

Recent Stay Orders on Faceless Assessments: Elephant in the Room Syndrome!!



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One morning, Lindi found an Elephant in her room.

"Look!", she called. "There is an Elephant in my room!"

"No there isn't", her mother called back.

"Elephants don't live in houses. Everybody knows that."

The Elephant yawned.

Well Friends, we all have heard about this 'Elephant in the Room Story' in our school days. But, in the present times also, this '**Elephant in the Room**' syndrome is clearly evident and visible in the grass-root level implementation of the faceless assessments in the first season of its full-fledged avatar for the AY 2018-19.

To be specific and precise, 'Antony Alphonse', 'Parag Kishorchandra Shah', 'Suresh Kumar Lakhotia', 'KL Trading Corporation', 'KBB Nuts Pvt Ltd', 'DJ Surfactants', 'Ekambaram Sukumaran', 'Raja Builders', 'SAS Finvest LLP', 'Shelf Drilling Offshore Services' and 'Axis Wind Farms' are the names of the assesseees who have been served with defective faceless assessment orders for the AY 2018-19, passed by the National Faceless Assessment Centre, either, without issuing the mandatory draft assessment orders and the show cause notices or without taking due consideration or cognizance of the replies of the assesseees or before the allotted time of filing a reply.

Accordingly, all these assesseees have filed their respective writ petitions before the respective Honorable High Courts, against their respective defective faceless assessment orders for the AY 2018-19, and the Honorable High Courts have decided their respective writs, as follows:

(i) Antony Alphonse Kevin Alphonse v. National e-Assessment Centre in Writ Petition No. 8379 of 2021 & W.M.P. No. 8932 & 8934 of 2021 dated 1.4.2021(Madras High Court)

In this case, a Show Cause Notice dated 4.3.2021 was issued to the assessee requiring him to file his reply on or before the end of the day on 15.3.2021 by 23:59 hours. The assessee filed his reply before this deadline. Dismissing the plea of availability of alternative remedy of filing an appeal before the CIT (Appeals) of the Revenue Authorities, the Hon'ble High Court has held that the impugned assessment order has been passed with a pre-set mind and without considering the reply filed by the assessee. The Hon'ble Madras High Court have remitted the impugned assessment order back to the National Faceless

Assessment Centre to pass a speaking order on merits in accordance with law after considering the reply filed by the assessee.

(ii) K L Trading Corporation v. National e-Assessment Centre in W.P. (C) 4774/2021 dated 16.4.2021 (Delhi High Court)

In this case, the petitioner has contended that the impugned assessment order has been passed in breach of the principles of natural justice as engrafted in the Faceless Assessment (1st Amendment) Scheme, 2021 [2021 Scheme].

The petitioner has contended that since there was a variation made to the declared income of the petitioner *qua* the assessment year 2018-2019, (assessed income at Rs. 3,50,79,205 as against the returned income of Rs. 2,00,76,180), a show-cause notice should have been issued, in terms of sub-clauses (b) and (c) of clause 2(xvi) of the '2021 Scheme', before finalizing the variation, and passing of the final assessment order by the National e-Assessment Centre.

Taking cognizance of these contentions of the petitioner, the Hon'ble Delhi High Court has stayed the operation of the assessment order dated 31.3.2021, passed u/s 143(3A), for the AY 2018-19 by holding that the petitioner has been able to set up a prima-facie case for issuance of notice and grant of an interim order.

(iii) Ekambaram Sukumaran v. National e-Assessment Centre in W.P. No. 10433 of 2019 & WMP Nos. 11029 & 11032 of 2019 dated 27.4.2021 (Madras High Court)

In this case, the pre-assessment notice dated 19.03.2021 was issued calling upon the petitioner to show cause why assessment should not be completed in line with the draft assessment order under the faceless assessment scheme. In conclusion, the petitioner was called upon to submit his response by 23:59 hours of 23.03.2021.

However, even prior to the elapse of time granted, the impugned order of assessment has come to be passed on the same day, i.e., 23.03.2021.

The Honourable High Court has set aside the impugned assessment order for de-novo completion, holding it to be in breach of the principle of natural justice.

(iv) DJ Surfactants v. National E-Assessment Centre in [2021] 127 taxmann.com 370 (Delhi)

In this case, show cause notice was issued to the petitioner on 01.03.2021, alongwith the draft assessment order of even date. As per the said show cause notice, the petitioner was required to file a response by 08.03.2021, as to why the assessment should not be completed as per the draft assessment order. The petitioner sought a week's accommodation to respond, as the queries raised in the aforementioned show cause notice required time to gather the relevant material. This request was made on 08.03.2021. Since no response was received from the assessment authorities, the petitioner, by way of abundant caution, filed a reply to the said show cause notice on 12.03.2021. Furthermore, in the reply, a request was made for grant of a personal hearing in the matter. The impugned assessment order was passed on 13.03.2021, without having regard to the aforesaid reply dated 12.03.2021 submitted by the petitioner.

