

THE CHAMBER OF TAX CONSULTANTS

FACELESS ASSESSMENTS AND APPEALS

Presented by:
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Chartered Accountant

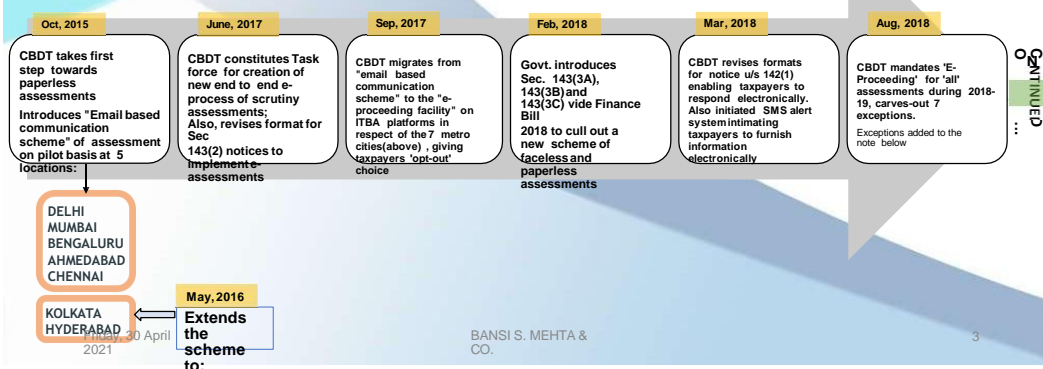
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HISTORICAL BACKGROUND

India's journey from "E-mail based proceedings" to "E-Proceedings on ITBA platform" to "E-assessment Scheme" to "Faceless Assessment Scheme"

