Faceless Assessment- Courts Uphold Principle of Natural Justice

Introduction:

The government's intention to reduce the interaction between assessee and the department and leaps in technology evolved the concept of "faceless assessment". Now technology is the vehicle which is used to carry out the assessment proceedings which were otherwise physical/manual in nature. The process of filing the submissions has changed from manual to online on income tax portal which generates a separate acknowledgement number for each such filing thereby removing the incidence of much wrongdoings by the parties involved. However, the shift in the process of assessment is to be backed by the shift in the attitude of authorities. Unfortunately, as is evident from the recent spate of writ petitions filed before various high courts across the country, this shift is still to take place.

The entire process of faceless assessment also led to the codification of the principle of natural justice which until now existed only in the various judicial pronouncements and at the mercy of the concerned assessing officer. Any violation of this eternal principle compelled the assessee to approach the appellate authorities and wait for a second round of assessment when such assessments would be set aside by the appellate authorities for fresh assessment.

The faceless assessment brought with it various obligations on the assessing authority which intended to reduce arbitrariness in the assessments and passing of orders behind the back of assessee. Old habits die hard. The recent orders passed by the High Courts across the country in writ petitions is a stark testimony of what ailed the assessment process earlier. The courts are no longer remaining polite to the apathy shown by the department. The authors have summarised some recent decisions which are staring at the face of CBDT and screaming for a corrective action including introducing accountability in the action / inaction by the assessing officers.

Issues:

The authors have cherry picked some recent decisions by the High Courts decided in writ petitions challenging the process of assessment orders. The High Courts have not only entertained such writ petitions in spite of their being alternate appellate remedy, they have not really been polite in holding the officers accountable for the pathetic show of performance. The authors have accordingly herein highlighted the issues which arose in the first year of such faceless assessment.

Issue 1: No Show Cause Notice ("*SCN*") / draft assessment order issued before passing the order

The principle of natural justice provides that the assessee must be confronted with the adverse material before the assessment can be finalised. This principle was laid down by the apex court and other courts repeatedly and is a concept as old as hills. Based on these decisions, the CBDT issued ***Instruction no. 20/2015 dated 29th December, 2015***, wherein at Para 4 it has been stated that in any case the AO proposes to make additions or disallowance, the AO ought to give a fair opportunity of being heard in accordance with principles of natural justice to the assessee to explain as to why such addition or disallowance shall not be made. For this purpose, the AO should issue a show cause notice indicating the reasons for the proposed addition / disallowance along with evidence in his possession. Before passing the final order, the AO is required to consider the submissions filed by the assessee in response to the show cause notice.

The above requirement is also codified in the Act. The the legislature has enacted section 144B/144C of the Income Tax Act for faceless assessment which provide that where a modification is proposed, the National e-Assessment Centre shall provide an opportunity to the assessee by serving a notice calling upon him to show cause as to why the assessment should not be completed as per draft assessment order. Thus, the faceless scheme introduced the concept of mandatory Show Cause Notice (SCN) and the draft assessment order calling for objection of the assessee before the assessment order can be finally passed and a demand is raised. This requirement is a watershed moment in the tax administration as it endeavours to remove the arbitrariness in assessment.

However, a violation of the above mandate by the AO was frowned upon by the Mumbai High Court. In the case of *Chander Arjandas Manwani (Writ Petition no. 3195 of 2021)* order dated 21st September 2021, the Mumbai High Court set aside the assessment order because the process of issuing SCN and draft assessment order was not followed. The AO has issued a notice seeking details and information from the assessee. The assessee replied to the same furnishing the details. The AO passed the order without issuing SCN. The assessee challenged the order on the ground that the requirements of faceless assessment have not been followed. The department filed an affidavit stating that the notice issued calling for information was itself the SCN. The Mumbai High Court did not agree and held that the said notice is not a SCN but a notice calling for further details and information.

The Court finally observed:

“9. In our view, as noted earlier no draft assessment order has been issued at all let alone on 1st February 2021. The notice dated 1st February 2021, as stated earlier, is seeking further documentary evidence and those evidences sought are for the first time. When the respondent is seeking documentary evidence, that communication by no stretch of imagination can be referred to as a draft assessment order.

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12. In the circumstances, the assessment order not having been passed in conformity with the requirements of the Faceless Assessment Scheme, 2019 has to be treated as non-est and shall be deemed to have never been passed."

