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**EFFECTS OF THE
PANDEMIC ON**

THE CA PROFESSION
THE ECONOMY
THE HUMAN PSYCHE

**WHAT HAS CHANGED AND WHAT IS
UNLIKELY TO GET REVERSED**

FACELESS REGIME UNDER INCOME-TAX LAW: SOME ISSUES AND THE WAY FORWARD

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INTRODUCTION

With a view to making the tax system ‘seamless, faceless and painless’, the Government of India had introduced the Faceless Assessment Scheme, 2019 (Faceless Assessments) in September, 2019. The purpose behind it was to ensure **fair and objective tax adjudication** and to make sure that some of the flaws in the operation of physical assessment proceedings (such as the element of subjectivity in assessment proceedings, non-consideration of written submissions, granting of inadequate opportunities to the taxpayers for filing responses, etc.) do not recur. What is equally commendable is the phased manner in which Faceless Assessments have been introduced (first, by introducing e-proceedings on a pilot basis, then on a country-wide basis, and lastly introducing Faceless Assessments).

All these steps were aimed in the right direction to impart greater **efficiency, transparency and accountability** by (a) eliminating the human interface between taxpayers and tax officers; (b) optimising the utilisation of resources through economies of scale and functional specialisation; and (c) introducing a team-based assessment with dynamic jurisdiction.

Currently, all income tax assessments [subject to certain exceptions viz., (a) assessment orders in cases assigned to central charges; and (b) assessment orders in cases assigned to international tax charges] are being carried out in a faceless manner. For the purpose of carrying out Faceless Assessments, the Government had set up different units [i.e., National Faceless Assessment Centre (NaFAC), Regional Faceless Assessment Centres, Assessment Units, Verification Units, Technical Units and Review Units].

However, as it is still in its nascent stage, the taxpayers have had to grapple with several challenges / issues (as discussed below) during the course of Faceless

Assessments. The Government needs to resolve these teething issues so that the objective of having a fair, efficient and transparent taxation regime is met. Nevertheless, there are some good features in the Faceless Assessment proceedings but these are not being fully utilised. There are some tabs in the e-proceedings section of the e-filing portal which provide details as to the date on which the notice was served to the taxpayer, the date on which the taxpayer’s response was viewed by the field authorities, etc., but such functionalities are not yet operational.

The following are some practical problems / issues faced by the taxpayers and the suggested changes:

■ **Requests for personal hearings and written submissions are not being considered before passing of assessment orders:** A salient feature of Faceless Assessments is that personal hearing (through video conferencing) would be given only if the taxpayer’s request for such hearing is approved by the prescribed authority. Unfortunately, in some of the cases, written submissions were not considered at all. Moreover, it has come to light that some taxpayers’ request for personal hearings were also not granted before passing of the assessment order despite the fact that the frequently asked questions (FAQs) uploaded by the Income-tax Department on its website require the field authorities to provide reasons in case a request for personal hearing is rejected. In many such cases, taxpayers were forced to file writ petitions in courts to seek justice on the ground of violation of the ‘*principles of natural justice*’.

Fortunately, the courts came to their rescue and stayed the operation of such faceless assessment orders¹ /

¹ *DJ Surfactants vs. National e-Assessment Centre and Ors. [Writ Petition (C) No. 4814/2021, Delhi High Court]; Axis Wind Farms (Anantapur) Pvt. Ltd. vs. Union of India and Ors. (Writ Petition No. 11812 of 2021, Telangana High Court); Shelf Drilling Offshore Services (India) Private Limited vs. Deputy Commissioner of Income-tax, Mumbai and Ors. [Writ Petition (L) No. 10949 of 2021, Bombay High Court]*

directed the Department to grant personal hearing² and do fresh assessments. **One of the basic tenets of tax adjudication / tax proceedings is that the taxpayer should get a fair and reasonable hearing / chance to explain its case and make its submissions to present / defend its case.** Written submissions are, perhaps, the most critical tool of taxpayers through which they can actualise this right. Needless to say, in Faceless Assessments the importance and vitality of written submissions grow manifold.

