Faceless Assessment Scheme

NALSAR UNIVERSITY OF LAW
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Prologue to Faceless Assessment Scheme (FAS)

- The E-assessment Scheme was first introduced in 2015 on pilot basis in five cities *viz.* Ahmedabad, Bangalore, Chennai, Delhi, and Mumbai, which was extended to two more metros in year 2016.
- The Income-tax Department rolled out with e-assessment proceeding where the conduct of enquiry is compulsorily made through the e-mails only.
- A new Rule 127 was inserted by Income-tax (Eighteenth Amendment) Rules, 2015 w.e.f. 2-12-2015, providing framework for issue of notices and other communication with assessee.
- From 2016 to 2018, the CBDT progressively amended the rules, notified various procedures, and issued the required guidelines to increase the scope of e-proceedings.
- In 2017, Income-tax Department developed an *integrated* platform, *i.e.*, Income-tax Business Application (ITBA) for electronic conduct of various functions/proceedings including assessments.

Prologue to Faceless Assessment Scheme (FAS)

- Scope of e-proceedings assessment was extended vide instruction no. 08/2017 dated 29-9-2017 for all cases getting time barred during F.Y. 2017-18 with option to assessee to voluntarily opt-out from e-proceedings.
- Instruction No. 01/2018 dt 12-2-2018 was issued to cover all pending scrutiny assessments under e-proceeding scheme with the exception of some cases like search and seizure, re-assessment etc.
- Instruction No. 03/2018 dt 20-8-2018 was issued carving out the way for all cases required to be framed u/s 143(3) during F.Y.2018-19, which were to be compulsorily (mandatorily) completed through e-proceeding only.
- By Finance Act, 2018, two new sub sections (3A) and (3B) were inserted in S.143(3) w.e.f. 1-4-2018, which enabled the Central Government to come up with a Scheme for Faceless-Electronic Assessment.
- Subsequently, "E-assessment scheme 2019" was renamed as faceless assessment scheme vide Gazette notification dated 13-08-2020 bearing F.No. S.O. 2745(E) coming in force on 13-08-2020.

Prologue to Faceless Assessment Scheme (FAS)

- The assessment shall not be conducted by any individual jurisdictional officer. The cases after selection will be assigned by NeAC to an assessment unit in any ReAC.
- A writ was filed by Sumandeep Vidyapith Throu Registrar Chandramani Bhagwan More v. Commissioner of Income Tax (Exemption) [R/Special Civil Application No. 11623 of 2020, dated 22-1-2021] - Gujarat High Court challenging the transfer of the case u/s 124 read with 127 to NeAC
- Writ was dismissed on the ground that transfer of case u/s 127 is more in the nature of administrative order rather than a quasi-judicial order and the assessee cannot have any right to choose his assessing authority as no prejudice is caused as to which authority of department passes assessment order.

Salient features of Faceless Assessment Scheme (FAS)

- Guidelines for implementing FAS 2019, given on 13th Aug 2020
- https://youtu.be/5fIQeIjUJWk link for PM speech
- Scheme of Assessment prior to FAS (Manual Scheme
- Taxpayers Charter also introduced on that day
- With the launch of the Tax Charter, taxpayer is assured of fair, courteous and rational behaviour
- Tax system aims to be Seamless, Painless, Faceless
- Emphasis is on making every law and policy People Centric and Public Friendly rather than Power Centric
- The hon'ble PM said the platform of "Transparent Taxation – Honouring the Honest, has been launched to meet the requirements of the 21st century taxation system

Salient features of FAS

- "When the life of an honest taxpayer of the country becomes easy, he moves forward and develops, then the country also develops and leaps forward" said PM.
- Ante-dated legislation & arbitrary discretion (run with the hare & hunt with the hound)
- Referring to the Faceless system he said there is no need for a direct contact between the Taxpayer and the Income Tax Officer in all matters of scrutiny, notice, survey or assessment, said PM
- He said the charter takes care of maintaining the dignity and sensitivity of the taxpayer and that is based on a trust factor and that the assessee cannot be merely doubted without a basis.

