (3), or (viii) treating the assessee as not being in default under sub-section (6) or sub-section (7) of section 220, or				

Sr. No.	Section [F.A.]	Particular - Purpose of Scheme	Time line to make scheme	Whether scheme notified or not	Date of notification of the Scheme	Name of the Scheme
		(ix) levy of penalty under section 221, or (x) drawing of certificate by the Tax Recovery Officer under section 222, or (xi) jurisdiction of Tax Recovery Officer under section 223, or (xii) stay of proceedings in pursuance of certificate and amendment or (xiii) cancellation thereof by the Tax Recovery Officer under section 225, or other modes of recovery under section 226 or (xiv) issuance of tax clearance certificate under section 230				
11.	264A [TOLA*, 2020 w.e.f. 01.11.2020]	For revision of orders under section 263 or section 264	31.03.2022	No		Time limit not extended
12.	264B [TOLA*, 2020 w.e.f. 01.11.2020]	For giving effect to an order under section 250, 254, 260, 262, 263 or 264	31.03.2022	No		Time limit not extended
13.	279(4) [TOLA*, 2020 w.e.f. 01.11.2020]	For granting sanction under sub-section (1) or compounding under sub-section (2) of section 279	31.03.2022	No		Time limit not extended

Sr. No.	Section [F.A.]	Particular - Purpose of Scheme	Time line to make scheme	Whether scheme notified or not	Date of notification of the Scheme	Name of the Scheme
14.	293D [TOLA*, 2020 w.e.f. 01.11.2020]	For granting approval or registration, as the case may be, by income-tax authority under any provision of the Act	31.03.2022	No		Time limit not extended
15.	245D(11) [F.A. 2021, w.e.f. 01.02.2021]	For settlement in respect of pending applications by the Interim Board	31.03.2023	Yes	01.11.2021	e-Settlement Scheme, 2021
16.	245MA(3) [F.A. 2021, w.e.f. 01.04.2021]	For dispute resolution under the Chapter 'Dispute Resolution Committee in certain cases'	31.03.2023	Yes	05.04.2022	e - Dispute Resolution Scheme, 2022
17.	245R(9) [F.A. 2021, w.e.f. 01.04.2021]	For giving advance rulings under the Chapter 'Advance Rulings' by the Board for Advance Rulings	31.03.2023	Yes	18.01.2022	e-Advance Rulings Scheme, 2022
18.	255 (7) [F.A. 2021, w.e.f. 01.04.2021]	For the purpose of disposal of appeals by the Appellate Tribunal	31.03.2023	No [extended up to 31.03.2024]		
19.	253(8) [TOLA*, 2020 w.e.f. 01.11.2020]	For the purpose of appeal to the Appellate Tribunal	31.03.2022	No [extended up to 31.03.2024]		

 # F.A. – Finance Act

**** TOLA, 2020 – the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, w.e.f. 01.11.2020***

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"In a conflict between the heart and the brain, follow your heart."

— *Swami Vivekananda*

Responding to Regular Notices under Faceless Assessments

CA Sharad Shah CA Shikha Parwal

Overview

Change process and effective communication under digital mode

Important definition

Legal aspect for commencement of faceless assessment and importance of valid notice

Response to notices

Importance of submissions and evidence in the course of assessment

Third party evidences including valuation experts and principle of natural justice

Transfer pricing assessment

Show cause notice and response thereto including vc

Draft assessments and final assessments

Having considered the overview and evolution of faceless assessments regime, let us try to understand the process of assessment, notices and response thereto under Faceless Assessment System.

As entire faceless proceedings bring in digital communication as against discussion and meetings in person, there is big change process.

Let us Start with Basics

S. 144B inserted w.e.f. 1-4-2021 empowers (as also describes the procedure) the Income Tax Authorities to carry out an assessment, reassessment or re-computation u/s 143(3), u/s 144 and u/s 147 in faceless manner as against physical hearing across the table conducted by Jurisdictional AO.

Traditionally, the practice of physical hearing allowed interaction with AO and it did help understanding AO's queries (sometimes his misunderstanding of the facts) which could be answered/resolved across the table. Now there is a basic change. Given the absence of in-person interactions in faceless assessments, effective communication is paramount.

One has to anticipate issues not only from the questionnaire sent by the AO but also from the answers and submissions given by the assessee.

General human tendency is to avoid reading annexures and attachments and therefore, it can result in the AO not noticing important aspects of the submissions. Therefore, it will also be advisable to summarise the submissions at the beginning itself with the cross reference of important annexures and papers, whether one calls it Executive Summary or Synopsis.

Use of long sentences should also be avoided. It is possible that some queries by the Assessing Officer (AO) come out of wrong or insufficient appreciation of the facts. Good representation would bring in a very polite manner the correct facts or legal position without using words like `you have wrongly understood' or `failed to applied mind' or like.

Another area of care needs to be taken about evidences in vernacular language. The AO might be sitting in another state and with a different linguistic background. If the particular evidence is very important, it is advisable to explain the content in English or Hindi (official communication language) and if necessary, by filing official translation by registered translator. It is also seen many times that some officers have problem with Hindi also. Considering this aspect, the best would be a translation in English.

Another area arises is to bring judicial pronouncement by authority, under whose jurisdiction, the assessee falls. The rules of precedence is important in this regard and the attention must be drawn of the AO, more so when different jurisdiction have different jurisdictional precedence.

We can summarize the points to be kept in mind for an effective communication under faceless representation:

1. Every submission should start by providing reference to particular notice or any other communication by AO that arises in the course of hearing.
2. Clear and concise addressing of the issues raised in the notice, point by point.
3. Provide supporting documentation and evidence as appropriate annexures, if so required
4. Use polite and professional language.
5. Avoid using harsh language or accusations.
6. Avoid long sentences.
7. Explain vernacular evidence in English or Hindi, if necessary.
8. Cite relevant judicial pronouncements – specially highlighting decisions by the jurisdictional appellate authorities, wherever available
9. Highlight important points using bold, italics, different font or shading. Many times graphical presentation such as diagrams, flow charts etc help in easy understanding of the issue.
10. Summarize submissions at the beginning, referencing key annexures and papers whether called as Executive summary or synopsis.
11. Use a naming and numbering protocol for easy cross-referencing. It is advisable to continue page serial number in subsequent submission/submissions
12. Submit responses promptly within the specified timeframe.

13. Respond through the designated e-filing portal.

14. Utilize the virtual hearing facility.

15. Seek clarification from the AO if required.

16. Maintain a record of all communications and submissions.

17. Utilize the virtual hearing facility.

18. Seek clarification from the AO if required.

19. In case of part submissions, it would be better to draw attention of the AO as regard the points not answered and seek time for such answers, if so required.

20. Maintain a record of all communications and submissions.

But Let us Not Forget the Legal Aspects also

The key area is digital communication and communication is complete only when properly communicated. Some of the important definitions are given hereunder:

- "***registered e-mail address***" ***means the e-mail address at which an electronic communication may be delivered or transmitted to the addressee, including—***

  (a) the email address available in the electronic filing account of the addressee registered in designated portal; or

  (b) the e-mail address available in the last income-tax return furnished by the addressee; or

  (c) the e-mail address available in the Permanent Account Number database relating to the addressee; or

  (d) in the case of addressee being an individual who possesses the Aadhaar number, the e-mail address of addressee available in the database of Unique Identification Authority of India ; or

  (e) in the case of addressee being a company, the e-mail address of the company as available on the official website of Ministry of Corporate Affairs; or

  (f) any e-mail address made available by the addressee to the income-tax authority or any person authorised by such authority.

  (Above be considered in the order of preference)

- "***registered mobile number***" ***of the assessee means the mobile number of the assessee, or his authorised representative, appearing in the user profile of the electronic filing account registered by the assessee in designated portal;***

- "***real time alert***" ***means any communication sent to the assessee, by way of Short Messaging Service on his registered mobile number, or by way of update on his Mobile App, or by way of an email at his registered email address, so as to alert him regarding delivery of an electronic communication;***

Such real time alert should prompt the assessee to visit Income Tax Portal where a full content of the notice would be visible.

Commencement of Faceless Assessment

a) Like any other proceedings, there is a necessity to commence the process by a valid notice. The prime process of assessment is no different than the regular assessment process otherwise prescribed. The process of assessment is provided in S. 143. Sub-section (2) of 143 makes obligatory for AO to issue a notice to the assessee when a return is furnished either u/s 139 or u/s 142(1) and the Income Tax Authorities considers it necessary or expedient to ensure the following:

- The income is not understated or
- The loss is not overstated or
- The tax is not under paid

What is important is that Income Tax Authorities considering it necessary or expedient to do so. Importance of formation of such necessity is rightly highlighted by Hon. Delhi High Court in the case of ***Hyosung corporation India, 385 ITR 0095***. The Delhi High Court held that notice cannot be issued in a routine or a mechanical manner. There has to be an opinion formed that there is a necessity or it is expedient to do so. (with the automated tool for selection of scrutiny cases, such situation may not arise)

b) Time limit for issue of such notice is 3 months (effective from 01-04-2021) from the end of the Financial Year in which such Return is filed by the assessee.

c) Such notice is visible on Income Tax Portal and the assessee is prompted to visit the portal by way of real time alert given through the digital communication (registered email and message alert on the registered mobile).

A valid notice is sinequa non. The following are some such situations where notice is treated to be invalid:

1) Notice issued Beyond Time Limit

2) Notice issued to non-existing person

3) Notice issued not supported by Real Time Alert

4) Notice issued by the Authority different than the Assessing Authority

5) Notice issued without specifying whether the case is selected for Limited Scrutiny or complete scrutiny.

6) Notice without DIN

However, the assessee should keep in mind the following provisions:

- S. 283 – Notice in the case of disrupted HUF, dissolved firm or dissolved AOP.
- S. 284 – Notice in case of discontinued business

If the assessee wishes to challenge the validity of notice, it is the most appropriate time to challenge it as soon as the notice is received, if necessary, by way of writ petition. Of course, validity can be challenged even in the process of assessment or at appeal stage. In case, the assessee wishes to comply with the notices while reserving his right to challenge the validity he should clearly state his legal position in every communication and state that it is without prejudice to challenge. The

attention of the readers is drawn to S. 292BB where an assessee is precluded from taking objection for non-service or non-service in time or service in improper manner if he has responded to such notice and objection is not taken before completion of the assessment. Of course, this section does not validate non-issue of notice.

Some important judicial pronouncements are narrated hereunder:

In ***Laxman Das Khandelwal 417 ITR 0325 (Sc)***, Hon. Supreme Court held that non-issue of notice u/s 143(2) renders the assessment order void even if the assessee has participated in the proceedings (inspite of S. 292BB).

In ***Maruti Suzuki India Ltd. 416 ITR 0613 (SC)***, Hon. Supreme Court held that issue of notice in the name of amalgamating company is not a valid notice and even the participation by the assessee is immaterial (inspite of S. 292BB).

In ***ACIT & Anr. vs. Hotel Blue Moon [2010] 321 ITR 362 (SC***), the Hon'ble Supreme Court has held that the issue of notice u/s. 143(2) of the I.T. Act is mandatory and not procedural.

In case of ***M/s. Cosmat Traders Pvt. Ltd vs. ITO (ITAT Kolkata)***- the tribunal held that notice by non- jurisdictional AO is bad in law and void-ab-initio.

Primary response to the notice

Upon receiving a valid notice, the assessee should determine whether it is for limited or detailed scrutiny. Their subsequent response will depend on this classification. In some cases, even limited scrutiny may ultimately require providing the same level of detail and evidence as detailed scrutiny.

Although, 2021 Scheme provides for a response to the notice within 15 days, after going through the notice and the content and details called for, the assessee may, if necessary, apply for additional time as may be desirable. Such prayer may for all details or for some of the details or evidences which require some time The assessee should ensure that this request is uploaded within the time allowed in the original notice.

By adhering to these strategies and thoroughly understanding the faceless assessment process, assessee can effectively navigate this new assessment regime and ensure their tax matters are handled fairly and efficiently

As stated earlier, in case the assessee wishes to challenge the validity, he should take appropriate steps at the earliest.

It may be noted that non-response/ noncompliance to notice can empower the AO to go for best judgement assessment apart from penalty of Rs, 10,000 u/s 271(1)(b) for each failure.

Substantive response

Once a valid notice is received, the assessee should prepare a detailed point-by-point response. Attaching annexures can be helpful, but a brief description and numbering of each annexure should be clearly included in the covering letter. Consecutive page numbering should be maintained across all submissions.

In cases where the AO requests voluminous information, such as purchase bills for fixed assets, consider providing an abstract of the ledger account and a few sample bills. Clearly explain the situation and state that only sample evidence is attached.

Another such example is many time, AO requests for the copies of Bank Statement, a sample covering letter is given hereunder:

Sr. No	***Questionnaire***	***Reply***
1		Brief note on the activities are attached As **Annexure No ____(Page Nos. ___ to ___)**
2		Loan confirmation of Mr ------ attached as **Annexure No ____(Page Nos. ___ to ___)**
3		The volume of Purchase Bills of Fixed Assets purchase is very high. We are attaching the ledger extract of each of the type of fixed assets as **Annexure No ____ (Page Nos. ___ to ___)** and we are attaching sample bills as **Annexure No ____ (Page Nos. ___ to ___)** for your ready reference. In case, you desire any further details/ bills, we pray you to provide the specific details from the ledger extract. We shall provide the such details in the subsequent submission.
4		The details are under preparation. We pray your honour to allow 15 days time.

It is to be kept in mind that there are certain protocol and limitations as regard file types and sizes. Only PDF and EXCEL files are allowed to be uploaded. Further a maximum size of 5 MB per file and total of all files in one submissions upto 50 MB is allowed. Splitting up files, compressing files and making multiple submissions can help manage these limitations.

It is also possible that the assessee has claimed certain deductions, which may be litigative or conflict with the disallowances emanating from the Tax Audit Report. Some of them might have suffered addition u/s 143(1) and some might be considered by the AO in the notice u/s 143(2). Irrespective of such contingencies, it is advised that assessee narrates, all such claims together with basis of claim and may also attach judicial pronouncements in its support.

Submission of Details and S. 263, S 147 and Rule 46A

Assessees are, many time, facing the proceedings u/s 263 or u/s 147, which could be very well defended if appropriate details were submitted in the course of regular assessment. Similarly, submitting certain documents in the regular assessment could save the assessee from additions or aid in defending additions at the appellate level.

While there may be unavoidable situations requiring additional evidence in subsequent proceedings, submitting proper evidence during regular assessments can prevent adverse assessments and mitigate the rigor of Rule 46A in appeals. There is tremendous resistance from the authorities to admit such evidences and in any case, it requires a remand to the AO. Rule 46A is reproduced hereunder:

46A. (1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals)] or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the AO, except in the following circumstances, namely:—

(a) where the AO 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 AO; or

(c) where the appellant was prevented by sufficient cause from producing before the AO any evidence which is relevant to any ground of appeal; or

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

(2) No evidence shall be admitted under sub-rule (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.

(3) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the AO has been allowed a reasonable opportunity—

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the AO) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.

Use of DVO and Other Valuation Experts as well as Conducting Audit

S. 142(2A) allows audit of accounts and/ or inventory valuation with the approval of PCCIT/CCIT/PCIT/CIT.

The above powers are utilised to evaluate property and investments for greater efficiency, transparency and accountability for estimation

of value including fair market value and now the powers also include valuation of inventory. Many times an assessee has claimed transactions at lesser than stamp duty value or shares and securities at less than market value. These reference to valuation/audit can result in extension of last date of completion of assessment by 6 months.

Summons u/s 133(6)

In the course of assessment, summons under S. 133(6) may be issued by Verification Unit to 3rd party/parties for verification of certain evidences and information. These parties will receive real-time alerts similar to those for notices under Section 143(2). It is possible that notice will be served on address, email etc given by the assessee in the course of submissions.

In such case, such party will have to submit the details or evidences on the Income Tax Portal. Many times, the Income Tax Authorities may record statements of third party.

Such third party would generally know the name of person being assessed. While not legally required, communicating with the assessee to verify their response can streamline the assessment process.

Right to Cross Examine (Principle of Natural Justice)

It is trite law that any authority uses third party evidences or statement against (which can include valuation reports also) an assessee in any proceedings, it is the duty of such authority and right of the assessee to allow verification of such evidences, rebuttal of such evidence as well as cross examination of such person. Failure on the part of the Income Tax Authorities has rendered may assessment void. There are plenty of judicial pronouncements, some are narrated hereunder.

i. The Supreme Court in ***Kishan Chand Chellaram vs. CIT (1980) 125 ITR 713 (SC)*** held that evidence which is used against the assessee must be provided to the assessee and also an opportunity to confront the same should be given permitting cross-examination.

ii. In the case of ***Kalra Glue factory vs. Sales Tax Tribunal (1987) 65 CTR (SC) 233*** -The Supreme Court set aside the order of the tribunal for failure to afford the facility of cross-examination to the assessee.

Trnsfer Pricing Assessment

If the assessee is also exposed to International Transactions or Specified Domestic Transactions, transfer pricing assessment may be required under Section 92CA. The Central Board of Direct Taxes (the CBDT) issued Instruction no. 3/ 2016 (guidelines) on March 10, 2016, providing guidance on the procedures to be followed for the selection and scrutiny of transfer pricing (TP) cases by the AO (AO) and the Transfer Pricing Officer (TPO). These provisions require:

- While assessing the case u/s 143(3), AO may refer the case for Transfer Pricing Scrutiny (determination of ALP) to TPO in terms of S. 92CA with the prior approval of PCIT/CI
- The circular prescribes the circumstances in which TP assessment should be carried out. Assessee should inquire as regard following up of the procedure prescribed in the said instruction.

- Kolkatta ITAT has held that reference in violation of instruction 3 of 2016 is invalid -**ZYDUS HEALTHCARE- 180/ KOL/2021**

At present, TP assessment is being carried out in physical mode by jurisdictional Transfer Pricing Officer. This Article narrates only in brief the detail as regard TP assessment.

It may be noted that if a valid reference is made by the AO to Transfer Pricing Officer (TPO), the time limit for completing the assessment gets extended by 1 year.

TP assessment process will result in

1) The TPO will issue a notice to the assessee requesting necessary details and records to prove that the prices are at arm's length.

2) The TPO may come out accepting the ALP or with TP adjustments. He has to complete TP assessment at least 60 days prior to the date of completion of the assessment (in case of search assessment, if the reference to the TPO is belated, the time for assessment by AO will be extended so as to give him a time of 60 days for completing draft assessment.

3) Failing to pass draft assessment order will result in an invalid assessment.

4) Once TPO gives an order, the same will get incorporated in the assessment order by the AO.

5) If there is Transfer pricing adjustment, a draft assessment order must be issued instead of a final assessment order. In case of assessment of certain non-residents assessees, draft assessment is also mandatory.

6) AO will, of course include the TP adjustment in his Show Cause Notice before completing the draft assessment.

7) Although the AO is bound by TPO order, it is good practice to file objections in response to the show cause notice by the AO.

E Verification Scheme 2021

Although it is not a faceless scrutiny in true sense and does not directly result in any tax demand, it could be the basis of assessment including reopening of assessments and therefore, to a limited extent, it is soft scrutiny of transactions reported under annual information system.

One has to visit Income Tax Portal and respond to the transactions (with the assessee) reported by other parties. The response may include:

1) Agreement with the transaction

2) Not agreeing with the transaction

   - not related at all or
   - incorrect assessment year
   - effectively belonging to someone else (e.g. spouse)

3) Sources of funds for carrying out such transaction, if belonging to him.

Any discrepancies arising in e-verification may affect assessment and if already completed, can invite proceedings under S. 263 or S. 148.

Show Cause Notice and Response

Principle of natural justice now find a direct place in the faceless assessment scheme.

In clause (ix) of S. 144B, show cause notice and opportunity to assessee is provided for

best judgement assessment on assessee's failure to comply with notice us/ 143(2) and/ or s. 142(1).

More important is the Show Cause Notice provided in clause (xii)(b) of S. 144B for any variation proposed by AO while assessing the Income, which is prejudicial to interest of the assessee.

This method has an advantage of knowing the final issues which may affect the assessment. It gives an opportunity for assessee to once again bring the details and evidences specifically focussed to the issues. As it is part of the process of assessment, submission of additional evidences does not require rigour of Rules 46A. The assessee must utilize this opportunity effectively. It is better practice to seek for virtual conference - hearing (VC) which also can be used to the best advantage, which may bring in some advantage of physical hearing. This prayer must be part of the response to the Show Cause Notice as well as through tab enabled with SCN. As per the guidelines, once the prayer is made, the AO must provide the VC.

Virtual Conference (VC)

"Seek Video Conferencing" button will be available only in respect of Show-cause notice/ Summons u/s 131(1)(b) issued to Assessee/ third party in cases under faceless assessment.

In other cases, the assessee can also request for virtual conference as a part of response to any notices.

VC Scheduled' letter shall be served on the registered email id of the Assessee and also made available for downloading from Income Tax e-Filing portal. 'VC Scheduled' letter will contain details of scheduled Date & time and Video conferencing URL. On the 'Video Conferencing' screen under e-Proceeding's tab, the Assessee shall be able to see changed status as 'Approved' & VC Scheduled Date & Time.

Video conferencing link shall also be shared by SMS and same will also be updated on e-filing portal.

The time is generally limited to around 30 minutes. Conference can be attended by the Authorised Representative as well as Assessee or his staff familiar with the accounts and income tax. Screen sharing of documents is also facilitated and also chat box is allowed at the time of virtual hearing.

Best can be made out by

1) Response point to point on issue raised by AO in SCN

2) Pointing out facts and arguments

3) Supported by appropriate document (naming and page number protocol are of tremendous help)

4) Support should also be by way of judicial pronouncements favouring assessee.

It is advisable that authorised representative has good oratory, be able to respond quickly, and avoid lengthy arguments. He should also keep a good synopsis in hand. At times, in complicated cases, AO may grant more time or even adjournments.

Video conferencing adjournment can be sought only once for a notice and the same can be sought up to the VC Scheduled time or response due date, whichever is earlier.

Option of Physical Hearing

Although the cases will generally be scrutinised under Faceless System but in some cases, the system of physical hearing is allowed with the concurrence of Range Head vide Circular No F. No.225/97/2021/ITA-II Dt 6th September 2021

The Jurisdictional Assessing Officer (JAO) shall complete the assessments/penalties in such cases as per the following broad contours to the extent technically feasible:-

A. All processes ill cases transferred u/s 144B(8) of the Act/ clause 5(2) of Faceless Penalty Scheme, 2021 may be conducted electronically to the extent technically feasible, except in those cases where the assessee does not have e-filing account/registered e-mail to communicate electronically with JAO. For cases without digital foot print, the JAO shall endeavour to get the e-filing account of the assessee registered and then conduct the proceedings in an electronic manner.

B. The request for personal hearings shall generally be allowed to the assessee with the approval of Range Head, mainly after the assessee has filed written submission to the show cause notice. Personal hearing may be allowed to the assessee preferably through Video Conference. If Video Conference is not technically feasible , personal hearings may be conducted in a designated area in Income Tax Offices. The hearing proceedings may be recorded.

C. Use of Faceless processes such as VU for online verification, TU for Technical inputs etc. m ay also be considered for non-faceless regime to the extent technically feasible. Page 1 of 2 .

D. In order to have consistency with the unit concept in faceless regime, the Range Head may compulsorily be involved in the fmalization of assessment of such cases transferred to JAO, for which the provisions of Section 144A of the Act may suitably be invoked. In penalties, the approval of Range Head is already embedded in Section 274(2) of the Act, over a specific monetary ceiling of 'penalty imposable'. Same may be adhered to.

Draft Assessment

Reference to draft assessment order came in elsewhere in this Article. Let us elaborate.

In certain situations, an assessee is entitled to and AO is obligated to prepare Draft Assessment order incorporating TP adjustments as per TPO order and other additions as proposed by him in the Show Cause Notice. Such situations are

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and (Proposed TP Adjustment)

(ii) any non-resident not being a company or any foreign company (Addition otherwise than TP addition)

Referred herein after as `Eligible Assessee'

This process is mandatory and there are decisions where not following this process has rendered the assessment orders invalid.

Bombay High court held in ***Dimension Data Asia Pacific (304 CTR 0140)***, the assessment order is null even in the case of order giving effect to ITAT order involving TP adjustment

SS-III-38

and no draft order was forwarded (of course, the High Court allowed Income Tax Department to carry out further proceedings under any other provisions, if available). There is also a matter now pending before the Apex Court in this regard referred to by the Income Tax Authorities.

Come that may be, the process requires preparation and forwarding of Draft Assessment Order.

The Eligible Assessee may prefer filing objections before Dispute Resolution Panel (a collegium of 3 Pr. CIT or CIT). within 30 days of receipt of draft order. They need to dispose off matter within 9 months from end of month in which draft order is forwarded to eligible assessee and give directions to AO as regard the additions in question. AO is bound by the directions of DRP and pass (final) Assessment Order accordingly without providing any further opportunity of being heard to the assessee.

It is also possible that the assessee does not prefer to go to DRP. He may convey such intention to the AO within 30 days. Upon intimation by the assessee or after expiry of the time available to file objections with DRP, AO must pass final assessment order.

Time limit for passing final assessment order is 1 month from the end of the month of following dates

- No objection letter is given by the assessee
- Time by which objections to DRP could have been filed
- The direction from DRP is received by the AO

Assessment Order

At the end of the process, after considering all the materials including response by the assessee as regard the issues raised in SCN and considering deliberations in the VC, the AO must pass the assessment order within the time allowable u/s 153, also prepare computation of income as well as Notice of Demand and send to the Assessee again in digitised mode.

Upon receipt of such order, the assessee may opt for appeal

- before CIT (Appeals) if no directions from DRP is sought and received within 30 days
- To ITAT, if the order is in pursuant to DRP direction within 60 days.

Importance of DIN

Central Board of Direct Taxes vide Circular No. 19/2019, mandated that no communications related to notice, order, appeal, assessment, investigation or any other correspondence shall be issued by the Income Tax Department without a computer-generated Document Identification Number (DIN).

Therefore, any notice, assessment order or other orders without DIN have been treated by appellate authorities as invalid in case of ***Tata Medical Centre Trust vs. CIT (E) (ITAT Kolkata-ITA No. 238/Kol/2021***.

Similar decision has been given by Ahmedabad ITAT in case of ***Nova properties Pvt Ltd-TS-671-ITAT-2023, Gupta Domestic Fuels (Nagpur Ltd)-TS 649-ITAT-2023, Delhi tribunal-in case of Innio Jenbacher Gmbh & Co. OG-TS-670-ITAT-2023(Del)***

Further order issued without DIN, invalid; S. 292B of Income Tax Act not applicable: Delhi HC in case of ***CIT (international taxation) vs. Brandix Mauritius Holdings Limited-(2023)-149 taxmann.com 238 (Delhi)***

Time Limits

This article can not be complete without knowing time limits:

Action	**Time Limit**
Notice u/s 143(2)	3 months from end of Financial Year in which return is furnished.
Regular Assessment	Within 12 months from the end of the relevant assessment year. Upto AY 2021-22, it was within 9 months.
-If reference to DVO is made/Audit of accounts or inventory valuation is ordered	Time is extended by time taken for giving such report (report has to be given within 6 months)
- If reference to TPO is made	The time limit is extended by 1 year.
If case is reopened u/s 147/148	1 year from the end of Financial year in which notice u/s 148 is given.

Conclusion

Without primary change in provision of assessment, the faceless system of assessment does bring transparency in the assessment, saving of valuable time of the assessee and Authorised Representative, which includes travel time and waiting time which also results in cost saving. There is a great advantage that show cause notices which were required due to judicial pronouncements, which has now become mandatory under the faceless assessment system.

However, absence of in-person interactions in faceless assessments, effective communication there are chances of incorrect appreciation of facts resulting in unfair assessments.

Every system has some advantages and some disadvantages. However, Faceless Hearing is now accepted part of process of assessment.

■●■

"The man who regards his own life and that of his fellow creatures as meaningless is not merely unhappy but hardly fit for life."

— *Albert Einstein*

SS-III-40

Dealing with Virtual Hearings

CA Narendra Kumar Jain

Overview

The principle of a fair hearing, enshrined in audi alteram partem, is very important because it embraces almost every aspect of fair procedure or due process. Personal hearing has always been cornerstone of judicial or quasi-judicial proceedings.

As per provisions of section 144B(6)(viii) of the Act, as amended by Finance Act 2022, makes it mandatory for the income tax authorities to allow personal hearing through video conferencing, when a request is made by the assessee. VC can be availed by only those taxpayers for whom a hyperlink "Seek VC" is enabled against a Notice. The assessee should opt for virtual hearing as in certain situations, it may not be possible to explain certain technicalities through written submissions, while it may be a matter of a few minutes to explain the same orally. One requires good hardware and internet connectivity to ensure that hearing is conducted smoothly.

The fundamental aspects of assessment proceedings does not change in virtual hearing. One's appearance as well as conduct has to be as formal as if one is physically present in the tax office. One should have the submissions with pagination, relevant case laws and Notices handy while appearing for virtual hearing.

Precise yet comprehensive written submissions and crisp, to the point submissions during the virtual hearing are currently the 'heart and soul' of the assessment proceedings.

1. Background

1.1 The principle of a fair hearing, enshrined in *audi alteram partem,* is very important because it embraces almost every aspect of fair procedure or due process. The principle of *audi alteram partem* has two aspects, one is 'Notice' and the other is 'Hearing'. The aspect of notice presupposes that before any action is taken, the affected party should be given a notice to show cause against the proposed action. Explanation of the party should be considered in an objective and fair manner before passing the order.

1.2 The second aspect of *audi alteram partem* is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him. The opportunity of being heard granted, must be real, genuine and substantial. It cannot be a mere pretense or empty formality.

1.3 Where an action entails civil consequences, observance of natural

justice would be warranted, unless the law specifically excludes the application of natural justice. Personal hearing has always been cornerstone of judicial or quasi-judicial proceedings. Providing opportunity of personal hearing before making any decision is considered to be a basic requirement in judicial or quasi-judicial proceedings.

2. Virtual Hearings in context of Faceless Assessment

2.1 The birth of Faceless Assessment was through insertion of sub-sections (3A), (3B) and (3C) of Section 143 in the Income Tax Act, 1961 ("Act") by the Finance Act, 2018. Pursuant to power under section 143(3A), the E-assessment Scheme, 2019 ("Scheme") was introduced vide Notification no. 61/2019 dated September 12, 2019.

2.2 Under the Scheme, vide Rule 11, it was provided that there would be no personal hearing before the Income Tax authority. It was further provided that virtual hearing though video conferencing may be provided in case of modification proposed in the draft assessment order. Such virtual hearing required the approval of CCIT or DGIT.

2.3 The provisions concerning the formation and implementation of the Faceless Assessment Scheme were incorporated in the Act itself by TOLA Act, 2020 w.e.f 01.04.2021. The philosophy of virtual hearing as provided in the Scheme were incorporated in Clause (vii) & (viii) to section 144B(6).

2.4 Before amendment by Finance Act, 2022, section 144B(7)(vii) of the Act provided that in case of variation is proposed in the draft assessment order and show cause notice is issued, the assessee or his AR can request for personal hearing so as to make the oral submissions before the tax authorities. Section 144B(7)(vii) provided that the "*CCIT or the DGIT, may approve the request for personal hearing referred to in clause (vii) if he is of the opinion that the request is covered by the circumstances referred to in sub-clause (h) of clause (xii)*.

2.5 As can be seen from the above, the personal hearing had to be approved by CCIT or DGIT. One wonders why even the very basic right of taxpayers of oral hearing was made subject to approval of one of the highest authorities in the Income Tax Department. This naturally was against the principles of natural justice as a mandatory right was made subject to approval.

2.6 The Delhi High Court in the case of ***Bharat Aluminium Company Ltd. vs. UOI [2022] 134 taxmann.com 187 (Delhi)***, observed that *a faceless assessment scheme does not mean no personal hearing. It is not understood as to how grant of personal hearing would either frustrate the concept or defeat the very purpose of Faceless Assessment Scheme.*

2.7 Considering various issues arising from existing provisions of section 144B of the Act, Finance Act 2022 revamped section 144B. Clause (vii) & (viii) of amended section 144B(6) now provide for personal hearing.