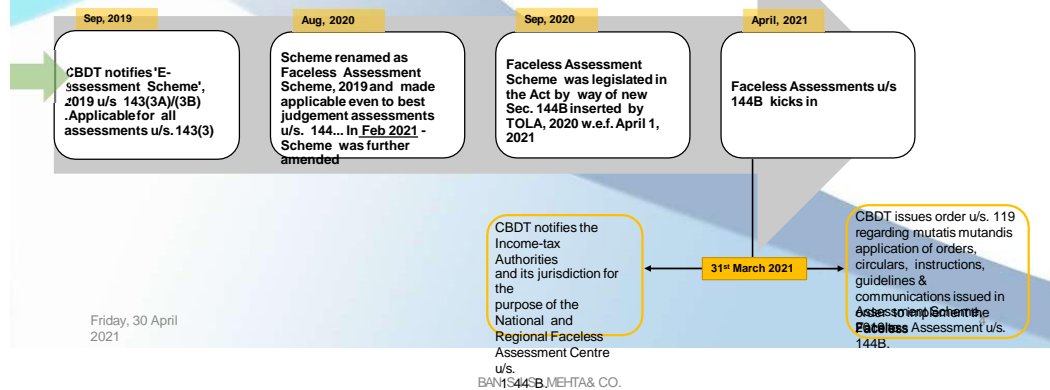


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HISTORICAL BACKGROUND

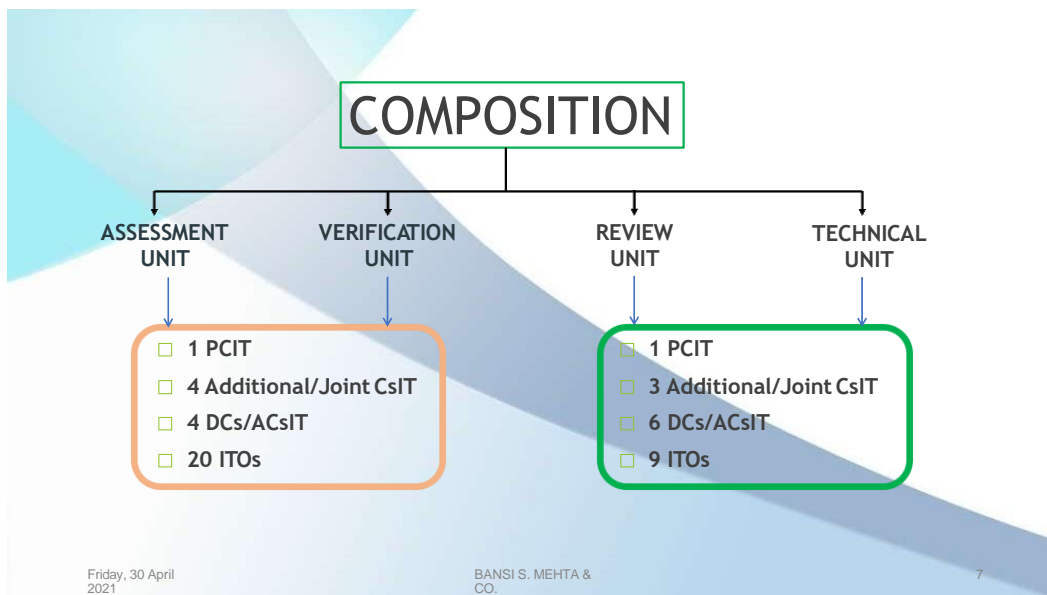
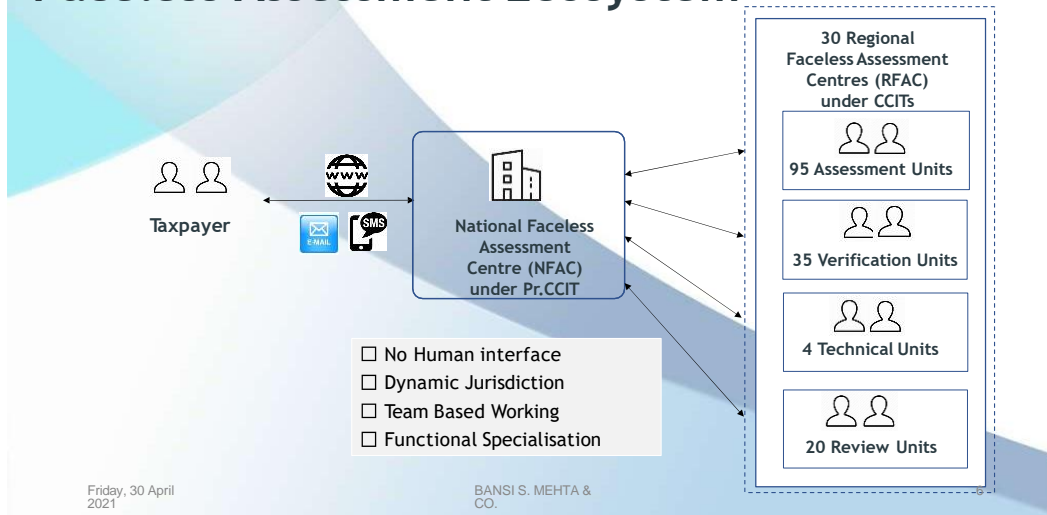
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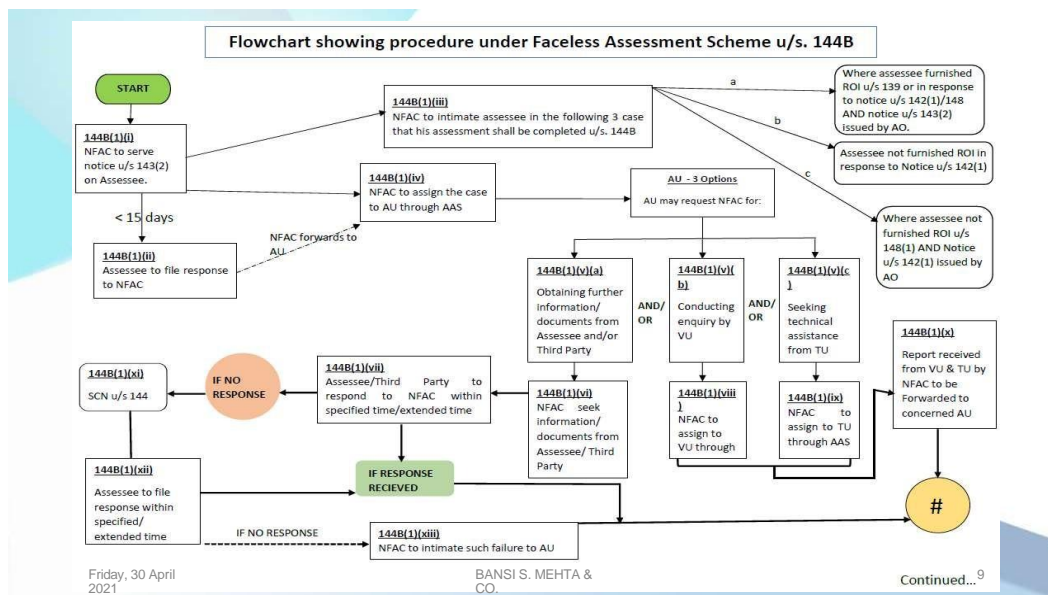
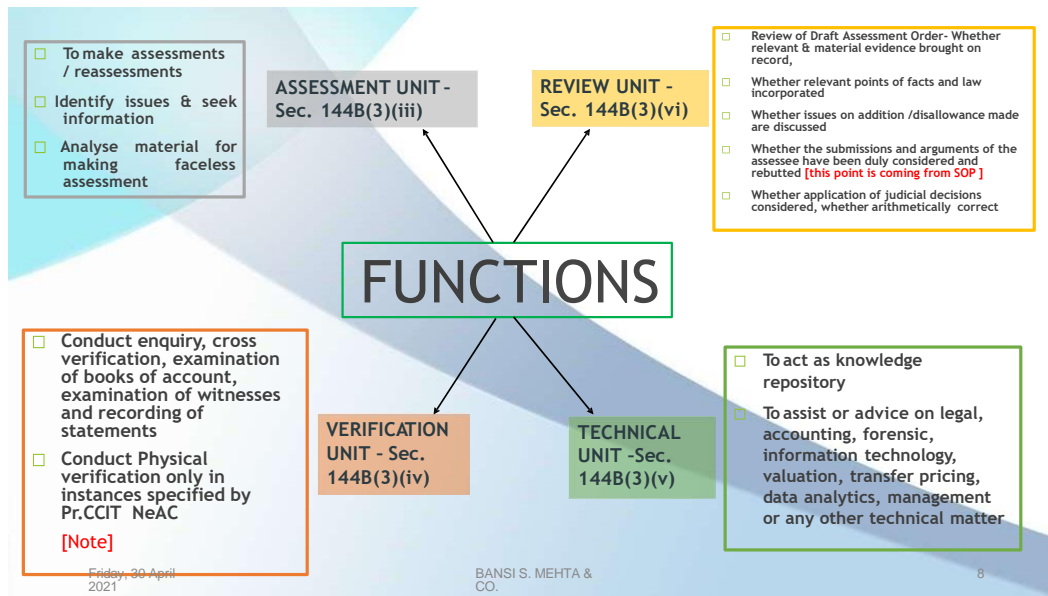


