Faceless Appeals

NALSAR UNIVERSITY OF LAW
6th May 2023

Faceless Appeals Scheme 2020 (FAS)

- The FAS was introduced on 25th Sept 2020 vide Notification S.O. 3296(E), which was superseded by Notification S.O. 5429(E) dt 28th Dec 2021.

- [Para 12 of Notification 3296(E)] – personal hearing discretionary

  (3) The Chief Commissioner or the Director General, in charge of the Regional Faceless Appeal Centre, under which the concerned appeal unit is set up, **may approve the request for personal hearing** referred to in sub-paragraph (2), if he is of the opinion that the request is covered by the circumstances referred to in clause (xi) of paragraph 13.

- [Para 12 of Notification 5429(E)] – allows personal hearing

  (3) The concerned Commissioner (Appeals) **shall allow the request for personal hearing** and communicate the date and time of hearing to the appellant through the National Faceless Appeal Centre.

Procedure in appeal (Para 5)

- automated allocation system;
- may condone the delay in filing appeal;
- notice to appellant to file his submission;
- NFAC to obtain such further information, document or evidence from the appellant or any other person;
- NFAC to obtain a report from AO on grounds of appeal, information, document or evidence furnished by appellant;
- CIT(A) may request AO for **making further inquiry under sub-section (4) of section 250,** and submit a report;
- CIT(A) may serve a notice upon appellant **or any other person**, or AO to submit such information, document or evidence or report, relevant to appellate proceedings

Procedure in appeal (Para 5)

- In appeal before CIT(A) entire order is open.

- **Additional grounds**
  - Appellant may file **additional grounds of appeal** to CIT(A) specifying therein the **reason for omission** of such ground in appeal filed by him;
  - Additional grounds shall be accepted if CIT(A) is satisfied that its omission in the form of appeal **was not wilful or not unreasonable**;
  - On accepting additional grounds, comments of AO shall be obtained;
  - If additional grounds, not admitted, CIT(A) to record reasons in writing;

Procedure in appeal (Para 5)

Rule 11 of the Income-tax Appellate Tribunal Rules

Grounds which may be taken in appeal

"The appellant shall not, except by leave of the Tribunal, urge or be heard in support of **any ground** not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, **shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:**

Provided that the Tribunal shall not rest its decision on **any other ground** unless the party who may be affected thereby has had a sufficient opportunity of being heard on **that ground**." (emphasis supplied)

Procedure in appeal (Para 5)

Additional Evidence (Rule 46A)

- No evidence, whether oral or documentary, other than the evidence produced during the course of proceedings before AO be produced, except in the following circumstances:
  - where AO has **refused to admit evidence** which ought to have been admitted; or
  - where AO has passed order **without giving sufficient opportunity** to appellant to adduce evidence relevant to any ground of appeal.
  - where **appellant was prevented by sufficient cause** from producing the evidence **which he was called upon to produce** by AO; or
  - where appellant was **prevented by sufficient cause** from producing before AO any evidence **which is relevant to any ground** of appeal.

Procedure in appeal (Para 5)

Additional Evidence (Rule 46A)

- Appeal Centre shall send the additional evidence to AO;
- AO shall furnish a report thereon;
- CIT(A) may, after considering additional evidence and report furnished by AO, admit or reject additional evidence, for reasons to be recorded in writing;
- CIT (A) shall, if he admits such evidence, prepare a notice to provide an opportunity to AO to examine such evidence or to cross-examine such witness, as may be produced by appellant, or to produce any evidence or document, or any witness in rebuttal of the evidence or witness produced by the appellant, and furnish a report thereof;
- AO may request Commissioner (Appeals) to direct production of any document or evidence by appellant, or examination of any witness.

Procedure in appeal (Para 5)

Additional Evidence (Rule 46A)

- CIT (A) may for the purpose of making enquiries in appeal proceedings prepare a notice –

  (A) directing the appellant to produce such document or evidence; or

  (B) **for examination of any other person**, being a witness;

- Where CIT(A) intends to enhance an assessment or a penalty or reduce the refund, he shall prepare a show-cause notice containing reasons;

- CIT (A) shall prepare in writing, an appeal order **stating the points for determination, the decision thereon and the reason for decision**;

Penalty proceedings in course of appeal proceedings

- Penalty proceedings arising from appeal proceedings before CIT(A), for **noncompliance of any notice, direction or order** issued under this Scheme on the **part of the appellant or any other person**;

- CIT (A) shall accordingly issue SCN & after taking into account all relevant material available on record & the response furnished, prepare a penalty order;

- Personal satisfaction of AO & not satisfaction borrowed from CIT (A) is essential for AO to issue penalty notices by him such as 270A etc;

- There can be no direction by CIT (A) to AO to initiate or levy penalty;

- Penalty in appeal proceedings is not the same as penalty order of AO appealed before CIT (A).