2.8 Clause (vii) of section 144B(6) is broadly in line with old section 144B(7)(vii). It provides that in case where a variation is proposed in the income or loss determination proposal or the draft order and show cause notice is issued to the assessee, the assessee may request for personal hearing so as to make his oral submissions.

2.9 Clause (viii) to section 144B(6) provides that *"where the request for personal hearing has been received, the income-tax authority of relevant unit shall allow such hearing, through National Faceless Assessment Centre, which shall be conducted exclusively through video conferencing or video telephony, including use of any telecommunication application software which supports video conferencing or video telephony, to the extent technologically feasible, in accordance with the procedure laid down by the Board."*

2.10 As can be seen from the above, it is now mandatory for the income tax authorities to allow personal hearing through video conferencing when a request is made by the assessee. Therefore, it is necessary that the assessee is aware of her rights and makes a request for personal hearing, if the circumstances so demand.

3. Application for Virtual hearing

3.1 VC stands for 'Video Conferencing'. Using the VC facility, the assessee is enabled to express orally before an Income Tax Authority.

3.2 VC can be availed by only those taxpayers for whom a hyperlink "Seek VC" is enabled against a notice. On clicking the hyperlink, a window appears. The assessee needs to select the appropriate reason for seeking VC from the drop-down values. If there are no predefined dropdown, the assessee may select "Others" and enter the description in text box. In the text box, the assessee can provide details for seeking VC and upload any document. As per SOP[1], VC must be given within 2-3 days of request by the assessee.

3.3 The department will send an email and SMS communication informing the date and time for VC along with VC URL. The VC details will also be displayed in the assessee's e-proceeding tab on the portal. The login password will be shared 2 hours before the scheduled time of VC on the registered mobile number. The assessee or her AR needs to join the link and appear for the VC at the scheduled time.

3.4 After video conferencing is successfully conducted, 'VC recording' hyperlink will be displayed under "VC link details" column within a reasonable time. This hyperlink contains URL details from which the VC recording can be downloaded. The assessee can download the video of VC proceedings for their records.

3.5 If the VC date and time given by the department is not suitable for any reason, an adjournment request to post the hearing to some another date and time can be submitted through a functionality "Seek VC adjournment". The adjournment request can be submitted by clicking hyperlink 'Seek VC adjournment'. The request for adjournment will have to be submitted before the expiry of VC date and time. Once expired, no request for adjournment can be submitted.

3.6 The Faceless scheme emphasizes on communication through written submissions thereby replacing the process of personal hearings. In certain situations, it may not be possible to explain certain technicalities through written submissions, while it may be a matter of a few minutes to explain the same orally. As per SOP, Income

1. Standard Operating Procedure issued by NFAC, Delhi dated 03.08.2022.

and Loss Determination Proposal (ILDP) should be prepared after considering reply of assessee in response to the SCN and oral submissions made during VC[2]. Therefore, the assessee should opt for VC option, so that submissions can be conveyed in effective way.

3.7 In the case of ***Metharam Pinjani vs. Income-tax Department [2022] 137 taxmann.com 148 (MP)***, the High Court held that since the petitioner did not make any specific express demand for a personal hearing, the non-grant of personal hearing by the Assessing Officer cannot lead to a case of breach of principles of natural justice. Therefore, it is necessary that the assessee makes a proper request for VC online.

4. Practical challenges in virtual hearings

4.1 Conducting on-line hearings requires creation and upgradation of technological infrastructure. One requires good hardware and internet connectivity to ensure that hearing is conducted smoothly. The main challenge is that of conducting uninterrupted hearing with good audio and video quality - without drop in connection. Good infrastructure may not always be available either at the end of assessee/ AR or the tax authorities, thereby affecting the quality of hearing.

4.2 Another challenge is that sometimes the video of Income Tax authorities is off and thereby the assessee cannot gauge the reaction of the Income Tax authorities to the submissions made by the assessee. Tone and body language are important aspects of communication, which may get lost in the virtual hearing.

5. During the Virtual Hearings

5.1 The fundamental aspects of assessment proceedings does not change in virtual hearing. Hence, the setting of the place (whether home or office) from where one takes the VC, one's appearance as well as conduct has to be as formal as if one is physically present in the tax office.

5.2 While filing reply to Notices, one should keep the following in mind, which will enable effective virtual hearing:

- There should be proper pagination of the submissions/documents filed in reply to Notices. All subsequent submissions should be consecutively numbered from previous submission. This helps in properly identifying the relevant page which one wants to refer during the virtual hearing.
- Annexure numbering should be properly done and separate listing of Annexure should be given so that it is easy to identify and refer the annexure during the virtual hearing.
- If the documents being filed are bulky, only relevant pages of the document may be given and same should be clearly mentioned in the submissions.

5.3 Do's while attending the virtual hearings.

- One should keep identification document like Aadhaar, PAN Card, Passport or any other government issued identification document handy and share when asked for.
- One should keep handy softcopy

2. Standard Operating Procedure issued by NFAC, Delhi dated 03.08.2022.

of all the documents on which one wants to place reliance during the VC and which may be shared during video conference.

- Switch on both the video & audio and make sure that face is properly visible and voice is audible.
- Before the VC, the equipment, camera, mic and internet connection should be tested.
- One should join the VC, 5-10 minutes before the scheduled time of the hearing.
- Lighting impacts the video quality. The speaker must avoid having bright light behind him, as it may result in dark foreground.
- The background should be formal, preferably plain, neat and uncluttered to avoid viewers' distraction. If it is not possible to unclutter the background, one can set up the virtual formal background.
- The submissions should be precise and to the point as in the virtual hearings it may not be possible to have lengthy discussions.
- The speaker should speak directly looking at the camera.
- Ideally entire internet bandwidth should be used only for the virtual hearing. Hence, other applications, like e-mail etc should be closed during the hearing.

5.4 Don'ts while attending the virtual hearings.

- One should not adopt casual approach towards virtual hearings.
- Smartphones should either be switched off or be kept in the silent mode during the entire proceedings, the way it is done during the in-person hearing.
- One should try and avoid other background noises during the hearing. These noises become irritant during the hearing.

5.5 One should keep following documents ready for the virtual hearing:

- One should keep identification document like Aadhaar, PAN Card, Passport or any other government issued identification document handy and share when asked for.
- Copy of show cause Notice issued by the Income Tax authorities.
- One should keep handy softcopy of all the submissions/documents on which one wants to place reliance during the VC and which may be shared during VC.
- Copy of any case law the assessee wants to rely.

6. Conclusion

6.1 The rules of representation under faceless assessments have been re-written whereby traditional face-to-face physical interactions with tax officers for discussing/explaining the case in hand has been substituted with "written submissions" and "virtual hearing". Hence, precise yet comprehensive written submissions with underlying documentary evidence and crisp, to the point submissions during the virtual hearing are currently the 'heart and soul' of the assessment proceedings.

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Responding to Show-Cause Notices

CA Ketan Vajani

Overview

Show-cause Notices are an integral and very relevant part of assessment proceedings. The significance of Show-cause Notice is more relevant during the faceless assessment regime for various reasons. The article deals with various issues emerging out of show-cause notices under the faceless assessment regime. The article discusses the criticality of show-cause notices, relevance of fundamental principle of natural justice, rights and obligations while responding to show cause notices, legal issues including jurisdictional issues, notices issued to dead person or to non-existing entities, validity of orders passed without show cause notices, validity of additions made beyond the proposed additions as per show-cause notices, validity of the orders passed without considering the response of the assessee etc.

The article also covers the significance of reasonable time to be allowed for responding to show-cause notices and consequences of failure to provide such reasonable time. Provisions in relation to the draft assessment order during the assessment proceedings are also discussed. The article also lists down some of the basic care to be adopted and also provides few practical tips in this regard.

Show-cause Notices are an integral and very relevant part of assessment proceedings. The significance of a Show-cause Notice cannot be undermined from both sides – the assessee and also the Income-tax department. In so far as the assessee is concerned, a show-cause notice allows the assessee an opportunity to put forward his claim and also substantiate the claims made with the required documentary evidence. The department also needs to ensure that the process of show-cause notices has been duly followed so as to ensure that the final assessment made does not suffer from an infirmity and thereby gets annulled on a technical point in a case where the assessee travels to Courts against the assessment. The fundamental principle behind the show-cause notice is the maxim "*Audi Alteram Partem*" meaning "*No man should be condemned unheard*". This principle is one of the fundamental principles of a sound legal system and the judiciary will normally avoid deviating from this principle.

This article seeks to deal with the criticality of show-cause notices and also discuss issues emerging from failure to follow the process of show-cause notice both from the assessee and the department's perspective. We will also look into technical and legal challenges and the care to be taken in complying with the show-cause notices. This article does not

cover the post-assessment show-cause notices for various purposes since the same is already being covered under a separate article.

Criticality of show-cause notices and principle of natural justice

Show-cause notices have always been very crucial even under the physical regime of assessment. We already had in-built provisions in the Income-tax Act dealing with show-cause notices under various situations. The relevance of show-cause notices becomes even stronger under the faceless assessment and faceless appeals regime. Under the old regime, there was physical interaction between the assessee or his representative and the authorities of the department. This permitted the assessee to explain the facts in the correct perspective during the course of physical hearings and also allowed them to adduce the evidences in a piece-meal manner. It was possible to address all and sundry queries arising from the Assessing Officers and ensure that the authorities are satisfied so as to not take any unnecessary adverse view of the matter.

The faceless regime has the noble purpose of reducing the human interface and thereby avoiding or at least reducing the possibility of corruption. Though no one can doubt the laudable object of faceless regime, we need to appreciate that this comes along with its own inherent limitations and challenges. It is no longer possible for an assessee to keep on explaining the correct facts on multiple occasions or to substantiate the claim with evidences as and when required. The communication is only in the written form. Written communication may not be as effective as oral communication unless the author is able to transpire his thoughts clearly and the reader is able to interpret the communication in the same manner as the author wanted it to be conveyed. Under this situation, the show-cause notices become very relevant. The SCNs make it possible for the department to ask pointed questions and also permit the assessee or his representative to pinpoint the particular area where the assessing authorities have doubts and to address that particular area with the desired focus.

As stated above, the principles of natural justice are always required to be embedded as fundamental principle in a sound legal system. Violation of the principle leads to shaking of the confidence of the assessee in the system which in the long run results in damaging the system substantially. Fortunately, the Courts have always stood by the principle and whenever it is found that the principle is compromised, the Courts have read the provisions of the Act in a manner which will serve the purpose of meeting this principle rather than frustrating the same. Under the faceless regime also, the Courts have been almost consistent in strengthening this principle time and again.

Show-cause notices under the faceless assessment regime

The faceless assessment scheme has been enacted under section 144B of the Act. The section has been inserted in the statute by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 w.e.f. 1-4-2021. The section so inserted has already been subjected to amendment by the Finance Act, 2022 with effect from 1-4-2022. The amendments made include some of the substantial amendments. This special story contains a separate article on the subject and hence it may not be worth for us to indulge in minute details of the amendment and its effects.

However, we must, with a pinch of salt, take note of the omission of sub-section (9) of section 144B with retrospective effect from 1-4-2021. The erstwhile sub-section provided that the assessment made in contravention of any of the provisions of the section will make the resultant order a non-est order. This

would have been a great respite in a case of non-adherence to the provisions and a perfect respect for the principle of natural justice. However, unfortunately, the sub-section has been omitted with retrospective effect.

In the case of ***Sapna Flour Mills Ltd. vs. Union of India, (2023) 451 ITR 521 (All.),*** the High Court held that the challenge to the omission of sub-section (9) cannot be sustained since section 144B is a procedural statute and accordingly no right can be said to have been conferred by the erstwhile sub-section (9). The SLP filed by the assessee against this judgment is also dismissed by the Hon'ble Supreme Court in ***Sapna Flour Mills Ltd. vs. Union of India (2023) 154 taxmann.com 275 (SC)***. The omission of sub-section (9) has the effect that although the principles of natural justice have to be respected, not following the same would not result in the nullity of the order. At best, the department will be required to adhere to the principle of giving fresh opportunity to the assessee.

Sub-section (1) of section 144B lays down procedures for faceless assessments to be carried out. Various show-cause notices as provided under the section are as under:

(a) Show-cause notice u/s. 144 for failure to comply with the statutory notices u/s. 143(2) or section 142(1). – Sec. 144B(1)(ix).

(b) Show-cause notice in respect of a proposal for variation of income or loss, prejudicial to the assessee – Sec. 144B(1)(xii)(b).

(c) Draft Assessment Order in the case of an 'eligible assessee' as mentioned in section 144C(1). This will however be governed by the provisions of section 144C i.e. Reference to the Dispute Resolution Panel and all the provisions of the said section will be applicable.

Besides the above, clause (xxxii) of sub-section (1) also provides for reference of the case for special audit as per the provisions of section 142(2A) of the Act. In such case, the provisions of sub-section (7) of section 144B will be applicable. Sub-section (7) provides for the transfer of the case to the jurisdictional Commissioner and jurisdictional Assessing Officer who are required to follow the procedures as laid down in section 142(2A) of the Act.

Show-cause Notice – Right and also the obligation of the assessee

While the Act provides for mandatory show-cause notice to be issued to the assessee before taking an adverse view in the matter, the assessee also is required to be vigilant and respond to the show-cause notice as and when it is issued. Non-compliance with the show-cause notice will not only lead to loss of opportunity to establish the case, but it will also amount to drawing inference against the assessee and might ultimately result in out-of-proportion additions in the assessment, which may actually not be justified. Considering the significance of the show-cause notice, we shall now discuss some of the Rights and Responsibilities of the assessee in so far as show-cause notices are concerned.

Technical Challenges to be part of the response to show-cause notice

During the last couple of years, it has been experienced that the department has been using the provisions of reassessment in a very rampant manner and there are many cases which are taken up for reassessment, at times on unjustified grounds. The entire scheme of reassessment has been revamped by the Finance Act, 2021. The transition from the earlier scheme to the new scheme has not been as smooth as it ideally should have been. Lack of proper understanding of the provisions prevails on both sides i.e. the departmental

authorities and also the assessee and his representative.

Many of the reassessments initiated suffer from inherent infirmities and it may be worth for the assessee to challenge the validity of the reassessment proceedings on various grounds such as time limits, lack of proper sanction, not forming a proper belief, not following the process laid down etc. While the assessee would be certainly well advised to raise his legal objections at the initial stage i.e. at the stage of responding to the notice issued u/s. 148A(b) of the Act, it will not be irrelevant for the assessee to continue raising valid objections even during the assessment proceedings and also while replying to the show-cause notice.

Similarly, there can be a situation where the assessee has missed out on responding in the desired manner at the pre-assessment stage and raised his objection as regards the validity of reassessment. In such a situation, it will certainly be advisable to raise the objection during the assessment proceedings and especially while replying to the show-cause notices. This will at least strengthen the case of the assessee at the appellate stage even if the assessment is not dropped based on such objections.

Right to ask for information/documents relied upon

It is seen regularly that the assessment of the assessee is taken up for regular assessment or reassessment on the basis of certain specific information received from some external source. In such cases, the department authorities shall ideally be sharing the relevant information or the evidences with the assessee at the initial stage of assessment proceedings. If, however, such documents or information is not shared with the assessee for any reason, the assessee should be categorical in his request for the information/documents and evidences while replying to the show-cause notice. It will be advisable for the assessee to seek such information/documents and also seek an adjournment, if necessary, for responding to the show-cause notice after analyzing the information which he is requesting the department to provide.

In this connection, it is very relevant to refer to the provisions of section 142(3) of the Act. Section 142 of the Act provides for inquiry before the assessment. Sub-section (2) of the section empowers the assessing officer to make such inquiry as he considers necessary. Sub-section (2A) provides for recourse to special audit in the circumstances specified in the said sub-section. However, one must appreciate that these powers allowed to the assessing officer are not unfettered powers. These powers have a backup provision in sub-section (3) which provides that the assessee shall be given an opportunity of being heard in respect of any material gathered based on any inquiry under sub-section (2) or any audit or inventory valuation under sub-section (2A) and proposed to be utilized for the purposes of the assessment.

Considering these provisions, the assessee must make a specific request for the information or the documents which are in the possession of the assessing officer and which are proposed to be used in the assessment by way of show-cause notice. This is an inherent right of the assessee which has to be respected by the assessment authorities. If this is not followed, the same would violate the provisions of the section and also the principles of natural justice. The courts would certainly be frowning at such incidents and the entire assessment might either be annulled or might be set a side allowing proper opportunity to the assessee.

Show-cause notice issued to a dead person or a non-existing entity

Section 159 of the Act deals with the provisions in relation to legal representatives

on the death of a person. Sub-section (2)(b) of the section provides that for the purpose of making an assessment of the deceased and for the purpose of levying any sum in the hands of the legal representative, any proceeding which could have been taken against the deceased if he had survived may be taken against the legal representative. As such, it is relevant to note that any proceeding which is initiated after the demise of the assessee can only be initiated against the legal representative of the deceased and not in the name of the deceased. If, however, the proceeding had already been initiated prior to the death of the deceased, clause (a) of sub-section (2) will be relevant. This clause provides that such proceedings taken against the deceased before his death shall be deemed to have taken against the legal representative from the stage at which it stood on the date of death of the deceased.

Considering the above provisions, if the assessment proceedings are initiated after the death of the assessee, such proceedings can be initiated only against the legal representative. If the assessing officer proceeds against the deceased, the proceedings are prone to be held as void ab initio and will be struck down, if challenged in appeal proceedings. Useful reference can be made on the judgments in the case of ***CIT vs. M. Hemanathan (2016) 384 ITR 177 (Mad.); Bhupendra Bhikhalal Desai vs. ITO (2021) 130 taxmann.com 196 (Guj)*** – SLP dismissed by the Supreme Court in ***ITO vs. Bhupendra Bhikhalal Desai (2021) 131 taxmann.com 40 (SC).***

In so far as the companies are concerned, there can be corporate events like the amalgamation of companies where one of the companies ceases to exist. Section 170 of the Act lays down the provisions in respect of succession to business otherwise than on death. Sub-section (1) of the section provides that in the case of succession of the business, the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession and the successor shall be assessed in respect of the income of the previous year after the date of succession. Accordingly, in a case where the proceedings are not initiated as on the date of amalgamation, the same can be taken up only against the successor company and not against the predecessor company. Any action taken against the predecessor company, which is in fact not in existence, will be void proceedings. Reference can be made to the judgment of the Hon'ble Supreme Court in the case of ***Pr. CIT vs. Maruti Suzuki India Ltd. (2019) 416 ITR 613 (SC)***. The ratio of the above judgment has been followed in several cases by High Courts including the Hon'ble Bombay High Court in the case of **N*ew Age Buildtech (P) Ltd. vs. National Faceless Assessment Centre (2023) 151 taxmann.com 66 (Bom.)***

If the assessment has been initiated against the deceased or has been taken up against a non-existing entity as discussed above, such assessment will be contrary to the settled legal position and the assessee or his legal representative can certainly object to the same while replying to the show-cause notices issued during the assessment proceedings. However, practically speaking, the representative of the assessee or the successor assessee may make a conscious decision as regards the appropriate time and appropriate stage where such a legal issue is to be taken up.

Orders passed without Show-cause Notice

As per the provisions of section 144B as summarily discussed hereinabove, it is mandatory for the assessment unit to issue a show-cause notice to the assessee in a case where there is a failure to comply with the statutory notices issued u/s. 143(2) or u/s. 142(1) of the Act. These provisions were already there under the physical assessment

regime under section 144 of the Act. In addition to the provisions of section 144, section 144B(1)(ix) specifically provides for such show-cause notice. Similarly, in a case where the assessment unit proposes any variation of income or loss, prejudicial to the assessee, clause (xii)(b) of sub-section (1) of Section 144B provides that the show-cause notice shall be issued to the assessee allowing the opportunity to explain why such variation is not justified.

Section 144B lays down the entire procedure for assessment under a faceless regime and any deviation from these provisions and procedures laid down will result in the assessment being prone to be quashed. In a case, where the show-cause notice as provided by the statute is not issued at all, the assessee can move to the Courts in writ petitions. The Courts have consistently held that the issue of show-cause notice as specified in the section is mandatory and failure on this front is fatal resulting in the assessment being quashed.

In the case of ***Take Solutions Ltd. vs. ITO, NaFAC (2023) 155 taxmann.com 204 (Madras),*** it has been held that in case any variation is made, prejudicial to the interest of the assessee, the assessment unit is required to serve a notice calling upon the assessee to show-cause as to why proposed variation should not be made. The order passed overlooking this safeguard prescribed u/s. 144B was required to be quashed. A similar view has also been expressed in the case of ***Shrenik Ltd. vs. Addl CIT (2023) 151 taxmann.com 61 (Gujarat)***. In fact, very recently, in a case where the email ID of the assessee was not available with the department, the Hon'ble Bombay High Court in the case of F***ayeza Muffadal Contractor vs. National Faceless Assessment Centre (2023) 156 taxmann.com 168 (Bom)*** has held that the requirement of issuing the show-cause notice cannot be done away and the same should have been at least served physically upon the assessee by courier or speed post as specified in the SOP issued by CBDT for faceless assessments.

Additions made beyond the issues listed in the Show-cause Notice

Let us consider a situation that the show-cause notice issued to the assessee discusses some of the particular issues where the department proposes to make variation to the income of the assessee. On receipt of the response from the assessee, the department may or may not make final additions on the issues listed in the show-cause notice. However, while finalizing the assessment, the assessment unit made a completely new addition, which was not discussed at the stage of the show-cause notice. Whether the addition in respect of a new issue, will be legally valid?

Here, one must appreciate that the purpose of a show-cause notice is to enable the assessee to provide his effective representation in relation to the additions proposed. Under the facts narrated above, the assessee is certainly deprived of this opportunity since he was never communicated about the issue which has been finally subjected to addition. The additions made vis-à-vis the issues listed in the show-cause notice are in compliance with the provisions of section 144B. However, in so far as a completely new issue is concerned, the provisions of section 144B of the Act cannot be said to have been complied and therefore the addition on account of this new issue deserves to be quashed at the threshold. Readers may refer to the judgements in the case of ***Margita Infra vs. National E-Assessment Centre (2023) 149 taxmann.com 51 (Gujarat)*** and also ***Acme Housing India (P.) Ltd. vs. National Faceless Assessment Centre (2023) 146 taxmann.com 286 (Bombay)*** for this proposition.

It will be also worth to take note of the judgment of the Hon'ble Madras High Court in

the case of ***P. T. Lee Chengalvaraya Naicker Trust vs. ITO (2022) 143 taxmann.com 252 (Madras),*** where the High Court has held that though the failure to issue notices as provided in section 144B would certainly vitiate proceedings as being in violation of principles of natural justice, it is a procedural infirmity that may be cured by permitting such Show-cause Notice to be issued.

Not allowing a reasonable time to respond

It has been observed frequently that the assessment proceedings are delayed by the assessment unit for a long period and at times there is no action by the assessment unit for months after the submissions made by the assessee. The assessment unit delays raising the queries for some unknown reasons and drags the assessment almost towards the end of the limitation period. As the limitation period is approaching near, suddenly the assessment unit becomes super-active and issues show cause notices as required under the provisions of the Act. However, since the limitation period is near, the time allowed to the assessee for responding to the show-cause notices is much less. In fact, there have been cases where the assessee has been given time of less than a day to respond to the show-cause notice.

Allowing an unreasonably short time to respond to the show-cause notice is merely a tick-box exercise, to say the least. Such show-cause notice does not amount to an effective opportunity to the assessee as is the purpose of the legislature. Under such a situation, the assessee should be well advised to file whatever details/documents/clarifications as may be possible and also make it very clear in the response that further time is necessary for filing the residual details/documents and that it is not possible to comply in the given short period of time. The assessee should also categorically request for adjournment for filing part of the details. This kind of mention in the response letter will be helpful to the assessee in a case where the additions are ultimately made and the assessee has to resort to appellate proceedings.

In fact, in such cases, it may also be worth for the assessee to adopt the writ proceedings before the High Court since there is a patent violation of the principle of natural justice. The judiciary will certainly be supportive of the assessee where a gross injustice is seen in this regard. In the case of ***Dineshkumar Chhaganbhai Nandani vs. ITO (2023) 153 taxmann.com 187 (Gujarat),*** the High Court considered a case where the assessing officer allowed the time of merely 12 hours to the assessee to respond to the show-cause notice. The High Court held that there was a gross violation of the principles of natural justice and therefore the final assessment order was to be quashed. A similar view has been expressed in the case of ***Dipak Natwarlal Dholakiya vs. Addl CIT (2023) 149 taxmann.com 151 (Guj).***

At times, it is also seen that the request made by the assessee for further time to respond to the show-cause notice is not considered at all and the assessment order is passed without allowing such additional time. This will also not be in accordance with the principle of natural justice and the assessment order is likely to be quashed. Reference may be made to the judgment in the case of ***Hirotec India P. Ltd. vs. Assessing Officer (2023) 156 taxmann.com 16 (Madras)***. Similarly in the case of ***Parul Bharat Shah vs. National Faceless Assessment Centre (2023) 146 taxmann.com 446 (Bombay),*** the adjournment request of the assessee was pending and the assessment order was passed even without rejecting the adjournment request. The Hon'ble High Court held that the assessing officer ought to have responded

to the assessee's request for an extension of time by rejecting the request or at least responded to her request for an online hearing by video conferencing. The assessing officer was directed to give a fresh opportunity to the assessee as requested and the order passed was set-a-side.

In the case of ***Shri Venkatesh Refineries Ltd. vs. Dy. CIT (2023) 153 taxmann.com 289 (Bombay),*** the assessee was directed to respond to the show-cause notice by 9-12-2022. The assessee emailed an adjournment request on 8-12-2022 and sought time till 16-12-2022. However, the window on the department portal was disabled on 9-12-2022 and the assessee could not upload the submissions on 16-12-2022. Under such a situation, the Hon'ble High Court in writ proceedings held that since the assessee's request for adjournment was neither accepted nor rejected, the assessment was not valid. The High Court directed the assessing officer to open the window so as to enable the assessee to make its submissions.

Response to SCN not considered in the final assessment

The issue of the Show-cause Notice is not an empty formality. The assessment unit is duty-bound to consider the response filed by the assessee before completing the assessment. If the response of the assessee is not considered at all, this will defeat the entire purpose of issue of show-cause notice. The assessment order passed without considering the response will not be accepted by the courts and will be quashed. Reference may be made to the judgment of the Gujarat High Court in the case of ***Shree Ganesh Intermediary Pvt. Ltd. vs. National Faceless Assessment Centre (2023) 154 taxmann.com 87 (Gujarat)*** in this connection. The High Court quashed the assessment order passed without considering the response of the assessee and directed the assessing officer to provide adequate opportunity of being heard.

Draft Assessment order and its impact

Having discussed the show-cause notice under the faceless assessment regime, let us also discuss the 'Draft Assessment Order' and its impact on the final assessment order. In this connection, it may be noted that as per the provisions of section 144B of the Act, as originally introduced by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 w.e.f. 1-4-2021, it was mandatory for the assessment unit to prepare a Draft Assessment Order in all the cases. The Draft assessment order so prepared was required to be served on the assessee along with the show-cause notice allowing him the opportunity to raise objections against the said draft assessment order and the final order was to be passed after considering the objections so raised by the assessee, if any. Not providing the draft assessment order has been held to be resulting in quashing the assessment – Refer to the judgment in the case of ***Dediyasan Industrial Co-Op. Credit Society Ltd. vs. Addl. CIT (2022) 141 taxmann.com 452 (Gujarat).***

However, section 144B as inserted originally has been amended by the Finance Act, 2022 with effect from 1-4-2022. One of the substantial amendments in the section is that the requirement of issuing draft assessment orders has been done away with in all the cases and the show-cause notice itself has the effect of providing an opportunity to the assessee to raise an objection. Issue of draft assessment order is now restricted only in the cases of an eligible assessee as specified in section 144C of the Act. As per clause (xxi) of sub-section (1), such draft assessment order will be served on the assessee. Further clauses (xxiv) and (xxv) provide that all the procedures and consequences as prescribed

in section 144C will apply in relation to such a draft assessment order as it used to apply under the physical assessment regime.

Response to the Show-cause Notices

We have already discussed the issues that are generally emerging under the faceless assessment regime in relation to the show-cause notices. Let us now try to list down some of the factual aspects to be taken care of while responding to the show-cause notices.

Factual Issues that might need to be addressed

Some of the factual areas where the assessee may need to provide explanation or clarifications during the assessment proceedings under a faceless regime are as under:

- Entries reflected in AIS and TIS
- Entries reflected in Form 26AS – where the deductor has deducted the TDS and the assessee has not offered the said income in his Return of Income
- Reconciliation of Turnover as per GST Returns and Income-tax Returns
- Explanation in relation to Loans
- Justification of Expenses claimed and also other deductions claimed

The above list is just an example and certainly cannot be exhaustive. In connection with the above issues, one must appreciate that the onus lies on the assessee to bring on record all the supporting documents and details for explaining all the issues. It is therefore advisable for the assessee to proceed with the assessment proceedings with due care and ensure that he has been able to establish his case.

Ideally, the details/explanations in relation to all the factual aspects shall be provided by the assessee in the submissions made without waiting for the issues to be raised by the assessment unit in the show-cause notices. If, however, any details or documents have not been filed during the initial phase of the assessment, the assessee must make the best use of the show-cause notice providing the opportunity and should ensure that at least while replying to the show-cause notices, all documentary evidences and clarifications are placed on records. Proper reconciliation between different figures like GST Reconciliation, TDS Reconciliation etc. may be filed as a part of the response to the show-cause notice. Due care, as was relevant during the physical assessment regime as well, needs to be taken while responding to the show-cause notices for effective assessment proceedings.

General Care to be taken

We will now discuss some of the general and basic care to be taken while filing a response to the show-cause notices, or any statutory notices during the course of the assessment proceedings.

- It has been seen in the faceless assessment regime that the department is very quick in reacting to non-compliance with any notices issued. In view of this, the assessee and his representative need to be absolutely careful about compliance within the given time frame.
- For any reason, if it is not possible to comply with the statutory notices within the time allowed, it must be informed by way of a written communication and request for adjournment that some more time is required to comply. Adjournment requests shall ideally also mention the reason for non-compliance and also the possible time within which it will be complied.

- It is advisable to file proper charts explaining the variations in financial results and the reasons for the same. It is also necessary to file reconciliation statements for any variation in relation to entries in Form 26AS/GST Records or any other such record of government authorities.
- Effective communication is the key under a faceless assessment regime and accordingly, it is absolutely necessary that the replies filed to the statutory notices and also show-cause notices are serially numbered and ideally the response shall bear the same paragraph number as the issue listed in the notices. If some of the queries raised are not relevant, even then the response should have one line saying that it is not applicable in the case of the assessee and the reason for the same being not applicable.
- If any of the issues are already decided by appellate authorities in favour of the assessee in some other year, it should be stated clearly in the response and the copy of the appellate order shall also be filed with the response. Similarly, if any issue is decided against the assessee, the same should also be stated. An attempt should also be made to explain why the view taken in the other year is not correct or why it is not applicable in the current year due to a change in fact or change in law or for any other valid reason.
- In case the assessee is relying on any of the judicial decisions, it is most important to mention the decisions in the submissions. However, while relying on the decisions, it is imperative to ensure that the facts of the case of the assessee match with the facts of the decision. A slight change in the facts might render a different outcome and therefore the judgment to be relied upon should be carefully selected after critical study of the same. It would be also advisable to attach a copy of the entire decision which is relied upon with due highlighting of the relevant paragraphs which are relevant.
- It would be highly recommended to number all the attachments to the response so as to ensure that the reader is in a position to relate to the same while reading the response.
- While making the submissions, it is advisable to select 'partial response' instead of 'full response'. This will ensure that the window remains open and if any further response is to be filed it becomes easier to do so.
- If the submissions are very lengthy, it is highly recommended to make an executive summary of the submissions in one or two pages and put it separately by way of attachment or at the end of the submissions.

I express my sincere gratitude to the Journal Committee of the Chamber for giving me this excellent opportunity and share some of my thoughts with the elite readers of the Journal. This assignment has made me go through the provisions once again and has ultimately benefited me on the academic front. I wish best of luck to the readers for the busy assessment season ahead.