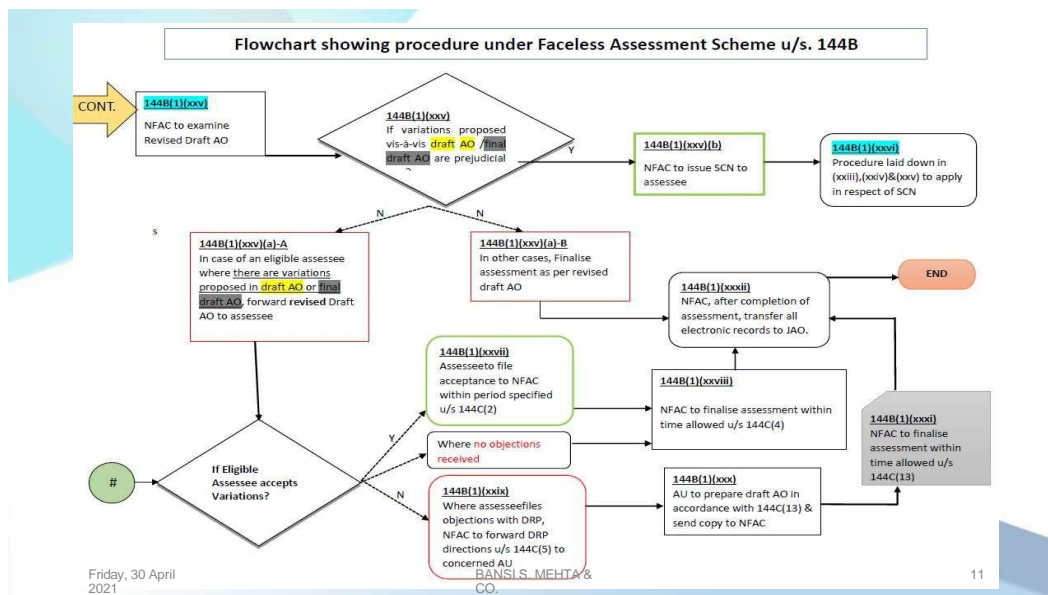
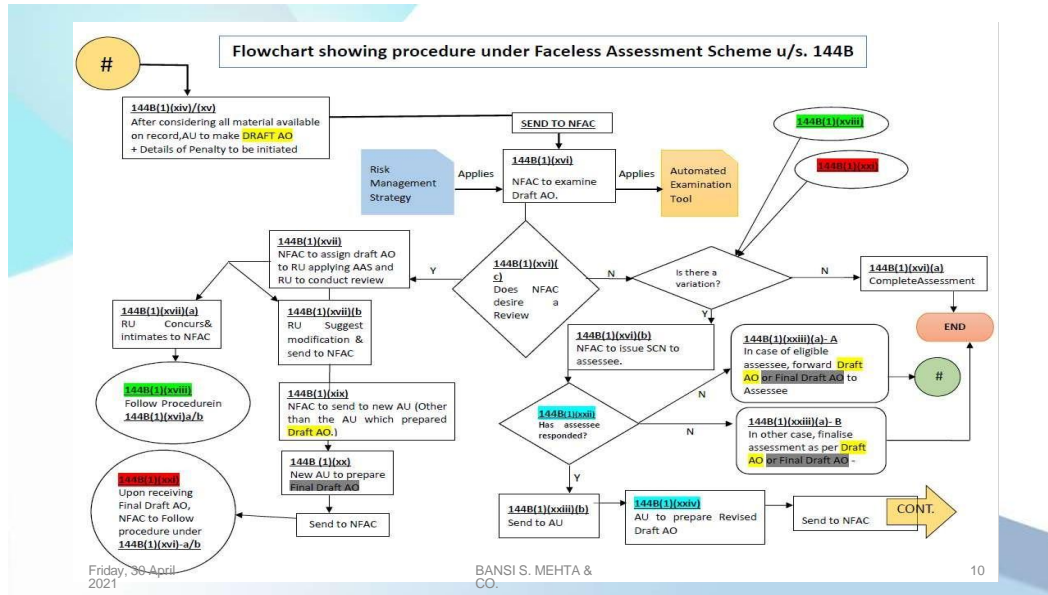
STATUTORY PROVISIONS

