

# Faceless Assessments: Season I - Sweet or Bitter?

Aug 06, 2021



**Bikramjit Singh Bedi**Partner, ASA and Associates



**Jyoti Gupta**Senior Manager, ASA and Associates



**Pragya Bansal**Assistant Manager, ASA and Associates

The roadmap of conducting assessment proceedings in an entirely electronic mode reached its zenith with the roll out of the Faceless Assessment Scheme 2019, in August 2020. Interestingly, much before the pandemic set foot, the Central Government had already paved the path for carrying out assessments and other critical tax matters, from a safe distance, in early 2019. In normal circumstances, the implementation may have been undertaken in a phased pilot run manner, however, the COVID-19 impact perhaps preponed the process. The Central Government certainly took a bold step in launching this new and dynamic faceless regime on such a large-scale nation-wide basis (perhaps the first of its kind across the globe) with an aim to combine transparency with minimum human interaction.

The first season of the Faceless Assessment regime is nearing closure, however, not without its share of controversies. The substitution of "physical or face-to-face hearing system with complete virtual proceedings" has been an over-all sweet and bitter experience. Where on one hand the assessments went smooth as tax authorities were sensitive towards the information asked, responses filed and passed mindful orders, while on the other hand, there were serious lapses in following proper laid procedures. Some key issues included non-service of proper Show Cause Notice ('SCN') and / or Draft Assessment Order ('DAO') before directly issuing final assessment orders or even where DAO was served, fair and just opportunity was denied in many cases either by granting inadequate time to file responses; or where objections were filed, the same were simply overlooked in an arbitrary manner, rendering a well-conceived exercise faulty.

This brings us to one cardinal rule in tax proceedings namely the "Principle of Natural Justice" which appears to have been overlooked in some cases making the outcome litigation prone.



#### Audi Alteram Partem

\*Audi alteram partem is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It entails that no person should be judged without allowing a reasonable hearing. Further, under the Income-tax Laws, this principle has been considered as a principle of fundamental justice and equity and vide many judicial precedents it has been held of prime importance and a key factor in determining the valid jurisdiction.

At this juncture, it is important to understand and delve upon the major issues encountered during the first phase of faceless assessments and the views taken by various courts.

Whether the final assessment order passed without issuing draft assessment order, is valid.

Here, it is relevant to note the relevant provisions of the newly inserted section 144B of the Act which has been introduced vide the Amendment Act, 2020:

- (xvi) the National Faceless Assessment Centre shall examine the draft assessment order in accordance with the risk management strategy specified by the Board, including by way of an automated examination tool, whereupon it may decide to—
- (a) finalise the assessment, in case no variation prejudicial to the interest of assessee is proposed, as per the draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, along with the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment; or
- (b) provide an opportunity to the assessee, in case any variation prejudicial to the interest of assessee is proposed, by serving a notice calling upon him to show cause as to why the proposed variation should not be made; or
- (c) assign the draft assessment order to a review unit in any one Regional Faceless Assessment Centre, through an automated allocation system, for conducting review of such order;

The section explicitly provides for issue of an SCN to provide an adequate opportunity to the assessee for placing its side of the story on the proposed additions/ disallowances. Accordingly, it can be inferred that issuance of SCN cum DAO by the National Faceless Assessment Centre ('NaFAC') to the assessee is mandatory as per the provisions of section 144B of the Act. Worthwhile to note that although this section was later inserted, however, Notification No. 61/2020 of August 13, 2020 (which provided guidelines of the scheme) emphasized on the requirement of issue of DAO to the assessee. Non-compliance of this procedure has forced some of the taxpayers to reach out directly to High Courts via writ petitions route challenging the principle of natural justice and valid jurisdiction assumed thereto:



### Globe Capital Foundation v. National E-assessment Centre (13.05.2021) [Delhi HC]

- Writ petition filed against the National E-Assessment Centre seeking grant of stay on the operation of the assessment order dated 17.04.2021 which is said to be passed without giving an opportunity to show cause why the addition/disallowance not be made as per the DAO. The assessee pleaded that assessment proceedinds have violated the principle of natural justice on account of non-issue of SCN cum DAO.
- The writ petition accepted by the Delhi High Court.