Salient features of FAS

- About Faceless Assessment Scheme, hon'ble PM said: **"Policy driven governance…….when policy is clear, the grey areas are minimum, ……….there is a reduction in the element of discretion in government decision-making."**
- Four units introduced for completion of assessment – Assessment Unit, Verification Unit, Technical Unit & Review Unit.
- FACELESS ASSESSMENT SCHEME, 2019 - SCOPE OF SCHEME - ORDER UNDER PARA 3 OF SCHEME FOR SPECIFYING SCOPE OR CASES TO BE DONE UNDER SCHEME ORDER F. NO. 187/3/2020-ITA-1, DATED 13-8-2020
- As a result of this Order, all cases, other than those in the Central Charges and International Taxation charges. The cases transferred to FAS, are:

- where the **notice under section 143(2)** of Income-tax Act, 1961 (hereinafter referred as the Act) was issued by the (the NeAC);
- where the assessee **has furnished his return** of income:
  a) under section 139 or
  b) in response to a notice issued under section 142(1) or section 148(1);

  and a notice under section 143(2) of the Act, has been issued by AO;
- where **notice under section 142(1) of the Act**, has been issued and assessee has **not furnished his return of income** in response to said notice of AO;
- where assessee **has not furnished his return** of income under **section 148(1) and a notice under section 142(1),** issued by AO.

Salient features of FAS

- FACELESS ASSESSMENT (FIRST AMENDMENT) SCHEME, 2021 - AMENDMENT IN PARAGRAPHS 2, 5 AND 11 NOTIFICATION S.O. 741(E) [NO. 6/2021/F. NO. 370149/154/2019-TPL], DATED 17-2-2021

- The First Amendment largely clarified the procedure to be adopted for FA (such as functions of AU, VU, RV & TU. It also required issuance of draft assessment orders in accordance with risk management strategy of CBDT)

- The procedure envisaged is largely internal and is not verifiable by assessee, but the notified procedure is such that transparency, efficiency & accountability is not compromised.

DIRECTIONS issued vide ORDER F. NO. 187/3/2020-ITA-I, 18-9-2020:

- All cases u/s 153A/153C lying with jurisdictional authorities (other than Central/International charges) be transferred to Central charges;
- All TP cases will continue to be handled by the TPO and TP report will be submitted to Jurisdictional AO (JAO);
- Cases with FT&TR references shall be transferred to Central charges;
- Cases where notices u/s 148 or 142(1) or any other notice has been issued manually to be uploaded on the ITBA;
- Cases involving Special audit u/s 142(2A), pending in jurisdictional charges to be done by ReACs. JAOs to upload pending special audit reports on ITBA;
- Cases selected u/s 133A (excluding International Taxation) having impounded material be transferred to Central Charges vide; and cases having no impounded material will be handled by ReACs; survey reports shall be uploaded on ITBA by JAOs.

DIRECTIONS issued vide ORDER F. NO. 187/3/2020-ITA-I, 18-9-2020:

- Cases have set-aside by any appellate forum OR by Pr. CIT/CIT u/s 263/264 to AOs to be framed de-novo by AOs of International Taxation/Central charges or ReACs depending upon where the original order originated.
- However, partly set-aside cases requiring verifications to be done or giving appeal effect to be completed by JAOs in faceless manner**.**

(Assessment related matters)

DIRECTIONS issued vide ORDER F. NO. 187/3/2020-ITA-I, 18-9-2020: (judicial matters)

- VU to conduct necessary verification of additional evidence & remand reports referred by CIT(A); physical records to be uploaded by JAOs;
- Power u/ss 263 & 264 to be exercised by jurisdictional Pr. CsIT;
- ITAT and High Court of taxpayer to be the ITAT and High Court of JAO having PAN;

SOP FOR FUNCTIONING OF ASSESSMENT UNIT (AU)

CIRCULAR F. NO. PR. CCIT/NeAC/SOP/2020-21, DATED 19-11-2020

A: Issue of Initial Questionnaire u/s 142(1),

B: Process of issuance of notice u/s 142(1)/questionnaire,

C: Grant of adjournment to initial notice u/s 142(1) on request of taxpayer or a suo-moto adjournment,