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Inter-play between Transfer Pricing Assessment and Faceless Assessment



CA Fatema Hunaid CA Vijay Kumar CA Divya Rani

Overview

The introduction of faceless assessment scheme in August 2020 marks a transformative step in the Indian Tax Administration system. The objectives of faceless assessment mechanism are to reduce interface between tax authorities and taxpayers, improve resource utilisation by the tax office and introduce a team-based assessment model, with technology and data analytics as the enablers for the scheme.

While faceless assessment and appeal process have been introduced in the Income-tax law, transfer pricing assessments remain outside the purview of faceless assessments and the Government has deferred implementation of faceless TP assessment atleast till March 2024. Currently, transfer pricing assessment by jurisdictional Transfer pricing officer operates alongside and interacts with the faceless assessment cycle. This article seeks to cover the interplay between the current TP assessment and faceless assessment process and what we might expect to see in the faceless TP assessment scheme which is yet to take a form.

As faceless TP assessment seems to be reality in long run, taxpayers must enhance their readiness, emphasizing the quality of documentation and opportunity to the Assessees to present their case is essential for a balanced and effective operation of faceless TP assessments.

Background

Introduction of e-assessment scheme in India in September 2019 and faceless assessment in August 2020 is a defining moment in the nation's tax administration system. Aimed at eliminating human interface, bringing in greater transparency and improve the quality of assessments by use of technology, the scheme has seen full operationalization at assessment level.

The transfer pricing assessment proceedings are yet to be covered under the faceless assessment process. Recognising the fact that transfer pricing matters require extensive discussions between the taxpayer and the TPO involving understanding of assessee's business, international transactions and underlying economics, benchmarking studies and iterations thereto, the government has deferred the application of faceless assessment

process to transfer pricing matters at least till 31 March 2024. However, it is expected that in coming years the government will introduce the procedure for faceless transfer pricing assessment keeping in line with the objective of transforming the tax administration in the country.

This article explores the interplay between the current transfer pricing assessment and faceless assessment process and sheds light on the possibilities after implementation of the faceless transfer pricing assessment process. While on one hand faceless transfer pricing assessment is expected to increase efficiencies in terms of use of technology, reduced paperwork, reducing human interface etc., it also demands addressing challenges relating to evaluation of complex cross-border transactions, detailed factual, legal submissions and arguments, evaluation of economic and commercial circumstances etc., both by the taxpayers and the tax office.

Current transfer pricing assessment process

Currently transfer pricing assessments are performed under section 92CA of the Act, by the jurisdictional Transfer Pricing Officer (TPO). The proceedings before the TPO are not faceless and follow the procedure laid down under section 92CA of the Act. However, the TP proceedings under section 92CA interact and merge into faceless assessment after passing of TP order. Similarly, proceedings before the Dispute Resolution Panel (DRP) under section 144C of the Act read with Income-tax (Dispute Resolution Panel) Rules, 2009 are currently outside the scope of faceless assessment and once DRP directions are issued the same gets incorporated into the faceless assessment cycle.

Reference to the TPO and the role of technical units

The SOPs dated 03 August 2022 issued by the National Faceless Assessment Center (NFAC) provide that the Assessment Unit may seek the assistance of Technical Units in specific matters with prior approval of the PCIT of the assessment unit.

The function of technical units is to provide technical assistance on legal, accounting, forensic, information technology, valuation, transfer pricing, data analytics, management or any other technical matter which may be required in a particular case or a class of cases, under section 144B of the Act.

In transfer pricing cases, the Assessment Unit has to refer the matter to the technical unit within 15 days from the date of allocation of case. The Technical Unit has to forward the reference to the designated authority in matters which include transfer pricing. The reference in transfer pricing matters is forwarded using "TP reference" option on ITBA portal which enables creation of work item for the TPO. Currently, three references are being forwarded from technical unit to the jurisdictional TPO's. However, post implementation of faceless TP assessments, the references may be made to the TPOs based on automated selection process and such TPO may not be the jurisdictional TPO of the Assessee.

It may be noted that the SOP, in relation to reference to the TPO, does not seek to do away with substantive provisions of the Act. The provisions of section 92CA(1) of the Act provide for the reference of the computation of the arm's length price in relation to the international transaction or specified domestic transaction entered into

by the assessee under section 92C of the Act to the TPO by the assessing officer (AO), if the AO considers it necessary or expedient so to do, with the previous approval of the Principal Commissioner or Commissioner. The case for TP assessment gets selected based on risk parameters or, if there is any evidence that the Assessee has not electronically filed the Accountant's report in Form 3CEB even after entering into international transactions or specified domestic transactions. Hence, the requirement of section 92CA(1) of the Act and meeting the risk criteria are still required to be adhered to for making reference to the TPO.

Submission of information to the TPO

Once the case is referred to the TPO, for determination of arm's length price, the jurisdictional TPO shall serve an initial notice to assessee requiring him to produce information or documents which the assessee has maintained under section 92D of the Act. This notice is automated by the ITBA system to be sent to the Assessee's email ID. Usually we see that the notice issued by the Jurisdictional TPO, allows a time of one week to two weeks to the Assessee for submitting the relevant information.

The Assessee submits its responses to such notices by uploading the same on the Income-tax portal, against the relevant notice. Further, a physical copy of the response is also usually submitted to the Jurisdictional TPO for ease of discussions and reference during the hearings and proceedings as the transfer pricing assessment process itself is not faceless currently.

Post implementation of faceless transfer pricing assessments, the submission of responses to the TPO are expected to be on income tax portal without any option of filing physical copies of the submissions and responses.

Show cause notices and in person hearings

Under the current TP assessment process, the jurisdictional TPO has to issue show cause notice (SCN) under section 92C(3) of the Act, to the Assessee in case a transfer pricing adjustment is proposed to the value of the Assessee's international transactions with Associated Entities or its specified domestic transactions (SDTs). After receiving responses from the Assessee and providing opportunity of hearing to the Assessee, the TPO passes the TP order which is forwarded to the technical unit and then to the Assessment unit through NFAC.

After including the transfer pricing assessments within the ambit of faceless assessment scheme, it is expected that in person hearings and submissions would be replaced by faceless process wherein assessments are done by a TPO selected by automated allocation system after reference to the technical unit. Thus, the TP assessment would be by a non-jurisdictional TPO and there may be no express requirement of in person hearings in the faceless assessment process.

However, considering that the current faceless assessment process allows the Assessee to put in a request for virtual hearing and rulings of various benches of Hon'ble High Courts which have held that in person hearing should be accorded in accordance with the principles of natural justice, the faceless Transfer Pricing Assessment process may also contain an option for the Assessee to request for virtual hearings.

The importance of personal hearings in transfer pricing matters has also been discussed in the ruling of Hon'ble Delhi High Court in the case of ***Moser Baer India Ltd vs. ACIT (2009) 176 Taxman 473 (Delhi).*** The case relates to determination of arm's length price of an international transaction by the TPO without granting opportunity of personal hearing to the Assessee.

Further, section 92CA(3) of the Act also specifically states that the TPO shall pass TP order after "hearing" such evidence as the assessee may produce on the date specified in the notice under section 92CA(2) or thereafter. Thus, in person hearing is a requirement under the statute governing transfer pricing assessment and after introduction of faceless transfer pricing assessment process, unless the provisions of section 92CA are amended, the mandatory requirement to conduct in person hearing is expected to remain as it relates to substantive provisions of the statute.

It is important for the Assessee's to make use of such options/provision of the statute, as transfer pricing is not an exact mathematical science and is rather an art, which is applied using knowledge of business, industry, specific facts, and circumstances of the Assessee. Further, matters involving benchmarking of international transactions and selection of comparables are fact specific and unique to each Assessee. Hence, detailed hearings with the TPO are helpful both to the Assessee and to the tax office.

Show cause notices required for every variation prejudicial to the Assessee

Under the current section 144B of the Act and SOPs issued for operation of various units under the faceless assessment scheme, after the Assessment Unit makes draft assessment order, the same is to be forwarded to the NFAC which shall issue an SCN to the assessee if the draft assessment order is prejudicial to the Assessee. The Assessee is allowed opportunity to file its responses against the proposal of adjustments or variations in the draft order. Further, SCN is required to be issued during the assessment proceedings for every variation which was not proposed in earlier version of draft orders.

In a similar manner, in current scheme of TP assessment proceedings too, any adjustment proposed by the TPO should be through SCN and the Assessee should be given an opportunity of in person hearing and file its responses. Any adjustment made in the TP order for which the Assessee the not granted an reasonable opportunity of being heard and file its responses would be bad in law. This position is likely to remain unchanged even under faceless transfer pricing assessment (as and when introduced) on account of substantive provisions of the statute as well as the provisions of current section 144B of the Act read with SOPs thereto. This further hyphenates for the need to conduct in person/ virtual hearings in TP matters in order to gain better understanding of the facts and circumstances of the international transactions and/or SDTs and discuss the thought process of the TPO to avoid multiple SCNs.

Passing of draft assessment order

The Assessment Unit after considering all information and material available on record made a draft assessment order and send a copy of the draft order to the NFAC including details of penalty proceedings to be initiated

therein. The draft order also incorporates the variations or adjustments made by the TPO.

Where the draft order contains variations to the income/loss returned by the Assessee which are prejudicial to the interest of the Assessee, the NFAC shall provide an opportunity to the assessee, by serving a show cause notice (SCN). Hence, currently under the faceless assessment scheme, the Assessee gets one more opportunity to file its submissions against the transfer pricing adjustments which are a part of the draft order. However, since the transfer pricing adjustments arise on account of TPO's order/ technical unit, the assessment unit does not make variations to the TP adjustments.

Post receiving draft order and Assessee's SCN responses from NFAC, in case there are no further additional variations or adjustments to the returned income/loss, the draft assessment order is served on the assessee.

Proceedings before the DRP

Upon receiving the draft assessment order from the assessment unit through NFAC, the assessee has an option to either file his acceptance of variation to the AU or file its objections against such variations before the DRP and the AU within 30 days of the receipt of the order under section 144C(2) of the Act. In case the assessee accepts the draft assessment order, the AU will issue the final assessment order.

The proceedings before the DRP currently are not under the faceless scheme and require filing of copies of Form 35A in accordance with provisions of section 144C(2) of the Income-tax Act, 1961 read with Rule 4(1) of the Income-tax (Dispute Resolution Panel) Rules, 2009. The hearings before the DRP are also conducted in virtual or in person manner. Thereafter the panel issues its directions after considering the submissions of the Assessee, evidences and material available on record and getting responses from the TPO, wherever required.

The DRP has a time limit of 9 month from the end of month to issue its directions. The TPO shall consider the directions passed by the DRP and pass its order giving effect to such directions. The TP order is then incorporated in the final assessment order by the assessment unit within 1 month from the end of month in which it has received directions from the DRP.

Alternatively, the assessee can prefer an appeal before CIT(Appeals). The appeal process before the CIT(Appeals) is under faceless appeal process.

Flowchart showing interaction of faceless assessment scheme with current TP assessment process

The flowchart 1 which follows this paragraph, shows the interaction of current process of TP assessment under section 92CA of the Act, which is not under faceless scheme, with the faceless assessment process under section 144B of the Act. The flowchart is only for showing the interaction and how TP order and DRP directions merge in the faceless assessment process. It does not show various scenarios of reference of cases to verification unit and review by review units, revision to draft assessment orders etc.

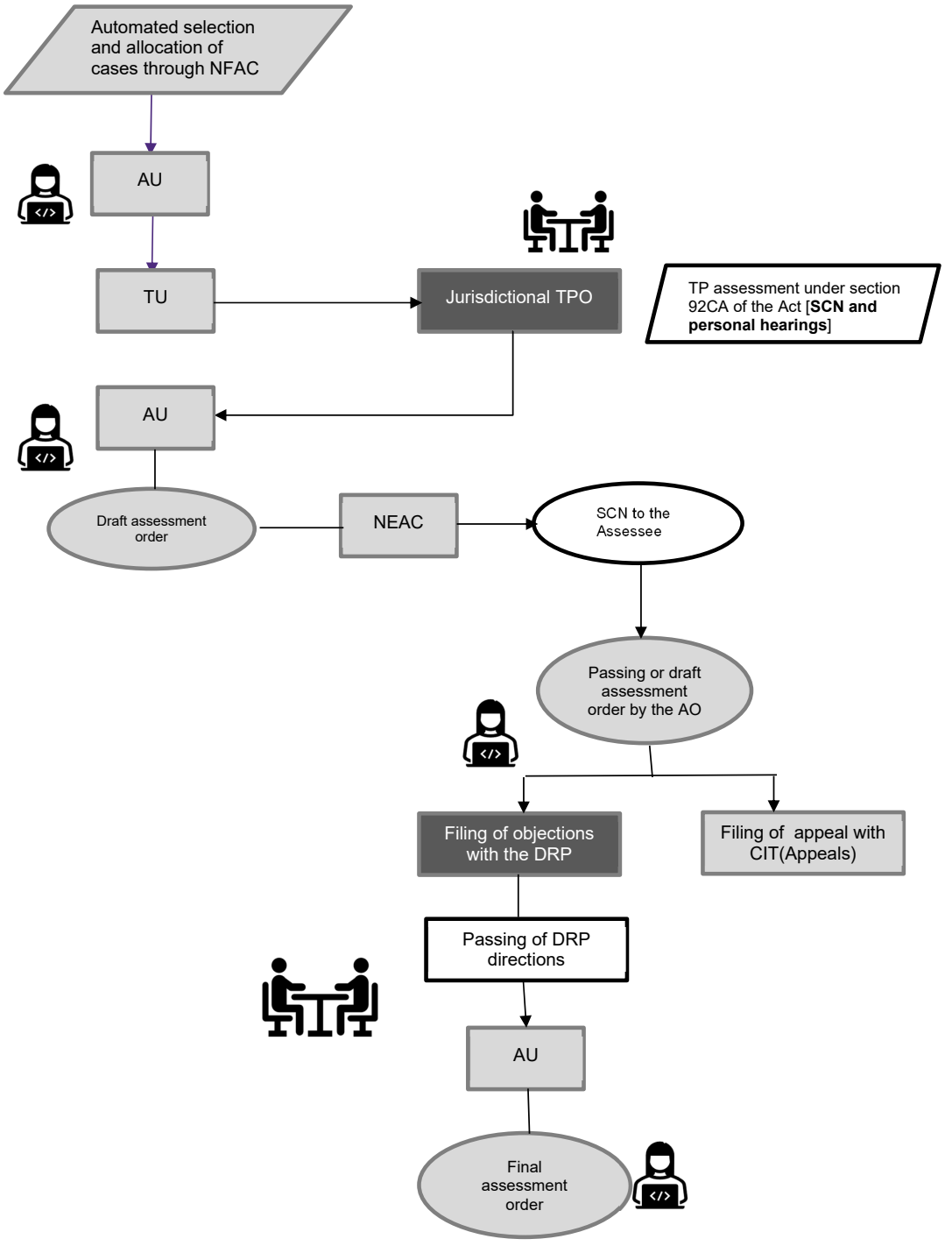

Figure 1 – Interaction of TP assessment with faceless assessment

SS-III-61

Expectations from faceless TP assessments

While the government has deferred the application of faceless assessment process to transfer pricing matters at least till 31 March 2024 and there are not updates currently on the probable timing of its implementation, faceless TP assessments seem to be a reality in long run keeping in line with ongoing tax administration reforms in India. Keeping this in mind, the taxpayers have certain expectations from the faceless TP assessment process. Some of these expectations include:

- The faceless process should respect the substantive provisions of the statute which enable in person hearings to discuss Assessee's responses and submissions. The faceless TP assessment process should allow for multiple virtual hearings with the TPO in order to discuss the arm's length pricing of assessee' s international transactions and SDTs which are governed by business, commercial and economic factors and specific facts of the assessee.
- Reasonable time should be allowed to file responses to SCNs in transfer pricing matters as preparing responses to SCNs in matters of determination of arm's length prices require detailed analysis of comparables, collation of supporting information from public domain, discussions on business and economic rationale, assumptions made, and filter applied in determination of arm's length prices etc. A time of one or two weeks would generally not be sufficient in such cases.
- On issues where jurisdictional tribunals, High Courts or the Apex court has held the matter in favor of the Assessee, such position should be adopted in the TP order. Where rulings of jurisdictional tribunals or the High Courts are not being followed, detailed reasoning should be given in the SCN on why such rulings are not binding the case of the Assessee and the Assessee should be given opportunity to file responses and be heard.
- With more use of technology and tools, the TPOs should also have access to global intelligence and information which is helpful in case of benchmarking of financial transactions and where tested parties are foreign entities.

Conclusion

In the wake of certainty of implementation of faceless transfer pricing assessments in the long run (if not from 01 April 2024), there is a need for the taxpayers to assess their readiness for facing the faceless transfer pricing assessment process. Under the faceless process, the quality of the TP documentation needs to improve significantly, as the Assessee will not have the opportunity of multiple and adequate in person hearings. The hearings are likely to be held through virtual mode and the Assessee might have limited window to present its submissions. Further, the documentation should be assessment ready as the same is to filed upon receipt of notice for online filing. Taxpayers also would need to invest in IT infrastructure to maintain and present documentation and supporting information.

While faceless transfer pricing assessments, when introduced, are expected to integrate TP assessments in the faceless assessment process, increase overall efficiency of assessment process and reduce human interface and bias, it is essential to maintain fundamental tenets of justice which allow reasonable and adequate opportunity to the taxpayers to present their submissions, attend hearings in person or virtually, sufficient time to file responses and submissions etc.

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SS-III-62

Dealing with Adverse Faceless Assessment Order

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Advocate

Overview

This article deals with the remedies available against an adverse faceless assessment order. The article highlights the pros and cons of each remedy available including filing of appeal before CIT(A), an objection before DRP, a revision application u/s 264 of the Act before the PCIT, rectification application u/s 154 of the Act and the newly evolved remedy of filing a writ petition, of course, in certain situations. The article provides some suggestions on which remedy to be chosen based on various factors. Further, the article deals with mechanism to approach the authority for stay the demand arising out of an adverse faceless assessment order.

It has been around three years since, the advent of faceless assessment proceedings under the Income-tax Act, 1961 ('the Act'). It was in the midst of pandemic, that the Hon'ble Prime Minister of India launched a platform for *"Transparent Taxation - Honouring the Honest"*. Faceless assessments were made mandatory for all the cases barring few. Initially, the entire scheme was introduced vide two notifications. The same was subsequently introduced (with few modifications) in the form of section 144B w.e.f. 1.4.2021. The orders passed under the said scheme and section 144B were tested in various High Courts with success to the assessees. As a result, even section 144B was substantially amended by Finance Act, 2022 w.e.f. 1.4.2022.

Everyone would agree that the faceless assessments have been a bittersweet experience, until now. We have seen cases, where tricky issues have been left alone whereas, high pitched additions have been made on silly and no brainer issues.

The faceless assessment proceedings have been dealt with in detail in the earlier articles. I have been entrusted with the job of dealing with the way forward after receipt of an adverse assessment order. Along with an adverse assessment order, one receives a computation sheet, notice of demand u/s 156 of the Act, and in most cases, show cause notices for levy of penalty. It becomes necessary to deal with all the said notices and orders within the time limit specified therein.

In the present article, I have refrained from dealing with the procedural aspects of filing of appeal, revision application, writ petitions etc.

Appeal to first appellate authority i.e., CIT(A)

There is a detailed appellate mechanism prescribed under the Act for dealing with adverse assessment orders. One can file an

appeal against an adverse assessment order u/s 246A of the Act. Such an appeal can be filed within 30 days of receipt of the notice of demand. Appeal can be filed belatedly, however, in such case, CIT(A) will have to condone the delay in filing such appeal, based on sufficiency of reasons put forth by an assessee.

All appeals against faceless assessment order would be heard in a faceless manner. The said appeal would be heard by CIT(Appeal Unit), NFAC. An appeal against faceless assessment orders would not be heard by JCIT(Appeal)[1]. This is mainly because, an order under faceless assessment scheme is passed with the prior approval of the Joint/Additional Commissioner. Also, the same is not to be heard by local CIT(A), in a non-faceless manner. Only assessees in Central Circle and International Tax Circle are assessed by Jurisdictional AO ('JAO') and the appeals are also disposed off by local CIT(A) in a non-faceless manner.

In the said appeal, one can challenge:

i. validity of the proceeding like validity of reassessment proceeding;

ii. other jurisdictional issues like non-issuance or wrong issuance of notice u/s 143(2) or time barring issues;

iii. additions on the merits of the case;

iv. violation of principles of natural justice like not granting sufficient opportunity of being heard, not granting copy of material relied upon and cross examination opportunities etc.

v. wrongful levy of interest u/s 234B or 234C etc.

vi. non-grant of credit of advance tax, self-assessment tax or TDS/TCS.

The grounds of appeal are generally precise and not argumentative in nature. In the memo of appeal, one has to also give statement of facts. This, in my view, is a very important document. One has to provide for all the facts pertaining to what has transpired in the course of the assessment proceeding. This should therefore, comprise of the assessee's version of facts as against what has been portrayed in the assessment order. Further, appropriate facts in respect of the grounds raised including the merits of the issue should also be mentioned. Whether, one has to also, bring out the arguments, would be one's judicial discretion, especially in this faceless scenario, where many a times, notices of hearing are not received and therefore, at least, the appellate authorities would have the benefit of our submission which would be part of the statement of facts.

Apart from the above, one can also raise additional claims and grounds before the first appellate authorities. if a claim has been left out to be raised in the original return of income and time has lapsed to file revised return then, one cannot raise any additional claim in the course of assessment proceeding[2]. However, such additional claims can be raised in the course of appellate proceeding[3].

One, can also file additional evidences, subject to the requirements of Rule 46A of the rules. One can also file additional grounds in the course of the hearing, after the appeal has been filed.

1. Order F. No. 370149/97/2023-Tpl, dated 16.06.2023.
2. *[2006] 284 ITR 323 (SC) Goetze (India) Ltd. vs. CIT.*
3. *[1991] 187 ITR 688 (SC) Jute Corporation of India Ltd. vs. CIT; [2012] 349 ITR 336 (Bom) CIT vs. Pruthvi Brokers & Shareholders.*

SS-III-64

It is important to note that CIT(A), has the power to enhance an assessment as its powers are held to be co-terminus with that of the AO. However, such power of enhancement cannot be used to bring to tax an additional source of income.

The practical difficulty with CIT(A) is the time taken to dispose the appeal. As is well known, some about 4.5 lakhs appeals are pending before the first appellate authorities and disposal of appeals post faceless regime has almost dried up. Thus, it will not be an exaggeration to say that an appeal filed today, may not come up for hearing at least upto three years from the date of filing.

Also, if additional claims are raised or additional evidences are filed, then the CIT(A) may call for remand report which may further delay the appellate proceedings. In my understanding, there is also, no clarity as to who has to prepare the remand report, JAO or FAO. This has further added to the confusion.

Objections before the Dispute Resolution Panel ('DRP')

This is an alternate route available for some categories of assessees. These assessee's are persons in whose case either any transfer pricing adjustment is made or a non-resident or a foreign company [S. 144C(15)]. It is important to note that even in a case of non-resident individual, option of approaching DRP is available. However, a non-resident person and foreign companies are assessed in International Tax Circle and therefore, such assessees would be out of faceless regime.

In case of eligible assessees, an AO has to pass a draft assessment order which shall contain all the adjustments and variations. Such an order, cannot be accompanied by any notice of demand or any penalty notices, as in such cases, it cannot be stated to be a draft assessment order[4]. Against such draft order, one can file objections before DRP within 30 days of receipt of such order [S. 144C(2)]. There is no provision for condonation of delay in filing of objections before DRP. If such objections are filed, then the DRP has to dispose of the objections within 9 months from the end of the month in which draft order is forwarded to the assessee [S. 144C(12)]. Basis such directions, AO will have to pass final assessment order within one month from the end of the month in which such directions are received [S. 144C(13)]. Further, such final order of the AO can be challenged directly before the ITAT.

It will be apposite to refer to recent judicial pronouncements, wherein the High Courts have held that the entire process of DRP and including passing of the final assessment order has to be completed within the time limit provided u/s 153 of the Act without excluding any time, during which the proceedings are pending before DRP[5].

In case, either no objections are filed or if objections are filed belatedly, then the AO will have to pass the final assessment order within one month from the end of the month in which either the time period to file objections expires or from the date of receipt of acceptance of variations [S. 144C(4)]. Against such final order, one can file an appeal before CIT(A).

4. *[2023] 149 taxmann.com 486 (Karnataka) CIT vs. Cisco Systems Services B.V.*
5. *[2023] 457 ITR 161 (Bombay) Shelf Drilling Ron Tappmeyer Ltd. vs. ACIT; [2022] 445 ITR 537 (Mad.) CIT vs. Roca Bathroom Products (P.) Ltd.* and *[2021] 432 ITR 192 (Mad.) Roca Bathroom Products (P.) Ltd. vs. Dispute Resolution Panel-2.*

The major benefit of DRP, is the time frame within which the authorities have to function and the fact that until final assessment order is passed, no demand can be recovered. Also, an added advantage is that one can directly file an appeal to ITAT against the final assessment order. Due to drastic reduction of pendency in the ITAT, the appeals before ITAT are coming up for hearing within a span of two-three months, at least, in some benches. However, the biggest disadvantage of DRP is negligible chance of success, mainly because, the Department has no right to file appeal against the final order of the AO, passed pursuant to the directions of DRP. As a result, practically in many cases, we have seen the DRP upholding the variation just for protecting the revenue.

Revision u/s 264 of the Act

One more remedy, which is mostly unused for obvious reasons is revision u/s 264 of the Act. An application for revision can be filed against any order of subordinate authorities before Jurisdictional Commissioners u/s 264 of the Act. Under section 264, the power of Commissioners are wide to pass such order as he may think fit, but not something which is prejudicial to the assessee. Such an application can be filed within one year from the date of receipt of the order. Further, belated applications can also be entertained on delay being condoned after showing sufficient cause for delay. Such application has to be disposed off within one year from the end of the month in which the application is received.

The problem with this remedy, is that against such order, there is no appellate mechanism provided. As a result, a negative order can only be challenged in a writ jurisdiction in High Court, which may not be pocket friendly for many assessees. Secondly, since, the Department does not have any right to challenge therefore, the Commissioner would be reluctant to give any major relief.

Digressing for a moment, it is pertinent to note that an additional claim can be raised before the CIT u/s 264 of the Act, though the same has not been raised earlier. The Courts have held that power of CIT u/s 264 is very wide to give reliefs to an assessee wherever the law provides for the same. CIT can entertain an addition claim, an additional ground though the same was never raised before the AO or in the return of income[6].

Writ Remedy

Since last two years, after the implementation of the faceless scheme, a new remedy has evolved which is directly challenging the assessment order before the High Court in a writ jurisdiction. However, such an approach would require a major hurdle to be crossed, which is availability of an alternate remedy. It is a settled law that if an alternate remedy is available, then a High Court would generally not entertain a writ petition. In the present scenario, since, an assessment order can be challenged before CIT(A), therefore, there is an alternate remedy and therefore, High Court would not ideally entertain a writ petition challenging the assessment order. However, there are exceptions to the above proposition.

6. *(2003) 175 Taxation 91 (Bombay) Hindustan Diamond Company Pvt Ltd. vs. CIT; [2023] 156 taxmann.com 126 (Bom) Pramod R. Agrawal vs. PCIT; (2017) 394 ITR 247 (Mad) Selvamuthukumar vs. CIT & Anr; (2016) 386 ITR 643 (Delhi) Vijay Gupta vs. CIT.*

A High Court can entertain a writ petition, despite availability of alternate remedy in cases where there is:

i. a breach of fundamental rights;

ii. a violation of the principles of natural justice;

iii. an excess of jurisdiction i.e., where the order is without jurisdiction; or

iv. a challenge to the vires of the statute or delegated legislation.

All High Courts have in one vain entertained writ petitions challenging the assessment orders passed where there is a breach of principles of natural justice like, not providing a show cause notice, not providing sufficient time to reply to show cause notice, not providing personal hearing, not considering the submissions made by an assessee etc. Further, some Courts have also entertained writ petitions, wherein the jurisdictional issues have also been raised. However, this remedy remains tricky since, ultimately, it is at the discretion of the High Court. Further, a High Court would only entertain a writ petition on the above grounds i.e., mainly on account violation of natural justice and that in all likelihood, it would not enter into the merits of the case.

In context of challenge to faceless assessment order, now even the Hon'ble Apex Court has approved the entertainment of writ petition by the High Court where there was violation of principles of natural justice[7].

Thus, in a case, where there is gross violation of natural justice and an obnoxious demand has been raised, it may be advised to approach the High Court, which can stay the demand and quash and set aside the order. However, the outcome of such writ petition, is invariably, remanding the matter back to the AO. Thus, one cannot expect any permanent quashing of assessment order. However, such remedy becomes useful, especially if the demand is very high in which case, one has to even otherwise approach the High court for getting stay of demand.

It would be advisable to file such writ in a timely manner and to obtain stay on the assessment order and consequential demand notices and show cause notice for levy of penalty.

Rectification proceedings

The Hon'ble Supreme Court[8] has held that 'a mistake apparent on the record' must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record.

Thus, the remedy of rectification u/s 154 is very narrow and limited. The same can be done, in cases like; non-grant of credit of TDS or any tax paid, or where an issue is directly covered by the judgement of the Jurisdictional High Court or Supreme Court, or where there is a clerical error or non-consideration of any provisions of any Act etc. Such a remedy lies before the JAO. Further, any negative order u/s 154 can also be appealed against before the CIT(A) or can be taken up in a revision proceeding u/s 264 of the Act.

7. *[2023] 453 ITR 230 (SC) NFAC vs. Automotive Manufacturers Pvt. Ltd.*
8. *(1971) 82 ITR 40 (SC) T.S. Balaram, ITO vs. Volkart Bros.*

Stay of demand

Along with the assessment order, one is also served with notice of demand u/s 156 of the Act. One has to pay such demand within 30 days of receipt of such notice. Non-payment of such demand would entail adverse consequences of being treated as assessee in default. Apart therefrom, one has to also pay interest u/s 220(2) of the Act. As a result, one has to reply to the notice of demand within such time period. An application for stay of demand has to be filed before the JAO.

If an appeal is filed by an assessee, then in such a scenario, there is an option available with an assessee to file an application for keeping the demand in abeyance u/s 220(6) of the Act. The Board has time and again issued various circulars and instructions laying down guidelines for stay of demand.

Vide Instruction No. 1914 dated 02.02.1993, the Board had laid down detailed guidelines for an Officer to deal with stay applications. Some illustrations have been brought out where complete stay of demand can be granted. The same was modified vide Office Memorandum dated 29.2.2016, wherein the Board had specified that since the field authorities insist on higher payments for staying the balance demand, it was specified that, generally on payment of 15% of the demand, balance demand will be stayed. Such percentage was increased to 20% vide Office Memorandum dated 31.07.2017. Further, in such order, it has been specified that the AO can in appropriate case, direct the assessee to pay more or less than 20% of the demand. Certain illustrations have also been given. The memorandum of 2016 also provides that such stay application should be disposed off in 2 weeks' time and in case an assessee is not satisfied with the said order disposing stay application; then an assessee can file an application with the Jurisdictional Commissioner.

An application of stay of demand can also be filed with the CIT(A)[9], though one has no clarity as to how and when a faceless CIT(A) would dispose off such stay application. In such a scenario, it is always advisable to file an application with the Jurisdictional Commissioner.

Payment of 20% of the demand, would generally bring to an end the tussle for stay of demand with the AO until disposal of appeal. Moreover, one can also explore the possibility of providing some sort of security to the Department instead of paying any demand.

It has been observed that a notion is harboured by the Department that payment of 20% of demand is sine qua non for getting stay of balance demand; in other words, such 20% of the demand is treated like a pre-deposit. The said notion is patently incorrect based on their own Office Instructions, brought out earlier, which specify that in certain cases demand of less than 20% can be recovered. Thus, the position under the Act, unlike provisions of Indirect tax statutes, is that there is no pre deposit for filing an appeal or for getting a stay of demand. This position is also now judicially settled[10].