While the underlying objective of Faceless Assessments – to eliminate human interface – is certainly a commendable reason, it cannot be denied that on many occasions (especially for complex matters such as eligibility of tax treaty benefits, etc.), face-to-face hearings are needed for the taxpayer to properly and effectively represent its case and put forth its submissions / arguments as well as for the tax Department to understand and appreciate such arguments / merits. During a personal hearing, the taxpayer / its authorised representatives would generally gauge whether the Assessing Officer (AO) / tax authorities are receptive to their arguments and averments. This is helpful because it gives them an opportunity to make further submissions, oral or written, or to adopt a different line of reasoning / arguments in support of their case. This distinct advantage is lost under the faceless regime. From the perspective of the tax Department also, personal hearings are helpful as it not only saves their time, energy and effort in understanding the facts and merits of the case, but also gives them an opportunity to ask more effective / relevant questions of the taxpayers for doing an objective assessment.

Thus, the Government may consider amending Faceless Assessments and provide a threshold (say income beyond a particular amount, turnover beyond a particular amount, etc.) wherein the taxpayers' right for personal hearing will not be denied / will not be at the discretion of the prescribed authority. **Given that the Government's focus is on digital push, it may consider allowing an oral-cum-video submission also in addition to filing of written submissions. This will improve the efficiency and efficacy of tax adjudication proceedings.**

■ **Taxpayers' requests for adjournment are not being**

2 *Satia Industries Limited vs. NaFAC [Writ Petition (C) No. 5587/2021, Delhi High Court]; Ritnand Balved Education Foundation (Umbrella Organisation of Amity Group of Institutions) vs. NaFAC and Ors. [Writ Petition (C) No. 5537/2021, Delhi High Court]*

■ **considered before passing of assessment orders:**

One of the grievances of many taxpayers who faced Faceless Assessments has been that their adjournment requests (filed in time / before the expiry of due date fixed for compliance) were not considered before passing of the assessment order. This is certainly not fair and is against the core principles of tax adjudication. In this regard, certain taxpayers also knocked the doors of courts on the ground of violation of the '*principles of natural justice*' and sought quashing of such assessment orders and consequent tax demands raised on them. Fortunately, the courts³ ruled in favour of the taxpayers and directed the tax Department to consider their written submissions and to do fresh assessments.

Further, instances have also come to light where **very short deadlines** were provided to taxpayers to comply with notices (sometimes only three to four days' time was given). Since currently the service of notices is done electronically, the possibility of the taxpayers missing out on such notices or realising very late that such a notice has been issued, cannot be ruled out. This is even more critical in the current Covid pandemic situation wherein the functioning of offices is already disturbed. It is thus advisable that the tax Department should give a reasonable time period (at least ten to 15 days) to taxpayers for filing their explanations – written submissions / comply with the notices.

■ **Draft assessment orders are not sent to taxpayers before passing the final assessment order:**

Under Faceless Assessments, the tax Department is required to serve a show cause notice (SCN) along with a draft assessment order in case variations proposed in the same are prejudicial to the interests of the taxpayers. It has been reported that final assessment orders were passed in some cases without providing such draft assessment orders to the taxpayers. Such orders have been quashed / stayed by the courts⁴ in writ proceedings.

■ **Passing of assessment orders prior to the expiry of time allowed in SCN:**

One of the intentions of Faceless Assessments was to hasten the assessment proceedings and to ensure time-bound completion. This objective

3 *Magic Wood Exports Private Limited vs. National e-Assessment Centre, Delhi [Writ Petition No. 10693 of 2021, Madras High Court]; Blue Square Infrastructure LLP vs. NaFAC and Anr. [Writ Petition (C) No. 5418/2021, Delhi High Court]*

4 *Globe Capital Foundation vs. National e-Assessment Centre [Writ Petition No (C) 5298/2021, Delhi High Court]; YCD Industries vs. NaFAC [Writ Petition (C) No. 5552/2021, Delhi High Court]*

gets reflected in the annual budgetary amendments wherein the time limits for passing assessment orders are gradually being reduced. But on a practical basis, it has come to light that in some taxpayers' cases Faceless Assessment orders were passed even before the expiry of the time allowed in the SCN. What has added to this grievance is that in some cases, taxpayers were not able to upload their written submissions also because the assessments orders were passed and the tab on the e-filing portal was closed. Again, this is neither fair nor pragmatic. In such cases also, the courts⁵ have granted relief to taxpayers by quashing such orders by observing that with the issuance of an SCN, the taxpayers' statutory right to file a reply and seek a personal hearing kicks in and which cannot be curtailed.