D: Procedure to be adopted in case of non-compliance of any notice u/s 142(1)& passing of best judgement assessment u/s 144 of the Act,

E : Issue of penalty notice & levy of penalty u/s 272A for non-compliance of 142(1) notice,

F: Analysis of Information submitted in response to questionnaire u/s 142(1),

G: Issue of additional questionnaire u/s 142(1),

Apart from the above SOP deals with many other issues

SOP FOR FUNCTIONING OF REVIEW UNIT (RU)

CIRCULAR F. NO. PR. CCIT/NeAC/SOP/2020-21, DATED 19-11-2020

A: Handling of case received for Review,

B: Procedure for seeking clarification from AU,

C: Preparation of Review Report

SOP FOR FUNCTIONING OF VERIFICATION UNIT (VU)

CIRCULAR F. NO. PR. CCIT/NeAC/SOP-VU/2020-21, DATED 19-11-2020

A: Handling of case(s), having digital footprint, received for Verification or Enquiry,

B : Handling of case(s), not having digital footprint, received for Verification or Enquiry,

C: Handling of case(s), where request is received for physical verification or VU decides for physical verification,

D: Handling of case(s), received by designated VU for physical verification,

E: Procedure for seeking clarification from AU,

F. Handling of case(s), which are not responding to notices u/s 133(6) of the Act and levy of penalty u/s 272A of the Act.

Apart from the above SOP deals with few other issues

SOP FOR PERSONAL HEARING

CIRCULAR F. NO. PR. CCIT/NeAC/SOP/2020-21, DATED 23-11-2020

Where any modification is proposed in draft assessment order (DAO) issued by AU and assessee in his written response disputes the facts underlying the proposed modification and makes a request for a personal hearing, the CCIT ReAC **may allow personal hearing through Video Conference**, after considering the facts & circumstances of the case, as below:

1. Assessee has submitted written submission in response to the DAO,
2. Video Conference will ordinarily be of 30 minutes duration. It may be extended on the request of the Assessee or authorised representative,
3. Assessee may furnish documents/evidence, to substantiate points raised in VC during the session or within a reasonable time allowed by the AU, after considering the facts and circumstances of the case.

SOP FOR HANDLING WRIT PETITIONS WHERE ASSESSMENT IS MADE UNDER THE FACELESS ASSESSMENT SCHEME 2019/SECTION 144B OF THE INCOME-TAX ACT, 1961 AND OR PENALTY IS PASSED UNDER FACELESS PENALTY SCHEME (FPS), 2021 WHERE NaFAC/CBDT IS ONE OF RESPONDENTS

LETTER F.NO. AA (NAFAC)-1/58/2021-22/333, DATED 26-7-2021

SOP for handling Writs where:

a) Assessment is mode under FAS 2019/section 144B, or
b) Penalty order under Faceless Penalty Scheme (2021) and

Where NaFAC/CBDT is a respondent

The FAS per se is commendable for a number of reasons: It is yet another attempt to introduce modern information technology in the functioning of the Income-tax department. In its essence, it consists of utilising third party information with the help of artificial intelligence to decide whether to investigate a case or not; and if so, to what extent. The department is one of the very few organisations of the Central Government which has achieved considerable success in inducting modern information technology in its day to day functioning.

Judgments under FAS

- No show cause notice was issued even though variation was proposed, assessment order & notices were *set aside* – YCD Industries v. National Faceless Assessment Centre [2021] 127 taxmann.com 606 (Delhi*)* & Smart Vishwas Society v. National Faceless Assessment Centre [W.P. (C) 5348 of 2021, dated 2-6-2021] - Delhi High Court.
- Assessment order is passed before expiry of time allowed in the show cause notice – order set-aside and matter remanded back. Raja Builders v. National Faceless Assessment Centre [2021] 127 taxmann.com 339 (Bombay) & S Velu Palandar v. DCTO [1972] 83 ITR 683.
- Time allowed to file objection was too short or adjournment was not granted – Delhi High Court in KBB Nuts (P.) Ltd. v. National Faceless Assessment Centre Delhi [2021] 127 taxmann.com 194 (Delhi) set aside assessment to for considering reply filed by assessee.