The Hon'ble Bombay High Court[11] has laid down certain parameters to be considered

9. *(1994) 208 ITR 676 (Mad) Paulsons Litho Works vs. ITO.*

10. *Civil Appeal No. 6850 of 2018 (SC) PCIT vs. LG Electronics India Pvt. Ltd.; [2017] 397 ITR 273 (P&H) Punjab Institute of Medical Sciences vs. DCIT; [2019]413 ITR 390 (Madras) Mrs. Kannammal vs. ITO; [2021] 435 ITR 151 (Bombay) Dilipkumar P. Chheda vs. ITO.*

11. [*251 ITR 158] KEC International Limited vs. B. R. Balakrishnan; MMRDA vs. DDIT [(2015) 273 CTR 0317 (Bom)]; UTI Mutual Funds vs. ITO 345 ITR 71 and UTI Mutual Fund vs. ITO in W. P.(L) No.523 of 2013.*

while disposing the stay application. The Court has held that stay should normally be granted in the following cases:

(i) in cases where the assessed income under the impugned order far exceeds returned income so as to make the demand arbitrary;

(ii) where the order appealed against is in breach of natural justice; or

(iii) where view taken in the order being appealed against is contrary to what has been held in the preceding previous years (even if issue pending before higher forum) without there being a material change in facts or law.

(iv) where the issues are covered by the judgments of Jurisdictional High Court; or of any other High Court, where there are no contrary judgments of the Jurisdictional High Court or by the Supreme Court;

(v) where an assessee is suffering from financial difficulties.

Importantly, Courts have also taken a view that where the demand is high pitched i.e., where the assessed income is twice the returned income, then, normally the demand has to be stayed[12].

If an assessee is not satisfied with the order passed by the Jurisdictional Commissioner/ CIT(A), then the only remedy available with an assessee will be to approach the High Court in a writ jurisdiction.

Such stay of demand on payment of less than 20% of the demand is subject to review by the AO and it is practically seen that reminders for payment of demand is received every few months especially in the month of March. Since, the appeal before the first appellate authorities is not likely to be disposed off very soon, an assessee would have to be cautious of such notices and have to reply appropriately.

Necessary, it is to note that during the pendency of any rectification application; stay application before the AO or before the CIT(A) and during the pendency of complaint before the High Pitched Assessment Committee, or pendency of revision application u/s 264 of the Act, no coercive steps can be taken by the AO.

One more important aspect which is noticed is automatic adjustment of refund of other years against the outstanding demand which is over and above 20% of the demand already paid or which is in contravention of the stay order passed or which is done before disposal of stay application by the AO. This is mainly done by CPC, Bengaluru. Once, 20% of demand is paid or when there is a subsisting stay order, then there can be no further adjustment of refund against the outstanding demand[13]. Needless to say that no adjustment of refund can be made without a prior notice u/s 245 of the Act[14].

Penalty show cause notices

Once, an appeal is filed against an assessment order, then one can file an application to the AO for keeping the penalty proceeding in abeyance.

12. *[2008] 307 ITR 103 (Delhi) Valvoline Cummins Ltd. vs. Dy. CIT, [2002] 323 ITR 305 (Delhi) Soul vs. Dy. CIT; [2023] 451 ITR 77 (Bombay) Humuza Consultants vs. ACIT.*
13. *[2017] 391 ITR 42 (Punjab & Haryana) Jindal Steel & Power Ltd. vs. PCIT; [2023] 154 taxmann.com 649 (Delhi) Jindal Stainless Ltd. vs. DCIT; [2017] 295 CTR 557 (Bom) Andrew Telecommunications India (P.) Ltd. vs. PCIT.*
14. *[1987] 165 ITR 86 (Bom) A.N. Shaikh, Sixteenth ITO vs. Suresh B. Jain .*

High pitched assessments

There are some other remedies to deal with high pitched assessments. The CBDT has issued instructions[15] in which the Board has admitted to the tendency of the AOs to frame high-pitched and unreasonable assessment orders. This has been held to cause harassment to taxpayers and it also leads to generation of unproductive work for the Department. A complaint can be filed with the Committee formed that the assessment is high pitched and that necessary action can be taken against the erring officers apart from providing relief to the assessee's concerned. Some illustrations have been laid down as to what would constitute unreasonable which includes, violation of natural justice. If it is found that unreasonable and high-pitched additions have been made, then committee would send a report to Pr. CCIT and suitable administrative action would be taken. Further, departmental position as determined by the Local Committee in such cases would be appropriately presented before the Appellate Authorities so that litigation is curtailed. However, the Local Committee, in no way, can be considered to be an alternative/additional appellate channel.

In my experience, this remedy is merely on paper, as I have not come across a case, where an assessment order is held to be a high-pitched assessment. On the contrary, the complaints filed are disposed off by way of a non-speaking order without assigning any reason, which makes such grievance redressal mechanism a farce.

Conclusion

To conclude, the natural course of action against an adverse assessment order is to file an appeal with CIT(A).

However, one has to take into account the following factors while deciding the appropriate course of action against an adverse assessment order:

i. Nature of order passed, where it is a high pitched assessment or not?

ii. Whether the order has been passed in violation of natural justice?

iii. Whether additional evidences would be required to be filed?

iv. Whether is unlikely that the AO would grant complete stay of demand?

v. Whether the assessee would be able to pay 20% of the demand without any major hiccup?

The above should be coupled with the fact that an appeal before a first appellate authority would take substantial period of time (not less than 3 years) in disposing an appeal.

Based upon such factors, and of course, based on the merits of the additions made, one has to decide, which remedy is to be adopted by an assessee against an adverse assessment order.

15. Instruction No. 17/2015 dated 09.11.2015 and Instruction F. No. 225/101/2021-ITA-II, dated 23.04.2022.

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SS-III-70

Faceless Appeal, Onset of new mechanism – Introduction and Insights

CA Nikhil Mutha

Overview

In the present article, the coverage is specific to Faceless Appeal Scheme. The same, interalia, includes the Background, Features, Key aspects, Special focus on safeguards to be followed in filing of appeal/ representation (Do's and Don'ts) and recommendation for CBDT's consideration. The topic assumes importance given the newness of the mechanism and also owing to the fact that after introduction of the Faceless Appeal Scheme there has been substantial delay in disposal of appeals filed. In such situation, the Assessee/ the Appellant may want to seize every opportunity of hearing granted by the Commissioner (Appeals) and hence, awareness of procedure becomes important, so that further delay is not attributed to the Taxpayers. As per the latest statistics, total appeals pending before Commissioner (Appeals) is 5,44,690, of which 82% pendency is with the Faceless Commissioner (Appeals).

The CBDT has also notified Central Action Plan for 2023-24 which provides a roadmap for expeditious disposal of pending appeals. The Taxpayers/ Tax Practitioners can expect momentum in matters pending before the CIT(A) and be wary of ex-parte order in case if repetitive adjournments are sought.

Dealing with appeal matters in a faceless manner has high dependency on procedure and processes, awareness of which is important for the Tax Practitioners as well as the Taxpayers. Any procedural lapse on the part of the Taxpayer/ the Appellant could lead to adverse disposal of appeal, unnecessarily give rise to second round of litigation with Tax Tribunals remanding the matter back to Faceless Appeals. Here, it is worth noting that getting an opportunity of hearing for matters remanded back by the Tribunals could be challenging under the Faceless Appeal Scheme.

Amongst addressing the procedural matters, we have also provided snippets around the contentious/ technical issues in relation to such procedural aspects. Since the intent of this article is to focus on change from physical to faceless appeal mechanism, such technical issues have not been dealt with in detail.

We hope the readers will find the article useful.

I. Background

The Indian government has undertaken significant measures to modernize tax reforms through digitalization. The transition towards e-compliances began in 2006 when it was mandated for the first time that corporate taxpayers must electronically file their income tax returns. Since then, there has been a gradual but consistent progression, with the government introducing various initiatives to drive digitization.

As a next step towards transformation, the government introduced a faceless assessment scheme by eliminating the interface between taxpayers and tax officials, leading to a paradigm shift in the way assessments are conducted, emphasizing a move towards a more transparent, efficient, and trustworthy system.

Post successful implementation of faceless assessment, the Faceless Appeal Scheme was introduced by the Central Board of Direct Taxes. The Scheme was implemented with the intention of eliminating human intervention between the Taxpayer and the First Appellate Authority so as to ensure that appeals are decided in a fair way and are not influenced by any human bias or personal relationship.

II. Introduction to Faceless Appeal

The provision for faceless appeals was introduced into the legislation through insertion of Section 250(6B) and Section 250(6C)[1] of the Act. There are three appeal Schemes notified by the Central Government, being:

a) Faceless Appeal Scheme, 2020 vide Notification No. 76 dated 25 September 2020,

b) Faceless Appeal Scheme, 2021 vide Notification No. 139 dated 28 December 2021 (in suppression of the earlier Scheme) making specific amendments to the earlier process, especially in light of the judicial developments.

c) e-Appeals Scheme, 2023 vide Notification No. 33 dated 29 May 2023, for appeals to be conducted by newly introduced authority i.e. JCIT(Appeals).

III. Key features of the Faceless Appeal Scheme ('the Scheme')

1. Clause 2 of the Scheme provides for definition of key terms which also includes reference to the Information Technology Act, 2000. The terms defined includes:

   a. addressee

   b. automated allocation system

   c. computer resource of appellant

   d. electronic record

1. Inserted vide Finance Act 2020 w.e.f from 01-04-2020.

e. hash function

f. registered account/e-mail address/ mobile number

As can be seen, these terms are either borrowed from Information Technology Act, 2000 ('IT Act') or are based on its provision. In case of any dispute (like service of notice, date of service of order, etc) the provision of IT Act and corresponding interpretations shall also play a role in case of tax litigation.

2. Clause 3 of the Scheme provides for the scope of the coverage stating that the appeals shall be disposed-off in respect of such territorial areas or person or class of persons or class of income or cases or class of cases, as may be specified by the Board. The Finance Ministry vide Press release dated September 25, 2020 had stated that under Faceless Appeals, all Income Tax appeals will be finalised in a faceless manner under the faceless ecosystem with the exception of appeals relating to serious frauds, major tax evasion, sensitive & search matters, International tax (including Transfer Pricing) and Black Money Act .

3. Clause 5 is the pivotal provision from the standpoint of procedure to be followed and outlines the adjudication process, covering aspects like condonation of delay, additional grounds, additional evidence, etc.

The process is largely the same what has been practiced in a physical construct, however such process is codified elaborately as a part of the Scheme, including detailed steps to be followed for each of the event.

4. Clause 6 of the Scheme empowers the Commissioner (Appeals) to initiate penalty proceedings through the NFAC in case of non-compliance with notices, directions, or orders issued under the Scheme. The Appellant is given an opportunity to show cause against the imposition of penalties.

5. Clause 7 of the Scheme describes the procedure to pass a rectification order pursuant to error in the original Appellant order. Such rectification can be initiated by the Assessee/ CIT(A)/Assessing Officer by making an application. The provisions also states that NFAC shall assign such application through automated allocation system. However, for such matters, the application should ideally vest with the CIT(A)'s who has passed the original order. An opportunity of hearing is accorded to the Assessee as well as to the Assessing Officer, as the case may be, on filing of such rectification application.

6. Clause 10 of the Scheme deals with Authentication of Orders, requiring the Commissioner (Appeals) to affix his digital signature. In case of NFAC to affix digital signature of authorised signatory for all communications made on behalf of the Commissioner (Appeals) and in case of the Appellant or any other person requiring authentication by way of affixing his digital signature or under electronic verification code or by logging into his registered account. Until implementation of Scheme of 2021, the Order were not authenticated

by the Commissioner (Appeals) but sent by NFAC through authorised signatory.

7. Clause 11 of the Scheme deals with Delivery of the Electronic Record. It specifies that such communication shall be delivered to the addressee by way of placing authenticated copy on registered account or sending the same to registered email address or uploading the same on the mobile app with a real time alert. The Appellant is required to deliver its submission only through registered account and once an acknowledgment is generated with hash result, the same shall be deemed to be delivered. It further states that time and place of despatch and receipt of electronic record shall be determined in accordance with the provisions of section 13 of IT Act, 2000.

8. Clause 12 of the Scheme clears individuals from the obligation to appear physically for any proceedings under the Scheme. However, it prescribes the mechanism to opt for video conferencing facility for providing personal hearing. Earlier grant of such hearing was subject to approval of the CCIT or DGIT in charge of Regional Faceless Appeal Centre under which the Appeal Unit is set-up. However, such condition has been done away with preserving the principle of natural justice mandating the Commissioner (Appeals) to provide an opportunity of hearing if requested by the Appellant[2].

IV. Recent decision on pendency of appeal before Commissioner (Appeals)

1. In light of substantial pendency of appeals at Appellate level, before the Commissioner (Appeals) a Public Interest Litigation (PIL) was filed by the All India Federation of Tax Practitioners under Articles 226/227 of the Constitution before the Delhi High Court. The Petitioner emphasized the need for a policy to expedite appeal resolutions, an increase in the number of Commissioners (Appeals), and the provision of essential infrastructural support. Additionally, the Petitioner sought clear guidelines for the chronological disposal of appeals and the issuance of orders within 10 days after the conclusion of hearings.

2. The Central Board of Direct Taxes (CBDT) responded with a detailed affidavit, outlining the historical and future approach of dealing with pending appeals. The Court held that since the CBDT's proposed plan, including the Central Action Plan for the financial year 2023-24, addresses the Petitioner's concerns effectively, the petition stands dismissed.

3. The CBDT's roadmap forms part of Chapter III, Litigation management under the Central Action Plan. In such plan, pending appeal has been categorized as follows:

2. *Lakshya Budhiraja vs. UOI & Anr (W.P.(C) 8044/2020 dated 15 December 2020).*

Category	Time of filing/Demand involved
A1	Appeal filed before 1.4.2023 and demand involved above Rs. 50 crores
A2	Appeal filed before 1.4.2023 and demand involved above Rs. 1 crore up to Rs. 50 crores
B1	Appeal filed before 1.4.2023 and demand involved above Rs. 10 lakh up to 1 crore
B2	Appeal filed before 1.4.2023 and demand involved up to Rs. 10 lakh
C	Current appeals filed during FY 2023-24

4. The Central Action Plan stipulates that:

   a. Appeals falling under categories A1 and those filed before 01.04.2020 for categories A2 and B1 must be disposed of by the end of the financial year 2024;

   b. Case set aside and restored to be disposed on priority;

   c. Appeal filed after 01.04.2020 to be taken if appeals filed prior to such date i.e. A1, A2 and B1 category remains undisposed/insufficient;

   d. To ensure disposals of 350-450 appeals throughout the year and also meeting the quarterly target.

5. Also, to expedite delay in disposal of appeals, the Central Board of Direct Taxes (CBDT) has issued Circular 279/Misc/M-102/2021-ITJ dated 29 December 2021. The Circular provides the situation where the appellate authority is empowered to permit priority or out-of-turn consideration to cases. The CBDT has notified the following situations in which can be heard out of turn by the Commissioner (Appeals):

   a. Cases having Demand above Rs. 1 Cr,

   b. Cases where refunds, as originally claimed in ITR, arc in excess of 1,00,000/-,

   c. Cases where directions to this effect have been issued by Courts,

   d. Cases where request is made by senior citizens and/or super senior citizens,

   e. Any other case or genuine hardship

Whilst there is no tab provided upon filing the appeal where taxpayers can file a request for an early hearing if covered by the above Circular, in absence of the same, it is suggested that an email can be sent to NFAC demonstrating how the appeal preferred is covered under the above categories which necessitates early disposal . In case post initiation of proceedings, if it is stalled and the link for filing submission is available, a further request for expediting the hearing referring to the above Circular can be filed.

V. Key aspects of the Faceless Appeal Scheme

1. Condonation of Delay

a. As per Clause 5(1)(ii)(a) of the Scheme, the Commissioner (Appeals) may condone the delay in filing appeal beyond the time

permitted under section 249 of the Act by recording the reasons for such condonation or otherwise in the appeal order.

b. There is no defined mechanism as to how the taxpayer needs to approach situation of condonation under the Scheme. Accordingly, as practiced earlier, at the stage of filing appeal itself a separate application along with affidavit demonstrating 'sufficient cause' for delay can be enclosed. A sufficient cause is a matter of fact.

c. Typically, if the condonation request is not well substantiated, the appeal is likely to get dismissed without Commissioner (Appeals) adjudicating the merits of the case. In such situation, the taxpayer shall not be left with any other option but to face the second round of litigation on Income Tax Appellate Tribunal ('ITAT') remanding the matter back to Commissioner (Appeals) (subject to delay being condoned at ITAT level).

d. Thus, it is pertinent that the request for condonation of delay should be filed with a speaking application justifying delay on day-by-day basis. The judiciary has allowed condonation only if the taxpayer is able to provide sufficient cause/justify the delay with appropriate backup on a day-by-day basis[3]. The same is based on the principle that the law assist those who are vigilant and not those who sleep over their rights. In certain decisions the Courts have also adopted a liberal view in relation to 'sufficient cause' so as to advance substantial justice[4]. The same is based on aphorism 'to err is human' and any lapses on the part of litigation should not normally cause the doors of judicature permanently closed before him. Basis such decisions, the Taxpayer could plead that a pragmatic/reasonable approach should be followed, and each days' delay is not required to be justified.

e. It is recommended that the delay in filing appeal is justified with a reasonable reason and associated backups. While filing the application for condonation, the taxpayer should also specifically seek an opportunity of hearing in the letter for condonation of delay as well as on the e-filing portal upon issuance of notice by the Commissioner (Appeals), NFAC. Depending upon the outcome of the hearing, the Appellant can seek leave to file further submission/ justification or evidence to demonstrate the sufficient cause.

3. *Ramlal, Motilal and Chhotelal vs, Rewa Coalfields Ltd. 1962 SC 361, Advani & Co. (P.) Ltd. vs. R.D. Shah, CIT [(969) 72 ITR 395 (SC).*

4. *Vedabai vs. Shantaram Baburao Patil (2002) 253 ITR 798, Collector, Land Acquisition vs. MST Katiji (1987) 167 ITR 471 (SC).*

2. Filing of Additional Ground

a. As per Clause 5(1)(vi) of the Scheme, the taxpayer may file an additional ground of appeal specifying reasons for its omission earlier. Once such additional ground of appeal is filed, the Commissioner (Appeals) shall seek comments from the Assessing Officer through NFAC. Upon receipt of the same, the Commissioner (Appeals) will admit the additional ground if satisfied that the omission of the ground was not intentional or unreasonable or may not admit the same by recording the reason for the same in the order.

b. In relation to the above, the Scheme does not prescribe any specific form/format in which such application for additional ground needs to be filed. However, as practiced earlier, such ground should be raised by way of a separate application and should be signed by the person competent to sign the appeal memo [i.e. person who can sign the return of income u/s 140 of the Act]. The application should also contain corresponding statement of facts. Likewise, in case if ground already raised requires to be modified, the same should be made vide separate letter signed by the competent person.

c. The application should also clarify the reason for not raising the additional ground before the Assessing Officer. Thus, the ground raised should be bonafide and that same could not have been raised earlier for good reason[5].

d. In case if there are multiple grounds which are additional/ modified, it is recommended to file a letter with consolidated grounds of appeal for ease of reference and to ensure that none of the ground is missed or incorrectly addressed.

3. Filing of Additional Evidence

a. As per Clause 5(1)(viii) of the Scheme, if any additional evidence is submitted by the taxpayer, the Commissioner (Appeals) through NFAC shall forward the same to the Assessing Officer for furnishing their report on the admissibility of such additional evidence. After receiving such report, the Commissioner (Appeals) shall decide whether such evidence is to be accepted or rejected by recording the reason in the final order.

b. If Commissioner (Appeals) admit such evidence, before conducting the appellate proceeding, the Commissioner (Appeals) shall prepare a notice to provide an opportunity to the Assessing Officer to produce any evidence or document, or any witness in rebuttal of the evidence or witness produced by the taxpayer and furnish a report thereof. For such report, the Assessing Officer can

5. *CIT vs. Pruthvi Brokers & Shareholders (2012) (349 ITR 336) (Bom HC).*

request Commissioner (Appeals) to direct taxpayer to provide such evidence/document as it may specify or examine any other person on witness. If Commissioner (Appeals) deem it fit, issue a notice accordingly to the taxpayer or any other person being the witness as the case maybe.

c. With regard to admission of additional evidence, having regard to Rule 46A of the Income Tax Rules, 1962 various courts have categorically held that whenever additional evidence is produced, it is the duty of the taxpayer to establish why such evidence could not be produced before the lower authorities and hence, the same should be addressed in the cover letter for admission of additional evidence.

d. The additional evidence should be duly page numbered and the relation of such additional evidence with the specific ground should also be clearly brought out in the cover letter. This shall make it convenient for Commissioner (Appeals) as well as the Assessing officer to understand the relevance of such additional evidence and its importance for particular ground. As matter of practice, the Commissioner (Appeals) shall forward the report of the Assessing Officer with the Appellant and seek its rebuttal and submission.

e. Further, it is equally important for the Commissioner (Appeals) to seek a report from the Assessing Officer as various courts have remanded the matter back to Commissioner (Appeals) in cases where an opportunity was not provided to the Assessing officer. In such event Tribunal has directed Commissioner (Appeals) to re-adjudicate the matter after calling for remand report from the Assessing Officer.

4. Power of Enhancement

a. Section 251 of the Act read with Clause 5(1)(ix) of the Scheme provides power to Commissioner (Appeals) to enhance an assessment or a penalty or reduce the amount of refund after providing a show-cause notice to the taxpayer.

b. The power to enhance the income has been exercised by the Commissioner (Appeals) in varied situation. Such authority stems from the principle that the power of the Commissioner (Appeals) is co-terminus with those of the Assessing Officer. The validity of the same has been contested by the Assessee and the Courts have adopted divergent views[6].

6. *Shapoorji Pallanoji (44 ITR 891) (SC), Sardari lal & Co. (251 ITR 864)(Delhi HC) , Nirbheram Daluram (224 ITR 610) (SC).*

c. The common thread of principle based on which such power has been tested is whether the Commissioner (Appeals) is entitled to identify the new source of income or can only enhance the income on the issues inquired by the Assessing Officer during assessment proceedings. Having regard to the proposition that the Revenue has at its disposal power to initiate revision/reassessment proceedings to tax new/additional source of income, the Courts have held that the power of enhancement available with the Commissioner (Appeals) should be restricted and do not entitle the Commissioner (Appeals) to travel beyond matter arising out of issues enquired by the Assessing Officer.

d. Likewise, it has been adjudicated that the power of enhancement can be extended only to the extent it could have been exercised by the Assessing Officer. Thus, if the Assessing Officer is seized with a case of limited scrutiny and if it is under appeal, the Commissioner (Appeals) may not be entitled to examine any new issue not falling within the scope of limited scrutiny.

e. The issue also arises as to whether Commissioner (Appeals) can record his opinion/satisfaction for an issue which the Assessing Officer has failed to do so in the course of assessment proceedings. The Courts have held that if a particular authority is nominated to record his satisfaction, being a specific requirement under the relevant provisions, it cannot be exercised by any other authority and hence, such jurisdictional defect in recording the satisfaction cannot be cured by the Commissioner (Appeal) by exercising power of enhancement[7].

f. It is important to note that the above aspects of scope of enhancement are contentious in nature and requires case specific examination in light of various judicial precedents on the subject matter.

5. Stay Proceedings

a. Once the demand is raised under section 156 of the Act and if the issue is under appeal, the Assessee prefers stay of demand before the Assessing Officer. In case the Assessing Officer rejects the request, the Assessee has an option to apply for stay of demand by making an application before the Commissioner (Appeals) or Administrative Principal Commissioner of Income Tax ('PCIT').

b. The Judiciary has held that appellate authority exercises quasi-judicial powers and hence power to consider prayer for stay of demand is incidental and ancillary to the power to hear appeals. Thus, Commissioner (Appeals) has power to grant the stay of demand[8].

7. *Siddhartha Ltd - 345 ITR 223 (Delhi HC).*
8. *Maheshwari Agro Industries vs. UOI (2012) 206 taxmann 375 (Raj HC), Sanjay Kumar Sohd vs. ITO (354 ITR 177) (MP HC).*

c. Also, in case of Dr. Thuruthiyath Suma [WP(C) NO. 34783 OF 2022], the Kerala High Court has directed the NFAC to provide a link to the taxpayer for filing stay petition before faceless Commissioner (Appeals) and to keep the demand in abeyance until decided by the NFAC. Similar was the Direction issued by the Kerala High Court, recently in case of Kolloorvila Service Co-operative Society Ltd (WP(C) No. 27445 of 2023). However, so far, separate link is not provided in the System.

d. In absence of such link, if the taxpayer wants to pursue stay of demand with Commissioner (Appeals), it can consider filing of the same before the NFAC via email [delhi.cit.nfac@incometax.gov.in] and seeking allotment of such application to relevant authority seized with the appeal. Besides filing of such application, it is recommended that the taxpayer also copy communication sent alongwith the application to the jurisdictional assessing officer with a request not to take any coercive action referring to relevant judicial precedents for the proposition that during the pendency of stay application, recovery cannot be initiated.

e. Filing of stay application with Commissioner (Appeals) could result in expeditious disposal of appeal since practically, the Commissioner (Appeals) shall not decide the stay application and prefer to dispose-off the appeal itself.

VI. Do's and Don'ts

Having regard to the process under Faceless Appeal Scheme, envisaging minimal human interaction, to ensure easy disposal of the appeal, following are certain Do's and Don'ts which can be considered:

(a) Grounds of Appeal (GoA) – The grounds should clearly bring out the issue under consideration but at the same time should not be argumentative. Taxpayers can consider taking a separate ground for any factual error committed by the Assessing Officer. A generic ground can be raised so as to cover any additional ground/legal issues not forming part of the other grounds. However, as may be required, new grounds should be raised by following the process of filing an application for additional ground of appeal. Issue regarding lack of opportunity of being heard or violation of principle of natural justice should be raised where necessitated. The same corroborates the reason for filing additional evidences, if any. Errors, if any in computing the demand/set-off or carry forward of losses, etc should also be considered.

(b) Statement of Facts (SoF) – The same should be detailed covering all factual aspects surrounding the addition/disallowance and divided separately for each issue/ground involved in appeal. Any incorrect observations made by the Assessing Officer on facts should be specifically addressed, besides issues like lack of opportunity of being heard. The SoF should be concerning only with the factual matrix alongwith its correlation to the issue under appeal and very briefly set-out reasons for imputing the disallowance/addition and key legal proposition which the Appellant wishes to raise in appeal.

The same should not include any detailed legal arguments, which can be separately addressed as a part of the written submission. Based on past experience, at times, the e-Notices issued by the Faceless CIT(A) are missed. In such a situation, a detailed SOF can assist the Appellate Authority to take decision.

(c) Condonation application – In case of belated filing, the appeal should also include a separate application for condonation of delay demonstrating the 'sufficient cause' for delay including affidavit (executed on stamp paper) describing the circumstances and providing justification for delay of each day. The Appellant can crave leave to supplement the reasons further alongwith furnishing of evidence as may be required by the Commissioner (Appeals) and seek an opportunity of hearing.

(d) Update the contact details – The e-filing account should reflect the correct email address as well as contact details to receive all notices in time. It should be noted that in Faceless scenario, the communications are only shared on the contact details reflected on the portal. Hence, this is one of the key aspects and necessary corrections should be forthwith updated.

(e) Timely submission - Submit your responses within the specified timelines to ensure timely compliance and avoid any ex-parte order. If the time available for preparation of the submission is not sufficient, file an adjournment request clearly explaining the circumstances under which the same is being sought. Repeated request for adjournment may not be entertained. One can consider filing partial submission with a request for additional time to demonstrate bonafides and intent of assisting in completion of the appeal.

(f) Written submissions – The following construct can be followed for each of the issue involved (consisting of one or multiple grounds):

- Summary of the issue involved and the relief sought (in few lines/ paras)
- Facts of the case (alongwith reference to relevant pages of paperbook)
- Detailed submission on arguments (factual as well as legal principles)
- Reference to judicial precedents including decisions in assessee's own case
- Prayer

Needless to mention that the submission should be concise and not repetitive in nature. Emphasis should be on facts. Any errors committed by the Assessing Officer should be distinctly brought to the notice in the written submissions. Multiple grounds can be consolidated, where necessary. Technical issues to be dealt separately vis-à-vis merits of the case. If only particular extract of the factual evidence is relevant, while the entire evidence is made part of the Paper Book, such extract can be reproduced as a part of the submission for ease of reference. Only select judicial precedents should be cited with narrative on facts of such case and decision and its relevance to the facts/issue under consideration should be correlated. To the extent available, magazine citations should be used, especially for decisions which are not

made part of the Paper Book. If common issues are involved across multiple years, it is preferred to provide a year-wise chart of the grounds with reference to written submissions filed or critical highlights like issue being squarely covered with judicial precedents, etc. The submissions via the portal can be filed as partial submission so that the portal enables if any additional submission on account of any subsequent change in the law or in light of judicial pronouncements or otherwise.

(g) Paper Book – The submission is generally accompanied by a Paper Book, consisting of the factual evidence as well as judicial precedents which the Assessee would like to rely upon. The Paper Book should contain a certificate regarding submission of factual evidence before the Assessing Officer. The Paper Book should be paginated in continuation and if new evidence is filed, the paging should be in continuation of the earlier Paper Book to avoid any confusion. The Paper Book should necessarily be indexed and such index can be divided ground-wise for ease of reference. The factual evidence, if lengthy, the relevant pages can be highlighted for ease in perusal. Legal Paper Book can be kept separate and the relevant paras of the decision concerning question involved, relevant facts and operating para can be specified in the Index to such Legal Paper Book for quick reference.

(h) Follow-up submissions – It is seen that the Commissioner (Appeals), NFAC has been issuing multiple notices at regular intervals. The subsequent notices may also contain a separate Annexure seeking additional details/ clarification and hence, the taxpayer should carefully peruse the entire notice. If detailed written submission is filed earlier, reference can be drawn to such submission instead of uploading the same again. Depending upon the complexity and the number of the issues involved, the Assessee can consider summarizing the issue rather than merely drawing reference to the submissions filed earlier. Also, if NFAC has not sent notice/s of hearing for other years, the same can also be made part of such submission to trigger such proceedings and seek consolidated disposal of all the pending appeals, where atleast common issues are involved.

(i) Virtual hearing – It is recommended to opt for virtual hearing, especially for complex issues or any novel/unsettled legal propositions. The window for hearing is limited and it is important to make maximum use of it. All the papers filed as a part of Paper Book which are required to be referred should be kept open and can be shared on the screen while describing the issues and the corresponding arguments. At regular intervals or on completing discussion around a particular ground, the representative can check for any questions/clarifications required. Where necessary, on completion of each ground, the key aspects on facts/legal proposition should be summarized to ensure completeness. If in the course of hearing, it is recognized that there is a need to file additional documents/ submission, a request should be made to enable the link for filing the same. If required, explaining the reasons, another opportunity of hearing should be sought.

(j) Additional ground/evidence – As discussed in detail above, admission of

additional ground/evidences is at the discretion of the authorities and requires the Assessee to substantiate the reasons of not raising/filing the same earlier. The grounds are required to be signed by the competent person who is required to sign the appeal and the same should also be accompanied by corresponding statement of facts. In case of additional evidence, the cover letter should also describe its relevance with the ground raised in the appeal.

(k) Technical glitch – In case of any technical glitch, either at the time of filing the appeal or submission or during the course of representing the matter via video conferencing, relevant screenshot should be maintained and such incident should be immediately notified to NFAC on the prescribed email address with request for additional opportunity to file or for hearing.

VII. Recommendations to the CBDT

1. Consolidation of cases: In multiple cases, the Taxpayer is in appeal across various years and mostly appeals across such consecutive years is concerning the same issue/s. In Form 35, the Taxpayer/ the Appellant also provides the details of pending appeals. There is no clarity if all appeals are being handled by the same Faceless CIT(A). Importantly, from a consistency standpoint, such should be the case and can be brought to the notice of the Taxpayer with the hearing intimation shared by the NFAC.

2. Demo of video conferencing: It is recommended to upload a Demo of video-conferencing so that certain aspects like how to share the screen, etc is known to the Taxpayer, especially the ones who are appearing themselves and not assisted by Tax professionals. Similar Demos can also be planned for other procedural aspects.

3. Hearing opportunity for CIT(A): There might be cases where though the Taxpayer has not sought a hearing opportunity but CIT(A) may need the same especially in complex matters or if there is any disconnect in detail sought vis-à-vis filings made by the Assessee. The present Scheme only envisages hearing opportunity triggered by the Taxpayer. To such extent, the Scheme can be modified to enable CIT(A) to seek hearing.