The Honourable High Court has held that the assessing authority has not taken into account the explanation and the material placed before him by the petitioner, along with its reply dated 12.03.2021, and although, a personal hearing was sought by the petitioner, the same was not granted by the assessing authority. In these circumstances, the petitioner has been able to establish at least at this stage, a prima-facie case in its favour.

(v) SAS Fininvest LLP v. National e-Assessment Centre in W.P.(C). No. 5087/2021 dated 4.5.2021 (Delhi High Court)

In this case, the Honourable Delhi High Court has stayed the operation of the impugned regular assessment order for the AY 2018-19, on the ground that the said order has been passed without issuing the mandatory show cause notice as prescribed in the Faceless Assessment Scheme, 2019 read with Faceless Assessment (Ist Amendment) Scheme, 2021 and CBDT Instruction No. 20/2015 dated 29.12.2015.

(vi) Parag Kishorchandra Shah v. National Faceless Assessment Centre in W.P. (C) No. 11052 of 2021 dated 6.5.2021 (Bombay High Court)

In this case, the Honorable Bombay High Court has directed to keep the impugned assessment order for the AY 2018-19 in abeyance till the next hearing date holding that prima-facie the assessment order has been passed without giving a proper opportunity of being heard to the assessee and as such the order is not in adherence to the principles of natural justice.

(vii) KBB Nuts (P) Ltd v. National Faceless Assessment Centre in [2021] 127 taxmann.com 194 (Delhi)

In this case, a show-cause notice, along with draft assessment order was served on petitioner by National Faceless Assessment Centre, whereby, petitioner was called upon to file its response by 23:59 hours on 21-4-2021. However, show cause notice was received by petitioner via e-mail on 20-4-2021 at 03:06 hours and since time for compliance was short, petitioner filed an application via e-portal, seeking a day's adjournment, i.e., till 22-4-2021. No response was received by the petitioner with respect to request for adjournment. Hence, the petitioner filed objections to aforementioned show-cause notice on 22-4-2021 at 15.22 hours. The Petitioner has contended that though impugned order was passed, objections filed by it were not taken into account by National Faceless Assessment Centre before passing impugned order, hence there had been a breach of principles of natural justice.

The Honourable High has held that, *"without getting into the tenability of the objections on merits, in our view, the best course forward would be to set aside the impugned assessment order dated 22.04.2021, and have respondent no.1 pass a fresh assessment order after taking into account the objections filed qua the show cause notice dated 19.04.2021 on behalf of the petitioner."*

(viii) Suresh Kumar Lakhotia v. National e-Assessment Centre in W.P. (C) No. 10639 of 2021 dated 12.5.2021 (Bombay High Court)

In this case, the Petitioner has contended that there are lot of glitches in the operation of the E-assessment Scheme. Pursuant to the said Scheme, by show-cause notice dated 23rd April,2021, a draft assessment order had been issued to Petitioner requiring Petitioner to show cause as to why the assessment should not be completed as per the draft assessment order. Petitioner had responded to the same on 23rd/24th April, 2021 and sought opportunity of hearing and requested for adjournment in order to respond to the draft assessment order due to lock-down. However, despite that order of assessment and notice of demand for Rs.18,39,23,430/- has been raised.

The Honourable High Court has stayed the effect, implementation and operation of the impugned assessment order and notice of demand till the date of next hearing on 21.6.2021.

(ix) Raja Builders v. National Faceless Assessment Centre in [2021] 127 taxmann.com 339 (Bombay)

In this case, the petitioner has contended that there appears to be glitches in the operation of the Faceless Assessment Scheme. The show cause notice dated 20th April 2021 along with a draft assessment order had been issued to petitioner requiring to show cause as to why the assessment should not be completed in terms of the draft assessment order. The said show cause appeared for the first time on the E-filing portal on 22nd April 2021 and on the same day the petitioner filed an online reply requesting for an opportunity of being heard. On 23rd April 2021, the petitioner filed a detailed reply to the show cause notice with

documentary evidences. However, without considering his request for hearing or the detailed reply, assessment order dated 23rd April 2021 came to be passed, even though the time limit to pass the assessment order was extended to 30th June 2021. In pursuance of the assessment order, there is a notice of demand for a sum of Rs. 17,71,87,220/- in addition to the penalty proceedings that have been initiated.