- Where personal hearing was sought by assessee but was not allowed – Delhi High Court in *Lemon Tree Hotels Ltd.* v. *National Faceless Assessment Centre* [W.P. (C) 5427 of 2021, dated 21-5-2021] - in *Ritnand Balved Education Foundation (Umbrella Organization of Amity Group of Institutions)* v. *National Faceless Assessment Centre* [W.P. (C) 5537 of 2021, dated 27-5-2021], stayed the operation of assessment order as no such personal hearing was granted even though requested.
- Delhi HC directed the NeAC to grant personal hearing through video conferencing to assessee and pass fresh assessment order. .(Lokesh Constructions (P.) Ltd. v. Asstt. CIT [W.P. (C) 5491 of 2021, dated 27-5-2021]; DJ Surfactants v NeAC [2021] 127 taxmann.com 641 (Delhi).
- Usage of the word '**may**', cannot absolve the respondent/revenue from the obligation cast upon it, to consider the request made for grant of personal hearing. Sanjay Aggarwal v. NeAC [2021] 127 taxmann.com 637 (Delhi). (**CCIT may allow a personal hearing**)

- Notification No. 61 dated 12.09.2019 used the expression "shall" thereby giving assessee mandatory right to make himself heard. The clause 2 read as:

  "In a case where a modification is proposed in the draft assessment order, and an opportunity is provided to the assessee by serving a notice calling upon him to show-cause as to why the assessment should not be completed as per the such draft assessment order, **the assessee or his authorised representative**, as the case may be, **shall be entitled to seek personal hearing** so as to make his oral submissions or present his case before the income-tax authority in any unit under this Scheme"

- However, the new notification No. 60 dated 13.08.2020 amended the clause 2 and replaced the word "shall" with "may request" thereby taking away the inherent right of an audience.

- Wherever Assessing Officer proposes additions/disallowances to the asessee's declared income, he is required to issue a show cause notice *qua* each addition/disallowance as directed by CBDT through instruction no. 20/2015, dated 29-12-2015. *vide* para 4 as under (refer- *CLH Gaseous Fuel Applications (P.) Ltd.* v. *National E-Assessment Centre*, Delhi [W.P.(C) 5272 of 2021, dated 12-5-2021] - Delhi High Court):

  "4. The Board further desires that in all cases under scrutiny, where the Assessing Officer proposes to make additions or disallowances, the assessee would be given a fair opportunity to explain his position on the proposed additions/disallowances in accordance with the principle of natural justice. In this regard the Assessing Officer shall issue an appropriate show-cause notice duly indicating the reasons for the proposed additions/disallowances along with necessary evidences/reasons forming the basis of the same. Before passing the final order against the proposed additions/disallowances, due consideration shall be given to the submissions made by the assessee in response to the show-cause notice."

Section 144B – Faceless Assessment

- Sub-section (1) starts with non-obstante clause, "Notwithstanding anything to the contrary contained in any other provision of this Act,……..."
- Clause (xii) of sub-section (1) of section 144B: "the assessment unit shall, after taking into account all the relevant material available on the record, prepare, in writing……."
  - relevant material, not to be ignored &
  - Irrelevant material, not to be considered
- Clause (xxi) of sub-section (1) of section 144B: "in case of an eligible assessee, where there is a proposal to make any variation which is prejudicial to the interest of such assessee, as mentioned in sub-section(1) under section 144C, the NFC shall……"
- Sub-section(1) of 144C: "The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment to eligible assessee…"

Section 144B – Faceless Assessment

- Sub-section (15) of section 144C: "For the purposes of this section,—

  "eligible assessee" means,—

  (i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; **and**

  (ii) any non-resident not being a company, or any foreign company."