4. Separate links for various matters: Currently, the only link available for the Appellant is either for filing the submission or to seek an adjournment. The same are also enabled upon receipt of first notice.

   It is recommended that link is enabled upon filing of appeal to file:

   (a) Stay application;

   (b) Additional Ground;

   (c) Additional Evidence.

   Such link can also be integrated with an intimation to the Assessing Officer since he is required to take cognizance of the same or comment/share his report.

   Thereafter, upon trigger of first notice itself a link should be available to seek hearing opportunity. The same will also enable CIT(A)'s office to auto-track in which all cases hearing has been sought.

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DIRECT TAXES
Supreme Court

Keshav B. Bhujle
Advocate

1 ***Principal CIT vs. Krishak Bharti Co-Operative Ltd.; [2023] 458 ITR 190 (SC): Dated 15/09/2023:***

Double taxation avoidance — Foreign tax credit — Dividend — Tax payable in contracting state deemed to include tax which would have been payable but for tax incentive granted under laws of contracting state designed to promote development — Assessee investing in joint venture company set up as its permanent establishment in Oman — Joint venture company aiding to promote economic development within Oman — Omani tax laws exempting dividend received by assessee from its permanent establishment — Assessee entitled to credit of tax that would have been payable in Oman on dividend but for exemption: S. 90 of ITA 1961: DTAA between India and Oman, Arts. 7, 11, 25: A. Ys. 2010-11 and 2011-12

The assessee entered into a joint venture with a company in Oman to form a joint venture company registered in Oman under the Omani laws. The assessee had a 25 per cent. share in the joint venture company. The assessee had a branch office in Oman which was independently registered as a company under the Omani laws having permanent establishment status in Oman in terms of article 25 of the Double Taxation Avoidance Agreement between India and Oman. The branch office maintained its own books of account and submitted returns of income under the Omani Income-tax laws. Under the Omani tax laws, exemption was granted to the dividend income by virtue of amendments made in the Omani tax laws with effect from the year 2000. The Assessing Officer brought the dividend income to tax in the assessment according to the Indian tax laws, allowing credit in respect of the tax which would have been payable in Oman, in respect of the dividend income received by the assessee from the joint venture company. The Principal Commissioner, in revision, held that no tax credit was due to the assessee u/s. 90 of the Income-tax Act, 1961 because no tax had been paid and that the assessee was not covered under the exemption.

The Tribunal allowed the assessee's appeal holding that the order passed by the Principal Commissioner was without jurisdiction and not sustainable in law. The Department's appeal therefrom was dismissed by the High Court holding that according to the relevant terms of the Double Taxation Avoidance Agreement between India and Oman, the assessee was entitled to claim the tax credit, which had been rightly allowed by the Assessing Officer.

The Supreme Court dismissed the appeal filed by the Department and held as under:

"i) Paragraph (4) of article 25 of the Double Taxation Avoidance Agreement clarifies that the tax payable in a contracting State mentioned in paragraphs (2) and (3) of the article shall be deemed to include the tax which would have been payable but for the tax incentive granted under the laws of the contracting State and which are designed to promote development. It was clear from the letter of the Omani Finance Ministry (in response to a query by the joint venture company) that dividend distributed by all companies, including tax-exempt companies, would be exempt from payment of Income-tax in the hands of the recipients.

ii) By extending the facility of exemption, the Government of Oman intended to achieve its object of promoting development within Oman by attracting investments. Since the assessee had invested in the project by setting up a permanent establishment in Oman, as the joint venture company was registered as a separate company under the Omani laws, it was aiding to promote economic development within Oman and achieve the object of article 8 (bis) of the Omani tax law. The Omani Finance Ministry concluded by saying that tax would be payable on dividend income earned by the permanent establishments of Indian investors, as it would form part of their gross income under article 8, if not for the tax exemption provided under article 8 (bis) of the Omani tax laws. Article 8 (bis) exempts dividend tax received by the assessee from its permanent establishment in Oman and by virtue of article 25 of the Double Taxation Avoidance Agreement, the assessee was entitled to the same tax treatment in India as it received in Oman. There was no reason why the assessee's establishment in Oman would not be treated as permanent establishment when for about 10 years it was so treated, and tax exemption was granted basing upon the provisions contained in article 25 of the Double Taxation Avoidance Agreement read with article 8 (bis) of the Omani tax laws.

iii) The letter was a clarificatory communication interpreting the provisions contained in article 8 and article 8 (bis) of the Omani tax laws. The letter itself had not introduced any new provision in the Omani tax laws. The Department had not demonstrated why the provisions contained in article 25 of the Double Taxation Avoidance Agreement and article 8 (bis) of the Omani tax laws would not be applicable and, consequently, we hold that the appeals have no sub- stance and deserve to be dismissed which are hereby dismissed."

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2 ***Kerala State Co-Operative Agricultural and Rural Development Bank Ltd. vs. AO; [2023] 458 ITR 384 (SC): Dated 14/09/2023:***

Co-operative society — Special deduction u/s. 80P(2)(a)(i), (4) of ITA 1961 —Assessee a state-level agricultural and rural development bank engaged in providing credit facilities to its members who were co-operative societies — Not a co-operative bank so as to require licence to carry on banking business — Assessee a co-operative credit society — Entitled to deduction of profits attributable to business of banking or providing credit facilities to its co-operative society-members: A. Y. 2007-08

The assessee was a State-level agricultural and rural development bank governed as a co-operative society by the Kerala Co-operative Societies Act, 1969 and was engaged in providing credit facilities to its members who were co-operative societies. The question was whether the assessee was entitled to claim deduction u/s. 80P of the Income-tax Act, 1961 of the whole of its profits and gains attributable to the business of banking or providing credit facilities to its members who were all co-operative societies.

The Supreme Court held as under:

"i) Section 80P of the Income-tax Act, 1961 speaks about deduction in respect of income of co-operative societies from the gross total income referred to in sub-section (2) of the section. Sub-section (2) of section 80P enumerates various kinds of co-operative societies. Sub-section (2)(a)(i) states that if a co-operative society is engaged in carrying on the business of banking or providing credit facilities to its members, the whole of the amount of profits and gains of business attributable to any one or more of such activities shall be deducted. The sub-section makes a clear distinction between the business of banking on the one hand and providing credit facilities to its members by co-operative society on the other. By sub-section (4), the provisions of section 80P shall not apply to any co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank. The expressions "co-operative bank", "primary agricultural credit society" and "primary co-operative agricultural and rural development bank" are defined in the Explanation as "co-operative bank and primary agricultural credit society" having the meanings respectively assigned to them in Part V of the Banking Regulation Act, 1949.

ii) Chapter V of the 1949 Act states that the Act shall apply to co-operative societies subject to modifications made thereunder. Section 56 begins with a non obstante clause and states that notwithstanding anything contained in any other law for the time being in force, the provisions of the Act shall apply to, or in relation to, co-operative societies as they apply to, or in relation to banking companies subject to the modifications, that references to a "banking company" or "the company" or "such company" shall be construed as references to a co-operative bank. The expression "banking company" is defined in section 5(c) of the 1949 Act as any company which transacts the business of banking in India. "Banking" is defined in section 5(b) of that Act to mean the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise. Therefore, a banking company must transact banking business vis-à-vis the public. Thus, in the first place a co-operative society must be engaged in banking business as defined in section 5(b) of the 1949 Act. For that, section 22 of the 1949 Act, speaks about licence to be obtained by a bank to do banking business, and clause (o) of section 56 states that no co-operative society shall carry on banking business in India unless it is a co-operative bank and holds a licence issued in that behalf by the Reserve Bank, subject to such conditions, if any, as the Reserve Bank may deem fit to impose. Secondly, a co-operative society must obtain a licence under section 22 of the 1949 Act, only

if it functions as a co-operative bank and not otherwise. Thus, a co-operative society including a co-operative credit society which is not a co-operative bank does not require a licence to function as such.

iii) Further, section 2(d) of the National Bank for Agriculture and Rural Development Act, 1981 defines "Central co-operative bank" while section 2(u) defines a "State co-operative bank" to mean the principal co-operative society in a State, the primary object of which is financing of other co-operative societies in the State which means, it is in the nature of an apex co-operative bank having regard to the definition under section 56 of the 1949 Act, in relation to a co-operative bank. The proviso states that in addition to such principal society in a State, or where there is no such principal society in a State, the State Government may declare any one or more co-operative societies carrying on business of banking in that State to be also or to be a State co-operative bank or State co-operative banks within the meaning of the definition. Section 2(v) of the 1981 Act defines "State land development bank" to mean "a co-operative society which is the principal land development bank (by whatever name called) in a State and which has as its primary object the providing of long-term finance for agricultural development". Section 2(w) states that words and expressions used in the 1981 Act which are not defined therein but defined in the Reserve Bank of India Act, 1934, shall have the meanings respectively assigned to them in that Act. Section 2(x) of the Act states that words and expressions used in the 1981 Act and not defined either in the Act or in the 1934 Act, but defined in the 1949 Act, shall have the meanings respectively assigned to them in the 1949 Act.

iv) A State co-operative bank or Central co-operative bank under the 1981 Act, is essentially a principal co-operative society either in a district or in a State, respectively, the primary object of which is the financing of other co-operative societies in the district or the State respectively.

v) Since the words "bank" and "banking company" are not defined in the 1981 Act, the definition in sub-clause (i) of clause (a) of section 56 of the 1949 Act has to be relied upon. In other words, if a co-operative society is not conducting the business of banking as defined in clause (b) of section 5 of the 1949 Act, it would not be a co-operative bank and not so within the meanings of a State co-operative bank, a Central co-operative bank or a primary co-operative bank in terms of section 56(c)(i)(cci). Whereas a co-operative bank is in the nature of a banking company which transacts the business of banking as defined in clause (b) of section 5 of the 1949 Act. But if a co-operative society does not transact the business of banking as defined in clause (b) of section 5 of the 1949 Act, it would not be a co-operative bank. Then the definitions under the 1981 Act would not apply. If a co-operative society is not a co-operative bank, then such an entity would be entitled to deduction but on the other hand, if it is a co-operative bank within the meaning of section 56 of the 1949 Act read with the provisions of the 1981 Act then it would not be entitled to the benefit of deduction under sub-section (4) of section 80P of the Act. Conversely, if a co-operative society is not a co-operative

bank within the meaning of section 56 of the 1949 Act, it would be entitled to the benefit of deduction under section 80P of the Act.

vi) A co-operative society which is not a State co-operative bank within the meaning of the 1981 Act would not be a co-operative bank within the meaning of section 56 of the 1949 Act.

vii) Under section 56 of the Banking Regulation Act, 1949 only three co-operative banks have been defined, namely, State co-operative bank, Central co-operative bank and primary co-operative bank which are covered under section 56(cci) read with (ccvii) read with the provisions of the National Bank for Agriculture and Rural Development Act, 1981. Thus, it is only these three banks which are co-operative banks which require a licence under the 1949 Act to engage in banking business. If a bank does not fall within the nomenclature of these three banks as defined under the 1981 Act, it would not be a co-operative bank within the meaning of section 56 of the 1949 Act irrespective of whatever nomenclature it may have or structure it may possess or incorporated under any Act. Further if a bank has to be a State co-operative bank, there has to be a declaration made by the State Government in terms of section 2(u) of the 1981 Act. A co-operative bank would engage in banking business on obtaining a licence under section 22(lb) of the 1949 Act. If an entity does not require a licence to do banking business within the definition of banking under section 5(b) of the 1949 Act, it would not fall within the scope of sub-section (4) of section 80P of the Income-tax Act, 1961.

viii) The assessee was not a co-operative bank having regard to the provisions of the Banking Regulation Act, 1949 and the National Bank for Agriculture and Rural Development Act, 1981 so as to require a licence thereunder for carrying on banking business. Further, under the provisions of the Kerala State Co-operative Agricultural Development Banks Act, 1984, "agricultural and rural development bank" means the Kerala Co-operative Central Land Mortgage Bank Limited, registered under section 10 of the Travancore-Cochin Co-operative Societies Act, 1951, i. e., the assessee. Thus, the assessee was not a co-operative bank within the meaning of sub-section (4) of section 80P of the Act. The assessee was a co-operative credit society u/s. 80P(2)(a)(i) of the Act whose primary object was to provide financial accommodation to its members who were all other co-operative societies and not members of the public. Although the assessee society was an apex co-operative society within the meaning of the 1984 Act, it was not a co-operative bank within the meaning of section 5(b) read with section 56 of the 1949 Act. The assessee was entitled to claim deduction of the whole of its profits and gains of business attributable to the business of banking or providing credit facilities to its members who were all co-operative societies u/s. 80P of the Income-tax Act, 1961."

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DIRECT TAXES
High Court



Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

1 *Ramona Pinto vs. DCIT [IT Appeal No. 2610 of 2018, dated November 8, 2023; Bombay High Court]*

Charge of income tax – section 4 of the Income Tax Act, 1961 – settlement amount received by assessee for relinquishing all her rights and claims as a partner in partnership firm is related to her retirement from firm and is not in nature of income chargeable to tax. [Section 148 of the Act]

Facts

Assessee was one of the partners in a family constituted partnership firm. Dispute arose between the partners when the Assessee came to know that she was treated as retired partner by her brothers. Matter was referred for arbitration by the Hon'ble Supreme Court and as per final settlement terms it was agreed that Assessee was to receive ₹ 28 crore (in instalments) for relinquishing all her rights, claims and demand against the firm/partners. During relevant AY 2010-11; Assessee had received ₹ 7 crore. The assessee filed her return of income for AY 2010-11 on 16.07.2010. In the said return the assessee has mentioned that as the amounts were received upon her retirement from the said Firm, the same were not chargeable to tax under the Act. The return was processed and accepted under section 143(1) of the Act.

Subsequently, the AO reopened the assessment of the assessee on the allegation that ₹ 7 crores received during AY 2010-11 is chargeable to tax had escaped assessment. However, while passing the final reassessment order, the AO made addition of ₹ 28 crores considering it to be business income under section 28(iv) of the Act. The AO in alternative also held that the amount is chargeable to tax as capital gains.

On appeal, the CIT(A) accepted that the provisions of Section 28(iv) had no application to the present case and that the amount of ₹ 28 Crores could not be assessed as capital gains in the hands of assessee. The CIT(A), however, held the amount of arbitration award as income from other sources under Section 56(1) of the Act because the amount had been received for settlement of a composite bundle of rights. On further appeal the Appellate Tribunal, Mumbai upheld the view of the Ld. CIT(A). The assessee being aggrieved by the order of the Appellate Tribunal, filed an appeal before the Hon'ble Bombay High Court under section 260A of the Act.

Decision of Hon'ble High Court

Hon'ble High Court was pleased to allow the appeal of the assessee by observing that the reasons recorded nowhere mentioned as to how arbitration award was in the nature of income. Mere belief of AO without any statement as to how the amount constituted

income, would render the reasons recorded as vague and incomplete. For treating the amount as income; the AO referred to some information/material only at the time of disposing the objection. Formation of belief should be based only on information/material available at the time of forming such belief and not subsequent to that. Reasons cannot be supplemented or improvised subsequently. Moreover, during assessment of AY 2008-09; it was accepted by the AO that arbitration award was not chargeable to tax; thus, reopening the assessment for taxing the said amount would constitute 'change of opinion' which is impermissible in the guise of re-assessment. The AO had initiated re-assessment proceedings without forming requisite 'belief' and only with a view to enquire/investigate the facts; which is impermissible. Accordingly, the re-assessment proceedings were held to be invalid.

Hon'ble High Court further observed that Tribunal erred in holding the arbitration award as 'special income' chargeable under section 56(1) because receipt on capital account cannot be treated as income unless specifically brought within the scope of definition of income. Further, section 45(4) brings to tax any distribution of capital asset, inter-alia upon retirement; whereas in this case there was no distribution of capital asset. Moreover, section 45(4) cast the taxability on the 'Partnership firm' and not on the retiring partner. Accordingly, the amount was not chargeable u/s. 45(4). Even if the arbitration award is considered as inheritance; the same is specifically excluded from the ambit of section 56(2)(vii). Further, if the amount is considered as receipt upon family arrangement; then also the same is not taxable as held in the case of ***CIT vs. Sachin P. Ambulkar (2014) 42 taxman.com 22 (Bom)***. If the amount received is regarded as in the nature of damages, then such receipt is considered as 'capital receipts' not chargeable to tax as capital gains as held in ***CIT vs. Abbasbhoy A. Dehgamwalla (1992) ITR 29 (Bom HC)***. Burden to show that a particular receipt is of an income nature is on the Revenue which has not been discharged in the facts of the present case; accordingly, the arbitration award was held to be not chargeable to tax.

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2 ***Chaitanya Memorial Educational Society vs. Commissioner of Income-tax (Exemption) [2023] 155 taxmann.com 378 (Telangana)***

Collection and recovery – Section 220 of the Income Tax Act, 1961 - Assessee deemed in default – application for rectification of assessment order pending for adjudication – assessee, being an educational institution registered under section 12A, should be granted stay of demand under section 220(6) of the Act

Facts

The assessee is an educational and charitable society engaged in activities of educational and medical relief. The assessee is duly registered under Section 12A of the. The assessee's return for AY 2018-19 was taken up for scrutiny assessment and entire gross receipt has been brought to tax and thereby creating huge demand of ₹ 2,50,00,000/-. On going through the assessment order, the assessee realized certain mistakes apparent on record and therefore, filed an application under section 154 of the Act to rectify the said errors. However, the application filed by the assessee remained unadjudicated for more than two and half years. In the mean time the assessee had also challenged the assessment order in the first appeal. The assessee had also made an application under section 220 of the Act to stay the demand till the disposal of the appeal by the appellate authorities.

The application for stay was decided by the authorities under section 220(6) partially allowing the application and directing the assessee to pay the partial demand of ₹ 35,00,000/- as a condition precedent for stay of demand.

Being aggrieved by the order passed under section 220(6) of the Act, the assessee challenged the same before the Hon'ble Telangana High Court by way of Writ Petition under article 226 of Constitution of India.

Decisions of the Hon'ble High Court

Hon'ble High Court was pleased to allow the writ petition filed by the assessee by observing that the assessee has been availing exemption from payment of Income Tax on account of the fact that the assessee is a charitable institution and the works executed by it again is with a charitable purpose. Since the assessee availed the said benefits all along prior to the issuance of demand notice and even in the subsequent years as well, there does not seem to be any prejudice going to be caused if the stay application under Section 220(6) is decided in favour of the assessee.

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3 *Ganesh Das Khanna vs. ITO & Ors. [WPC 11527/2022; dated 10 November 2023; Delhi High Court]*

Reassessment – Section 148 of the Income Tax Act, 1961 – notice issued under section 148 of the Act between 1 April 2021 to 30 June 2021 for AY 2016-17 and AY 2017-18 where alleged escapement of income is less than ₹ 50 lakhs are unsustainable in law

1. The issue before the Hon'ble Delhi High Court was validity of reassessment proceedings, based on initiation notices issued between 1 April 2021 to 30 June 2021, for AY 2016-17 and AY 2017-18.

2. In the present case, Hon'ble Delhi High Court analysed the revenue's argument that the due dates for issuing the statutory notices under section 148 of the Act is deemed to be extended to 30 June 2021, in view of the provisions of Section 3(1) of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 and the notifications issued thereunder from time to time. The broad arguments made by the Revenue were as under:

   (i) Observation of the Hon'ble Supreme Court in the case of ***Ashish Agrawal (2023) 1 SCC 617*** ought to be appreciated

   (ii) Observation of the Hon'ble Delhi High Court in the case of ***Mon Mohan Kohli (2021) SCC OnLine Del 5250*** ought to be appreciated

   (iii) The Hon'ble Delhi High Court had already decided the issue against the Assessees in the case of Touchstone and Salil Gulati

   (iv) The third and fourth provisos to Section 149(1), allowing exclusion of certain periods, would bring the impugned notices within the limitation period

3. The Hon'ble Delhi High Court observed that in the case of Ashish Agrawal, the Hon'ble Supreme Court was called upon to grapple with a piquant situation, which was the creation of the revenue, concerning the viability of notices issued on or after 01.04.2021, when Finance Act 2021 had already kicked in. The Hon'ble Supreme Court, in order to balance the interests of the Assessees and the revenue and based on a broad consensus arrived at between the ld. ASG and the counsels representing the

Assessees, directed that Section 148 notices issued between 1 April 2021 to 30 June 2021, based on the amended provisions, ought to be deemed as notices issued under Section 148A(b). The Hon'ble Supreme Court had also directed that all defenses, including those available under Section 149 of the amended 1961 Act, would remain open to the assessees and also that all rights and contentions available to the Assessees and the revenue under Finance Act, 2021 and in law would continue to subsist.

4. The Hon'ble Delhi High Court observed that there was no discussion or deliberation concerning provisions of TOLA and notifications issued thereunder in the Hon'ble Supreme Court decision in the case of Ashish Agrawal.

5. Based on the above, the Delhi High Court rejected the revenue's argument that the defense of limitation as available under Section 149(1)(a) of the Act. In-fact if the revenue wanted to make arguments based on the provisions amended by the Finance Act, 2021, it was eligible to do so. Hence, Ashish Agrawal's case was of no help to the Revenue in the present situation.

6. Concerning Revenue's reliance on the decision of the Delhi High Court in the case of Mon Mohan Kohli, the Hon'ble Court observed that the subsequent decision of the Apex Court in Ashish Agrawal's held the fort, an accordingly nothing could turn over based on the revenue's reading of certain observations made in Mon Mohan Kohli's case.

7. Further, regarding Revenue's arguments based on the Delhi High Court judgments in Touchstone and Salil Gulati's case, the Hon'ble Court observed that those decisions did not deal with the facts and circumstances, which obtain in the instant cases, i.e., income escapement of less than ₹ 50 lakhs. Accordingly, the principle of res-judicata did not apply. In any case, the Hon'ble Delhi High Court observed that if the revenue's argument was allowed, it would run counter to the Hon'ble Apex Court's decision in case of Ashish Agrawal and therefore cannot be entertained.

8. Coming to the Revenue's argument that as Central Government had extended time-limits for initiation of reassessment, by virtue of notifications issued under Section 3(1) of TOLA, Revenue's actions were in order, as they were taken before the end date, i.e., 30 June 2021, the Hon'ble Delhi High Court observed that:

   (i) There was no power under TOLA, and that too via Notifications, to amend the statute, which had the imprimatur of the Legislature. Since, with effect from 1 April 2021, i.e., when the Finance Act, 2021 came into force, the Notifications that are sought to be portrayed by the Revenue as extending the period of limitation, were contrary to the provisions of Section 149(1)(a) of the Act. Accordingly, the Hon'ble Delhi High Court held that the Notifications had lost their legal efficacy.

   (ii) Further, the power which was conferred on the Central Government under Section 3(1) of TOLA, was concerning the end date for completion of proceedings and compliances and could not be construed as power to extend the period of limitation. Based on

the ratio in Ashish Agrawal's case, period of limitation as per Section 149(1)(a) would apply to AY 2016-17 and AY 2017-18.

9. Lastly, concerning the Revenue's argument based on the provisos to Section 149, the Hon'ble Delhi High Court observed that:

   (i) The third proviso appended to Section 149 of the Act, inter alia, provides that the time or extended time allowed to the assessee as per the show-cause notice issued under Section 148A(b) of the 1961 Act shall stand excluded for computation of limitation provided under the said Section.

   (ii) The fourth proviso provides that where the timeframe adverted to in the third proviso leads to the situation that the period of limitation available to the AO for passing an order under 148A(d) is less than seven (7) days, then the remaining period shall stand extended to seven (7) days. Consequently, the limitation under Sub-Section (1) shall be deemed to be extended accordingly.

10. Concerning the third proviso, the Hon'ble Delhi Court held that its plain reading would show that it only excludes the timeframe obtaining between the date when the notice under Section 148A(b) was issued and the date by which the assessee filed its response within the time and extended time provided in the said notice. Therefore, the date cannot be shifted beyond the date when the original notice under Section 148 of the unamended 1961 Act was issued, which was treated, as per the judgment in Ashish Agrawal's case, as notice under 148A(b). Concededly, these notices were issued between 01.04.2021 and 30.06.2021, by which time the limitation under Section 149(1)(a) of the Act had already expired.

11. Concerning the fourth proviso, the Hon'ble Court held that as third proviso itself is not applicable the fourth proviso has no role.

12. In view of the above, the Hon'ble Delhi High Court held that there was nothing that supported the Revenue's argument of 'travel back in time' and therefore the provisions of amended Section 149 would apply.

13. The Hon'ble Delhi High Court also held that Instruction dated 11.05.2022 are beyond the powers conferred on the CBDT under Section 119 of the 1961 Act and that certain paragraphs are clearly ultra vires the provisions of Section 149(1) of the amended 1961 Act. The Hon'ble Court also observed that legislative policy also indicated that it was not worthwhile to chase assessees beyond three years, where the alleged escaped income was less than ₹ 50 lakhs.

14. Accordingly, the Hon'ble Delhi High Court concluded that reassessment initiation notices issued between 1 April 2021 to 30 June 2021 for Ay 2016-17 and AY 2017-18 where alleged escapement of income is less than ₹ 50 lakhs are unsustainable in law.

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DIRECT TAXES
Tribunal


CA Viraj Mehta CA Kinjal Bhuta

1 *J. B. Advani & Company Pvt. Ltd. vs. ACIT (ITA No. 2544/Mum/2023 dt. 06.11.2023) (AY 14-15)*

Sec. 32 rws. Sec 71/72 - Brought forward unabsorbed depreciation – allowed to be set off against short term capital gain

Facts

The assessee had filed the return of income disclosing a total income of ₹ Nil. The case was selected for limited scrutiny. AO found that the assessee has adjusted brought forward unabsorbed depreciation of ₹ 15,11,939/- against short term capital gain of the current year, whereas the assessee had disclosed the income under the head, income from house property, short-term capital gains, and income from other sources and the business loss of ₹ 2,27,37,524/-. AO disallowed the set-off of unabsorbed deprecation of earlier year and assessed the total income of ₹ 15,11,940/- and passed the order u/s. 143(3). CIT(A) confirmed the action of AO without considering assessee's submissions. Being aggrieved, appeal was filed before ITAT.

Held

ITAT held that CIT(A) has erred in sustaining the action of the AO in denying claim of set-off of unabsorbed depreciation carried forward from earlier year against the income from short term capital gains earned in the current year. Unabsorbed depreciation carried forward from earlier year has to be treated on par with the Current Year depreciation. Relying on case of Bombay High Court in case of ***Bond Safety Belts vs. DCIT in ITA No. 853 of 2018 dt. 27.09.2023***, ITAT held that the unabsorbed depreciation carried forward from earlier years to set off against the short term capital gains. Accordingly, appeal filed by the assessee was allowed.

2 *Xania Trading Private Ltd vs. ACIT [ITA No. 2188/Mum/2023 dt. 02.11.2023] (AY: 2016-17)*

Sec. 68 – Interest-free unsecured loan availed – assessee proved the identity, creditworthiness, and genuineness – lender had sufficient own funds to advance loan – no additions merely because the loan is interest-free

Facts

The assessee is engaged in the business of retail trading. The assessee had availed an unsecured interest-free loan of ₹ 79 lakhs. The AO noted that the assessee had filed only the loan confirmation and income tax return of the lender but not the bank statement. Accordingly, the AO was of the opinion that the assessee failed to prove the genuineness of the loan transaction, and the amount was added as unexplained cash credits u/s. 68. The

assessee preferred an appeal before CIT(A). The CIT(A) took a view that the assessee has not paid any interest to the lender and further, the lender was incurring a huge loss by paying heavy interest to its creditor and it is unlikely that such a lender was not charging interest on loans advanced by it. The CIT(A) confirmed the additions made by the AO.

Held

Before ITAT, it was argued by the AR, that the assessee had filed loan confirmation, financial statements, ITR acknowledgment, and also an extract of the bank statement of the lender and that the assessee has discharged its onus. It was argued by the AR, that the AO had not examined the documents properly and contended that the assessee failed to furnish bank statement. The AR further submitted that the lender had sufficient funds to advance the loan to the assessee and that the charging of interest would depend upon the terms agreed between the parties and the same is not relevant for examining cash credits u/s. 68 . The DR argued that the assessee had received interest interest-free loan from a company burdened with heavy interest payments on its borrowings and also incurring huge losses and it is beyond the scope of human probabilities that a loss-making company would give interest free advance to the assessee. The DR contended that it is unlikely for such a company to provide interest interest-free loan to the assessee. The ITAT noted from the financial statements of the lender, that the lender had sufficient own funds and share application money and the loan amount lent is meagre compared to the own funds, thus the creditworthiness of the creditors stands proved. The assessee furnished the bank statements of the lender which showed the flow of funds through the banking channel. Thus, the assessee proved the genuineness of the transaction and fulfilled the initial onus placed upon him. The ITAT held that the contention of the CIT(A) is incorrect as the lender had sufficient own funds to advance loan to the assessee and the lender incurring heavy losses and paying huge interest cannot be the reason to disbelieve the genuineness of the loan transaction and seems to be based on just surmises. The ITAT set aside the order passed by the CIT(A) and directed the AO to delete the additions made under section 68 of the Act.

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3 ***M/s. Net Agri Company Pvt. Ltd. vs. ITO [ITA No. 4945/Del/2019 dt. 24.11.2023] (AY: 2012-13)***

Sec. 69 – CIT(A) travelled beyond the directions issued by ITAT – made addition on a new source without issuing show cause notice – addition not sustainable

Facts

The assessee had purchased an immovable property at an auction from Bank. The AO passed an ex-parte order u/s. 144 of the Act making an addition of the entire purchase value on account of source being unexplained. Before the CIT(A), the assessee submitted additional evidence. However, CIT(A) did not consider the same and confirmed the additions. Appeal was filed before the ITAT as the lower authority did not consider the additional evidences. The ITAT set aside the matter to the file of CIT(A) with a direction to admit the additional evidence and decide the matter afresh on merits. On set aside, though the CIT(A) deleted the addition on account of source of purchase of immovable property, but made addition on some other stand that the assessee failed to prove the source of cash deposit in the bank account used for repayment of loan taken from M/s. LMJ Logistics Ltd., for the property purchased. Thus, both the revenue and the assessee have preferred an appeal before Hon'ble ITAT.

Held

Before ITAT, the AR argued that the assessee had purchased the property by availing a loan from Development Credit Bank. However, as its disbursement was taking time, an unsecured loan was obtained from M/s. LMJ Logistics Ltd. Subsequently, when the loan amount was disbursed by the Development Credit Bank, the same was utilised to repay the unsecured loan availed from M/s. LMJ Logistics Ltd. The CIT(A) has erred in going beyond the directions of the Hon'ble ITAT by finding a new source of addition, alleging cash deposits when the amount was returned to M/s. LMJ Logistics Ltd. It was further submitted that the AO made an addition on account of the alleged undisclosed source of investment u/s. 69 which was changed by CIT(A) to an addition u/s. 68. The AR relied on various judgments to support his contentions that the CIT(A) cannot examine and make an addition upon an issue which does not arise from the assessment order without actually providing a show cause notice. Per contra, the DR contended that the CIT(A) was examining whether the investment in the property was from a genuine source. The ITAT held that the assessee had filed sale deed, loan sanction letter, account statements, and unsecured loan confirmations from M/s LMJ Logistics Ltd., and the CIT(A) was satisfied that the investment was not from an undisclosed source. However, the CIT(A) casted doubts concerning the cash deposits made in the bank account before the repayment of the loan to LMJ Logistics. It was held that the CIT(A) travelled beyond the directions issued by the ITAT. Even otherwise, the CIT(A) should have issued notice to the assessee to examine the source of cash deposits in the bank. However, the CIT(A) failed to do so and thus the addition made on a new source is not sustainable. It was also held that examining the source of investment in property differs from examining the source of cash deposits made in the bank. Thus, the appeal filed by the assessee was allowed.