Section	Legal Framework	Assessment / Appeal U/S	Scheme notified? When
143(3A)/(3B)/(3C)/(3D)	applicable from April 1, 2018	143(3) & 144	Yes. Sept 12, 2019 Scheme applicable to assessments made upto March 31, 2021
144B	Assessments made on or after April 1, 2021	<ul style="list-style-type: none"> 143(3) & 144 148, If 143(2) Notice already Issued by JAO. 148, If ROI not furnished and 142(1) issued by AO. 	<ul style="list-style-type: none"> NA
151A	November 1, 2020	148 - Issue of Notice & Re-assessment u/s 147 and order u/s 148A	Not yet
157A	November 1, 2020	154 / 155 / 156 / 157	Not yet
264A	November 1, 2020	263 / 264 OGE to order u/s. 250 / 260 / 264 / 254 / 263	Not yet
264C (14B)/(14C) 250, (6B), 2021	November 1, 2020 April 1, 2020 & April	Faceless DRP Scheme is yet to be notified	Not yet CIT(A) - Yes. Sept 25, 2020

Faceless Assessment Ecosystem







Sec. 144B(2) : Scope of Faceless Assessments

- Faceless Assessment – only for specified territorial area, specified persons/class of persons/ incomes / class of incomes
- CBDT order u/s. **144B(2)** dated March 31, 2021 specifies –
 - *all the assessment proceedings pending as on March 31, 2021 and those initiated on or after April 1, 2021*
 - *other than in the Central & International tax charges*
- Central charges – Search cases [Sec. 153A/153C], FT&TR cases, Survey cases (only where some material is impounded)
- International tax charge - Non-residents / foreign companies

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Sec. 144B(5) to (7): Mode of communication

- Communication between the Assessee and AU/VU/TU/RU: Only through NFAC
- Communication between NFAC & Assessee: “exclusively by Electronic Mode”
- Internal communication between NFAC and RFAC: “exclusively by Electronic Mode”
 - Exception: Cases where physical verification is required by VU (114B(7)(xii) r.w. SOP)
- NFAC to authenticate its communication by affixing digital signature
- Assessee to authenticate:
 - If assessee required to furnish ROI under digital signature: then by digital signature
 - Other cases: either by digital signature or electronic verification code in prescribed manner

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Sec. 144B(5) to (7): Mode of communication

(cont'd)

- All notices / orders / communication shall be delivered to the assessee by way of:
 - Placing it in assessee's registered account;
 - Sending to registered email address of assessee or authorized representative;
 - Uploading it on assessee's Mobile App.