A similar issue arose before the Delhi High Court in the case of ***RMSI Private Ltd. v. National E-Assessment Centre*** **W.P.(C) 6482/2021 (Delhi HC), order dated 14/07/2021** wherein the Court held that "*it is mandatory for the National E-Assessment Centre to provide an opportunity to the assessee, by serving a notice calling upon him to show cause as to why the variation proposed in the Draft Assessment Order, which is prejudicial to the interest of the assessee, be not made."*

On the similar issue, the Bombay High Court had in an earlier case of *SHL (India) Private Limited v. UOI and others* W.P. (L) No.11293 OF 2021), order dated 28/07/2021, in para no. 27 held that the provision clearly mandates that before the AO passes a final assessment order, he is required to first prepare and furnish a draft assessment order to the assessee. The said draft assessment order is an opportunity of being heard provided to the assessee which enables the assessee to provide his objection to the proposed variation in the taxable income. Failure to follow the said procedure under section 144C(1) would lead to jurisdictional error and not merely irregularity and procedural error.

Issue 2: Insufficient time provided for replying to the SCN

The principle of natural justice provides that "adequate" and "reasonable" opportunity of hearing should be granted to the assessee to make submissions and provide details. The statute does not provide for the time period as to what constitutes "adequate" and "reasonable". However a rational period is what the courts look at from the perspective of type of information and the actual time provided.

In the case of ***Suresh Kumar Lakhotiya in Writ Petition no. 2848 of 2021*** **decided on 08/09/2021** the Mumbai High Court quashed the assessment order which gave only 30 hours to the assessee to respond to the Show Cause Notice. The said period covered a weekend.

In the above case the assessee had filed a grievance petition on the portal for the unreasonable manner in which the assessment was being carried out. The national e assessment centre did nothing to prevent this arbitrariness of the assessing officer. So the Court had to intervene.

The above decision holds the view that not only SCN is required to be issued but it should provide reasonable time to assessee to reply. Such SCN is not an empty formality but should clearly reflect the intent of the AO to actually provide proper opportunity before assessment can be made.

Issue 3: Virtual hearing not granted even on request

The faceless assessment scheme provides indulgence to the assessee to seek personal hearing where he so desires. However, granting of such personal hearing was not considered as mandatory. The authors always believed that such hearing should be

accorded unless there are compelling reasons for refusing to do so and to be recorded in writing by the AO in the assessment order. Where such a process was not followed for not granting personal hearing, the assessment order is liable to be quashed as violative of the principle of natural justice.

In the case of ***Chander Arjandas Manwani (Writ Petition no. 3195 of 2021) order dated 21st September 2021***, the Bombay High Court set aside the assessment order because the personal hearing was not granted even though requested by the assessee. No reasons were provided for not granting the request of the assessee. The High Court set aside the assessment holding that such an action of the AO was violative of the faceless assessment scheme.

In the case of ***Neeraja Rateria WPO No.969 of 2021, order dated 05th October 2021***, the Calcutta High Court set aside the assessment order where even though personal hearing was theoretically granted to the assessee, the password for virtual hearing through video conferencing was not provided by the AO. Thus the entire process of granting personal hearing became an eye wash.

In the case of ***Naresh Kumar Goyal v. NFAC WP no. 6245/2021 and CM Appls. 19753-54/2021, order dated 12/07/2021***, the Delhi High Court observed that the show cause notice was issued on 19/04/2021 to make submission by 21/04/2021 i.e. only 48 hours were given to file reply in response to the show cause notice. In response, the assessee requested for personal hearing as per section 144B(7)(vii). However, the said request of the assessee was rejected for the reason that the request was not made through link, but was made through a letter. The NFAC concluded the assessment proceedings by passing the assessment order on 20/05/2021. On these facts, the Court held that the provisions of section 144B are violated and thereby set aside the assessment order and directed NFAC to pass a reasoned order after providing personal hearing to the assessee through video conferencing.

Similarly, the Delhi High Court in the case of **Sanjay Aggarwal bearing WP (C). 5741/2021, order dated 02/06/2021** set aside the assessment order passed in violation of the principle of not granting personal hearing. While setting aside the assessment order, the Court observed that in section 144B(7)(vii), the assessee has been given liberty to seek a personal hearing and under section 144B(7)(xii)(h), the revenue has been granted powers to frame standards, procedures and processes for approving such request of the assessee. Hence not granting the hearing to the assessee even on request is fatal to the assessment order.

Issue 4: Submissions not considered

This article will be hopelessly incomplete if it does not cover the decision of Mumbai High Court in the case of ***Mantra Industries Limited in WP No.1625 of 2021 order dated 11th October 2021***. The said order clearly brought to fore so many issues ranging from non consideration of submission of assessee, to filing of wrong affidavit by the department and not providing personal hearing even on request. This frustrated the High Court bench to the extent that the bench passed strictures against the officer and also

directed the Ministry to look into the matter. The Court held that the submissions dated 23rd April 2021 and 27th April 2021 were not considered by the AO even though claimed otherwise by the AO in his affidavit before the Court. This act was considered a gross violation of the principle of natural justice and also a violation of the faceless assessment scheme.