## Trendsutra Client Services Pvt. Ltd v. ACIT (06.05.2021) [Bombay HC]

- \*Writ petition filed as assessment order passed without issuing a DAO as mandated under faceless assessment proceedings.
- The writ petition accepted by the Bombay High Court.

## SAS Finvest LLP v. National E-assessment Centre (04.05.2021) [Delhi HC]

- \*Writ petition filed as assessment order was passed without issuing a SCN. Reliance also placed on the Central Board of Direct Taxes Instruction No. 20/2015, dated December 29, 2015 which provided that "the assesses would be given a fair opportunity to explain his position on the proposed additions/ disallowances in accordance with the principle of natural justice."
- •The writ petition accepted by the Delhi High Court and operation of the order stayed. Matter listed for 10.08.2021.

## HONDA Cars India Ltd. v. DCIT (31.05.2021) [Delhi HC]

- \*Writ petition filed on the ground that DAO u/s 143(3) s.w.s. 144C of the Act was issued without issuing an SCN u/s 144B of the Act.
- The writ petition accepted by the Delhi High Court and operation of the order was stayed. Matter listed for 31.08.2021.

A parallel reference may also be drawn from the provisions of section 144C of the Act, which provide a similar procedure of issuing the DAO before completion of the final assessment. It is settled law that when powers are accorded for executing certain matters in a particular manner, they should be performed likewise and deviations thereto are not permitted. In other words, if the assessment is not completed in the way it ought to be done, the result would be infected by infirmities of law. Similar issue was dealt in a recent judgement by Delhi High Court in *Headstrong Services India Pvt. Ltd.* [TS-697-HC-2020(DEL)-TP] . Relevant part of the judgment is reproduced below:

"20. Now to accept the appellant's argument would be to permit the Assessing Officer to decide the objections filed by the Assessee - which power has been specifically denied by the statute.

It is a settled law that when a power is given to do certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are forbidden.

Considering the above, it may be inferred that the requirement of law entailing issuance of SCN cum DAO, has been duly appreciated and emphasized upon in the judicial precedents observing that proper opportunity of being heard is a *sin qua non*.

Whether show-cause notice cum draft assessment order issued only for the sake of mechanical discharge of procedure - fulfil the requirement of law

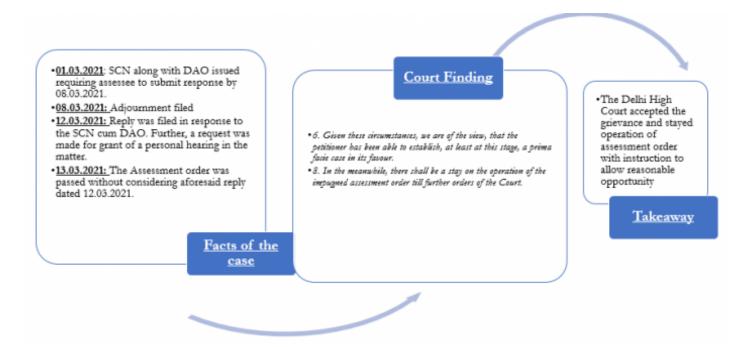


Taxpayers across the country have filed writs in respective High Courts citing breach of principle of natural justice since the NaFAC did not grant appropriate and fair opportunity of being heard and passed the assessment orders without considering the objections filed by the assessee. Let's see what the High Courts have held in various recent judicial pronouncements under these circumstances:

## Madras High Court ruling in M/s. Magick Woods Exports Private Limited [TS-343-HC-2021(MAD)]

•10.03.2021; Received SCN Court Findings accompanied by DAO. Adjournment was sought. 17.03.2021: Assessment order A corollary may be drawn passed without taking note of the that the NaFAC/ request of the formal assessing officer not only "...Admittedly, the request for adjournment has not adjournment requested by the needs to give an been rejected, neither the assessee duly intimated. assessee and the fact that there opportunity to the Thus, there has been apparent violation of principles of remained enough time to pass the assessee in the form of natural justice. assessment order. SCN cum DAO but it 3. The impugned order is <u>set aside</u>. The petitioner will comply with must be fair and the directions in notice dated 10.03.2021 and intimate the Assessing reasonable and effective Officer accordingly within a period of three (3) weeks from today. The towards the very cause. respondents will facilitate receipt of such reply by the petitioner by enabling the portal to receive the objections. Upon receipt of objections, the Assessing Authority will hear the petitioner and take forward the Facts of assessment and complete the same in accordance with law. <u>the case</u> **Takeaway** 