AND (in all three cases)

- Followed by real time alert (i.e. sms / mobile app / email)
- All communication with persons other than assessee by:
 - Sending it to the registered email address

AND

- Followed by real time alert (i.e. sms / mobile app / email)
- Assessee to file his response through his registered account. Acknowledgement containing the hash result – final.
- Q: Are the requirements of sec. 282 (service of notice etc) overridden?
- A: Yes. S. 144B(1) – starts with a non obstante clause

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Sec. 144B(5) to (7): Mode of communication

(cont'd)

- Assessee / AR shall not be required to appear in the assessment proceedings
- But, Assessee / AR may request for personal hearing where SCN is issued as to why assessment should not be completed as per draft order
- CCIT/DGIT of concerned RFAC may approve the request for personal hearing
- SOP for personal hearing:
 - Where assessee disputes the facts regarding the proposed variation to income
 - Assessee has submitted written submissions
 - Allow personal hearing through VC
 - VC generally not more than 30 minutes
- Assessee may furnish evidence / documents during the VC or after the hearing within reasonable time.

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Sec. 144B(5) to (7): Mode of communication

(cont'd)

- All examination and recording of statement of the assessee or any other person (other than in survey) – exclusively through VC
- CBDT required to establish facilities for VC at different locations (where assessee and ARs may not have access to such facilities)
- Power to frame SOPs – S. 144B(7)(xii):
 - SOPs for effective functioning of NFAC, RFAC
 - Service of notice
 - Receipt of information / documents
 - Issue of acknowledgement
 - E-proceedings facility – login, assessment tracking status, download, etc
 - General administration and grievance redressal mechanism

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Sec. 144B - Explanation: Certain important Definitions

- Computer resource of assessee: “includes” –
 - Assessee's registered account in IT portal
 - Mobile App linked to registered mobile number
 - Registered e-mail address
- Registered account – e-filing account in IT portal
- Registered Mobile no: Assessee or AR's mobile no on e-filing account
- Registered email address:
 - On e-filing account;
 - Last ITR
 - Email in PAN and Aadhaar database
 - MCA web-site
 - Email address made available to the Department

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Other provisions of S. 144B

- 144B(8): PCCIT/ PDGIT of NFAC may transfer the case to the JAO if considered necessary, at any stage of the assessment
- 144B(9): Assessments not in faceless form – non est

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SOPs issued by Pr. CCIT, NeAC for implementation of FAS, 2019

- Pursuant to powers enshrined in Para 12 of the Faceless Assessment Scheme, 2019, Pr.CCIT, NeAC issued SOP / guidelines in November, 2020, with prior approval of the CBDT laying down the standards, procedures and processes for units set-up under this Scheme for the purpose of implementation of Faceless Assessment Scheme (FAS), 2019.
- The new Scheme u/s. 144B being *pari materia* with the above Scheme also provides for similar power u/s. 144B(7)(xii).
- On March 31st, 2021, CBDT issued order u/s. 119 regarding *mutatis mutandis* application of orders, circulars, instructions, guidelines & communications issued in order to implement the FAS, 2019 to Faceless Assessment u/s. 144B.
- By virtue of this CBDT order, can the aforesaid SOP issued under earlier Scheme with prior approval of CBDT be read into the new Scheme u/s. 144B?
- If yes, can these SOPs which are though stated to be for internal departmental guidance be relied upon since the power to issue such SOPs is derived from Sec. 144B itself?

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Outline of SOPs for AUs

- 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)

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Outline of SOPs for AUs (cont'd)

- H : Reference to Verification Unit for online enquiry/Verification.
- I : Sending reference to VU for field physical verification.
- J : Sending reference to Technical Unit (TU)
- K: Handling Re-assessment under section 148 of the Act
- L : Handling approval for withholding of refunds u/s 241A of the Act
- M : Handling of revised return cases:
- N: Handling of unverified return cases

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Outline of SOPs for AUs (cont'd)

- O: Handling of cases with CPC related defect issues
- P : Handling of reference for attachment u/s 281B of the Act (Need to make reference to Board for amendment after reading New scheme)
- Q: Handling of Compulsory Scrutiny cases & Handling of Legacy Set Aside cases
- R: Handling of PAN marked as fraud PAN.
- S: Preparation and Submission of draft assessment order.
- T: Issue of Show Cause Notice
- U: Passing of Final Assessment Order