Rectification proceedings

- Mistake apparent from the record,

- An application for rectification of mistake may be filed by:-
  - the appellant or any other person, as the case may be; or
  - the CIT (A) who has passed the appeal order; or
  - the AO

Appellate proceedings

- appeal against an order passed by the CIT(A) shall lie before ITAT having jurisdiction over the jurisdictional Assessing Officer of appellant.

- where any order passed by CIT(A) is set-aside and remanded back to CIT(A) by the ITAT or High Court or Supreme Court, NFAC shall assign the order to a CIT(A) for further action.

What CIT cannot do

CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC)

SC while adjudicating the question as to whether in enhancing the assessment for any year, the **Appellate Assistant Commissioner, can travel outside the record,** that is to say, **the return made by the assessee and the assessment order passed by the Income-tax Officer** with a view to **finding out new sources of income, not disclosed in either**, had categorically held that in view of the provisions of sec. 34 and 33B by which escaped income can be brought to tax, the power of the Appellate Assistant Commissioner is limited. He has no power to travel beyond the record to enhance the assessment of any year by discovering new source of income not mentioned in the return of the assessee.

What CIT cannot do

- In case of ITO v. Biswajit Chaterjee [IT Appeal No. 565 (Kol) of 2013, dated 10-11-2017], on the peculiar facts and circumstances of the case, the Kolkata bench of the Tribunal **dismissed the plea of the department**:
  - that the CIT (A) was wrong in not giving direction to the Assessing Officer to **reopen the case of the assessee for another year**,
  - **if he was of the view** that the addition did not belong to the year under consideration.

The hon'ble bench referring to the powers given to CIT (A) under section 251 and also referring to a landmark judgement of the Apex Court in the case of ITO v. Murlidhar Bhagwan Das [1964] 52 ITR 335, came to such conclusion.

Sub section (4) of section 250

- The CIT (A) may, before disposing of any appeal, **make such further inquiry as he thinks fit, or may direct the AO to make further inquiry** and report the result of the same to the CIT(A)

Sub-rule (4) of Rule 46A

- Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.

- When the CIT (A) himself has directed production of any document, or examination of any witness, there is no question of it being considered as an additional evidence. Hence there is no question of its admission as additional evidence.

- Reasonable opportunity ought to be furnished to AO only before taking into account additional evidence.

- No opportunity, let alone reasonable opportunity, be furnished to AO in respect of inquiry suo motu made by CIT(A), if AO has chosen not to appear before CIT (A).

Sub section (4) of section 250 & sub-rule (4) of Rule 46A

CBDT Circular F No 279/Misc/M-124/2018-ITJ dt 14th February 2019.

- Para 3 of the said circular requires that: "…..*each AO shall identify the top 20 cases of quality assessments and shall make proper representation in these cases before CIT(A), either personally or by filing written submissions. The Joint/Addl.CIT Range will identify top 20 cases of the Range and will personally monitor proper representation in these cases before the CIT(A).*"

- In the absence of guidelines from CBDT, to designate a case as top case of quality assessments, the only incentive and initiation left with the AO & Addl CIT to designate a case as a quality assessment, **is the highpitched assessment case, as these are not excluded from the meaning of quality assessment**.

Sub section (4) of section 250 & sub-rule (4) of Rule 46A

CBDT Circular F No 279/Misc/M-124/2018-ITJ dt 14th February 2019.

- Vide item (i) of sub-clause A to clause 5, **PCIT is only required** to ensure that quality assessment orders are properly marked as quality assessment orders and are duly represented before the CIT (Appeal) by department. No responsibility or duty has been cast on PCIT to even enunciate the basis of a quality assessment order.

It is evident that Department has sufficient opportunity to represent itself before CIT (A).

May & Shall entangle

- When CIT (A) intends to use the provision containing "may" against the assessee, he is obliged to:

  (*a*) have a "reason to believe" that the provision can be so used;

  (*b*) "record his satisfaction" in this respect;

  (*c*) furnish to assessee a "reasonable opportunity of being heard"; &

  (*d*) conduct the inquiries and verification necessary to form the said reason to believe.

- **The provision containing "may" shall be enforced against assessee, only when it cannot be invoked for granting relief to him**, as when two opinions are otherwise possible in law, the opinion otherwise necessary favourable to assessee ought to be adopted.