## Delhi High Court ruling in DJ Surfactants [TS-6014-HC-2021(DELHI)-O]



Delhi High Court ruling in KBB Nuts Private Limited [TS-347-HC-2021(DEL)]



- 30.11.2017: ROI filed. Case transferred to TPO and assessment proceedings kept in abeyance from December 2019 to January 2021.
- Thereafter, notices issued u/s 142(1) between 15.02.21 and 07.04.2021 and responses filed.
- 19.04.21: SCN and DAO issued on 19.04.2021 and received by Assessee on 20.04.21 at 03.06 hours, requiring response to be filed by by 23:59 hours on 21.04.21
- Subsequently, adjournment filed with the NFAC seeking a day's adjournment i.e. up-to 22.04.21.
- 22.04.21: Since no response is received qua the request for adjournment, objections to SCN is filed at 15.22 hours.
- 22.04.21: Assessment order along with notice of demand issued <u>without</u> considering the objections filed by the Assessee.

Facts of the case

## Court Findings

- •5.2 Therefore, 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. It is ordered accordingly. ...
- 6.1. Needless to add, respondent no. 1 will consider the objections dated 22.04.2021, filed qua the show-case notice dated 19.04.2021.

•The Delhi High Court observed that the assessment order was passed by the NaFAC on the same date upto which the adjournment had been sought for, without considering the objections filed by the assessee in response to the SCN. Thus, assessment order set aside to allow proper oppurtunity.

Takeaway

# **Bombay High Court ruling in Raja Builders** [TS-5636-HC-2021(BOMBAY)-O]

- 20.04.2021: SCN cum DAO issued. Received by Assessee on 22.04.21.
- 22.04.2021: Assessee filed a response asking for opportunity of being heard.
- 23.04.2021: Assessee filed detailed documentary evidence. However, assessment order along with notice of demand issued without considering the reply filed by the Assessee or giving an opportunity of hearing.

Facts of the case

# **Court Finding**

•Pending bearing 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.  The Bombay High Court stayed the operation of the assessment order, notice of demand and the SCN as oppurtunity of being heard denied.

Takeaway

In the above backdrop, it can be deduced that mere issuance and discharge of compliance procedures for the sake of conformity alone does not fulfil the requirements of law. The actual cause and intention behind law is to be carried out in substance before an opportunity may qualify as "just and fair". The opportunity of being heard must be real, reasonable and effective and not namesake. This would involve allowing adequate turn-around time, asking for appropriate and relevant details after considering the taxpayers assertions.

## Due Consideration to the objections filed towards Draft assessment order.

Now comes the latter stage, where post issue of DAO, the taxpayer files its objections, however, these objections are not taken on record / considered, while passing the final assessment order. This issue has been a matter of litigation in many cases.:



## Madras High Court ruling in Antony Alphonse Kevin Alphonse [TS-399-HC-2021(MAD)]

•SCN was issued on 04.03.2021 requiring assessee to file reply on or before the end of the day on 15.03.2021 by 23.59 hours. The assessee filed a response on the due date. However, the assessment order was passed on 15.03.2021 itself without taking the above response on record.

> Facts of the case

## Court Findings

Since the impugned order has been passed before the time prescribed for filing the reply, it is evident that the impugned order has been passed with pre-set mind. In any event, the order has been passed without considering the reply received from the petitioner. Therefore, this Court is inclined to grans the relief sought for by the petitioner as there is a manifest violation of business of justice while passing the impugned order.  The Madras High Court has explicitly iterated that where the assessment order was passed with a pre-set mind without considering the reply of the assessee, it would tantamount to violation of principle of natural justice.

