The Chamber of Tax Consultants
Estd. 1926
ज्ञानं परमं बलम्
Mumbai | Delhi

President
Anish M Thacker

Hon. Jt. Secretaries
Haresh P Kenia | Neha R Gada

Vice President
Ketan L Vajani

Hon Treasurer
Parag S. Ved

Imm. Past President
Vipul K Choksi

20th January, 2021

To,

1. Office of Prime Minister of India
   Government of India,
   South Block, Raisina Hill
   New Delhi-110011

Respected Sir,

**Ref:** Faceless Appeals scheme as notified by the CBDT vide Notification No. 76 and 77 of 2020 dated 25.09.2020.

---

1. The Chamber of Tax Consultants (CTC), Mumbai was established in 1926. CTC is one of the oldest (about 94 years) voluntary non-profit making organizations in Mumbai formed with the object of educating and updating its members on Tax and other laws. It has a robust membership strength of about 4000 professionals comprising of Advocates, Chartered Accountants and Tax Practitioners. It has from time to time made various representations to different Government Authorities drawing their attention to pressing issues.
2. Amendments were brought in by the Finance Act, 2020, in respect of appellate proceedings before the Commissioner of Income-tax (Appeals) ['CIT(A)']. By introducing sub-section (6B), (6C) and (6D) in section 250 of the Income-tax Act, 1961 ('Act'), the Central Government was empowered to come out with a scheme on faceless appeals. Vide Notification No. 76 and 77 of 2020 dated 25.09.2020, such scheme was directly rolled out the Board. A press release was also issued on the same day, highlighting the features of the scheme.
3. At the outset, CTC would like to appreciate the object behind such introduction i.e. to impart greater efficiency, transparency and accountability. Apart from bringing transparency and reducing corruption, the benefit of not visiting the Department

repeatedly is also a big relief for the assessees and their representatives. Having said that, it is also important to point out that there are certain critical areas of the scheme which shakes the entire foundation of the scheme. Attention is drawn to such issues by way of the present representation.

## 4. Personal hearing

4.1. Since many years, the concept of a hearing of any appeal is an indispensable part of appellate proceedings including the ones before the CIT(A). Practically also, it is experienced that oral arguments have an altogether different impact on the CIT(A) as compared to the written submissions. It has been experienced that some issues are difficult to explain by way of written submission though the same may not require more than few minutes when explained orally. The importance of stress and emphasis on certain aspects of the arguments while arguing orally also cannot be undermined. Further, in a hearing, there are arguments and debates and there are questions and answers which goes on simultaneously; which leads to clearance of many doubts and issues which is harboured by or which crops up in the mind of the appellate authorities. Apart from the above, arguing matters which involves a lot of paperwork and referring to several documents at the same time, would be extremely difficult and a lengthy affair if the written mode is adopted. The same would be easier when done in a physical and oral form. Needless to point out the technological issues in submitting voluminous papers online.

4.2. When one comes to the new scheme, one will notice from paragraphs 9(a), 11(3), 12(1) and 12(4) that this new scheme envisages no physical hearing under any circumstances. Thus, there is a complete doing away with it differently put, non-allowing of, physical hearing in all cases, **without a single exception**. In certain cases, the situation or the facts of the case may so require to have a physical hearing. In such situations, complete debarment of the physical hearing appears to be absurd and arbitrary.

4.3. To take it further, as per paragraphs 12(2) and 12(3) of the Scheme, an assessee has no right of oral hearing via video conferencing. What an assessee can do is only request for such opportunity for oral hearing and the Chief Commissioner or the

Director General, in charge of the Regional Faceless Appeal Centre ('RFAC'), under which the concerned appeal unit is set up, may approve the request for personal hearing if the request is covered by the circumstances to be prescribed in this regard in paragraph 13(xi) of the scheme. This, provision also appears to be absurd, irrational and illegal.

4.4. It should not be forgotten, that an assessee has filed an appeal and it is the assessee appellant who has to make out his case before the first appellate authority. An assessee therefore, should be allowed to make out his case, if he so desires, by making oral arguments either by way of physical hearing or through video conferencing, without any conditions attached.

