

Faceless Appeals: What's the Method in its Madness?

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Faceless Appeal Scheme - Unmasked

Assessment proceedings in India underwent a sea change pursuant to changes implemented in August 2020 ([link to our earlier article dated 18 September 2020 - Faceless Assessment Scheme - Unmasked](#)). Adopting a similar mechanism to appeal proceedings was the obvious next step and accordingly, Faceless Appeal Scheme, 2020 (**Scheme**) was announced in September 2020.

The Scheme has been announced in view of the powers vested to the Government under section 250(6B) of the Income-tax Act, 1961 (**IT Act**) recently inserted by the Finance Act, 2020. The Scheme is slated to completely transform the appellate process before Commissioner of Income Tax (Appeals) (**CIT (A)**), which is the first appellate authority in the Income tax hierarchy.

This is one more welcome step towards the Government's attempt to make the tax system 'seamless, faceless and painless' and part of the Hon'ble Prime Minister's initiative of the 'Transparent Taxation' Platform launched on 13 August 2020 comprising of faceless assessments, faceless appeals and taxpayers' charter.

In the ensuing set of questions and answers the authors^[1] have analyzed the Scheme, listing key changes and delving into how these changes are likely to impact various stakeholders.

1. What is the scope of Scheme? What changes from 25 September 2020?

Under the IT Act, appeals against the orders passed by the assessing officers are appealable before the CIT(A). This appellate process until 24 September 2020 was conducted manually which involved personal interaction between the taxpayer (or its authorized representative) and the CIT(A) as physical hearings were conducted, wherein even the tax department had the option to appear (though the tax department seldom appeared in such appellate proceedings).

From 25 September 2020, all appellate proceedings have been handed over to the National Faceless Appeal Centre (**NFAC**). Appellate orders will now be passed under this Scheme only by NFAC. NFAC is the equivalent of Central Processing Centre for processing of tax returns and National e-assessment Centre, which now deals with all assessment proceedings centrally.

It is however pertinent to note that certain appeals relating to serious frauds, major tax evasion, sensitive and search matters, International tax and Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 matters will, for now, stay outside the purview of this Scheme.

Out of almost 4.6 lakhs total pending appeals before CIT(A), 88% of the appeals will be transferred under the Scheme and almost 85% of the present strength of CIT(A)s has been allocated for disposing of appeals under this Scheme.

2 . Does Scheme apply to pending appeals (say wherein hearing notices have already been issued or part hearings have taken place) as well or only fresh appeals filed on or after 25 September 2020?

All cases wherein appellate orders were not passed by 24 September 2020 will be concluded under this Scheme.

Even in cases as on 25 September 2020, where part or entire appeal submissions have been filed and appellate proceedings have been concluded with only the appellate order pending to be passed, the

proceedings would need to be completed under this Scheme. Necessary clarification from the Central Board of Direct Taxes (**CBDT**) is desirable in this regard. It is pertinent to note that under the Faceless Assessments Scheme, any order passed by any officer other than National e-Assessment Centre (NeAC) from 13 August 2020 would be treated as non-est, similar language is not found in the present Scheme.

3. What are the new terminologies one needs to know and their relevance in the Scheme?

The Scheme empowers the CBDT to set up several units for the purpose of disposing e-appeals. These are namely NFAC, Regional Faceless Appeal Centres (**RFAC**) and the Appeal Units (**AU**). Their functions are as under:

- a) **NFAC**- NFAC will facilitate the conduct of e-appeal proceedings in a centralized manner. NFAC will act as a single point of contact for all communications between (i) the taxpayer and the AU, or (ii) AU and the NeAC/ tax officer.
- b) **RFAC**- To facilitate the conduct of e-appeal proceedings if CBDT deems necessary.
- c) **AU**- It shall perform the function of disposal of appeal including admission of additional grounds of appeal, making further inquiries, directing the NeAC or the tax officer for making further inquiry, seeking information or clarification on admitted grounds of appeal, providing opportunity of being heard to the taxpayer, analysis of the material furnished by the taxpayer, review of draft order, and such other functions as may be required for the purposes of the Scheme.