The Honourable High Court has held as under:

"Pending hearing and final disposal of the Petition, the operation of the assessment order passed under section 143 (3) read with Section 144B of the Act dated 23rd April 2021 and the notice of demand in Form No. 156 dated 23rd April 2021 as well as the show cause notice under section 274 read with Section 270A and 271AAC of the Act dated 23rd April 2021 are stayed."

(x) Shelf Drilling Offshore Services (India) Private Limited v Deputy Commissioner of Income Tax, Mumbai and Others (Writ Petition No. 10949 of 2021)(Bombay High Court)

In this case the Honourable High Court has granted an interim stay on an assessment order passed under the faceless assessment regime by observing that the petitioner's submissions were not heard at all in respect of the new additions made in the assessment order. The Hon'ble Bombay High Court has further remarked that there are a lot of glitches in operation of faceless assessment scheme.

(xi) M/s Magic Wood Exports Private Limited v National e-Assessment Centre, Delhi in Writ Petition No. 10693 of 2021 (Madras High Court)

In this case the Honourable High Court has set aside an assessment order passed under the faceless assessment regime without considering the adjournment request filed by the petitioner and has directed the assessing authority to consider the petitioner's submission and complete the assessment proceedings in accordance with the law.

(xii) Axis Wind Farms (Anantapur) Private Limited v Union of India and Others in Writ Petition No. 11812 of 2021 (Telangana High Court)

The Honourable High Court has granted an interim stay on an assessment order passed under the faceless assessment regime involving similar facts.

Though in all the above writ petitions, the impugned assessment orders have either been provisionally stayed or set aside for de-novo completion by the honourable High Courts, but in author's personal understanding and opinion, by virtue of the express legislative provision contained in section 144B(9) of the Income Tax Act, all such assessment orders passed without adhering to the prescribed procedure u/s 144B of the Act, are amenable to be considered as nonest in the eyes of law.

Section 144B(9) of the Income Tax Act reads as under:

144B(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."

Interestingly, in the conventional assessment regime, this writ petition window was very rarely invoked and normal course was to file an appeal before the CIT(Appeals).

It appears that this being the first season of implementation of full-fledged faceless assessments, either due to paucity of time or due to lack of awareness or training, the faceless assessment authorities have themselves given a very convenient window of filing

writ petitions before the honourable High Courts as per Article 226 and 14 of the Constitution of India to the assessee, by passing defective faceless assessment orders, either, without issuing the mandatory draft assessment orders and the show cause notices or without taking due consideration or cognizance of the replies of the assessee or before the allotted time of filing a reply.

Though in majority of the regular assessment cases for the AY 2018-19, the returned incomes of the assessee have been accepted by the faceless assessing authorities. However, in cases where the deviations/additions/disallowances to the returned income, have been proposed by the faceless assessment authorities, and where the doctrine of 'audi alteram partem' (hear the other side) or grant of suitable opportunity of being heard to the assessee, could have been really tested, have unfortunately turned out to be in a sorry state of affairs as is evidenced by the above discussed stay orders by the honourable High Courts.

Suggestions for Improvement

No doubt, the overall experience of the conduct of the faceless assessments in its full-fledged avatar, during its first season for AY 2018-19 has been good and smooth, but nonetheless, in order to make this experience more pleasant and flawless, it is desirable that firstly atleast the already stipulated or mandated procedures for the conduct of these faceless assessments should be strictly adhered to, by the concerned income-tax authorities both in the National Faceless Assessment Centre and the Regional Faceless Assessment Centres.

Secondly, in the procedure of Faceless Assessments enshrined in section 144B of the Income Tax Act (inserted w.e.f. 1.4.2021), the Show Cause Notice (SCN) is being issued to the appellant only after passing of the Draft Assessment Order by the Assessment Unit in the Regional Faceless Assessment Centre (RFAC). Further the assessee is not having any 'by-default' right of personal hearing and the assessee may only request for a personal hearing by way of video conferencing/telephony, in case of disagreement with the additions/disallowances proposed in the draft assessment order. The Chief Commissioner or the Director General, RFAC, may approve such request for personal hearing, if he is of the opinion that the case falls in the list of specified circumstances as notified by CBDT.

The circumstances where the request of the assessee for personal hearing via video conferencing may be approved are yet to be notified by CBDT and in order to do away with the ambiguity, a suitable clarification by the CBDT concerning the specified circumstances wherein the request of personal hearing of the assessee may be approved by the CCIT RFAC is desirable.

In the old E-Assessment Scheme, 2019, by virtue of a right vested in the scheme, the assessee was entitled to personal hearing, by way of video conferencing/telephony, in case of disagreement with the additions/disallowances proposed in the draft assessment order, in all assessment cases.