4.5. It is also important to bear in mind that most of the assessments except a few would be done in a faceless manner and even in such faceless assessment, an assessee will not get an opportunity of personal hearing except for very few cases which are yet to be prescribed. If even at the first appellate stage, an opportunity for personal hearing is not granted, then the assessee would go without any oral hearing opportunity at two stages. In such cases, the first time when his or his authorised representative's voice would be heard will be before the Income-tax Appellate Tribunal which is the last fact finding authority. This is absurd.

4.6. There is a reasonable apprehension in the mind of the taxpayers that this scheme will have an adverse impact on the overall decision making process and the persons to be affected the most would be the assessees. The concept of e-proceeding and faceless proceeding, is many a time detrimental even in case of assessments. Stretching this concept to appellate proceeding is something which will not inspire confidence in the masses.

**4.7. Therefore, the following is suggested:**

**a. Where an appellant assessee requests or desires an oral hearing (via video conferencing), the same should be granted without any ifs and buts.**

**b. Where an appellant assessee requires a physical personal hearing, depending upon the facts of the case, the National Faceless Appeal Centre ('NFAC')/ RFAC should accept/ reject such request in an objective manner**

**based on the criteria to be prescribed. Such criteria should be kept flexible and should be discussed with the stakeholders before any notification. Further, rejection of such request for physical hearing should be done by way of a reasoned order which should be made appealable before a higher forum or before the ITAT.**

## 5. Review of orders

5.1. The scheme envisages review of order passed by one appeal unit. As per para 5(xix), once a draft order is prepared by one appeal unit, and if the disputed tax, fee, penalty including surcharge and cess exceeds a prescribed limit then the same has to be compulsorily referred to another appeal unit for review. In case the disputed tax is less than the prescribed limit, then the NFAC shall examine the draft order in accordance with the risk management strategy specified by the Board, including by way of an automated examination tool and then either confirm it or send it to another appeal unit for review. In some cases, an order may go through the lens of three appeal units.

5.2. It may be appreciated that CIT(A) is a quasi-judicial authority entrusted with the task of adjudicating appeals between the assessees and the Department [employer of the CIT(A)]. CIT(A) is expected to perform its functions in an independent, objective, fair and unbiased manner.

5.3. At this stage, it is apt to draw attention to proviso to section 119(1) of the Act. Section 119(1) of the Act, enables Board to issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act. However, proviso to section 119(1) of the Act restricts such power of Board so as to not interfere with the discretion of the CIT(A) in the exercise of his appellate functions. Further, the proviso also restricts the power of Board so as to not require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner. Interference in the appellate process was frowned upon by the **Hon'ble Bombay High Court in case of Chamber of Tax Consultants vs. CBDT - 416 ITR 21(Bom),** where the CBDT action plan was under challenge. The Court therein held that "*it is well laid down*

*through series of judgments in field of administrative law, interference or controlling of the discretion of a statutory authority in exercise of the powers from an outside agency or source, may even be superior authority, and is wholly impermissible. This general principal of administrative law finds statutory embodiment in subsection (1) of Section 119 of the Act*". In this judgment, the Court had held that mere propensity to influence the appellate Commissioners to pass an order in a particular manner so as to achieve a greater target of disposal would not stand the test of law.

5.4. The very fact that order of the appeal unit would be reviewed by another officer of the Department ruins the confidence of the appellant assessees, as the apprehension of compromise of independence would loom large. A basic postulate of the rule of law is that justice should not only be done but it must also be seen to be done. Further, the **Apex Court in case of P. K. Ghosh vs. J. G. Rajput [(1995) 6 SCC 744]** has held that "*Credibility in the functioning of the justice delivery system and the reasonable perception of the affected parties are relevant considerations to ensure the continuance of public confidence in the credibility and impartiality of the judiciary. This is necessary not only for doing justice but also for ensuring that justice is seen to be done.*"

5.5. The entire process of review of order is likely to fall foul of the above legal position, even if the jurisdictional appellate authority is NFAC. NFAC, it appears, does not consist of CIT(A) rather it consists of Chief Commissioner and other administrative officers. Thus, this entire process of review of orders requires reconsideration. There appears to be intermingling of administrative and quasi-judicial functions which is bad in law. It is never envisaged/ contemplated/ experienced that an order of an appellate authority is reviewed by any person leave aside by any officer of the party to dispute. Such review mechanism is a fatal blow to the independence of this appellate forum. Review of order cannot be done by the party to the dispute, as no man can be judge in his own cause.