- FAS does not apply to international taxation and Central charges, hence to meaningfully understand clause (xxi) of sub-section (1) of section 144B, sub-clause (ii) of eligible assessee above, cannot applied to clause (xxi).
- Section 92CA, applies to an assessee who has entered into an international transaction or specified domestic transaction. (ie transfer pricing provisions apply even to domestic transactions)
- In my humble view, to international transactions or SDTs of a resident assessee, TP provisions shall apply and to that extent section 144C & 144B shall also apply.

Risk Management Strategy

- The clause (xvi) of sub-paragraph (1) of paragraph, states that NeAC: "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……".
- CBDT will take a holistic view when it formulates as well implements this strategy. When it periodically revised the monetary limits for the department to file appeals before higher forums, it did so by sacrificing its "risk management strategy," in favour of arbitrarily reducing litigation.
- Perhaps instead of periodically increasing such limits for filing appeals before higher forums, it would have found it more fruitful to shift to an "issue-based" approach for filing fresh appeals or withdrawing the same before various appellate forums.
- Bombay HC in CIT v. TCL India Holdings (P) Ltd. [2016] 71 taxmann.com 216/241 Taxman 138 observed that that "the department must have in place a system of keeping a record of questions of law which have been admitted or dismissed by Court as it would enable a consistent stand being taken by revenue when a similar question arises before same or different Bench of Court."
- Jharkhand HC in CIT v. Sidhi Vinayak Metcon Ltd. [2019] 106 taxmann.com 2 held that: "It is high time for Commissioner to have orientation courses or induction courses conducted for Assessing Officers to make them understand that whenever assessee receives any amount by cheque, there is a need for Assessing Officer to give notice to drawers of those cheques." It is a principle of law applicable even otherwise in respect of all other matters examined by AOs and CsIT(A) alike.

Risk Management Strategy

- Hon'ble SC in State of Karnataka v. Gadilingappa [2010] 2 SCC 728, at page 730, observed: "It is a well settled principle of law that even if a wrong is committed in an earlier case, the same cannot be allowed to be perpetuated", furnishes enough reasons and inspiration to correct the wrong unknowingly committed, more so when there is no merit in perpetuating the wrong, and the party benefitting from "the wrong" in the order, cannot be allowed to have a stake in "the wrong" order.
- Hon'ble Justices Y V Chandrachud and P N Bhagwati both publicly regretted judgment pronounced by them in case of ADM Jabalpur. It was held that fundamental rights of citizens stand suspended in the case of an emergency.
- Hon'ble Justice Kurian Joseph was on the bench which found the NJAC unconstitutional and had upheld the Collegium system of appointment of judges. He regretted his decision of rendering NJAC unconstitutional for the major reason that collegium did not improve upon fallacies pointed out by the Supreme Court in the said NJAC judgement.

Risk Management Strategy

- In Suresh M. Jamkhindikar v. ACIT [2018] 405 ITR 544, Bombay HC recorded its "sincere appreciation for the proactive and sensitive manner in which the CIT has intervened to ensure that injustice caused to the party is addressed. His expression of regret for the inconvenience caused to the Petitioner for acts of his department is gracious and a very commendable and fair gesture, which is rarely noticed on the part of the Revenue. If such conduct would become the norm, the department itself would gain as the fairness in dealing with an assessee would automatically result in greater compliance of the laws by the tax payer. This secure in the belief the tax department would be fair and not treat the assessee as its enemy/adversary." PCIT Sachidanand Srivastava
- The en masse reversal by courts of bogus-purchase additons, confirmed by the CsIT(A)); failure to bring even the basic corroborative evidence on record, let alone independent evidence, leading to the quashing of orders in penny stock cases; department losing more than 80% appeals at appellate forums; inclination of AOs, including that of CsIT(A) to unfailingly, always err in favour of revenue & a plethora of other issues, need consideration for effective risk management strategy.

Risk Management Strategy

- The mere ensuring, nay, legislating application of decisions of courts at the stage of assessment proceedings, shall not only help in risk management, but shall also provide sufficient insurance against all risks – administrative and legal – of passing of illegal and unsustainable orders.