4 *Rehwa Corporation Pvt. Ltd. vs. ITO [ITA No. 1165/Mum/2017 dt. 07.11.2023] (AY: 2012-13)*

Sec. 68 – Assessee received share application money – addition made as creditworthiness and genuineness not proved – share applicants were having meagre profits irrelevant -- money was routed through bank account and share applicants were having sufficient funds – no addition based on mere information of investigation wing - impugned additions were deleted

Facts

The assessee is an investor in shares. The assessee's case was selected for scrutiny. The AO noticed that the assessee had received share application money from various persons. The assessee was asked to furnish details of shareholders, directors, share application money received during the year, share premium charged etc. The assessee furnished the details except for two parties, viz. Sarang Chemicals Ltd and Sheetal Bio Agro Tech Ltd. The AO also received information from ADIT(Investigation) that a search was conducted in the case of Sarang Chemicals Ltd, wherein its director admitted that his companies, including the group companies (Sheetal Bio Agro Tech Ltd.), were providing accommodation entries. Accordingly, the AO asked the assessee to prove the identity, creditworthiness, and genuineness of the share application money received from the above two companies. The assessee furnished copies of the balance sheet and bank statement of both the above-said companies. The assessee also submitted that the share application money was received through a banking channel. Hence, the transactions are genuine and cannot be considered as unexplained cash credit. The AO did not accept the explanations of the assessee as they were furnished belatedly. The AO relied on the information

received from the Investigation Wing and held that the assessee had received accommodation entry by way of share application money and addition was made u/s. 68 of the Act. The CIT(A) relied on the statement given by the director of share applicants and acknowledged that the assessee had furnished the balance sheet and bank statements of share applicants but still took the view that the assessee had failed to furnish PAN, ITR, and computation of total income of the share applicants. The CIT(A) noted that the share applicants had a NIL or meagre income and confirmed the additions.

Held

Before ITAT, the AR argued that the assessee had furnished the copies of balance sheet of the share applicants and bank statements which proved their creditworthiness and genuineness of the transaction. It was also submitted that Mr. Pratik Shah was a director only up to 2005 and not during the year under consideration in both companies. The AR furnished copies of the affidavit obtained from the present director. The DR submitted that Mr. Pratik Shah was controlling the affairs of both the share applicant companies, the statement of Shri Pratik Shah was provided to the assessee. The ITAT held that the assessee had furnished the financial statements of both the share applicants and the investment made is duly reflected in their respective balance sheets. Since the investment was made from the funds available, the creditworthiness stands proven. The contentions of the AO that the share applicants are having meager or no profits do not hold good as there is no bar under the law to make investments out of borrowed funds. The AO did not find any deficiency or fault in the evidence produced by the assessee. Hence the assessee has discharged the initial burden placed upon him. The ITAT citing various decisions concluded that additions cannot be made solely based on information received from the Investigation Wing. Thus, the matter was set aside with a direction to delete the addition made under section 68 of the Act.

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5 ***Standard Fiscal Markets Pvt. Ltd. vs. DCIT [ITA No. 1469/Mum/2023 dt. 03.11.2023] (AY: 2016-17)***

Sec. 68 – Assessee received loans – all details submitted – assessee being a mere conduit entity and was not the actual beneficiary – matter set aside on direction that if assessee is a mere conduit entity then no addition can be sustained

Facts

A search was conducted u/s. 132 of the Act and the ledger of the assessee was found in the digital data backup seized from the premises of M/s Trimax IT Infrastructure and Services Ltd. Accordingly, proceedings u/s. 153C were initiated against the assessee. The AO noted that the assessee has taken loans of ₹ 13,95,00,000/- from 3 different parties. Assessee furnished the names, addresses, and PAN of the aforesaid creditors. The assessee was then asked to show cause as to why the sum credited in their books should not be added u/s. 68, as during the search conducted on Trimax IT, it was found that the aforesaid 3 creditors had received funds from Trimax IT pursuant to bogus purchase transaction. In response, the assessee submitted that the loans are genuine and made through proper banking channels & the loans received from the aforesaid parties were invested in M/s Trimax IT and there is a possibility that in some of the cases, money was transferred from M/s Trimax IT to the parties who have given loans to the assessee for business transaction purpose. The assessee also submitted that against the unsecured loan, the assessee had issued secured compulsory convertible non-transferable debentures. The AO held

that the assessee failed to establish the creditworthiness of the lender and genuineness of the transaction. Furthermore, the Directors/ CFO of the aforesaid creditors admitted that they had provided accommodation entries of bogus purchase bills to Trimax IT, and on the instructions of Trimax IT the funds were transferred to various companies including the assessee. The AO disregarded the submissions made by the assessee and made an addition of ₹ 13,95,00,000/- u/s. 68 of the Act. CIT(A) confirmed the order of the AO. Being aggrieved, assessee has preferred an appeal before the Hon'bleITAT.

Held

Before ITAT, it was argued by the AR that the assessee had furnished the necessary documents supporting the loan transaction. The AR submitted that the money was paid by Trimax IT to the aforesaid three creditors who after retaining their commission, transferred the balance to the assessee as a loan which was subsequently invested by the assessee into Trimax IT. To support this claim, the AR referred to the bank statements to establish that the money which originated from Trimax IT has again gone back to Trimax IT through various layers, including the assessee, as share application money. The AR also referred to the assessment order passed in the case of Trimax IT wherein an addition of ₹ 2,75,50,000/- u/s. 69C. The AR argued that since the said amount has already been taxed in the hands of Trimax IT, the same amount should not be taxed again in the hands of the assessee as it was merely a conduit entity. The ITAT noted that the aforesaid creditors had provided accommodation entries to Trimax IT. The ITAT held that in the case of Trimax IT, the addition made was only ₹ 2,74,50,000/-, however, in the present case, an amount of ₹ 13,95,00,000/- was given to the assessee as loan, which was further invested by the assessee into Trimax IT. It was held that the documents supporting the assessee's claim of being a conduit entity were not examined by any of the lower authorities, therefore, the matter was restored to the file of AO for denovo adjudication. ITAT directed the AO that upon examination, if it is established that the amount actually belongs to Trimax IT and is received by the assessee through the aforesaid 3 creditors only as a conduit, then relief must be granted to the assessee since the tax is to be charged from the real beneficiary and not from the conduit party.

Thereby, appeal filed was allowed and matter was set aside to the AO.

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6 *Anirudh Venkata Ragi (ITA No. 352/Hyd/2019 dt. 21/11/2023]*

Section 68 – Penny stock LTCG/unexplained source – Upheld the addition made by the Tax Authorities following the principle of preponderance of human probabilities

Facts

The Assessee-Individual, for AY 2015-16, purchased 1,50,000 shares of a company, Life Line Drugs & Pharma Ltd., at ₹ 6 per share and sold the same at ₹ 283 per share, deriving profits of ₹ 2.60 Cr within a span of 19 months and claimed the exemption under Section 10(38) of the Act. The AO took note of investigations undertaken by the IT Department and SEBI, whereby a huge syndicate of entry operators, share brokers and money launderers involved in providing bogus accommodation of long-term capital gains and short term capital loss was unearthed. The AO also considered the statement of a third party admitting to provision of accommodation entries of long-term capital gains with respect to certain companies including Life Line Drugs & Pharma Ltd. Thus, the AO held the transaction to be bogus and disallowed the exemption under Section 10(38) and made

addition of the entire sale consideration as income from unexplained source. The CIT(A) confirmed the addition. Aggrieved by the decision of the CIT(A), the Assessee filed an appeal before the ITAT.

Held

The ITAT held that the Assessee is not a professional in dealing in shares and neither in the past nor in the subsequent years engaged into any such investment to have a huge windfall. The Tax Authorities considered the enquiries conducted by SEBI and identifying some of the issues of the manipulations of share market with the inputs given by their own surveillance system and also by the Income Tax Department. The ITAT further observed that the Tax Authorities view that the unpredictably high rising of price supported the presumption that all is not fair and there is manipulation of price. If the Assessee has been so informative about the nuances of the share market, he would have certainly undertaken such adventurous activities at least in future by making such investment in the unknown stock, but the Assessee never again entered into any such transaction. The ITAT observes that the Assessee has meticulously completed the paperwork by routing his entire investment through banking channel, but the results thereof are altogether beyond the pale of common course of natural events, human conduct and public and private business. In the present facts of the case, the ITAT held that what is apparent is not real and what is real is not made to appear.

The ITAT relied on the decision of co-ordinate bench in case of ***Shri Sanat Kumar vs. ACIT (ITA No.1881/Del/2018 dated 14/06/2019)*** and the decision of the Hon'ble Calcutta High Court decision in the case of ***Pr. CIT vs. Swati Bajaj (2022) (139 Taxmann.com 352***).

7 *Ganesh Rambhau Pakhe vs. ITO, Ward 2(3) (ITA No. 1097/PUN/2023 dated 14/11/2023)*

Section 143(3) – Regular assessment – Invalid if initiated based on an invalid return

Facts

The Assessee is an individual engaged in the business of sale of auto parts. Original return was filed on 11-09-2015 declaring total income at ₹ 5,01,460, which was a belated return u/s 139(4) of the Act. Thereafter, the Assessee filed a revised return on 11-02-2016 declaring total income at ₹ 95,21,060. In such return, the Assessee declared long term capital gain and also claimed exemption under section 54F of the Act. The case was selected for limited scrutiny under CASS on account of "Deduction claimed under the head Capital Gains". The AO completed the assessment at a total income of ₹ 1,51,53,060 by adopting income as per the return of income filed on 11-09-2015 declaring a total of income at ₹ 5,01,460. The CIT(A) did not allow the assessee's claim of exemption u/s. 54F on sale of the property and also confirmed the disallowance out of selling expenses. On the last ground raised before him, the CIT(A) directed the AO to start the computation of income by adopting the income offered in the revised return at ₹ 95,21,060. The assessee preferred an appeal before the ITAT.

Held

The ITAT noted the facts that the concerned assessment is for year 2015-16, the original return was furnished on 11-09-2015, which was a belated return filed u/s. 139(4). Revision of a belated return, prior to the AY 2017-18, was not permissible. Thus, the ITAT held that the revised return filed by the assessee was an invalid return which did not require any action thereon.

If the assessment is found to be done of the original return, then no illegality can be attributed to it. The case was selected for limited scrutiny under Computer Aided Scrutiny Selection (CASS) for the reason of "Deduction claimed under the head Capital Gains". The ITAT thus held that it was only in the revised return that the Assessee offered income from long term capital gain after claiming exemption u/s. 54F and hence, it is evident that the return taken up for scrutiny was the revised return and not the original one. Having observed the same, the ITAT concluded that the selection of the case under Limited Scrutiny under CASS on the basis of the invalid return and thereafter the issuance of jurisdictional notice u/s. 143(2) can have no consequence except the passing of an illegal assessment order. Therefore, the assessment order and the consequential proceedings flowing therefrom stands vacated.

8 *DCIT vs. M.G.Metalloy Pvt Ltd [ITA No. 3631/Del/2019 dt. 01.11.2023] (AY: 2012-13)*

Sec. 153C - AO had failed to demonstrate that the seized documents belonged to the assessee company - seized documents mentioned in the satisfaction note were found to be unrelated – No Incriminating Material Found - Assessment Invalid and quashed

Facts

A search and seizure operation were conducted on 11.11.2014 in M/s. Apple Group of Companies ("AGC"). Certain incriminating materials were found and seized during the operation, which allegedly belonged to the assessee. Subsequently, a notice under section 153C was issued to the assessee. Thereafter, order u/s 153C was passed. On appeal before CIT(A), assessee challenged the legal validity of the notice under section 153C, asserting that no satisfaction, as required by the section, was recorded by the AO. Appellant contended that no documents belonging to the assessee were found and seized during the search, and there was no incriminating material that had a direct nexus with the relevant AY. CIT(A) accepted the assessee's submissions and held that the AO had failed to demonstrate that the seized documents belonged to the assessee company. The notice under section 153C was ab-initio invalid and legally unsustainable. The assessment framed based on this notice was consequently quashed. Being aggrieved, department filed appeal before ITAT

Held

ITAT upheld the CIT(A)'s decision that the satisfaction of the AO is crucial for the validity of a notice under section 153C. AO could not establish that the seized documents belonged to the assessee, and no seized document had any bearing on the determination of the total income of the assessee. Citing the Supreme Court's decision in ***PCIT-3, Pune vs. Sinhgad Technical Education Society***, ITAT held that the nexus between the notice and the incriminating material found during the search must exist. The addition made by the AO lacked the necessary connection with any seized documents, rendering the notice legally unsustainable. Hence, appeal filed by department was dismissed.

9 *LG Electronics India Ltd vs. ITO(TDS) (ITA No. 7926/Del/2018 dt. 21/11/2023]*

Section 201 – Assessee in default – No TDS liability in case of notional attribution of profits to the PE of the payee – Impossibility of performance

Facts

Assessee is a wholly owned subsidiary of L.G. Electronics, Korea. The Assessee was subject

to survey operation under section 133A of the Act. In the course of the survey, the Tax Authorities observed that the Assessee has entered into various international transactions with LG Korea and other associated non-resident group companies for purchase of raw materials, finished goods, capital goods, etc. The Tax Authorities on the basis of certain papers and documents impounded during the survey and statements from certain expatriate employees held that LG Korea and other non-resident associated group companies constitute Permanent Establishment (PE) in India and hence, the Assessee was liable to deduct tax under Section 195 on payments made to such companies. Accordingly, the Tax Authorities held the Assessee to be in default under section 201(1)/201(1A) for non-deduction of tax at source for AY 2005-06 to 2010-11. Against the said order, the Assessee preferred writ petitions before the Hon'ble Delhi HC. The Hon'ble HC set aside the order under Section 201(1)/201(1A) and directed the Tax Authorities to issue fresh show-cause notice. In compliance of the HC's directions, the Tax Authorities issued fresh show-cause notices under section 201, and after, almost four years, issued another show-cause notice and ultimately passed orders under section 201(1)/201(1A) for the relevant AYs 2005-06 to 2011-12, holding the Assessee to be in default and raised aggregate demand of ₹ 103.36 Cr. In the assessment proceedings of the payee companies, the Dispute Resolution Panel (DRP) held that, except LG Korea, no other non-resident companies have PE in India. It further held that in case of LG Korea, 20% markup on 50% of salary cost should be considered as profits attributable to the PE. Accordingly, drawing reference from the decision of the DRP in case of payees, the CIT(A) gave partial relief against the order under section 201 and reduced the demand to ₹ 12.36 Cr. Aggrieved by the decision of the CIT(A), the Assessee preferred the present appeals on validity of order/time barring date and on merits.

Held

Regarding validity, the Assessee contended that the proceedings under section 201 ought to have been completed within a period of one year from the end of the year in which the proceedings were initiated. In this regard, the Assessee relied on the decision of the Hon'ble Special Bench in case of ***Mahindra & Mahindra Ltd vs. DCIT (2009) (30 SOT 374),*** which was upheld by the Hon'ble Bombay High Court. The Department's Representative relied upon the Allahabad High Court decision in the case of ***Mass Awas Pvt Ltd vs. CIT (Misc Bench No.1088 of 2016 dated 10/07/2017)***. Since, the Hon'ble ITAT pronounced the decision on merits in favour of the Assessee, it did not dealt with the issue of validity of the order/time barring date.

The ITAT held that from facts it becomes clear that while passing order u/s 201, the basis for computation of TDS default was payment to LG Korea. However, subsequently, the position changed substantially as in case of payee entity/LG Korea, the DRP, change the method of attribution of profit to a notional payment of 20% of mark-up on 50% of salary cost of expatriate employees. Thus, the Hon'ble ITAT held that the basis of attribution of profit to the payee, is purely notional as it is the specific case of the assessee that it has not paid any salary cost of expatriate employees to LG Korea. Thus, when the basis of attribution is notional, the Assessee cannot be expected to perform an impossible act of computing TDS on notional payment. The ITAT, considering the development in assessment of the payee, also observed that the factual position as on date, is there is no tax liability of the payee. Hence, on overall consideration of facts and material, the Assessee cannot be treated as assessee in default u/s 201.

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ML-137

INTERNATIONAL TAXATION
Case Law Update

Dr. CA Sunil Moti Lala
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A. High Court & Supreme Court

1 *Augustus Capital PTE Ltd. vs. CIT(IT) [TS-718-HC-2023(DEL) (Delhi HC)]*

Section 9(1)(i)-*Explanation* 6 & 7, cure vagueness posed by prior retrospective amendments, hence, retrospective

Facts

i. Assessee, a Singapore based company, invested in equity and preference shares in another Singaporean company [Accelyst Pte. Ltd. (APL)] between January 2013 to March 2014. In Mar 2015, assessee sold its Singaporean investment to an Indian company for ₹ 41.24 Cr. For AY 2015-16, assessee declared Nil income and claimed a refund of ₹ 17.84 Cr.

ii. The assessee relied on the provisions of Explanation 6 & 7 to Section 9(1)(i) and submitted that since it acquired only 0.05% of the ordinary share capital and 2.93% of the preference share capital of the Singaporean Company and had no right of management and control on its affairs, hence the capital gains arising on account of transfer of shares was not taxable in India and that the aforesaid explanations though introduced in the year 2015, had retrospective application.

iii. Revenue made an addition of long term capital gain of ₹ 36.33 Cr (sale consideration of ₹ 41.24 Cr less COA of ₹ 4.91 Cr.) which was upheld by DRP and set aside by the Hon'ble Tribunal.

iv. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court noted that Section 9(1)(i) of the Act inter alia seeks to impose tax albeit via a deeming fiction qua all income accruing or arising, whether directly or indirectly, through or from any property in India or through or from any asset or through transfer of asset situate in India, or the transfer of a capital asset situated in India.

ii. The judgment of the Supreme Court rendered in Vodafone, however, excluded from the scope and ambit of Section 9(1)(i) of the Act gain or income arising from the transfer of shares of a company located outside India, although the value of the shares was dependent on assets which were situated in India.

iii. It is to cure this gap in the legislation, Explanations 4 and 5 were introduced via FA 2012, which were given effect from 01.04.1962. Explanations 4, 5 inter-alia provide that the "share" or

"interest" derives, directly or indirectly, its value "substantially" from the assets located in India. Explanations 4 and 5 presented difficulties in that the expressions "share and interest" and "substantially" found in the explanations were vague, resulting in undue hardship for transferors/ assessee where the percentage of share or interest transferred was insignificant. The Finance Minister's Speech while introducing the amendments (Explanation 6 & 7) via FA 2015 (extracted below) is revelatory since a dim view was taken of the retrospective amendment brought about by Explanations 4 and 5, effective from 01.04.1962.

> *"114. The provision relating to indirect transfers in the Income-tax Act which is a legacy from the previous government contains several ambiguities. This provision is being suitably cleaned up….These changes would eliminate the scope for discretionary exercise of power and provide a hassle free structure to the taxpayers…"*

Therefore, the legislature took a curative step regarding the vague expressions used in Explanation 5, i.e., "share/ interest" and "substantially".

iv. The argument advanced on behalf of the Revenue, boiled down to the fact that the insertion of Explanations 6 and 7 via FA 2015 was to take effect from 01.04.2016 and could only be treated as a prospective amendment. The argument advanced in support of this plea was that Explanations 6 and 7 brought about a substantive amendment in Section 9(1)(i) of the Act. This submission was misconceived because Explanations 6 and 7 alone would have no meaning if they were not read along with Explanation 5. Therefore, if Explanations 6 and 7 have to be read along with Explanation 5, which concededly operates from 01.04.1962, they would have to be construed as clarificatory and curative. If Explanations 6 and 7 are not read along with Explanation 5, no legislative guidance would be available to the AO regarding what meaning to give to the expression "share/interest" or "substantially" found in Explanation 5.

v. The Hon'ble High Court relied on Commissioner of Income Tax vs Alom Extrusions Ltd., (2010) 1 SCC 489 and Commissioner of Income Tax I, Ahmedabad vs Gold Coin Health Food Private Ltd., (2008) 9 SCC 622 and concluded that although Explanations 6 and 7 were indicated in FA 2015 to take effect from 01.04.2016, they could be treated as retrospective, having regard to the legislative history which led to the insertion of Explanations 6 and 7.

vi. Accordingly, the Hon'ble High Court held that no substantial question of law arose and dismissed the Departments appeal.

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2 *PCIT vs. Qualcomm India (P.) Ltd. [(2023) 156 taxmann.com 288 (HC - Delhi)]*

Once working capital adjustment is granted, there is no requirement of any further adjustment w.r.t outstanding receivables

Facts

i. The assessee permitted a ninety (90) days credit period to its AEs. Once the credit period exceeded 90 days interest was charged.

ii. The TPO interalia made adjustment on account of outstanding receivables. Further, working capital adjustment was denied by the TPO but allowed by the DRP.

iii. Before the Hon'ble Tribunal it was argued on behalf of the assessee that once working capital adjustment was allowed, then no adjustment on account of interest on receivables was required to be made.

iv. The Tribunal, has relied upon its decision dated 1-11-2021 for AY 2015-16 and concluded that the said issue needed to be restored to the Assessing Officer (AO) for verifying the assessee's claim, albeit, after providing reasonable opportunity of hearing to the assessee.

v. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court accepted the submission of the assessee that once working capital adjustment was made, no further adjustment was required to be made on account of interest received on receivables, in view of the judgment of the coordinate bench in ITA 765/2016, titled ***Pr. Commissioner of Income Tax-V vs. Kusum Health Care Pvt. Ltd.***

ii. Further, the Hon'ble High Court rejected the Revenue's argument that since a specific amendment was brought about in Section 92B of the Income-tax Act, 1961 with the insertion of the Explanation, therefore, adjustment ought to have been made - by holding that the aforesaid plea of the Revenue had already been considered in the case of ***Kusum Health Care Pvt. Ltd. (supra).***

iii. Accordingly, the Revenue's appeal was dismissed.

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3 ***PCIT vs. Fujitsu India (P.) Ltd. [(2023) 156 taxmann.com 310 (HC - Delhi)]***

RPM was held to be the most appropriate method in case of distribution and marketing activities when goods were purchased from associated entities and there were sales to unrelated parties without any processing and value addition.

B. Tribunal

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4 ***DCIT vs. Ramco Systems Ltd. [[(2023) 156 taxmann.com 640 (ITAT - Chennai)]***

Where assessee claimed relief of foreign tax credit at rate of 10 per cent of royalty received by it from Australian company and said claim was accepted by AO, but thereafter, due to revision in rate of withholding tax to 15 percent, additional withholding tax was deducted, AO was not justified in denying the claim of additional tax deduction.

Facts

i. Assessee -company, engaged in business of software developing, claimed relief under section 90 which included a sum being withholding tax deducted by an Australian company on royalty paid to assessee at rate of 10 per cent of royalty. The said claim was accepted by the AO.

ii. Thereafter, as Australian tax authorities revised rate of withholding tax to 15 percent, additional withholding tax was deducted and paid to Australian Government, after filing the return.

Consequently, the assessee claimed additional relief of FTC during the assessment proceedings which was denied by the AO.

iii. The CIT(A) directed the AO to allow the relief on account of additional FTC claim.

iv. Aggrieved, the Revenue filed appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal held that the question of foreign tax credit for withholding tax on royalty income was not in dispute.

ii. The claim did not impact the income of the assessee but only related to giving credit for additional taxes paid on the income already declared.

iii. Once credit for foreign withholding tax had been allowed@ 10%, the subsequent revisional rate of tax was also required to be allowed.

iv. Accordingly, the appeal filed by the Revenue was dismissed.

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5 *Insta Pharmaceuticals Ltd. vs. ACIT [(2023) 156 taxmann.com 391 (ITAT-Ahmedabad)]*

Where assessee had adopted internal CUP for benchmarking its transaction of loans advanced to its AEs and charged interest at rate of 3.32 percent being rate of interest quoted by internal CUP on seeking loan from Bank of Nova Scotia, Singapore (BNS), the Tribunal accepted the internal CUP and held that since BNS was a renowned bank having global operations, authenticity of quotation could not be doubted.

Facts

i. The assessee had advanced loan to its AEs and charged interest at the rate of 3.22 per cent being higher than the LIBOR based on a quotation given to the assessee by Bank of Nova, Scotia (BNS), Singapore, on seeking loan from it.

ii. The TPO, however, rejected the internal CUP taken by the assessee by holding that it was merely a quotation and proposed application of rate arrived at LIBOR/EURIPOR plus different mark ups and further addition of 100 basis points towards forex risk adjustment. Accordingly, he made an upward adjustment towards interest on advances.

iii. On appeal, the Commissioner (Appeals) upheld the order of the TPO. He distinguished the judgement of Hon'ble Gujarat High Court [***CIT vs. Adani Wilmar Ltd., (2014) 363 ITR 338 (Guj.)***] relied upon by the assessee.

iv. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal held that the internal comparable taken by the assessee, being the rate of interest quoted by the Bank of Nova Scotia, Singapore, on a proposal of USD loan to the assessee, was rejected for the reason that it was a mere quotation.

ii. The CIT(A) held that the quotation was not a reliable document and referred to the decision of the Gujarat High Court in the case of ***CIT vs. Adani Wilmar Ltd., (2014) 363 ITR 338 (Guj.)*** in this regard. The reasoning borrowed by the Commissioner (Appeals) from the aforesaid judgement was that in

the said case the Gujarat High Court had held "publication" of rates by Oil Board as authentic and reliable; and, in the instant case the quotation of the Bank of Nova Scotia, Singapore was not a publication, and therefore, could not be said to be reliable. This comparison drawn by the CIT(A) was of no relevance. How a publication was reliable, while a quotation was not had not been explained by the CIT(A).

iii. What can be derived from the order of the Gujarat High Court is that what is relevant for accepting an internal CUP is authenticity of the document from which it is derived. In the said case, it was a quotation which was published by the Oil Board and was held by the High Court to be an authentic document which could be relied upon. In the instant case, no reason was given by the authorities below, nor was there any finding by the Revenue Authorities below to the effect that quotation of the Bank of Nova Scotia, Singapore was, in any way, not authentic.

iv. There was no investigation or inquiry conducted by the Revenue Authorities with regard to the authenticity of the quotation, and the Bank of Nova Scotia, Singapore is a renowned bank having global operations. Therefore, there was no basis for doubting the authenticity of the quotation.

v. The decision of the Gujarat High Court in the case of ***CIT vs. Adani Wilmar Ltd., (2014) 363 ITR 338 (Guj.)*** supported the case of the assessee that the internal CUP being derived from an authentic document, cannot be rejected. Thus, the basis of the CIT(A) for rejecting the internal CUP of the assessee was not correct.

vi. There is no doubt that the internal CUP is the best comparable which can be taken for comparability analysis as compared to external comparable and as no deficiency had been found in the internal CUP, the external CUPs taken by the Assessing Office/TPO were to be rejected as not applicable for comparability analysis in the instant case.

vii. In view of the above, the Hon'ble Tribunal concluded that the transactions of loans advanced to AEs by the assessee was adequately demonstrated by the assessee to be at arm's length price based on the comparability analysis done with its internal comparable. Therefore, no TP adjustment to the same was warranted and the adjustment made by the authorities below was directed to be deleted.

Note – The Hon'ble Tribunal also held that where international transactions of sales had been demonstrated to be at arm's length by adopting TNMM method; after making working capital adjustment to Profit Level Indicator (PLI), there remained no scope for making any further adjustment on account of overdue outstanding receivables on account of very same sale transactions made to AEs, since working capital adjustment made to PLI took care of overdue outstanding receivables.

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INDIRECT TAXES
GST – Recent Judgments and Advance Rulings


CA Naresh Sheth CA Jinesh Shah

A. WRIT PETITON

1 *Deepak Sales Corporation vs. Union of India – Punjab And Haryana High Court [2023: PHHC: 131711-DB]*

Facts and Issues involved

Petitioner is a proprietorship trading concern. In the month of August 2017, the petitioner had ₹ 81,95,564/- as opening balance of ITC in its electronic credit ledger. During the month of August 2017, the petitioner was entitled to avail ITC to the extent of ₹ 1,40,57,836/-. However, while filing returns for the month of August 2017, inadvertently the petitioner typed the amount of ITC as ₹ 14,05,78,663/- thereby claiming excess ITC to the tune of ₹ 12,65,20,827/-.

For the same month, the central tax liability of the petitioner was ₹ 1,61,71,190/- and after discharging it by using its ITC, the balance in the electronic credit ledger account of the petitioner was left as ₹ 13,26,03,037/-.

The petitioner realized the error only while filing return on 28.12.2017. The petitioner, thereafter, kept on requesting the respondents by sending E-mail to guide them in the matter as being a new entrant in GST regime, it was not aware about the procedure for reversing ITC. Since no response was received from the respondents, therefore, ultimately, the petitioner reversed the excess ITC while submitting its return for the month of July 2018.

An audit was conducted by the GST Authorities in the year 2020 where this error came to light. GST Authorities issued a Show Cause Notice (SCN) demanding interest at the rate of 18% on the whole amount. After adjudication of the same, the adjudicating authority upheld interest on amount of ₹ 21,13,354/- (difference between eligible ITC and output liability for the month of August 2017).

Discussions by and observations of High Court

On a cursory reading of Section 50 of the CGST Act, it was observed that the legislative intent is that where ITC is wrongfully reflected in electronic ledger, the same is not sufficient to draw penal proceedings until the same or any part of such ITC is put to use so as to become recoverable and if such credit is reversed before utilization, then even the demand of interest and penalty cannot be said to be tenable.

Petitioner did not utilize the excess ITC of ₹ 12,65,20,827/- during the month of August. Further, till August 2018, the ITC balance available in the electronic ledger of the petitioner was never below ₹ 12,65,20,827/- evidencing that the petitioner had not utilized the excess ITC which was subsequently reversed in August 2018.

Therefore, following the ratio laid down in Jagatjit Industries Ltd, Grasim Bhiwani Textile Ltd and ***M/s Commercial Steel Engineering Corporation vs State of Bihar,*** the Court allowed the appeal.

Decision of High Court

Petitioner is not liable to pay the amount of interest or penalty on the excess ITC wrongly entered by it in its electronic credit ledger for the relevant period.

2 *Nahar Industrial Enterprises Limited vs. Union of India– Rajasthan High Court [Writ Petition No. 8476/2021]*

Facts and Issues involved

Petitioner is engaged in manufacturing of cotton yarn, cotton blended yarn, polyester/viscose yarn, polyester/viscose blended yarn. The rate of GST on these output supplies vary from 0.1% to 12%. Raw material used for manufacturing of aforesaid goods is cotton, manmade fiber, packing material, store consumables and spares and other inputs on which rate of GST varies from 5% to 28%.

While GST rate on many inputs and output supplies are the same, yet rate of GST on various other inputs (raw materials) is higher than the rate of GST on output supplies. Therefore, petitioner is entitled to refund of excess ITC accumulated on account of inverted duty structure as laid out in Section 54(3) of the CGST Act r.w. Rule 89(5) CGST Rules.

Circular 125/44/2019-GST dated 18.11.2019 clarifies that refund under inverted duty structure should be sanctioned even if rate of some inputs procured are equal to or lower than the rate on output supplies. Petitioner filed refund claim for the period January 2020 to March 2020 which was rejected vide order dated 24.08.2020 on the grounds that petitioner's case does not fall under category of inverted duty structure because:

- 80% of output sales carry a rate of 5% and the inputs are also majorly of 5% rate and hence the rate is more or less the same;
- Refund is mainly due to high input purchases that are in stock during the claim period;
- There was no accumulation of ITC in certain tax periods; and
- Circular mentioned above is only applicable in cases where there is a single output.

Appellate authority also rejected the appeal filed by petitioner and hence, petitioner preferred the present writ petition.

Petitioner's submission

Petitioner submitted that the rejection order is based on misinterpretation of law and is also against the letter and spirit of the statutory scheme of refund engrafted under Section 54(3) of the CGST Act.

Further, in case of multi taxable output supplies the rationale to determine whether a taxpayer falls under the category of inverted duty structure by comparing the average rate of duty of inputs with the average rate of duty of outputs. The formula specified in Rule 89(5) envisages consideration of all inputs and all outputs for the same. Moreover, the determining factor for applicability of Section 54(3) read with Rule 89(5) is rate of

tax and quantum of ITC, not value/quantum of individual inputs (going into an output) and the outputs.

GST law does not recognize the words "more or less". Even if the overall rate of all inputs is marginally higher than the rate of output, credit accumulations would entitle refund under "inverted rated structure".

The scheme of Section 54(3) of the CGST Act or the formula under Rule 89(5) of the CGST Rules does not talk of stock. It only refers to output turnover (adjusted turnover) during the claim period. Rule 89(5) of the CGST Rules, 2017 envisages that total ITC claim of inputs during the claim period gets consumed in respect of the turnover of the claim. To nullify the stock impact, even if we take a tax period of one year, credit still gets accumulated, and the petitioner is entitled for a refund of the same.