■ **Notices are not getting uploaded / reflected on e-filing portal on real-time basis:** As part of Faceless Assessments, notices issued by NaFAC in connection with the Faceless Assessment proceedings are to be uploaded on the taxpayers' account on the e-filing portal. But cases have come to light where notices issued by NaFAC were getting reflected on the e-filing portal after one or two days – perhaps due to technical glitches. Due to such delays, taxpayers are left with less time to comply with such notices and as a consequence, they are left with no option but to file adjournment requests. One hopes that these technical glitches get resolved soon so that the notices are reflected on the e-filing portal on a real-time basis. This step will increase the efficiency of Faceless Assessments significantly. Even as per Faceless Assessments, every notice / order / any electronic communication should be delivered to the taxpayer by way of:

- Placing authenticated copy thereof in taxpayer's registered account; or
 - Sending an authenticated copy thereof to the registered email address of the taxpayer or its authorised representative; or
 - Uploading an authenticated copy on the taxpayer's mobile app.
- and followed by a real-time alert⁶.

⁵ *Renew Power Private Limited vs. National e-Assessment Centre, Delhi [Writ Petition (C) No. 5235/2021, Delhi High Court]; Antony Alphonse Kevin Alphonse vs. Income-tax Officer (Writ Petition No. 8379 of 2021, Madras High Court)*

⁶ **Real-time alert has been defined under Faceless Assessments. It 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 e-mail at his registered e-mail address, so as to alert him regarding delivery of an electronic communication**

It has been further specified that the time and place of dispatch and receipt of electronic record (notice, order, etc.) shall be determined in accordance with the provisions of section 13 of the Information Technology Act, 2000 (21 of 2000) which *inter alia* provides that receipt of an electronic record occurs at the time when the electronic record 'enters' the designated computer resource (that is, the taxpayer's registered account on the e-filing portal) of the taxpayer. **Thus, the crucial test for determining service / receipt of any notice / order, etc., is the time when it 'enters' the taxpayer's registered account on the e-filing portal. Since there is a time lag between uploading of notice by the tax Department and its viewability by the taxpayer, an issue can arise as to what will be the date of service of notice.**

The first step in a communication process is intimating the taxpayer about the issuance of any notice / order, etc. Thus, unless a taxpayer is informed, it will not be possible for the taxpayer to comply with the same. Further, in the case of reopening of assessments, there has been litigation on the aspect of issuance and service of reopening notice. The Supreme Court in the case of *R.K. Upadhyaya vs. Shanabhai P. Patel [1987] 166 ITR 163 (SC)* ruled that service of reopening notice u/s 148 is a condition precedent to making the order of assessment. Thus, service of a notice is an important element and to avoid any unnecessary litigation it is advisable that the technical glitch gets resolved and notices are reflected on the e-filing portal on a real-time basis. **Given that short messaging service (SMS) is one of the most effective ways of putting the other person on notice about some communication, it is advisable that sending of real-time alert to taxpayers by SMS be made mandatory.**

■ **Certain restrictions / glitches on the e-filing portal:**

There are certain other technical restrictions or glitches on the e-filing portal which cause practical difficulties in the effective and efficient implementation of the Faceless Assessments. The same are discussed below:

- Attachment size restriction: Currently, the e-filing portal has a restriction wherein attachment size cannot exceed 10 MB. This means that if the size of the response (written submissions / annexures) exceeds this limit, the same is required to be split into different parts such that each attachment size does not exceed 10 MB. While the tax Department is expected to read the entire response (written submissions and annexures) and assess the

taxpayers' income accordingly, practically it becomes difficult for the Department to open multiple files and read them in continuation when written submissions including annexures run into a number of pages (especially in case of large taxpayers). This difficulty for the tax Department becomes a cause of suffering for the taxpayers. Thus, the Government should consider investing in improvement of digital infrastructure and increase the attachment size limit (say to 40 to 50 MB per attachment).

- Issuance of reopening notices: It is seen that reopening notices are issued by the tax Department asking the taxpayers to file their return of income. There is no window / tab available to the taxpayers to object to such reopening notice which was otherwise allowed under the physical assessment proceedings as per the settled position of law. Further, there is no window / option available on the e-filing portal to ask for reasons for reopening of an assessment even after filing the return of income in response to reopening notices.