It is pertinent to note here that the Hon'ble Madras High Court in a recent order in the case of '**Salem Sree Ramavilas Chit Company v. DCIT [2020] 114 taxmann.com 492 / 423 ITR 525 / 273 Taxman 68 (Madras)**', have observed and stated that the faceless tax-assessment system can lead to erroneous assessment, if officers are not able to understand the transactions and statement of accounts of an appellant without a personal hearing.

Thus, in order to reduce litigations and tussles, the CBDT may reconsider and review the amended provision of conditional grant of opportunity of personal hearing via video telephony to the appellant, only in certain specified circumstances, and may restore the earlier provision of grant of such opportunity of personal hearing via video telephony to the appellant, in all cases, wherein the appellant asks for it in writing.

Thirdly, in the current framework, the opportunity of personal hearing is granted to the assessee only after passing of the draft assessment order by the assessment unit in the RFAC and not before that. In order to

make this right of personal hearing more effective and meaningful, such an opportunity should be granted to the assessee before passing of the draft assessment order.

Concluding Remarks:

The recent developments in the form of the above discussed Stay Orders on Faceless Assessment Orders by the Hon'ble High Courts, are living testimony of the prevailing "Elephant in the Room Syndrome" in the ground-level implementation of this pioneering and landmark tax reform of faceless adjudication.

The problems or deficiencies at the ground level, in the actual conduct of the faceless assessment proceedings as per the mandated procedure, are clearly visible to all and sundry, but still turning a blind eye and deaf ear to these problems is nothing but 'ignoring an elephant in a room'.

The rule of '*audi alteram partem*' or the grant of suitable/reasonable opportunity of being heard' is an essential and necessary ingredient of the '*Principle of Natural Justice*'.

The learned and respected friends from the Revenue side may counter above discussed propositions by asserting that unlike in U.S.A. and England, the Courts in India do not consider the right to oral or personal hearing as part of the principle of audi alteram partem unless the statute under which the action is taken by the authority, expressly provides for the oral or personal hearing and the legislative requirement of grant of suitable opportunity of being heard may also be achieved by providing opportunity to the affected person by making 'written representation' instead of oral or personal hearing as has been provided in the case of '*Union of India v. J.P. Mitter*' (SC).

However, the question here is not about winning an argument or scoring a brownie point. The issue here is about winning the trust and confidence of the major stakeholders to whom our beloved and honourable PM Sh. Narendra Modi often refer to as 'the wealth creators' i.e. the taxpayers and the appellants.

No doubt the primary objective of the faceless tax administration is the elimination of physical interface and as such physical visits and meetings between the appellant and the assessing authority can't be allowed, and infact no-body should ask for it, but nonetheless that objective can still be achieved by inserting an enabling legislative provision of the grant of by-default right of personal hearing via video conferencing or telephony to the appellant, if he/she asks for it, in the faceless assessment, appeal and penalty schemes.

Grant of half an hour opportunity of personal hearing via video conferencing to the appellant or his/her authorised representative to enable him/her to represent his/her case, is far more effective, meaningful and productive than the electronic uploading of 100 pages written submission paper book, which the adjudicating authority may choose to read or not.

The entire discussion can be summed up in just one line,

"Even murderers are given an opportunity of personal hearing, I am just an assessee/appellant."

Useful Reference

For More Details and Complete Understanding of the nitty-gritties and nuances of the New Faceless Assessments, Appeals & Penalty Regime, the thoroughly revised and updated fourth edition of the **Book titled "Faceless Assessment Appeals & Penalty Ready Reckoner with Real Time Case Studies"**, authored by the author of this article **Sh. Mayank Mohanka, FCA**, and published by **Taxmann**

Publications, may be referred, which is a ready reckoner and a referencer and user manual to help and assist the assesseees and the assessing authorities in their 'faceless assessments, appeals and penalty proceedings pursuits'. An honest and sincere effort has been made in this Book to explain and demonstrate the practical aspects and nitty-gritties of 'faceless taxation regime' in a 'step-by-step-manner' through 'real-time practical case studies' encompassing crucial and significant scrutiny issues having immense relevance and practical utility for all the assesses and the assessing authorities. The manner and practical aspects of 'e-filing of Rectification Application' u/s 154 of the Act and 'e-filing of Responses against the outstanding Income Tax demand have also been explained and demonstrated in a 'step-by-step' manner.

This Book characterizes a '**natural blend of law and practice**' concerning the New "**Faceless Taxation Regime**", and also includes the **Country-specific Best International Practices in Tax Administration** and the measures taken up by the Indian Tax Administration Authorities to ramp up the effectiveness and efficiency of the governance levels and to transform into a 'digitally mature' tax administration.

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