Further, the formula as set out in Rule 89(5) of the CGST Rules envisages that the ITC gets apportioned based on the turnover, i.e., it gets allocated to inverted duty supplies and to supplies other than inverted. GST Authorities have compared total output liability with total ITC to calculate the refund amount, which is incorrect. In other words, petitioner claims that it has affected inverted duty supplies in all tax periods but it cannot be ascertained by simply deducting total output liability from total ITC.

Discussions by and observations of High Court

On a comparative analysis done by the Hon'ble High Court, it was clear that the rate of output supplies is lower than the rate of inputs taken on aggregate level. The rate of tax on output ranges from 0.1% to 5% or 12% whereas rate of tax applicable on some inputs may be 5% or 12%, but on remaining inputs, rate of GST is certainly higher than 5% or 12%.

Further, the approach that "rate is more or less the same", runs contrary to the statutory scheme. This patently violates not only the letter but also the spirit of the law. Once all the inputs and output supplies on comparative basis led to a situation where the rate of tax on inputs is higher than the rate of tax on output supplies, the scheme of refund is required to be given full effect to and it cannot be denied on such considerations that rate of tax, on comparative analysis, is more or less the same.

The grounds that the claim of refund is mainly due to high input purchases, and they were in stock during the claim period (tax period) is also unsustainable in law. Rule 89(5) of the CGST Rules, 2017 envisages that total ITC claimed on inputs during the claim period gets consumed in respect of the turnover of the claim period, it does not talk of stock whatsoever. Therefore, the stock-based approach violates the statutory scheme of refund.

The ground that there was no ITC accumulated is based on factual premises but since the refund has been rejected based on misinterpretation of law, the Hon'ble High Court found such factual premises untenable in law.

On a plain reading of Section 54(3), it was observed that the statute purposely uses the words, "inputs" and "output supplies" signifying the plurality of both inputs and output supplies. It is well-settled that taxing statutes should be construed literally therefore while applying the rule of literal construction and strict interpretation, the statutory scheme of refund of unutilized input tax credit is applicable despite there being multiple inputs and output supplies provided it fulfills statutory precondition that accumulation of unutilized input tax credit is on account of rate of tax on inputs exceeding the rate of tax on output supplies.

Decision of High Court

The order was set aside with a direction to the adjudicating authority to undertake fresh exercise of consideration of claim of refund in the light of the observations.

3 *IMS Ship Managements (P.) Ltd. – Bombay High Court [(2023) 156 taxmann.com 97]*

Facts and Issues involved

Petitioner received ASMT-10 notice on 23.07.2021 which was duly replied on 23.07.2021 itself. Form DRC-01A was issued on 31.12.2021 which was duly replied on 31.01.2022. Adjudicating authorities issued SCN (Form GST DRC-01) dated 25.02.2022 without considering submissions made by petitioner.

Without granting any opportunity of personal hearing, Order (Form GST DRC-07) was uploaded on GST portal on 28.04.2022. However, the same was not communicated vide any email or SMS. Petitioner came to know about the order only on receipt of email dated 20.08.2022 from Deputy Commissioner of State Tax requesting them to submit payment of proof or copy of appeal filed.

Petitioner filed an appeal dated 26.09.2022 and stated the date of communication of order as 20.08.2022. On 12.12.2022, appellate authority passed an order dismissing the appeal as the same was filed late by 59 days which is beyond the period specified in Section 107(4) of the CGST Act.

Petitioner preferred current writ petition challenging the order passed by appellate authority on the grounds of limitation period as well as non-consideration of submissions.

Discussions by and observations of High Court

Impugned order dated 12.12.2022 passed by appellate authority is certainly bereft of any reasons. Appellate authority has not considered written submissions filed by petitioner wherein it was specifically pleaded that the limitation would start from 28.08.2022 i.e. the date of the petitioner receiving knowledge of the passing of Order.

Appellate Authority ought to have considered the submissions of the Petitioner on this issue and ought to have given his reasons in the impugned order while deciding the limitation issue. There is no consideration of these submissions by appellate authority in the order. Having not done so, the order suffers from infirmity and therefore, requires it to be quashed and set aside.

Decision of High Court

Order dated 12.12.2022 passed by appellate authority is quashed and set aside.

Appeal filed on 26.09.2022 is restored with a direction that appellate authority would give a personal hearing to the Petitioner and after considering all the submissions would pass a speaking order dealing with all the contentions of the Petitioner with respect to the issue relating to the limitation and thereafter passed a speaking order.

4 *Malik Traders vs. State of UP and Others – Allahabad High Court [2023:AHC:201260]*

Facts and Issues involved

Petitioner is a scrap dealer and has availed ITC of ₹ 6,16,074.12/- for April 2018 to September 2019. Petitioner was served with

show cause notice for wrong availment of input tax credit to which a reply was submitted by the petitioner. Being not satisfied with the reply of the petitioner, tax liability to the tune of ₹ 6,16,074/- along with penalty of ₹ 6,16,074/- amounting to ₹ 12,32,148/- was demanded from the petitioner vide order dated 4.10.2019. Thereafter, an appeal has been preferred which was rejected vide impugned order dated 6.3.2021. Hence the present writ petition.

Petitioner's submission

Petitioner has submitted that he has purchased the goods/scrap from various parties through tax invoices for which e-way bills were also generated. The said goods were transported through trucks along with bilties and payments were also made through cheques or RTGS/NEFT. On the basis of selling dealer having not shown the said purchases in its return or not deposited tax, the action cannot be taken against the petitioner. Further, if the selling dealer have not paid the tax/deposited the tax with the Government, the benefit of input tax credit cannot be denied to the petitioner.

Benefit of tax credit in the GST regime is being brought with intention to avoid cascading effect and once the tax has been charged on the bill and paid by the petitioner through banking channel, the benefit of input tax credit cannot be denied, legally.

If the selling dealer have not deposited the tax so charged from the petitioner, the selling dealer shall be penalized and not the petitioner. In the event the amount of input tax credit claimed by the petitioner is being recovered that would amount to double taxation, which is not the spirit of GST regime.

Discussions by and observations of High Court

The benefit of concession/ITC under the tax statute can be availed only on fulfilment of certain conditions or restrictions as stipulated under the Act. In the event of breach of any of the conditions as enumerated under the Act, no benefit can be conferred to the dealer.

In the ***State of Karnataka vs. M/s Ecom Gill Coffee Trading Private Limited (Civil Appeal No. 230 of 2023, decided on (13.03.2023),*** Hon'ble the Apex Court has held that primarily burden of proof for claiming ITC is upon the dealer i.e. to furnish the details of selling dealer, vehicle number, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. to prove and establish the actual physical movement of the goods. Petitioner has only brought on record the tax invoices, e-way bills, GR and payment through banking channel, but no such details such as payment of freight charges, acknowledgement of taking delivery of goods, toll receipts and payment thereof has been provided. Thus in the absence of these documents, the actual physical movement of goods and genuineness of transportation as well as transaction cannot be established. Further, no proof of filing of GSTR 2A has been brought on record, the proceeding has rightly been initiated against the petitioner.

In light of above and judgements in case of ***M/s Astha Enterprises (Civil Writ Jurisdiction Case No. 10395 of 2023) and Commissioner Commercial Tax vs. M/s Ramway Foods Ltd. (supra) (Sales/Trade Tax Revision No. 26 of 2023)*** wherein it was held that primary responsibility of claiming the benefit is upon the dealer to prove and establish the actual physical movement of goods, genuineness of transactions, etc. and if the dealer fails to prove the actual physical movement of goods, the benefit cannot be granted, the present writ petition fails.

Decision of High Court

The writ petition fails and is dismissed accordingly.

5 *Soldium and Stars Guild LLP vs. Commissioner of Central Tax (Appeals-Ii) – Delhi High Court [W.P. (C) 8182/2023 and CM No. 43743/2023]*

Facts and Issues involved

Petitioner had filed a refund application dated 21.05.2021 for claiming refund of unutilized ITC of ₹ 76,76,106 in respect of goods exported during the period November 2020 to March 2021. The adjudicating authority issued a show cause notice dated 19.07.2021 proposing to reject the refund on the grounds of non-existent suppliers and mismatch in invoice and FOB values.

The petitioner responded to the show cause notice and claimed that purchases made were genuine from dealers that were registered. Adjudicating authority on verification found that one of the suppliers named M/s Siddhi Impex was found to be non-existent. Adjudicating authority rejected the refund by order dated 05.08.2021. The petitioner preferred an appeal to Appellate Authority which was rejected by Order-in-Appeal dated 31.05.2022 on the ground that M/s Siddhi Impex was found to be non-existent, and petitioner has claimed refund fraudulently on the strength of the invoices issued by M/s Siddhi Impex.

On cancellation of registration of M/s Siddhi Impex, the petitioner voluntary deposited the amount of ₹ 21,76,260/-, being the amount of refund claimed of ITC in respect of the two invoices of Siddhi Impex, in its electronic credit ledger.

The petitioner has filed the current writ application against order rejecting balance amount of ITC refund of ₹ 54,99,846 in respect of inputs received from suppliers other than M/s. Siddhi Impex.

Discussions by and observations of High Court

High Court observed that there was no allegation regarding any irregularity in respect of the supplies made by the suppliers other than M/s Siddhi Impex. There is also no dispute as to the quantum of the ITC in respect of those supplies. Neither the Adjudicating Authority nor the Appellate Authority has raised any doubt in respect of other suppliers in their respective orders. Thus, there is no reason to deny refund in respect of ITC pertaining to supplies made by suppliers other than M/s Siddhi Impex.

Adjudicating Authority is directed to process the petitioner's claim for a sum of ₹ 54,99,846/- pursuant to its application dated 21.05.2021, along with interest, in accordance with law as expeditiously as possible and preferably within a period of four weeks from today.

Decision of High Court

The present petition is allowed. The order of adjudicating authority and appellate authority are set aside to the extent as aforesaid.

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INDIRECT TAXES
Service Tax – Case Law Update


CA Rajiv Luthia CA Keval Shah

1 *Review Petition: Commissioner of CGST & Central Excise, Mumbai East vs. Flamingo Travel Retail Ltd. 2023-TIOL-128-SC-ST-LB*

Backgrounds and facts of the case

- The Appellant filed a review petition of the decision of the Apex Court dated 10th April, 2023 wherein the Hon'ble SC had held that the Duty-Free Shops located at the Mumbai International Airport are entitled to refund of the service tax on the rent paid by them to the Mumbai International Airport for the period 1st October, 2011 to 30th June, 2017.
- The Respondent was engaged in the business running duty free shops at the arrival and departure terminals at the international airports at Mumbai and Delhi. The respondent filed an application claiming a refund of service tax paid in respect of the charges levied by Mumbai International Airport for the period in question on the basis of a notification No 41/2012-Service Tax dated 29 June 2012. The adjudicating authority rejected the refund claimed on the ground that the payment of service tax on renting of immovable property of the duty free shops was not liable to be refunded in terms of the provisions of the Finance Act 1994. The order was affirmed by the Commissioner (Appeals).
- In appeal, the CESTAT came to the conclusion that the duty free shops situated at international airports constitute a global market competing in a tax exempt environment and the levy of service tax was bereft of lawful authority. The CESTAT placed reliance on a decision of this Court in Indian Tourist Development Corporation Limited through Hotel Ashoka v Assistant Commissioner of Commercial Taxes (2012) 3 SCC 204 = 2012-TIOL-08-SC-VAT.
- The Union Government has sought to submit that the position as it obtains in relation to goods is distinct from the applicable statutory regime in respect of services. In its judgment dated 10 April 2023, this Court affirmed the judgment of the CESTAT noting that against a judgment of the High Court of Judicature at Bombay dated 28 November 2018 **[2018-TIOL-2916-HC-MUM-GST]** in Al Cuisine Pvt Ltd v UOI WP No. 8034 of 2018, a SLP (C) 33011 of 2018 was dismissed by an order dated 14 December 2018 of this Court.

Appellants' Submissions

- The Additional Solicitor General on behalf of the appellants' submit that that the applicable regime in regard to goods stands on a distinct footing from the regime applicable to the levy of service tax and later, under IGST.
- The ASG submitted that the decisions of the HC of Judicature at Bombay and the Kerala HC pertain to goods and not to the levy of service tax on the renting of immovable property. Whether this would make any difference to ultimate outcome is debatable, and would, therefore, require substantial consideration.

Decision of the Hon'ble Supreme Court

- At this stage, absent such a consideration in the judgment under review and since the issue which is raised would have large consequential ramifications, we are of the considered view that the review should be allowed.
- The SC allowed the review by recalling the judgment dated 10 April 2023. Civil Appeal No 2753 of 2023 shall stand restored to the file of the Court. The Civil Appeal shall stand tagged with the above appeals.

Author's Comments

- The above decision has a significant impact as it does not merely allows the re-opening of all the appeals but also raises the important question of "Whether the duty-free shops located at the Airport are a place outside India for the purpose of Service Tax ?"
- The judicial precedents in relation to this matter are in relation to Sale of Goods under the VAT regime. Can the same view be obtained for the purpose of Service Tax is an important question warranting thought provoking arguments.

2 *BT India Pvt. Ltd. vs. Union of India and Anr. 2023-TIOL-1502-HC-AHM-ST*

Backgrounds and facts of the case

- The Appellants' filed a writ petition against the order passed by the respondents whereby a refund claim of unutilized CENVAT credit were rejected on the grounds that the services of broadcasting, business support, IT Software and management & maintenance or repair services provided by the appellant does not qualify for "export of services" under Rule 6A of the Service Tax Rules, 1994.
- The department rejected the refunds on the following grounds:

  (i) Broadcasting Services: The ordering entity was a company based out of Mauritius but the customer operation details provided indicated beneficiaries of service located in India and also the satellite services offered by the petitioner were that of the channels broadcasted in India. The department concluded that services rendered to HO located in Mauritius also implies services being provided to branch/ representative in India, thus falling out of net of "export of services" as contemplated under the Act and Rules.

  (ii) Management, Maintenance & Repair: The appellants had failed to submit agreements of services provided to the clients located outside India. The department observed that merely because

the location of the clients is that outside India, does not mean that the services necessarily qualify for "Export of Services".

(iii) Business Support Service: The appellants had entered into an agreement with the parent company but has provided services to international customers/group entities which were possibly located in India. Also, the appellants failed to place any invoices on records.

Appellants' Submissions

- The Ld. Counsel for the appellants argued that the department neither contested the Service tax ST-3 returns filed by the appellants u/s 72 of the Finance Act, 1994 nor placed any Show Cause Notice in accordance with Section 73 of the Finance Act, 1994. Thus, it was not permissible for the department to deny the refund claim by questioning the self-assessed ST-3 returns filed by the appellants.
- It was then contended that an Adjudicating Authority cannot while considering an application for refund either question the self-assessment made by the assessee nor can it delve into issues touching upon the merits of the self-assessed return. The proceedings pertaining to refund are akin to execution proceedings, and thus, while dealing with such claims, it is impermissible for the Adjudicating Authority to either sit in appeal over the self-assessment made by the assessee or for that matter seek to reopen or revise the self-assessment. Reliance was placed on the decision of the Apex Court in the case of ITC Limited.
- The refund proceedings are neither in the nature of assessment nor re-assessment and thus the second respondent stood denuded of any jurisdiction to question or review the claim for refund as sought by the petitioner. A self-assessment can be reopened or modified only by either taking recourse to appropriate appellate proceedings in cases where an order may have been passed or insofar as the present case is concerned, in accordance with the provisions contained in Sections 72 and 73 of the Act.

Respondents' Submissions

- The Respondents submitted that the petitioner should be relegated to the alternative remedy as provisioned for under Section 85 of the Act and file an appeal before the appropriate Appellate Authority, challenging the impugned order. They also submitted that the allegation of the principles of natural justice having been violated is also clearly misconceived bearing in mind the deficiency memos which were issued.
- The claims for refund that may be made with respect to CENVAT credit would necessarily have to be considered in accordance with the provisions made in Section 11B of the Excise Act read with Rule 5 of the CCR Rules. Section 83 of the Act contemplates certain provisions of the Excise Act, including Sections 11B and 11BB, to be applicable to service tax in the same manner as they would apply to assessment of excise duty. It was in the aforesaid backdrop that it was contended that since Section 11B (2) of the Excise Act is predicated upon the competent authority being 'satisfied' that the whole or any part

of the duty is refundable, similar tests should apply when it comes to refund of CENVAT credit. This is clearly indicative of the issue of refund not resting on the mere ipse dixit of the assessee.

- Rule 5 of the CCR Rules speaks of determination of the amount that is liable to be refunded. It was further submitted that Rule 5 makes the grant of refund subject to the procedure, safeguards, conditions and limitations as may be specified by the CBEC in terms of a notified order.
- A conjoint reading of Section 11B of the Excise Act and Rule 5 of the CCR Rules would lead one to the irresistible conclusion of a power of determination inhering in the competent authority even at the stage where an application for refund may be made.
- Further, the reliance placed on Section 73 of the Act is clearly misconceived since the refund has not been denied on grounds which are spoken of in that provision. Emphasis on Section 73 being applicable only in a situation where either service tax has not been levied or paid or has been short levied, short paid or erroneously refunded. According to learned counsel, neither of those situations prevail in the facts of the present case when one bears in mind that the application itself stood confined to refund of CENVAT credit.

Decision of the Hon'ble Delhi High Court

- The Hon'ble Delhi HC first considered the issue of Natural Justice and held that the deficiency memos' issued by the department do not sustain the broad compliance of the natural justice requirements as they essentially called upon the petitioner to furnish additional documentation and provide further details with respect to the various transactions which formed the subject matter of the claim for refund. Those communications, were more in the nature of interrogatories rather than a SCN. In order for the deficiency memos to qualify as notices which would be compliant with the requirements of the principles of natural justice, it was incumbent upon the respondents to have confronted the petitioner with the issue of 'export of services' as well as whether it was an 'intermediary'. For a notice to be recognized as being compliant with the principles of natural justice, it was incumbent upon the respondents to place the petitioners on due notice of the proposed action or the view that they were inclined to take.
- It becomes pertinent to note in this regard that a deficiency memo does not serve the same purpose as a SCN. A communication of the former genre is essentially aimed at requiring the noticee to place additional material and evidence for the consideration of the competent authority. This would also flow from the requirements put in place in terms of Rule 5 of the CCR Rules read along with the Notification dated 18 June 2012. It becomes pertinent to note that the aforesaid Notification specifies the various particulars, details and documentation which must accompany and form part of a refund claim. A deficiency memo would thus be confined to the applicant assessee being called upon to fulfil any shortcoming or supplement documentation that must accompany a claim for refund. In any event, the deficiency memo cannot be viewed as a substitute for a SCN. The HC relied upon the observations rendered by

the Gujarat High Court in New Pensla Industries v. Union of India 2017 SCC Online Guj 2596 and which in our considered opinion, correctly held that a deficiency memo is not in the nature of a SCN and that it merely serves the purpose of placing a party on notice of being liable to furnish additional information and remedy any deficiency in a claim that may be laid.

- While examining the refund claim, the Hon'ble HC held that in terms of the Act, every person liable to pay service tax is obliged to furnish a self-assessed return in terms of Section 70. The return so submitted can be questioned either in accordance with Section 72, if the competent authority is of the opinion that the assessee has failed to assess the tax in accordance with the provisions of the Act or Rules made thereunder or in circumstances which are enumerated in Section 73.
- A comprehensive reading of the provisions of the Act would thus establish that a self-assessed return stands placed on a pedestal equivalent to that of an actual order of assessment, provisional or best judgment assessment or a reassessment. This issue in any case is liable to be answered against the respondent in light of the decision in ITC Limited. Rule 5 of the CCR Rules and which embodies the procedure liable to be followed by an assessee claiming refund of CENVAT credit. It becomes pertinent and at the outset to note that while Rule 5(1) does employ the expression 'determined', the same is of little relevance insofar as the question which stands posited before us is concerned. This, we do hold, since we find that the determination which is spoken of in Rule 5(1) is confined to a quantification of the refund allowable in accordance with the formula prescribed therein. The court was unable to sustain the submission of the respondent that the word 'determined' must be read in aid of recognizing a power of assessment being available to be exercised while considering a claim for refund.
- The SC in ITC Limited, notwithstanding Section 27(2) employing the expression 'satisfied' held that unless a self-assessed return is revised or doubted in exercise of powers of reassessment, best judgment assessment or where it be alleged that duty had been short levied, short paid or erroneously refunded, those powers would not be available to be exercised at the stage of considering an application for refund.
- In the absence of the self-assessed return having been questioned, reviewed or re-assessed, the claim for refund of CENVAT credit could not have been denied by the respondents. When confronted with the application for refund, all that the respondents could have possibly examined or evaluated was whether the provisions of Rule 5 read along with the various prescriptions contained in the notification dated 18 June 2012 had been complied with. The respondents, at this stage of the proceedings, could not have doubted, questioned or undertaken a merit review of the self-assessed return which had been submitted.
- Accordingly, and for all the aforesaid reasons, the writ petition shall stand allowed. The impugned order was quashed and set aside. The department was directed to process the refund claim in accordance with law.

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CORPORATE LAWS
Case Law Update

CS Makarand Joshi

Companies Act – Case 1

ROC adjudication order by ROC Delhi in the matter of VALOR ADVISORY (INDIA) PRIVATE LIMITED. Order dated 16th November 2023.

Facts of the case

- VALOR ADVISORY (INDIA) PRIVATE LIMITED (hereinafter known as 'company') was incorporated on 23.12.2021 under the jurisdiction of Registrar of Companies, Delhi ('ROC').
- From the annual return for the financial year 2022-23 filed by the company vide e-form MGT-7, ROC noticed that VALOR MANAGEMENT SDN. BHD is holding 100% shares in the subject company. However, it is seen that the company has in total 2 (two) shareholders. Therefore, the beneficial holder and the registered holder ought to have declared the status of their interest in the shares in terms of Section 89(1) and Section 89(2) of the Act, which was not done.
- It was also seen that the company has not filed MGT-6 in terms of Rule 9(3) of Companies (Management and Administration) Rule, 2014 with the ROC.
- In view of the above facts, a show cause notice u/s 89 of the Act dated 05.10.2023 was issued to the company.

Company's contentions

On behalf of the company, its authorised representative and the practising company secretary contended that,

- The requirement for declarations in Form MGT-4, MGT-5 and MGT-6 arises when there is a distinction between the registered owner and the beneficial owner of shares, and this fact is not known to the company.
- In our case, Mr. Chan Lye Yee is holding one share in the company as a nominee on behalf of VALOR MANAGEMENT SDN. BHD and not as registered owner of the share and this fact is known to the ROC and the company from the inception of the company.
- Section 89 is not applicable in the present matter. Yet, to avoid any further legal dispute and for the sake of brevity, the company has filed form MGT-6 on 16.10.2023 subsequent to the receipt of notice u/s 89.

ROC's contentions

- VALOR MANAGEMENT SDN. BHD is holding 100% shares in the subject company. However, it is seen that the company has in total 2 (two) shareholders. Therefore, the beneficial holder and the registered holder ought to have declared the status of their interest in the shares in terms of Section 89(1) and Section 89(2).
- The company has not filed MGT-6 in terms of Rule 9(3) of the Companies (Management and Administration) Rule,
- Subsequent to the receipt of notice u/s 89 It is seen that the company has filed form MGT-6 vide SRN F68464908 on 16.10.2023. Form MGT-4 and MGT-5 have been filed as attachments.
- The submissions of the company have no merits as at one point in time it has been submitted that the distinction between the registered owner and the beneficial owner does not exist in the present case. However, when the company filed the form MGT-6, it clearly indicated that the individual is a registered owner and not a beneficial owner in respect of the sole share. The foreign holding company (based in Malaysia) has also declared that in respect of that sole share, the beneficial interest lies with the Malaysian company. Therefore, the obligations u/s 89 are clearly attracted in respect of the registered owner, beneficial owner and concerned Indian company.

Penalty

- The facts suggest that while there has been considerable delay in submitting form MGT-4 and form MGT-5 to the company by the registered owner and beneficial owner respectively, the subject company on its part has complied with the provision of Section 89(3) of the Act by filing e-form MGT-6 within the stipulated time period.
- Ms. CHAN LYE YEE as registered owner was entered in the register of member on 31.03.2022 and accordingly was required to file a declaration in form MGT-4 on or before 30.04.2022. But the said declaration in form MGT-4 has been given on 16.10.2023 with a delay of 534 days by the registered owner. Hence, the registered owner is liable for penalty for violation of Section 89(1) of the Act.
- VALOR MANAGEMENT SDN. BHD. as a beneficial owner was entered in the register of member on 31.03.2022 and was accordingly required to file a declaration in form MGT-5 on or before 30.04.2022. But the said declaration in form MGT-5 has been given on 16.10.2023 with a delay of 534 days by the beneficial owner. Hence, the beneficial owner is liable for penalty for violation of Section 89(2) of the Act.
- The ROC imposed the following penalty on the registered owner and beneficial owner of the company for violation of section 89.

Violation section & period	Penalty imposed on	Calculation of penalty amount (In Rs.)	Penalty imposed as per Section 89(5) (in Rs.)
Section 89(1) for delay of 534 days in filing of from MGT-4	Ms. CHAN LYE YEE **(Registered Owner)**	50000 + 534 x 200 =1,56,800 Subject to maximum 5,00,000	1,56,800
Section 89(2) for delay of 534 days in filing of from MGT-5	VALOR MANAGEMENT SDN. BHD. **(Company registered in Malaysia) (Beneficial Owner)**	50000 +534 x 200 = 1,56,800 Subject to maximum 5,00,000	1,56,800

Companies Act – Case 2

ROC adjudication order in the matter of BMM TESTLABS INDIA PRIVATE LIMITED, ROC Delhi, order dated 8th November 2023

Facts of the case

- BMM TESTLABS INDIA PRIVATE LIMITED (hereinafter known as 'company') was incorporated on 09.08.2021 under Registrar of Companies, Delhi ('ROC').
- From the annual returns of the company for the financial year ended 31st December 2022 filed in e-form MGT-7, ROC observed that BMM International LLC is holding 100% shares in the subject company. However, it is seen that the company has in total two shareholders. Therefore, the beneficial holder and the registered holder ought to have declared the status of their interest in the shares in terms of Section 89(1) and Section 89(2) of the Act.
- It was also seen that the company has not filed MGT-6 in terms of Rule 9 (3) of Companies (Management and Administration) Rule, 2014 with this office.
- In view of the above facts, a show cause notice u/s 89 of the Act was issued to the company vide dated 05.10.2023.

Company's contentions

The company's authorised representative contended that,

- The company had submitted the Significant Beneficial Ownership declaration in Form Ben-2 vide SRN-T74544206 dated 27.01.2022.
- As far as compliance of Section 89 is concerned, the company had received declarations pursuant to Section 89(1) and Section 89(2) in the forms MGT-4 and MGT-5 from both the registered owner and the beneficial owner of the share vide dated 25.11.2021 but company inadvertently omitted the filings of MGT-6 within the prescribed time limit.
- Now, pursuant to the SCN, the company has filed form MGT-6 with relevant

documents vide SRN-F69304939 dated 19.10.2023.

- It has been prayed that unintentional omission in the filing of e-form MGT-6 may be considered with no penalties.

ROCs contentions

- It is evident from the filings of e form MGT-6 that the company had received forms MGT-4 and MGT-5 on 25.11.2021 but form MGT-6 has been filed on 19.10.2023 with a delay of 664 days.

Penalty

Now in exercise of the powers conferred vide Notification dated 24th March 2015 and having considered the reply submitted by the noticee (s) in response to the notice issued on 20.10.2023, I do hereby impose the penalty on the company and its officers in default for violation of Section 89(6) of the Act:

Violation section & period	Penalty imposed on company/ director(s)	Calculation of penalty amount (In Rs.)	Penalty imposed as per Section 89(7) (in Rs.)
Delay of 664 days in filing of from MGT-6	BMM TESTLABS INDIA PRIVATE LIMITED (company)	664 x 1000 = 6,64,000 Subject to maximum 5,00,000	5,00,000
	MANNU KHANDELWAL (director)	664 x 1000 = 6,64,000 Subject to maximum 2,00,000	2,00,000
	MARTIN JOSEPH STORM (director)	664 x 1000 = 6,64,000 Subject to maximum 2,00,000	2,00,000

SEBI – Case 1

Order of the Securities Appellate Tribunal in the matter of New Delhi Television Limited

Facts of the case:

1. Securities Exchange Board of India ('SEBI') had received certain complaints dated July 16, 2013, December 27, 2013 and January 09, 2014 from New Delhi Television Limited ('NDTV') alleging that Sanjay Dutt and certain entities namely, Quantum Securities Limited ('QSL'), Taj Capital Partners Pvt Ltd ('TCPPL') and SAL Real Estate Private Limited ('SAL REPL') were involved in dealing in securities of NDTV in violation of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 ['PIT Regulations']

2. With regards to the complaints received, SEBI investigated suspected insider trading in the scrip of NDTV during the period starting from September 1, 2006, to June 30, 2008 ['Investigation Period']

3. The investigation revealed that Mr. Sanjay Dutt and his associated entities had indulged in insider trading in the scrip of NDTV from September 2006 to June 2008. The investigation further

revealed that the promoters of the NDTV Dr Prannoy Roy ['Appellant 1'] and Mrs. Radhika Roy ['Appellant 2'] were also involved in the trading in scrip of NDTV during the Investigation Period. It also needs to be highlighted that during the Investigation Period their activities undertaken by NDTV and hence SEBI alleged that there were six different types of price-sensitive information during the Investigation Period.

4. SEBI further stated that as per NDTV's annual reports for the financial years 2006-07, 2007-08 and 2008-09 Dr Prannoy Roy, apart from being one of the promoters, was also the Chairman and Whole Time Director of NDTV during the Investigation Period. Mrs. Radhika Roy, spouse of Mr. Prannoy Roy, was also one of the promoters and served as the Managing Director of NDTV.

5. On completion of the investigation Whole Time Member ['WTM'] SEBI vide order dated November 27, 2020, held the appellant Sanjay Dutt in violation of Section 12A(d), (e) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') read with Regulations 3(ii) and 4 of the PIT Regulations. WTM SEBI held that except Mr Sanjay Dutt all other entities viz, QSPL, Prenita Dutt, TCPPL and SAL REPL were liable for insider trading. Aggrieved by this order an appeal was preferred before Hon'ble Securities Appellate Tribunal ('SAT') which was allowed by SAT *vide* its order dt: February 2, 2023. SAT quashed the order of WTM SEBI dt: November 27, 2020, stating that information relating to the decision of the board of NDTV to evaluate options for the reorganisation of NDTV which could include demerger, a split of company into news related business and investments in 'Beyond News' businesses which are currently held through its subsidiary NDTV Networks Plc is not UPSI ['PSI-6']. With respect to other aspects of the impugned order SAT referred matter back to SEBI.

6. SEBI WTM vide order of same date i.e., November 27, 2020, held Appellant 1 and Appellant 2 liable for insider trading. SEBI stated that PSI 6 had come into existence on September 7,2007 and it was published post trading hours on April 16,2008 and Appellants 1 and 2 being insiders had traded on December 26, 2007, by buying NDTV shared during UPSI period relevant to PSI 6.

7. Appellant 1 and Appellant 2 have now preferred appeal against the order of the WTM dated November 27, 2020, pursuant to the show cause notice August 31, 2018.

Charges levied

1. Appellants 1 and 2 were alleged to have violated the provisions of sections 12A(d) and (e) of the SEBI Act, 1992 read with regulations 3(i) and 4 of the PIT Regulations, 1992.

2. Appellant 1 and 2 are also alleged to have violated NDTV's Code of Conduct and the provisions of regulation 12(2) read with regulation 12(1) of the PIT Regulations, 1992.

Arguments by Appellant 1 and Appellant 2

1. **PSI-6 is not unpublished price-sensitive information as per PIT Regulations:** Appellant 1 and Appellant 2 placed reliance on the order of SAT dt: February 2, 2023, in the matter of Mr. Sanjay Dutt and Ors. It was submitted that vide this order SAT held that PSI-6 cannot be considered as unpublished price-sensitive information as the board of directors was exploring options for restructuring the business of the company. Hence it was submitted to SAT that trading by Appellant 1 and Appellant 2 would not be considered as UPSI.