- All file formats are not allowed: Currently, the taxpayers can upload the documents / responses only in certain file formats – .pdf, .xls, .xlsx and .csv format. Other commonly used file formats, viz., .doc, .docx, .ppt, .pptx, etc., cannot be uploaded. The Government should consider investing in improvement of digital infrastructure on this count so that all types of file formats get supported by the e-filing portal.

- Special characters are not allowed: The e-filing portal does not allow use of certain special characters. However, the problem occurs at the time when taxpayers are submitting their response in the respective fields, and just then they are given a message that special characters are not allowed. It is advisable that the disallowed special characters are highlighted, and the taxpayers get a pop-up as and when such special characters are used by them.

- Other glitches: It has also been observed that taxpayers faced other technical glitches such as e-filing portal was not working at certain times, video conferencing link was not working, documents were not getting uploaded, etc.

CONCLUSION

One of the apprehensions of the entire taxpayer community is that with Faceless Assessments coming into force, proper hearing may not be given and this could lead to erroneous / unfair assessments. In this regard, attention is invited to the decision of the Supreme Court in the case of *Dhakeswari Cotton Mills Ltd. vs. CIT*

[1954] 26 ITR 775 (SC) wherein it was held that the 'principle of natural justice' needs to be followed by the tax Department while passing assessment orders. The Court also ruled that the taxpayer should be given a fair hearing and aspects like failure to disclose the material proposed to be used against the taxpayer, non-granting of adequate opportunity to the taxpayer to rebut the material furnished and refusing to take the material furnished by the taxpayer to support its case violates the fundamental rules of justice. Thus, it is crucial that in doing Faceless Assessments, (a) proper hearing is afforded to the taxpayer; (b) 'written submissions' filed are duly taken into account before passing the assessment order; and (c) adjournment is allowed in genuine cases.

The Government should resolve these teething issues (as discussed above) so that this fear / apprehension does not turn into reality. With revenue of Rs. 9.32 lakh crores⁷ already stuck in direct tax litigation in various forums, and considering the vision of the Government in making India a US \$5 trillion economy, it will not be prudent if such teething issues are not resolved at the earliest. If not done, Faceless Assessments may need to pass through various litmus tests in courts⁸. Further, one hopes that the Central Board of Direct Taxes comes up with some internal instructions (such as writing proper reasons in the assessment order in case field authorities do not accept / reject judicial precedents cited by the taxpayer in its support) to the field authorities for fair, smooth and effective functioning of Faceless Assessments.

The Government is also on a spree to digitise the tax administration system in India which is evident from the fact that Faceless Assessments; Faceless Appeal Scheme, 2020; and Faceless Penalty Scheme, 2021 are already in force. Besides, enabling provisions have been introduced under the Income-tax Act, 1961 to digitise other aspects of tax adjudication, viz., faceless inquiry, faceless transfer pricing proceedings, faceless dispute resolution

⁷ This data is taken from 'The Direct Tax Vivad se Vishwas Bill, 2020' introduced in the Parliament. In the statement of objects and reasons, it was mentioned that as on 30th November, 2019, the amount of disputed direct tax arrears was Rs 9.32 lakh crores. Further, as per press release dated 8th March, 2021 issued by the Government, Rs 53,346 crores was collected by the Government under the Vivad se Vishwas Scheme till 1st March, 2021

⁸ Please note that the aspect of granting personal hearing at the discretion of prescribed authority under the Faceless Appeal Scheme, 2020 is already under challenge before the Delhi High Court in the case of *Lakshya Budhiraja vs. Union of India & Anr. [Writ Petition No. (C) 8044/2020]*. The writ petition has been filed seeking a direction to the Government to grant an opportunity of hearing to all taxpayers and to hold that the same should not be at the discretion of the prescribed authority as at present laid in the Faceless Appeal Scheme, 2020

panel proceedings, faceless collection and recovery of tax, faceless effect of appellate orders, faceless Income Tax Appellate Tribunal, etc. Thus, it becomes all the more important to resolve the aforesaid teething issues at this stage itself so that other faceless schemes (existing as well as upcoming) are free of such shortcomings / gaps.

One hopes that the new, revamped e-filing portal of the Government will bring a new ray of hope to the taxpayers wherein such issues are taken care of.

(The views expressed in this article are the personal views of the author/s) ■

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