Suo-motu powers never summoned

- We hardly come across orders passed by CIT (A), invoking the suo motu, powers enshrined in sub-section (4) of section 250, read with sub-rule (4) of Rule 46A, to dispose of an appeal, submitting the assessee to the door steps of sub-rule (1) to Rule 46A, with all the infirmities, disabilities and attendant miseries, in case additional evidence were not to be so admitted.
- Disposal of an appeal by CIT (A) leads to its finality – wisdom of Justice Atkins **"Finality is good but justice is better".**
- Supreme Court in the case of GOI v. Pirthwi Singh stated that "The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the court decide," must be eschewed and condemned. The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the National Legal Mission to reduce average pendency time from 15 years to 3 years"

SC to decide fewer cases, but with more certainty

- “Ultimately, the fastest way to tackle the Supreme Court's notorious backlog and restore confidence in the decisions of the upper judiciary might not be to decide more cases, but to decide fe”wer, with more certainty. Nick Robinson

Faceless Appeals Scheme 2020 (FAS)

- Appeal unit to have:
  - one Commissioner (Appeals);
  - such other income-tax authority, ministerial staff, executive **or consultant to assist** the Commissioner (Appeals) as considered necessary by CBDT

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सहज मिले सो दूध सम, मांगा मिले सो पानि
कह कबीर वह रक्त सम, जामें एंचा तानि।

Section 246 amended to incorporate appeals to JCIT

- The memorandum at page 34 under the heading "Introduction of the authority of Joint Commissioner (Appeals)" at para 2, states:

  > "It has been noted that as the first authority for appeal, **Commissioner (Appeals) are currently overburdened** due to the huge number of appeals and the pendency being carried forward every year. In order to **clear this bottleneck**, a new authority for appeals is being proposed to be created at Joint Commissioner/ Additional Commissioner level to **handle certain class of cases involving small amount of disputed demand.** Such authority has all powers, responsibilities and accountability similar to that of Commissioner (Appeals) with respect to the procedure for disposal of appeals."

Section 246 amended to incorporate appeals to JCIT

- The source of appeals-to-be-filed with CIT (Appeals) itself has been hugely & unusually depleted in the last 2 pandemic years;

- JCIT is required to execute several administrative responsibilities, apart from being empowered with quasi-judicial authority under section 144A, to "…….issue such directions as he thinks fit to complete the assessment…."

- It bears a recall that "…..A Joint Commissioner, may on his own motion or on a reference being made to him by the Assessing Officer or on the application of an assessee, call for……….."

Section 246 amended to incorporate appeals to JCIT

- It is stated that: "a new authority for appeals is being proposed to be created at Joint Commissioner/Additional Commissioner level **to handle certain class of cases involving small amount of disputed demand…...**"

- In the interest of justice & equity, assessment proceedings should not raise a small demand which shall also be a step in reducing litigation, much in accordance with CBDT circular No 17 of 2019 dt 8th Aug 2019 (limits for filing appeals by department).

- We have sub-section (7) of section 270A, in respect of penalty, which helps reduce litigation, on payment of penalty equal to 50% of tax.

Section 246 amended to incorporate appeals to JCIT

Reduce the burden of CIT (A)

- CIT (A) are never really borne the burden of appeals; indisputably it is the beleaguered appellants who bear the real burden;

- Large scale reversal of orders of CIT (Appeal) orders by higher appellate authorities demonstrates **that the premise of burden, to facilitate the reform, is itself incorrect**, though the intention of the government is certainly honorable.

- When the hon'ble Supreme Court pronounces orders favouring the revenue, very rarely does the contribution of CIT (A) gets acknowledged.

Section 246 amended to incorporate appeals to JCIT

Why no section 144A direction issued in assessment

- In deciding appeal JCIT should be asked to state why he did not issue any direction under section 144A at the assessment stage,
- The JCIT should be asked to state in the assessment proceedings why he did not deem it fit to issue a direction at that stage,
- Power to decide appeals prevailed with DCIT, under section 246 till 2000,
- **The sub-section (6B) of section 250**, dealing with procedure for disposal of appeals, by **CIT (A)** states: "The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of disposal of appeal by Commissioner (Appeals), so as to impart greater **efficiency, transparency and accountability** by—...."

Section 246 amended to incorporate appeals to JCIT
Why no section 144A direction issued in assessment

- The sub-section (5) to the 246 provides that: "……for the purposes of disposal of appeal by the Joint Commissioner (Appeals), the Central Government may make a scheme, by notification in the Official Gazette, so as to dispose of appeals in an **expedient manner with transparency and accountability** by eliminating…………"
- The **absence of *efficiency***, by advertence or inadvertence, in the procedure stated in said sub-section (5) is evident. As efficiency is absent can this office be trusted to **pass just, fair and legally sustainable orders, is left to the imagination of scholars of NALSAR**.