2. **Pre-clearance was taken before executing trades by Appellant 1 and Appellant 2:** It was submitted that pre-clearance was taken by Appellant 1 and Appellant 2 from the compliance officer of NDTV before executing trades.

Contentions by SEBI

1. **PSI-6 is not unpublished price sensitive information as per PIT Regulations:** SEBI submitted that Appellant 1 and Appellant 2 while submitting information regarding the alleged insider trading by one Mr. Sanjay Dutt and his connected entities, had submitted details of various price sensitive information, including the information as to when each of those six(6) price sensitive information was crystallized and who were the entities privy to such information. The information submitted by the NDTV itself clearly identified the UPSI period from September 07, 2007, to April 16, 2008, regarding the PSI-6 that dealt with the proposed reorganization/demerger of the NDTV. It cannot be the case of Appellant 1 and Appellant 2 that the very same information that was undisputedly price sensitive for one set of insiders was not to be treated as a PSI for another set of insiders.

2. **Pre-clearance was taken before executing trades by Appellant 1 and Appellant 2:** In this regard, SEBI submitted that the charge levied against Appellant 1 and Appellant 2 are not related to any non-disclosure or trading without obtaining pre-clearance. Rather, the SCN has a serious charge of insider trading against the Noticees, who have traded in securities while in possession of the UPSI. Code of Conduct applies to listed companies for the purpose of regulating, monitoring and reporting by the insiders of their dealing in securities as insiders, as specified under the provisions of PIT Regulations. The above stated mechanism only prescribes the mode and way an insider is expected to act while dealing in securities. It cannot be contemplated that the regulatory regime under the PIT Regulations read with the Code of Conduct can envisage of a situation in which the Company can give pre-clearance to anybody to engage in insider trading in violation of the PIT Regulations, 1992. Therefore, compliances relating to disclosure (under the Takeover Regulations, etc.) and obtaining a pre-clearance from the Company before indulging in such activities would not legitimize any insider trades executed in violations of the statutory provisions governing the same.

Decision by SAT

SAT mentioned that PSI-6 was about the board of the company merely deciding to evaluate various options for re-organization of the company and no definite decision either of de-merger or of split or any other re-organization was taken by the board. Further Clause (vii) of the definition of PSI under PIT Regulation 1992 declares that significant changes in policies, plans or operations of the company would be deemed to be a PSI. In this case, there was no change in policies, plans or operations of the company, but merely the board decided to evaluate the options regarding the same. Further, SAT mentioned that it is a common knowledge when the board evaluates various options and ultimately makes some proposal, the same is placed before the shareholders and thereafter a definite decision is taken. However, in the present case, the board had not even contemplated any specific plans but merely thought to explore the possibility. Hence same, therefore, cannot be called as PSI within the ambit of the definition. Therefore, their trading cannot be called as insider trading, and no charge of insider trading can be sustained on Appellant 1 and 2. Hence SAT concluded PSI 6 which was about the board of the company merely deciding to evaluate various options for re-organization of the company and no definite decision being taken was not PSI.

Appellants 1 and 2 had sold their shares on April 17, 2008, when the trading window was closed and, therefore, it was urged that they had violated NDTV's Code of Conduct and the provisions of Regulation 12(2) read with Regulation 12(1) of the PIT Regulations, 1992. In this regard, SAT stated that as it already held that PSI-6 was not a price sensitive information and hence, the question of violating the NDTV's Code of Conduct for trading during the window closure period becomes immaterial. Further, SAT stated that Appellant 1 and 2 had secured pre-trade clearance from the Compliance Officer of NDTV which was also admitted fact in the show cause notice and, therefore, the trades executed by these two entities was in conformity with the NDTVs Code of Conduct and the PIT Regulations. Hence SAT held that Appellants 1 and 2 had not violated NDTV's code of conduct as they did not buy shares during the investigation period rather were allotted shares in tranches by the Company NDTV under Employee Stock Option Scheme-ESOP's. SAT allowed the appeal and quashed order of the WTM SEBI dt: November 27, 2020.

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""Practise hard; whether you live or die does not matter. You have to plunge in and work, without thinking of the result."

— *Swami Vivekananda*

ML-160

OTHER LAWS

FEMA – Update and Analysis

CA Hardik Mehta CA Tanvi Vora

In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars and Press Notes & Press Releases.

A. Update through A.P. (DIR Series) Circulars

1. Guidelines on import of silver by Qualified Jewellers as notified by – The International Financial Services Centres Authority (IFSCA)

AD Banks were permitted to remit advance payments on behalf of Qualifed Jewellers as notified by International Financial Services Centres Authority (IFSCA) for eleven days for import of gold through India International Bullion Exchange IFSC Ltd (IIBX)

Vide Notification No.35/2023 dated October 11, 2023 issued by DGFT in addition to nominated agencies as notified by RBI (in case of banks) and DGFT (for other agencies), Qualified Jewellers as notified by International Financial Services Centres Authority (IFSCA) have now also been permitted to import silver under specific ITC(HS) Codes through IIBX.

Accordingly, RBI has permitted AD Banks to allow Qualified Jewellers to remit advance payment for eleven days for import of silver through IIBX subject to the conditions as mentioned in the original circular - A.P. (DIR Series) Circular No.04 dated May 25, 2022.

A.P. (DIR Series) Circular No. 07 dated 10th November 2023

(Comments: The benefit available of advance for import of gold through India International Bullion Exchange IFSC Ltd (IIBX) Qualifed Jewellers as notified by International Financial Services Centres Authority (IFSCA) has now also been extended to silver as well. The some of the important conditions as applicable to advance payment for import of silver as applicable gold as per A.P. (DIR Series) Circular No.04 dated May 25, 2022 include:

i) The advance remittance for such import through exchange/s authorised by IFSCA shall be as per the terms of the sale contract or other document in the nature of an irrevocable purchase order.

ii) AD bank shall carry out all the due diligence and ensure the remittances sent are only for the bona fide import transactions through exchange/s authorised by IFSCA

iii) The advance remittance for import of Gold should not be leveraged in what-so-ever form for importing Gold worth more than the advance remittance made.

iv) In case the transaction for which advance remittance is sent does not materialize, or the advance remittance made for the purpose is more than the amount required, the unutilised advance remittance shall be remitted back to the same AD bank within the specified time limit of eleven days

v) QJ shall submit the Bill of Entry (or any other such applicable document issued/ approved by Customs Department for evidence of import), issued by Customs Authorities to the AD bank from where advance payment has been remitted.

vi) All payments by qualified jewellers for imports of gold through IIBX, shall be made through exchange mechanism as approved by IFSCA in terms of IFSC Act and regulations.)

B. Amendment Notification

1. 'Fully Accessible Route' for Investment by Non-residents in Government Securities – Inclusion of Sovereign Green Bonds

Fully Accessible Route (FAR) was introduced by the Reserve Bank vide A.P. (DIR Series) Circular No. 25 dated March 30, 2020, wherein certain specified categories of Central Government securities were opened fully for non-resident investors without any restrictions, apart from being available to domestic investors as well.

The Government Securities that are eligible for investment under the FAR ('specified securities') are notified by the RBI from time to time vide FMRD circulars. Accordingly, the RBI has now been decided to also designate all Sovereign Green Bonds issued by the Government in the fiscal year 2023-24 as 'specified securities' under the FAR.

FMRD.FMID.No. 04/14.01.006/2023-24 dated 8th November 2023

(Comments: While this notification not per se issued under FEMA but is issued under the RBI Act, it is of relevance under FEMA since it broadens the options available to non-residents for investments in India.

The 'Fully Accessible Route' for Investment by Non-residents in Government Securities is issued under Foreign Exchange Management (Debt Instruments) Regulations, 2019 and includes FPI in Debt.

In keeping with the ambition to significantly reduce the carbon intensity of the economy, the Union Budget 2022-23 announced the issue of Sovereign Green Bonds (para 103). These bonds are aimed at helping GoI in tapping the requisite finance from potential investors for deployment in public sector projects aimed at reducing the carbon intensity of the economy. As per Press Information Bureau's Press Release, Sovereign Green Bonds amounting ₹ 16,000 crore are proposed to be issued in the current financial year for mobilising resources for green infrastructure projects of which ₹ 8,000 crore has already been raised in the first tranche of the SGBs.)

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Best of The Rest

Rahul Hakani
Advocate

Niyati Mankad
Advocate

DILIP B JIWRAJKA VS. UNION OF INDIA & ORS – JUDGMENT DATED 09/11/2023 – PASSED IN WRIT PETITION (CIVIL) NO 1281 OF 2021 AND ORS [SUPREME COURT]

Sections 95 to 100 of the Insolvency and Bankruptcy Code 2016 ("IBC") – not violative of Section 14 and 21 of the Constitution of India – the adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under section 100 for the purpose of determining whether to accept or reject the application

Facts

In a set of 384 petitions filed under Article 32 of the Constitution, the Petitioners contested the constitutionality of Sections 95 to 100 of the Insolvency and Bankruptcy Code 2016 (IBC). These sections, part of the IBC, aim to expedite the resolution of insolvencies for corporate persons, firms, and individuals. They replaced previous laws that had led to inefficient resolution processes marked by delays. Specifically, Part III of the IBC deals with insolvency resolution and bankruptcy for individuals and partnership firms, replacing older laws like the Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920. Notably, the IBC's provisions also apply to personal guarantors of corporate debtors. The Union Government issued a notification bringing certain sections into force, which was challenged in ***Lalit Kumar Jain vs. Union of India***, where it was established that a guarantor's liability isn't discharged solely upon the discharge of the corporate debtor. Additionally, Parliament introduced amendments, including changes to Section 60 defining the jurisdiction of the National Company Law Tribunal in matters involving the bankruptcy of corporate or personal guarantors linked to a corporate debtor.

Issue Involved

Whether Sections 95 to 100 of the IBC are *ultra vires* the Constitution of India?

Held

the Court upheld the constitutional validity of the provisions of Sections 95 to 100 of the IBC and concluded as below:

"(i) No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;

(ii) The resolution professional appointed under Section 97 serves a facilitative

role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;

(iii) The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

(iv) The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;

(v) There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;

(vi) No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;

(vii) The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 for the purpose of determining whether to accept or reject the application;

(viii) The purpose of the interim-moratorium under Section 96 is to protect the 63 debtor from further legal proceedings; and

(ix) The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution."

The writ petitions were accordingly dismissed.

LOMBARDI ENGINEERING LTD. VS. UTTARAKHAND JAL VIDYUT NIGAM LIMITED – ORDER DT. 06/11/2023 PASSED IN ARBITRATION PETITION NO. 43 OF 2022 [SUPREME COURT]

Arbitration and Conciliation Act, 1996 ("the Act") – Section 11(6) – in the context of the Arbitration Agreement - the layers of the "Grundnorm" as per Kelsen's Pure Theory of Law – (i) Constitution of India, 1950; (ii) Arbitration and Conciliation Act, 1996 & any other Central/State Law; and (iii) Arbitration Agreement entered into by the parties in light of s. 7 of the Arbitration and Conciliation Act, 1996 – Arbitration

ML-164

Agreement contained condition requiring pre-deposit of 7% of total claim by the party initiating arbitration – to be ignored as it is in violation of Article 14 of the Constitution of India

Section 12 has been amended by the Amendment Act, 2015 - the main purpose for amending the provision was to provide for neutrality of arbitrators - when the arbitration clause finds foul with the amended provisions of Section 12 of the Act, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible.

Facts

The Petitioner i.e. Lombardi Engineering Ltd. ("LEL"), a design consultancy firm based in Switzerland entered into an agreement with the Uttarakhand Project Development and Construction Corporation Limited (UPDCC) on 25/10/2019. The project was to commence on 25/10/2019 and had to be completed within 24 months, by 25/10/2021.

In view of the order passed by Govt. of Uttarakhand on 08/05/2020, the project was taken over by the Respondent i.e. Uttarakhand Jal Vidyut Nigam Limited ("UJVNL"), wholly owned corporation of the Government of Uttarakhand by virtue of tripartite agreement, which novated to the extent that all responsibilities and obligations were transferred to UJVNL.

The Clause 53 read with clause 55 of General Conditions of Contract set out the Arbitration Agreement which provided that if there is dispute of any kind, it shall be referred in accordance to provisions of Arbitration and Conciliation Act, 1996 ("the Act").

Clause 55 of the General Conditions of Contract stated that the 'pre-deposit' condition of 7% to be paid by the party initiating the Arbitration. It further stated that for the claims with a value of upto 10 crores, a single arbitrator shall be appointed by the Principal Secretary/Secretary (Irrigation) of the Government of Uttarakhand.

Disputes arose and on 6/5/2022, LEL issued a notice of arbitration and called upon UJVNL to appoint an arbitrator as per the terms of General Conditions of Contract. Instead of responding to the Arbitration Notice, on 09/05/2022 UJVNL issued a letter terminating the Contract alleging non-compliance of work and non- fulfilment of the contractual obligation. Accordingly, LEL filed a petition under Section 11(6) of the Act.

Issues

(i) Whether the dictum as laid down in ***ICOMM Tele Limited vs. Punjab State Water Supply and Sewerage Board and Anr. [reported in (2019) 4 SCC 401***] can be made applicable to the case in hand more particularly when Clause 55 of the General Conditions of Contract provides for a pre-deposit of 7% of the total claim for the purpose of invoking the arbitration clause?

(ii) Whether there is any direct conflict between the decisions of this Court in ***S.K. Jain vs. State of Haryana and Anr [reported in (2009) 4 SCC 357]*** and ***ICOMM Tele Limited (supra)***?

(iii) Whether this Court while deciding a petition filed under Section 11(6) of the Act 1996 for appointment of a sole arbitrator can hold that the condition of pre-deposit stipulated in the arbitration clause as provided in the Contract is violative of the Article 14 of the Constitution of India being manifestly arbitrary?

(iv) Whether the arbitration Clause No. 55 of the Contract empowering the Principal Secretary/Secretary (Irrigation), State of Uttarakhand to appoint an arbitrator of his choice is in conflict with the decision of this Court in the case of ***Perkins Eastman (supra)***?

Held

While deciding Issue Nos. 1 & 2, the Supreme Court referred to various decisions of High Courts analysing the Judgments in the case of ***S.K. Jain (supra)*** and ***ICOMM Tele Limited (supra)*** including the judgement delivered by the Supreme Court of Canada in case of U***ber Technologies etc vs, David Heller***. The Supreme Court observed that the arbitration clause in the present case failed to provide any clarity on how the 7% pre-deposit mandated by Clause 55 of the General Contract Conditions (GCC) would be ultimately adjusted at the conclusion of the arbitral proceedings. This ambiguity, according to the Court, rendered the clause susceptible to arbitrariness, thus, contravening Article 14 of the Constitution.

Issue No. 3: The Court held that in the context of the Arbitration Agreement, the layers of the Grundnorm as per Kelsen's theory would be in the following hierarchy:

(i) Constitution of India, 1950;

(ii) Arbitration and Conciliation Act, 1996 & any other Central/State Law;

(iii) Arbitration Agreement entered into by the parties in light of s. 7 of the Arbitration and Conciliation Act, 1996.

The Court further held that the concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. The argument canvassed on behalf of the Respondent that the Petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit. The Court reiterated that it is a settled position of law that there can be no consent against the law and there can be no waiver of fundamental rights.

Issue No. 4: After considering various decisions including decisions in the case of ***Uber Technologies etc vs, David Heller*** by the Supreme Court of Canada (wherein Doctrine of unconscionability was defined as an equitable doctrine that is used to set aside unfair agreements) and also certain judgments by Courts of United State of America, the supreme court reached to the conclusion that the two conditions contained in Clause 55 of the GCC, one relating to 7% deposit of the

total amount claimed and the second one relating to the stipulation empowering the Principal Secretary (Irrigation) Government of Uttarakhand to appoint a sole arbitrator and proceed to appoint an independent arbitrator, be ignored.

Accordingly, the application was allowed and the Former Chief Justice of the High Court of Sikkim was appointed to act as the sole arbitrator.

SANJAY KUMAR AGARWAL VS. STATE TAX OFFICER (1) & ANR. – JUDGMENT DATED 31/10/2023 PASSED IN REVIEW PETITION (CIVIL) NO. 1620-1623 OF 2023 IN CIVIL APPEAL NO. 1661 OF 2020 [SUPREME COURT]

Article 137 of the Constitution of India – scope of review - review is not an opportunity for a rehearing or a fresh decision – review cannot be allowed to be "an appeal in disguise – review can be sought only in case there is an error on the face of record - must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

Insolvency and Bankruptcy Code 2016 ("IBC") - Section 48 of the GVAT Act is not inconsistent or contrary to Section 53 or any other provisions of the IBC – GVAT dues are secured debt and accordingly holds the status of a secured creditor under the IBC

Facts

The case involved five Review Petitions seeking a review of the common Judgment and Order dated 06.09.2022 passed by the Court in Civil Appeal No. 1661 of 2020 and Civil Appeal No. 2568 of 2020. Both appeals were filed by the State Tax Officer-Appellant.

Civil Appeal No. 1661 of 2020 was filed against the National Company Law Appellate Tribunal's (NCLAT) decision dismissing the Company Appeal related to the order rejecting the appellant's claim over the property of the Corporate Debtor under the Gujarat Value Added Tax Act, 2003 (GVAT Act) against the provisions of the Insolvency and Bankruptcy Code 2016 (IBC).

Civil Appeal No. 2568 of 2020 was filed against the NCLAT's order in Company Appeal (At) (Ins) No. 1193 of 2019, which was based on the judgment and order dated 19.12.2019 passed in Company Appeal (At) (Insolvency No. 404 of 2019).

The Court, in the impugned order dated 06.09.2022, allowed the appeals, holding that Section 48 of the GVAT Act is not inconsistent with Section 53 of the IBC. The Court emphasized the secured creditor status of the State under the GVAT Act, criticized the lower authorities for rejecting the appellant's claim based on delay, and set aside the resolution plan approved by the Committee of Creditors.

Five Review Petitions were filed, challenging the judgment.

Issue Involved

Whether the review petitions were maintainable?

Whether the impugned Order was right in holding that dues of the government under

GVAT Act are to be treated as secured creditor?

Held

The court upheld that the State, acting under the GVAT Act, holds the status of a secured creditor under the IBC. This status entitles the State to rank equally with other specified debts, including debts on account of workman's dues, as per Section 53 of the IBC. The court clarified that Section 48 of the GVAT Act is not inconsistent or contrary to Section 53 or any other provisions of the IBC. It emphasized that the GVAT Act's provisions do not override the hierarchy or priority of claims outlined in Section 53 of the IBC.

The court set aside the resolution plan approved by the Committee of Creditors (CoC) and directed the Resolution Professional to consider a fresh resolution plan, taking into account the observations made in the judgment.

The court also held that a review is not an opportunity for a rehearing or a fresh decision. It highlighted the limited scope of a review petition and reiterated that a party seeking a review must establish a mistake or an error apparent on the face of the record.

INSTAKART SERVICES PRIVATE LIMITED VS. MEGASTONE LOGIPARKS PVT. LTD. – ORDER DATED 13/10/2023 PASSED IN R/ PETN. UNDER ARBITRATION ACT NO. 159 of 2022 [GUJARAT HIGH COURT]

Arbitration and Conciliation Act, 1996 ("the Act") – Section 11(6) - when ancillary agreements are interconnected and disputes arise, the arbitration clause in the main agreement can be invoked, and - the exclusive jurisdiction for such matters is determined by the 'seat' of arbitration designated in the main agreement and not by its 'venue'.

Facts

The Parties executed a Lease Agreement dated 1.3.2018 in respect of the Premises (for warehouses) in Gujarat. Subsequently, they executed a Maintenance and Amenities Agreement (M & E Agreement) dated 07.05.2018 whereunder the respondent had agreed to maintain the premises under Lease and provide various common services and amenities there. Some dispute arose between the parties, as a result of which, the Petitioner had terminated the Lease Agreement as also the M&E Agreement on 07.07.2021, asking the Respondent to take the possession of the premises-in-question and also to refund the security deposit paid by the Petitioner under the M & E Agreement. It was Petitioner's case that the respondent had failed to perform their contractual obligations and stopped the water supply in the premises. The Petitioner issued pre-arbitration notice dated 16.05.2022 disclosing its intention of amicable settlement of disputes in terms of Clause '25' of the Lease Agreement. By the reply dated 22.06.2022, the respondent denied the Petitioner's stance. Accordingly, the Petitioner filed Petition under Section 11(6) of the Act in Gujarat High Court.

This was opposed by the Respondent on the grounds that (i) the Lease Agreement and M & E Agreement are separate agreements and that though the disputes arising out of the Lease Agreement are subject to arbitration, the arbitration proceedings with respect to the disputes arising out of the M & E Agreement,

cannot be referred to the arbitration by invoking Clause '25' of the Lease Agreement and (ii) Gujarat High Court did not have territorial Jurisdiction to decide the Petition as arbitration proceedings were to be conducted in Bangalore.

Issue Involved

a. Whether the arbitration clause contained in Lease Agreement can be invoked for appointment of an arbitrator in respect of a dispute arising from the Maintenance and Amenities Agreement (M & E Agreement) dated 07.05.2018?

b. Whether in the facts and circumstances of the case, the High Court of Gujarat had territorial jurisdiction to entertain the petition under Section 11 of the Act, 1996?

Held

After hearing the arguments from both parties, reviewing relevant records and considering various case laws such as ***Chloro Controls India Private Limited vs. Seevern Trent Water Purification Inc. [(2013) 1 SCC 641], Duro Felguera S.A. vs. Gangavaram Port Ltd. [(2017) 9 SCC 729], Ameet Lalchand Shah vs. Rishabh Enterprises [(2018) 15 SCC 678],*** and ***M.R. Engineers and Contractors vs. Som Datt Builders [(2009) 7 SCC 696***], the court concurred with the Petitioner's argument that the Lease Agreement and M & E Agreement are interconnected, and their disputes should be resolved under the arbitration clause in the Lease Agreement.

Further, the court observed that in the present case, Clause 25 of the Lease Agreement conferred jurisdiction on the courts at Ahmedabad for all matters related to the agreement, while Clause 25(ii) designated Bangalore as a convenient venue for arbitration proceedings. The court concluded that Bangalore is a convenient venue for arbitration, but the exclusive jurisdiction is with the courts at Ahmedabad, which should be considered the seat of arbitration. As a result, the court rejects the arguments disputing its territorial jurisdiction and proceeds to appoint an arbitrator.

Accordingly, the Court allowed the Petition and appointed an Arbitrator to decide the disputes arisen between the Parties.

CHANDRALOK PEOPLE WELFARE ASSOCIATION VS. STATE OF MAHARASHTRA AND ORS. – ORDER DATED 18/10/2023 PASSED IN WRIT PETITION (L) NO. 17361 OF 2023 [BOMBAY HIGH COURT]

Sections 354, 489, and 499 of the Mumbai Municipal Corporation Act, 1888 - reconstruction is different from redevelopment - if the property owner fails to submit a reconstruction or redevelopment proposal within a reasonable timeframe, then MCGM has power and authority to compel or permit "reconstruction" in cases affecting tenants due to building demolition – tenants' rights continue or remain unhindered even after the demolition of a tenanted building – tenant association had the right to reconstruction

Facts

The Petitioner is a Welfare Association comprising of 103 persons and having a

Managing Committee of seven persons, who are or were monthly tenants of the Chandralok building at Sudhakar Dubey Compound. The Association is registered under the Maharashtra Public Trusts Act, 1950.

The building was constructed in 1965. Due to lack of repairs and maintenance, by 2014, the building had deteriorated considerably. Ultimately, the MCGM categorized the building in C-1 category and declared it dilapidated, dangerous, uninhabitable and required to be demolished. The building received notices inter alia under Section 353-B on 10/04/2019 and then a notice under Section 354 of the Mumbai Municipal Corporation Act, 1888 ("MMC Act") on 24/06/019 (which was not in dispute). The building was vacated on 16/07/2019 and was demolished. The Respondent claims that this demolition is in violation of orders of the City Civil Court, particularly, an order dated 11/07/2019.

Since July 2019, all 103 tenants are off-site, scattered across the city, their once tightly-knit community fractured. Since then, and this is the number of the complaint, they have seen no vestige or semblance of any proposal for reconstruction or redevelopment.

In the circumstances, the Petitioner filed the present Writ Petition inter alia praying for mandamus demanding that the MCGM direct compliance with various sections of the MMC Act to compel the reconstruction or redevelopment of the building in question and for grant of compensation in lieu of transit accommodation etc. The alternative prayer (b) was for a direction to the Tenants Association to call for tenders from interested developers to redevelop the property.

Issue Involved

Whether in the facts and circumstances of the case, the Petitioners are entitled for the prayers sought?

Held

The Court, emphasizing the concept of dual ownership in Indian law, where land ownership is separate from building ownership, noted the unresolved nature of the matter despite earlier orders passed by them. The Court delved into the legal obligations associated with property ownership, especially in the context of tenants, the court explored the interface between municipal law and property rights. The Petitioner's prayer was framed u/s 489 and 499 of the MMC Act, enabling reconstruction. The Court held that if the property owner fails to submit a reconstruction or redevelopment proposal within a reasonable timeframe, the MCGM is authorized to demand it. Referring to Sections 354, 489, and 499 of the MMC Act, the court elucidated their interconnected nature. It interpreted MCGM's authority to compel or permit reconstruction in cases affecting tenants due to building demolition. Drawing a distinction between "redevelopment" and "reconstruction," the court mandated the latter in this case, preserving tenants' rights. Citing the Supreme Court decision in ***Shaha Ratansi Khimji & Sons vs. Kumbhar Sons Hotel Pvt. Ltd. & Ors.***, the court affirmed tenants' rights even after the demolition of a tenanted building. Consequently, the court partially granted the rule, allowing the Petitioner Association to apply for MCGM's permission to reconstruct the demolished building. The Court held that the mere pendency of a rent

ML-170

proceeding wouldn't disentitle tenants to possession in the reconstructed premises, upholding the statutory right to reconstruction and the MCGM's obligation, while rejecting the contentions of the Respondents Nos. 6 to 8.

As the court, faced with circumstances where neither the Petition nor the Affidavit of the Respondent provided satisfactory answers, partially granted the Rule based on prayer clause (b), allowing the Petitioner Association to seek permission from the MCGM for the reconstruction of the demolished building. Mr. Dwivedi (Owner) and the Petitioner were given the opportunity to devise a redevelopment proposal, considering factors like FSI and TDR. The court reiterated the continuity of tenants' rights and instructed the MCGM to supervise the project, ensuring tenant welfare and monitoring progress.

Simultaneously, in the absence of a specific provision in the MMC Act regarding transit accommodation or rent, the court directed the Petitioners to the Maharashtra Rent Control Act, 1999, for a potential remedy.

Addressing the fate of tenants in the reconstructed building, the court decreed that, subject to any orders in Rent Act proceedings, all tenants would continue as tenants in the new structure. The pendency of a rent proceeding would not hinder a tenant's right to possession of the reconstructed premises. The responsibility for financing the reconstruction was placed on the association, while the court affirmed their statutory right to reconstruction and the MCGM's obligation to permit it without requiring prior consent from the Respondents.

■●■

"Come out into the broad light of day, come out from the little narrow paths, for how can the infinite soul rest content to live and die in small ruts?"

— *Swami Vivekananda*

"Change is always subjective. All through evolution you find that the conquest of nature comes by change in the subject. Apply this to religion and morality, and you will find that the conquest of evil comes by the change in the subjective alone. That is how the Advaitic system gets its whole force, on the subjective side of man."

— *Swami Vivekananda*

THE CHAMBER NEWS

CA Neha Gada
Hon. Jt. Secretary

CA Vitang Shah
Hon. Jt. Secretary

Important events and happenings that took place online/physical between **November 1, 2023 to November 30, 2023** are being reported as under:

I. ADMISSION OF NEW MEMBERS

The details of new members who were admitted in the Managing Council Meeting held on November 21, 2023 are as under:

Type of Membership	No. of Members
Life Member	05
Ordinary Member	05
Half Yearly – Ordinary Member	12
Student Member	08
Total	**30**

II. PAST PROGRAMMES

Sr. No.	*Date*	*Topics*	*Speakers*
		DELHI CHAPTER	
1.	06.11.2023	Discussion on Recent Supreme Court judgements	*Chairman:* Hon'ble ITAT JM Shri Sudhanshu Srivastava - Lucknow Bench *Speakers*: CA Saurav Bhattacharya Prakash Sinha, *Advocate*

ML-172

Sr. No.	*Date*	*Topics*	*Speakers*
		DIRECT TAXES	
1.	The Direct Taxes Committee had planned a seminar on "Art of Representation in Faceless proceedings and before Appellate Authorities" at Walchand Hirachand Hall, IMC, Churchgate. The session-wise detail of the program is as under: *(Jointly with Western India Regional Council of ICAI, IMC Chamber of Commerce & Industry & Bombay Chartered Accountants' Society)*		
a.	03.11.2023	Role of professionals in Tax Representation	Hiro Rai, *Advocate*
b.		Roadmap for Faceless Assessments and Appeals	*Panellists:* Shri Naresh Kumar Balodia (CCIT) Smt. Amrita Mishra (CIT) CA Yogesh Thar *Moderator*: CA Anish Thacker
c.		Role of tax professionals and the tax department in effective depensation of justice	Hon'ble Justice R.V. Easwar (Retired Judge, Delhi High Court)
d.	04.11.2023	Keynote Address	Shri G.S. Pannu, Vice President, Income-Tax Appellate Tribunal
e.		Expectations of the Bar from young professionals	Dr. K. Shivram, *Senior Advocate*
f.		Bench and Bar: Role and Responsibilities	*Chairman*: Shri G.S. Pannu, Vice President, Income-Tax Appellate Tribunal *Panellists*: Shri Amit Shukla (Hon'ble Member, Income Tax Appellate Tribunal), Shri Prashant Maharishi (Hon'ble Member, Income Tax Appellate Tribunal), Saurabh Soparkar, *Senior Advocate* (CA) CA Rajan Vora *Moderator:* CA Anil Sathe

ML-173

Sr. No.	*Date*	*Topics*	*Speakers*
g.		Moot Court	Shri B.R. Baskaran (Hon'ble Member, Income Tax Appellate Tribunal) Shri Vikas Awasthy (Hon'ble Member, Income Tax Appellate Tribunal) *Co-ordinator/Moderator:* CA Sanjiv Brahme
INDIRECT TAXES			
1.	08.11.2023	Issues in GST Compliances and Portal Disclosures	*Group Leader:* CA Deepali Mehta *Chairman*: CA Vasant Bhatt
INTERNATIONAL TAXATION			
1.	07.11.2023	International Taxation Study Circle on Practical Consideration - MFN clause	CA Jimit Devani
2.	28.11.2023	FEMA Study Circle on Overview of Foreign Direct Investment	CA Viral Satra
STUDENT COMMITTEE			
1.	07.11.2023	Overview of the Mediation Act, 2023	Shruti Desai, *Advocate*

■●■

"All power is within you. You can do anything and everything. Believe in that. Do not believe that you are weak; do not believe that you are half-crazy lunatics, as most of us do nowadays. Stand up and express the divinity within you.

— *Swami Vivekananda*

ML-174

Direct Taxes Committee

Seminar on the Art of Representation in Faceless proceedings and before Appellate Authorities was held on 3rd & 4th November, 2023 at Walchand Hirachand Hall, IMC, Churchgate (Jointly with Bombay Chartered Accountants' Society, IMC Chamber of Commerce & Industry, WIRC of ICAI)

CA Vijay Bhatt (Vice-President) giving his opening remarks

Hiro Rai, Advocate (Speaker) address the delegates

Panel discussion: Panellists from L to R:
CA Yogesh Thar, Shri Naresh Kumar Balodia (CCIT), Smt. Amrita Mishra (CIT) and Moderator: CA Anish Thacker

Hon'ble Justive R. V. Eashwar (Retired Judge, Delhi High Court) addressing the delegates

Shri G. S. Pannu (Vice-President, Income Tax Appellate Tribunal) delivering his Keynote Address

Panel discussion: Seen from L to R:
CA Rajan Vora, Saurabh Soparkar, Senior Advocate, Shri G. S. Pannu, Vice-President, Income Tax Appellate Tribunal (Chairman of the Session), Shri Amit Shukla, Hon'ble Member Income Tax Appellate Tribunal, Shri Prashant Maharishi, Hon'ble Member Income Tax Appellate Tribunal and Moderator: CA Anil Sathe

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