4. How the cases will be assigned to the AUs under the Scheme?

The appeals will be allocated by NFAC to any AU in a random manner (with the help of suitable technological tools, including artificial intelligence and machine learning). The taxpayer would not know which AU is dealing with its appeals. Thus, an AU say based in Delhi will take up the appeal of a taxpayer based in Mumbai and all communications will be routed through NFAC.

5. If this is so, in case of divergent views of high courts, whether the AU will need to follow the rulings pronounced by the High Court of their physical location (Delhi in the above example) or jurisdiction of the taxpayer (Mumbai).

While there is no formal clarification in this regard, time and again it has been stated by various authorities in the above context as well as in the context of Faceless Assessment Scheme (and rightly so) that rulings issued by the taxpayers' jurisdictional high court (based on the taxpayers' PAN jurisdiction - Mumbai in the present case) would be considered binding and followed. Clarity from CBDT in this behalf is desirable.

6. How will notices/appellate orders be communicated to the taxpayers?

Every notice/order/any other electronic communication will be delivered to the taxpayer by way of placing in the taxpayer's registered account or sending it to the registered email address or uploading on the income-tax department's mobile application followed by a real time alert. The taxpayer is required to file responses to any notice or order or any other electronic communication under this Scheme through his or her registered account.

Thus, it becomes imperative on the part of the taxpayers / representatives to regularly check their registered account for communications if any as well as register / update their latest and active email ids and mobile numbers so that they do not miss any communications and avoid the rigours of non-compliance which may escalate issues and in worst case scenarios also result in passing of ex-parte appellate orders.

7. Can taxpayer request for a personal hearing?

While personal interface is not intended, a taxpayer may request for personal hearing to make oral submissions to present his case. The Chief Commissioner or the Director General, in charge of the RFAC under which the concerned unit is set up, may approve the taxpayer's request for personal hearing (an electronic hearing through video conferencing) provided such a request is covered under the prescribed circumstances (circumstances yet to be notified).

8. How will the appellate proceedings be conducted under the Scheme?

Broadly, the process will be as under:

- An AU [which will be a team of CIT(A)] will be allotted appeals by NFAC in a random manner. These appeals would include pending appeals as well as new appeals as and when are filed by the taxpayers.

- An AU may make a request to NFAC for:
 - o obtaining such further information, documents or evidence from the taxpayer or any other person, as it may specify;
 - o obtaining report from NeAC or the tax officer on grounds of appeal or information or documents or evidence as filed by the taxpayer;
 - o directing NeAC or tax officer for making further inquiries and submit a report on the same;
- AU, after considering the response/submissions filed by the taxpayer and on perusal of information available on record, will pass a draft order in writing and send such draft order to NFAC along with details of any penalty proceedings to be initiated, if any.
- The NFAC upon receipt of draft order in case where:
 - o The aggregate amount of tax, penalty, interest or fee, including surcharge and cess, payable in respect of issues disputed in appeal is more than the amount as may be prescribed, will send the draft order to an AU other than the AU which prepared the draft order through automated allocation system for conducting review of such order;
 - o In any other case, examine the draft order (with the help of suitable technological tools, including artificial intelligence and machine learning to reduce the scope of discretion), whereupon it may decide to:
 - finalise the order; or
 - send the draft order to AU other than the AU which prepared the draft order through automated allocation system for conducting review of such order.
- The NFAC after finalizing the order will send a copy of order to the taxpayer and concerned tax officers. In case where initiation of penalty has been recommended, NFAC will also serve a notice on the taxpayer calling upon him to show cause as to why penalty should not be imposed.

One of the salient features of the Scheme is that where an AU intends to enhance an assessment or a penalty or reduce the amount of refund, it needs to prepare and send a show-cause notice containing the reasons for such enhancement or reduction, as the case may be, to NFAC, whereupon NFAC will (i) serve a show-cause notice on the taxpayer, and (ii) act as a communication channel between the taxpayer and the AU.