The above order by the HC has come as a huge relief to many such cases where the assessee spends hours and hours preparing detailed submissions for the AO to consider but the AO looks the other way only because he has pre decided to pass an assessment order making additions. As smart Alec one said “the AO has dealt with the submission by not dealing with it”. The Authors believe that the CBDT will look closely at this aspect of the assessment proceedings and ensure that the assessee is not pushed to the doors of litigation only because the AO in his discretion (which, incidentally he doesn’t have) chose to ignore such submissions.

Issue 5: Order passed before date of Compliance as per SCN

One of the basic principles of natural justice is that order should always be a speaking order to prevent any bias. This principle has been upheld by various courts over the years. To observe that the said principle is being followed by the Income Tax Department, CBDT has issued ***Instruction no. 20/2015 dated 29th December, 2015***, wherein at Para 4 directing the AOs to deal with the submission of the assessee and accordingly pass assessment orders. The said Instruction continues to hold good in case of the faceless assessment. Now, section 144B(1)(xxiv) requires the assessment unit to draft a revised draft assessment order after taking into account the response furnished by the assessee. Thus, mandating the officers to pass a speaking order.

Recently, in faceless assessment, in the case of ***Antony Alphonse Kevin Alphonse WP. No. 8379 , 8932 and 8934 of 2021, order dated 01/04/2021*** *(Madras HC)* wherein the order was passed before the time prescribed for filing of reply, the Madras High Court quashed the impugned assessment order and remitted the matter back to the office of the AO to pass a speaking order on merit after considering the submissions filed by the assessee.

Issue 6: Submission could not be filed due to non working of portal:

Recently, due to change in the income tax portal, all the assessees had to face and are still facing lots of issues. One of the common issues is that the portal is not working on the due date of filing submission and accordingly, the assessee is unable to file submission in response to the notice / show cause notice / draft assessment order. And to no surprise, the Department ignored such issues and passed the assessment orders holding that the submissions were not filed. This has resulted in violation of the principle of natural justice.

This issue was raised before the Delhi High Court in the case of *Fariq Chand v. National E-Assessment Center, Delhi bearing WP(C) no. 8054 of 2021 order dated 09/08/2021.* In this case, the assessee received a show cause notice and draft assessment order dated

09/06/2021. However, the assessee could not file the response since the portal was not working from 01/06/2021 to 17/06/2021. To the assessee's surprise, the assessee received a final assessment order dated 18/06/2021 u/s. 143(3) r.w.s. 144B by making an addition of approx. Rs.1.06 crores. Considering the facts, the Delhi High Court set aside the said assessment order with a direction to pass a fresh assessment order after considering the submission of the assessee.

Issue 7: Assessment order passed before date of compliance

In the faceless assessment, one more issue that has been faced by the assessee is that the assessment orders are passed before expiry of the due date for filing reply to the show cause notice / draft assessment order.

One such issue was in the case of *Antony Alphonse Kevin Alphonse (supra)*. In this case the assessee was required to file a reply to the show cause notice on or before 15/03/2021 by 11:59 PM. However, the assessment order was passed on 15/03/2021 at 4:22 PM i.e. before the expiry of the due date and time of filing reply to the SCN. On these facts, the Madras High Court held that the assessment order has been passed In violation of business of justice as the order has been passed with the pre-set of mind and before the prescribed time for filing reply. Also refer *Ekambaram Sukumaran bearing WP. No. 10433, 11029 and 11032 of 2019, order dated 27/04/2021* passed by Madras High Court.

Conclusion:

All the above issues in faceless assessment are violating the basic principle of natural justice. Until now the said concept existed in judicial pronouncements. However now they have been codified under the faceless scheme and courts have accordingly come down heavily especially in the Mantra industries case (supra).

In Spite of the above aberrations the authors remain hopeful that as more water flows under the bridge, the human mind will give up the reluctance and adapt to inevitable change introduced in the process of assessment. The shift will be required not only by the Department officers but also by the assessee and professionals and all will have to move hand in hand to ensure the success of the faceless system. The legislature on its part will have to tighten the process so that the faceless process does not become another poor version of the arbitrary and one sided assessments. The first year experience has done away with a lot of ills of manual / physical assessment and we hope that whatever is left will get eroded in the coming future.

Tags: Faceless Assessment

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