Is Section 154 rendered redundant, by FAS?

- The notification No 61 of 2019 under para 5 clause (xx) states,that NeAC shall, after completion of assessment, transfer all electronic records of the case to AO having jurisdiction over such case, for:

  (a) imposition of penalty;

  (b) collection and recovery of demand;

  (c) **rectification of mistake;**

  (d) giving effect to appellate orders;

- The question is will the AO rectify an order that is passed under the indirect scrutiny & approval by his superior officers.

Sub-section (9) of section 144B, repealed with retrospective effect

- Sub-section (9) of section 144B repealed by FA 2022, w.e.f 1st April 2021,
- A provision akin to s.144B(9) was embedded in the assessment scheme from the beginning i.e. by an instruction dated 13.08.2020 (F. No. 187/3/2020/ITA-I) issued by CBDT in FAS notified by it under s. 143(3C) and 143(3D), applicable prior to introduction of 144B wef 1st April 2021.
- Said provision [144B(9)] was introduced by Parliament from 1.4.2021;
- Adherence to mandatory provision is the soul of FAS, which puts fetters on AO to follow the spirit of law.
- Explanatory Memorandum for repeal says: "a large number of disputes have been raised under this subsection **involving technical issues arising due to use of information technology**, leading to unnecessary litigation. It is, therefore, proposed to omit this subsection i.e., sub-section (9) of section 144B from its date of inception. This amendment will take effect retrospectively from 1st April, 2021."
- This retrospective repeal is manifestly arbitrary and violates Article 14 of Constitution, as it does not spell out any rational reasons or determining principles for repeal.

Sub-section (9) of section 144B, repealed with retrospective effect

Supreme Court in *NFAC* v. *Mantra Industries Ltd* stayed operation of order of Bombay High Court by getting persuaded / recording submissions of the Revenue on the ground that s. 144B(9) is repealed retrospectively w.e.f. 1st April 2021 by Finance Act, 2022, and also that the taxpayer should have availed a statutory appellate remedy against the adverse assessment order.

Bombay High Court had *set aside* order passed by AO due to applicability of s. 144B(9) which provides that the assessment order shall be *non-est* if the assessment is not made in accordance with s. 144B.

However, from bare perusal of order, it is clearly whether assessment was remanded back to AO, as was done by other High Courts in similar matters, or the assessment.

Seemingly Bombay HC has actually quashed the assessment as the matter travelled to SC Court as serious prejudice has been caused to the Revenue.

Is Section 263 & 264 rendered redundant, by FAS?

Section 263—Revision of orders prejudicial to revenue

- The PCIT may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by AO or TPO, is erroneous in so far as it is prejudicial to the interests of revenue, he may after giving assessee an opportunity of hearing and **after making or causing to be made such inquiry as he deems necessary**, pass such order as the circumstances of case may justify.
- PCIT is firstly an admin officer, and later an quasi-judicial authority, and has responsibility to ensure correctness in procedure for proceedings and also in the passing of an order therein.
- Causing inquiries to be made is a requirement of PCIT, even at assessment stage.
- Expln 2, clause (a): "the order is passed without making inquiries or verification which should have been made"

Is Section 263 & 264 rendered redundant, by FAS?

Section 264—Revision of other orders

- In case of any order other than an order to which section 263 applies, the PCIT either on his own motion, or on any application by assessee for revision may call for the record of any proceeding under this Act, and may make such inquiry or cause such inquiry to be made and pass such order, not being an order prejudicial to assessee, as he thinks fit.
- PCIT is firstly an admin officer, and later an quasi-judicial authority, and has responsibility to ensure correctness in procedure for proceedings and also in the passing of an order therein.
- Causing inquiries to be made is a requirement of PCIT, even at assessment stage.

Justice Antonin Scalia (A lion of the law)

- US Supreme Court vs Indian Supreme Court,
- Composition of benches of Indian Supreme Court
- Assertion of Attorney General K K Venugopal

- "to allow the **policy question** of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine, **is to violate a principle even more fundamental** than no taxation without representation: no social transformation without representation."