If the Principal Chief Commissioner of Income-tax or Principal Director General in-charge of the NFAC are of the view that a case needs to be heard physically, they can transfer the appeal with the prior approval of the CBDT to such CIT(A) as may be specified in the order. Besides this, the Scheme also provides for mechanism of rectification of orders passed by NFAC.

9 . Which bench of the Income Tax Appellate Tribunal (ITAT) will now have jurisdiction to adjudicate appeal arising out of orders passed by NFAC?

An appeal against an order passed by the NFAC will lie before the ITAT bench having jurisdiction over the jurisdictional tax officer.

10. What are the pros and cons of this Scheme?

Pros:

- Intent of the Scheme is to bring transparency and uniformity in the appellate proceedings and bring an end to physical hearing of appellate proceedings which involved high level of personal interaction between the taxpayer (or its authorised representative) and the CIT(A).
- Involvement of more than one CIT(A) as an AU will consist of a group of CIT(A)s (and not an individual CIT(A)) as well as review of orders as listed above will take away a lot of inconsistencies and should ensure passing of well-reasoned appellate orders. This would in turn reduce unnecessary litigation.
- Being electronic process, it would result in substantial savings of time and resources for the taxpayer, tax practitioners as well as the tax department.
- The Scheme also provides mechanism to specifically adjudicate on condonation of delay cases, admission of additional ground and/or evidence before proceeding with the disposal of appeal, this will also bring in uniformity in administration of appeals.

Cons:

- There could also be some communication gaps (atleast in the initial period), more so when all stakeholders have been so used to explaining (being explained) the nuances in person and that it would take some time for all to adjust to only written filings. Although, once the Scheme is implemented in the spirit that it has been proposed, these issues would vanish and result in smooth conduct of appellate proceedings.
- Since personal hearing will not be allowed (subject to certain circumstances), it may lead to some litigation on the grounds of 'reasonable opportunity not having been given' by the AU and that the principles of natural justice were violated, etc. Sufficient safeguards against such occurrences would go a long way in making this Scheme a success.

Authors comments:

Appeal filing process was automated in the year 2016 which is when it was mandated that the prescribed form (Form 35) under which an appeal is filed before the CIT(A) was required to be filed only in an electronic mode through the e-filing portal. Introduction of the Scheme is a welcome move especially considering the overall intent to eliminate human interface between taxpayers and tax administration and appellate authorities. This will bring in greater transparency in appellate proceedings.

A writ petition (W.P (C) 8044/2020) has been filed before the Delhi High Court challenging the provisions of the scheme granting 'discretionary' rights to the authorities in allowing personal hearing (discussed in Question 7 above). The petitioner has termed these discretionary provisions as 'discriminatory', 'arbitrary' and in violation of Article-14 of the Constitution of India (which confers equality rights). The petitioner seeks that a direction be given that an opportunity of hearing be granted to all taxpayers and this should not be at the discretion of the Chief Commissioner or the Director General as presently prescribed in the Scheme. The Delhi High Court has issued notice in the matter and listed it for hearing on 15 December 2020. It will be interesting to see how the court looks at these provisions as it has also been contended that the Scheme is contrary to sections 250(1), 250(2) and 250(5) of the IT Act, which specifically state that right of hearing shall be granted to an appellant at the appeal stage. It would be interesting to see whether the court will hold that an opportunity to file written arguments followed by show case notices wherever enhancements are proposed could suffice the requirements prescribed under law.

Given that going forward, generally there will be no personal hearings in appellate proceedings and the fact that CIT(A) is the first appellate authority, it becomes imperative for taxpayers / representatives to focus on filing comprehensive and convincing written submissions covering all factual aspects and legal arguments. With the assessments and appellate processes completely revamped by adoption of technology, one cannot wait to see what further changes are introduced in the way tax assessments and litigations would take place in India.

[1] Views expressed (if any) are personal and should not be considered as legal advice.