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Outline of SOPs for AUs (cont'd)

- V: Handling Clarifications sought by VU / TU
- W: Handling of cases received by new AU after suggestion of modification by RU
- Annexure I-1
- SOP for handling non-responsive cases
- Sending email communication to other emails available in internal sources
- Sending SMS communication to other mobile numbers
- Marking the person as Non-responsive
- Handling of non- responsive case by Verification Unit
- Supervision and monitoring

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Outline of SOPs for AUs (cont'd)

- Annexure I-2
- SOP for handling Address Verification Requests
- Preparation of reference for address verification
- Allocation of reference for address verification
- Handling of address verification by Verification Unit
- Annexure I-3
- SOP for handling untraceable cases
- Marking the person as untraceable
- Handling of untraceable case
- Supervision and monitoring

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Outline of SOPs for VUs

- 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.
- G: Handling of case(s), received for examination of books of account.
- H: Handling of case(s), for examination or cross examination of witnesses.
- I: Preparation of Verification Report.
- CHECKLIST FOR MAKING REFERENCE FROM AU TO VU

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Outline of SOPs for TUs

- A: Handling of case received for Technical Assistance on legal matters.
- B : Handling of references received in Technical Unit for assistance in TP Matters.
- C: Handling of references received in Technical Unit for assistance in audit u/s142(2A) of the Act.
- D: Handling of references received in Technical Unit for assistance in Valuation of asset, property or investment etc.
- Handling of case received for assistance in respect of information to be called from Foreign Jurisdictions.
- F: Handling of case received for assistance in analysis of accounts.

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Outline of SOPs for TUs (cont'd)

- G: Handling of case received for assistance in accounts, forensics, Information & technology, data analytics, management or any other technical matter.
- H: Technical Knowledge Repository
 - Technical Issue Dictionary (i-wiki and i-forum)
 - Technical Issue Checklist (i-wiki and i-forum)
 - Published Technical Reports (i-Library)
 - Published articles on Technical issues (i-Library)
 - Technical Discussion Forums (i-Forum)
 - Technical Queries (i-Query)

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Outline of SOPs for RUs

- A: Handling of case received for Review
- B : Procedure for seeking clarification from AU
- C: Preparation of Review Report

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Outline of SOPs for personal hearing through VC

- *Where any modification is proposed in the draft assessment order (DAO) issued by any AU and the Assessee or the authorized representative in his/her 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:-*
 - *The Assessee has submitted written submission in response to the DAO.*
 - *The Video Conference will ordinarily be of 30 minutes duration. It may be extended on the request of the Assessee or authorised representative.*
 - *The Assessee may furnish documents/ evidence, to substantiate points raised in the Video Conference during the session or within a reasonable time allowed by the AU, after considering the facts and circumstances of the case.*

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Recent Case Law

- CBDT has filed a Caveat Application in the Bombay High Court in cases of challenge by any person to the faceless assessments and appeal schemes.
- Manickan Ravichandran v. PCIT NeAC – Kerala HC (April 9, 2021):
 - SCN dt 18.3.21 to file reply by 22.3.21 (20 and 21/3 – Sat and Sun)
 - SCN accompanied by draft AO u/s. 144C
 - Assessee files request for 4 more days on 23.3.21
 - Order dated 23.3.21 passed by AO
 - Ker HC – prima facie order suffers from perversity and non compliance with rules of natural justice. Admitted WP, stayed all further proceedings pursuant to the Order till disposal of the WP

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Recent Case Law (cont'd)

- K. L. Trading Corp. v. NeAC – Del HC (April 16, 2021)
 - Assessment Order dt. 31.3.21 – passed without issuing a SCN for additions made
 - Prima facie case for issuance of notice – notice issued to Department
 - Counter affidavit to be filed by the Department
 - Operation of the Assessment Order stayed till the next hearing (21.5.21)
- Salem Sri Ramnivas Chit Company – Mad HC (WP no 1732 of 2020 – order dt. 4.2.2020)
 - Demonetisation – cash deposited – assessee claimed it to be out of balance on hand. Department treated as unexplained
 - HC – noted limitations of e-proceedings – sent back the matter for proper examination – assessee to provide proper submissions.

Note: Importance of proper submissions – written submissions, pagination of papers, cross referencing, explaining the ledger dumps etc properly, reproduction of important paragraphs from agreements, documents, decisions etc., asking for personal hearing if not satisfied.