**Takeaway** 

# Delhi High Court ruling in Renew Power Private Limited [TS-391-HC-2021(DEL)]

- SCN cum DAO issued on 18.04.2021 required the assessee to submit its response by 23:59 hours on 22.04.2021.
- However, the assissment order under section 143(3) of the Act read with section 144B of the Act was passed on 22.04.2021 at 14:11 hours.
- Although at about 22:00 hours, the Assessee tried to upload a response to the aforementioned SCN cum DAO, the same could not be uploaded.
- At the time of proceedings before the Hon'ble High Court, it was contented by the Revenue that:
- (i) First, the petitioner has an alternative remedy available to it under the Act.
- (ii) Second, on the previous occasions, that is, prior to the issuance of the show cause notice-cum-draft assessment order dated 18.04.2021, several opportunities were given to the petitioner.

Facts of the case

#### Court Findings

- As noted above, we have reached the conclusion that the impugned orders cannot be sustained, as none of these facts, which are stated in our order of 10.05.2021, have been put in issue.
- 6. The argument that an alternate statutory remedy is available to the petitioner does not find favor with us as it is simply a selfimposed limitation which does not prevent a Court from entertaining a writ petition in a fit case.
- .....
- The other argument advanced on behalf of the respondent/revenue that several opportunities were given to the petitioner, before issuance of the show cause notice-cum-draft assessment order, and hense, merely because the impugned assessment order was passed prior to the expiration of deadline prescribed for preferring a response, the same would not result in violation of principles of natural justice — is, equally, untenable.
- The Delhi High Court set aside the assessment order, notice of demand and the notice initiating penalty proceedings
- The Delhi High Court stressed upon the noticee's statutory right to file a reply when the SCN cum DAO is received, which cannot be curtailed.
- Alternative remedy to file appeal not an impediment to file writ.

Takeaway

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Delhi High Court ruling in Blue Square Infrastructure LLP [TS-392-HC-2021(DEL)]



- The SCN cum DAO dated 20.04.2021, required the petitioner to file its response by 23:59 hours on 23.04.2021.
- However, revenue passed the impugned order on 23.04.2021, without dealing with the request for adjournment and without waiting for the timeframe given in the SCN cum DAO dated 20.04.2021 to expire.
- The assessment order erroneously refers to the date of the SCN as 16.03.2021, whereas it was issued on 20.04.2021.

Facts of the case

### Court Findings

- Given this position, the best way forward, according to us, is to set aside the impagened assessment order, and proceed further from the stage of the show cause notice-cum-draft assessment order dated 20.04.2021.
- 9.1. We also take judicial notice of the fact that the Central Board of Direct Taxes has issued a notification dated 24.04.2021, whereby the timeframe for completion of assessment has been extended till 30.06.2021.
- 10. Accordingly, the impugned assessment order dated
  23.04.2021 as also the notice for demand, and notice for initiation of penalty proceedings, of even date, are hereby set aside.
- The Delhi High court while setting aside the impugned assessment order emphasised that the time period of three days to file reply in response to SCN is short.
- It observed that the order was passed with undue haste.

Takeaway point

#### Conclusion

Simply put, 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". Hence, precise yet comprehensive written submissions with underlying documentary evidence are currently the 'heart and soul' of the assessment proceedings. Where the submissions are simple, easy to comprehend and give a holistic view to the examiner, half of the battle is already won. Having said so, while significance of well-articulated written submissions under new faceless regime cannot be undermined, the pitfall associated with nil / inadequate opportunity to file contentions or ignorance of the filed submissions proved fatal for the tax-payers. Moreover, even in cases where video conferencing was opted, this alternative was either not granted or rendered meaningless owing to technical glitches, which further aggravated the just cause of natural justice.

The transition aimed at being a faceless, seamless and painless experience altogether, however, with the teething issues, the complete success of Season 1 has been elusive. The multiplicity and complexity of writ petitions all over the nation has in fact compelled the Government to recently come put with SOPs as internal instructions to the tax department for dealing with such matters.

As we look forward to a more mature faceless regime, the incumbent assessment framework has made a significant headway in achieving the goal of transparency with minimal human interaction while bringing PAN India assessment units working together for a common cause. We hope that "Season 2" will be more tax-payer friendly, will strictly adhere to all procedural protocols and give the stakeholders respite from unintended and costly litigation.