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Some other points to note

- All orders, circulars, instructions, guidelines issued under 2019 scheme, valid *mutadis mutandis* under section 144B.
- Voluminous details sought - Exclusive email id for grievances regarding roving questionnaires - feedback.notice.neac@incometax.gov.in
- SC ruling in IVen Interactive Limited [TS-631-SC-2019] (Revenue favour ruling) - Sec. 143(2)-notice issuance at assessee's address as per PAN- database, sufficient; Actual service immaterial – This ruling may not hold water under the new Faceless Scheme. Mode of service articulated in 144B / SOPs
- Department maintains a database for technical inputs – called “INSIGHTS”. AUs may use the structured questionnaire to be sent to the Assessee and other inputs from INSIGHTS

Some other points to note (cont'd)

- SOP says “The quality of questionnaire must reflect the application of mind and due diligence of the AU”. This aspect may be kept in mind for arguing matters in fit cases.
- SOP – 15 days time for responding to 142(1) notice. Adjournment normally for 7 days.
- AU can make request for physical verification to the designated VU after recording reasons in writing in the following circumstances with Pr CIT approval:
 - a. It is a high risk potential case
 - b. The impugned PAN is a potential fraud PAN
 - c. AU suspects a large tax evasion in the case

Some other points to note (cont'd)

- Physical verification can be conducted in select cases through the designated VU, where the assessee is non-compliant or where the third party from whom information/document/evidence is to be collected doesn't have a digital footprint.
- Designated VU means the Verification Unit physically located nearest to the location where physical verification is required.
- In Limited Scrutiny Cases, the AU shall issue additional questionnaire, only after the PCIT(AU)'s approval, if a new point of dispute arises that is inextricably linked with the issue involved in the Limited Scrutiny

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Some other points to note (cont'd)

- Cases of S. 148 – reasons recorded by AO, assessment completed by NFAC – whether valid?
 - Jawaharlal Agarwal v. ITO (2017) 190 TTJ (Agra) 870;
 - Gavrav Joshi v. ITO ITA No. 274/Asr/2018
 148 initiated by AO at Ludhiana, completed by AO at Jhalandhar – held to be bad in law.
 Q: Will this principle apply to NFAC cases? A: Probably NO. –
 - As per 31.3.2021 Circular, both JAO and the NFAC has “concurrent jurisdiction”; and
 - Statute itself now recognizes such re-assessment to be completed by NFAC only.

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FACELESS APPEALS

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INTRODUCTION

- As per the power conferred u/s 250 (6B) and 250 (6C) of the Income Tax Act, 1961, the MoF, through CBDT launched Faceless Appeal Scheme, 2020 on 25th Sept. 2020
- CBDT data as on September 25th highlights pendency of almost 4.6 lakh appeals at the level of the Commissioner (Appeals)
- CBDT Press release states 88% of the total appeals will be handled under the Faceless scheme and almost 85% of the present strength of CIT(A)s shall be utilised for disposing off the cases under the Faceless Appeal mechanism
- Until now, over 250 CITs have been diverted to the newly created Appeal Units. (CBDT office order dated September 25, 2020 & CBDT transfer order dated November 12, 2020)



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SCOPE OF THE SCHEME

- All Appellate orders (w.e.f. Sept 25, 2020) will be passed under this Scheme only by National Faceless Appeal Centre (NFAC)
- CBDT order dated April 7, 2021 - Faceless Scheme applies to only Income-tax Law and no other Direct tax Acts including Wealth-tax Act, Interest tax Act, Equalisation Levy, Securities Transactions Tax, Commodities Transaction Tax, Gift tax Act
- **CBDT press release dated Sept 25, 2020 - Appeals not covered under the scheme:**
 - Appeals relating to serious frauds
 - Major tax evasion,
 - Sensitive & search matters
 - International tax
 - Black Money Act

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FUNCTIONS OF THE UNITS

National Faceless Appeal Centre (NFAC) (headed by Pr. CCIT)

- To facilitate the conduct of e-appeal proceedings in a centralised manner

Regional Appeal Centre (RFAC) (headed by CCIT)

- To facilitate the conduct of e-appeal proceedings having jurisdiction to dispose appeal
- Four RFAC are established at Delhi, Mumbai, Chennai and Kolkata

Appeal Units (one or more CIT(A)s and other income-tax authority, staff etc)

- To facilitate the conduct of e-appeal proceedings
- Admission of additional grounds of appeal
- Making further inquiries
- Directing the NeAC or the AO for making further inquiry
- Seeking information or clarification on admitted grounds of appeal
- Providing opportunity of being heard to the taxpayer
- Analysis of the material furnished by the taxpayer
- Review of draft order

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PROCEDURE

- Procedure involved is largely similar to Faceless Assessments procedure
- NFAC shall assign the appeal to an appeal unit (AU) in any one RFAC through an automated allocation system
- An AU may make a request to NFAC for:
 - o obtaining such further information, documents or evidence from the taxpayer or any other person, as it may specify;
 - o obtaining report from NeAC or the AO on grounds of appeal or information or documents or evidence as filed by the taxpayer;
 - o directing NeAC or the AO for making further inquiries and submit a report on the same;
- AU, after considering the response/submissions filed by the taxpayer and on perusal of information available on record, will pass a draft order in writing and send such draft order to NFAC along with details of any penalty proceedings to be initiated, if any.

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PROCEDURE

- The NFAC upon receipt of draft order in case where:
 - o The aggregate amount of tax, penalty, interest or fee, including surcharge and cess, payable in respect of issues disputed in appeal is more than the amount as may be specified, will send the draft order to an AU other than the AU which prepared the draft order through AAS for conducting review of such order;
 - o In any other case, examine the draft order (in accordance with risk management strategy), including automated examination tool), whereupon it may decide to:
 - finalise the order; or
 - send the draft order to AU other than the AU which prepared the draft order through automated allocation system for conducting review of such order.

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PROCEDURE

- Steps are prescribed to specifically adjudicate on condonation of delay, allowing non-compliance of conditions prescribed in section 249(4)(b), admission of additional ground and/or evidence before proceeding with the disposal of appeal.
- The NFAC after finalizing the order will send a copy of order to the taxpayer and concerned tax officers. In case where initiation of penalty has been recommended, NFAC will also serve a notice on the taxpayer calling upon him to show cause as to why penalty should not be imposed.
- Where an AU intends to enhance an assessment or a penalty or reduce the amount of refund, it needs to prepare and send a show-cause notice containing the reasons for such enhancement or reduction, as the case may be, to NFAC, whereupon NFAC will serve a show-cause notice on the taxpayer
- **Similar to Faceless Assessments**, the Pr.CCIT / DGIT, NFAC, may at any stage of the appellate proceedings, if considered necessary, transfer the appeal with the prior approval of CBDT to such Commissioner (Appeals) as may be specified in the order.

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ISSUES

- **Personal Hearing [Refer to Note 1] –**
 - Provision worded similar to Faceless Assessment Scheme
 - 'Discretionary' personal hearing under Faceless Appeals scheme faces Constitutional challenge
 - Scheme seems contrary to sections 250(1)/(2)/(5) of the IT Act, which specifically state that right of hearing shall be granted to an appellant at the appeal stage.
- Focus on filing comprehensive and convincing written submissions covering all factual aspects and legal arguments
- A Delegated piece of legislation driven by CBDT notification
- No timeline prescribed for passing appellate orders, whereas the Scheme envisages stringent timelines to be met by assessee!
- No specific procedure on intimating the appellant for any adverse report given by NeAC/AO and file response against such observations of NeAC/AO

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Writ Petitions on Faceless Appeals

- Faceless CIT(A):
 - Delhi HC – Lakshya Budhiraja – WP filed. Interim order passed on October 17, 2020. Petitioner's case in WP as follows:
 - Approval of the CCIT/DGIT for right of being heard - is discretionary, therefore against the settled principles of law and in violation of the article 14 of the Constitution of India
 - Such discretion is against the principles of "audi alteram partem", i.e. no person should be judged without a fair hearing.
 - The Faceless Appeal Scheme is also in contradiction with the provisions of section 250(1), 250 (2) and 250 (5) of the Act which specially says that 'hearing' of the appeal shall be granted to an assessee.
 - Matter was last listed in February 2021. Now on August 4, 2021.

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Writ Petitions on Faceless Appeals (cont'd)

- Faceless ITAT:
 - Delhi HC – Praveen Kumar Bansal v. MOF. PIL – Constitutional validity of S. 255(7) challenged. Main grounds of challenge are:
 - Against concept of "public hearing"
 - Amendment without debate / deliberations;
 - Affects right of effective representation;
 - Intensive cross questioning, free and open exchange of ideas and views hampered.
 - WP disposed of with the direction that the Govt should decide the already preferred representation by the petitioner dated 28.02.2021 in accordance with law as early as possible and practicable.

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