5.6. Apart from the above, when the matter is reviewed by an appeal unit, it is most strange to find that such appeal unit may suggest variations in such draft order and while suggesting such variations, there is no requirement to hear the parties. Thus, without hearing the parties, the appeal unit which reviews the draft order shall

suggest variations. It is only when the appeal unit reviews the order and suggests variations that the matter will be assigned to a third appeal unit and such appeal unit shall issue a show cause notice through NFAC where the suggestions intend to enhance an assessment or a penalty or reduce the amount of refund. Further, in such cases, at what stages, personal hearing opportunity will be granted is also equally important. It may so happen that due to personal hearing before an appeal unit, the unit gets satisfied with the assessee's claim, but when the same is reviewed by another unit and if no opportunity of personal hearing is granted before such unit, the result changes. Though this would not even come to the knowledge of the assessee, but is certainly possible and will lead to miscarriage of justice.

**5.7. Therefore, the following is suggested:**

**a. There should be no review of order of an appeal unit by any other unit or any other officer under any circumstances.**

**b. If at all, there is any apprehension, the Board may contemplate setting up of bench of two or more CIT(A) to adjudicate on any dispute. However, no order of an appeal unit can be reviewed by another unit or by any other authority.**

## 6. Date of hearing

6.1. The very first step in any appellate proceeding is to fix a date and place of hearing and ask the appellant to put forth his case. The same step is even prescribed in section 250(1) of the Act. In the procedures prescribed under the Scheme, it appears that as per paragraph 5(1)(v), the NFAC will issue a notice if information or documents etc. is required from the appellant and then the appellant can reply as per para 5(1)(vi). Such a facility/ concept is inherently flawed; as in case of an appeal, it is the appellant who has to make out his case. Thus, the first step as per section 250(1) of the Act to issue a notice fixing a time and date of hearing appears to be missing in the entire faceless scheme.

**6.2. Therefore, the following is suggested:**

**a. The first step in the procedures prescribed in para 5(1) should be issue of**

**notice u/s 250(1) of the Act to the assessee to file submission/ details/ documents etc. to put forth his case.**

**7. <u>Opportunity of being heard in respect of application for condonation of delay etc.</u>**

7.1. The appeal units have to dispose of the application for condonation of delay, application for non-compliance with section 249(4)(b) of the Act, application for admission of additional ground/ additional evidence. It is not appearing from the scheme, whether before passing any adverse order in this regard, any opportunity of being heard/ or a show-cause notice would be issued or not. Similarly, if the Department files any submission or where the Assessing Officer ('AO') / National E-assessment Centre ('NEAC') submits any report or reply in respect of additional ground/evidence or otherwise, whether the same shall be presented to the appellant assessee for his rebuttal is not coming out clearly in the scheme.

**7.2. Following is, therefore, suggested:**

**a. A specific step should be prescribed to the effect that before passing any adverse order disposing of any application either for condonation of delay or for non-compliance with section 249(4)(b) of the Act or for admission of additional ground/ additional evidence, a show cause notice should be issued to the assessee stating the reasons in this regard and an opportunity of being heard should be granted to the assessee.**

**b. Any submission, reply or report received from the AO/ NEAC in respect of additional ground/evidence or otherwise, should be presented to the assessee for his rebuttal/ reply.**

**8. <u>Additional evidence at the instance of the Revenue - Para 5(xv) and 5(xvi) of the Scheme</u>**

8.1. Attention is invited to paragraphs 5(xv) and 5(xvi) of the scheme. As per paragraph 5(xv), the NEAC or AO, as the case may be, may request the NFAC to direct the production of any document or evidence by the appellant, or the examination of any

witness, as may be relevant to the appellate proceedings. As per para 5(xvi), appeal unit shall consider such request and may, if it deems fit, prepare a notice and send the same to the appellant. This request on behalf of the AO appears to be independent of the remand proceedings.

8.2. This request on the part of the AO or NEAC appears to be incongruous with the provisions of the Act and the judicial precedents. The AO has to rely upon the documents which form part of the assessment proceedings. He cannot travel beyond what is stated in the assessment order. In such case, by asking the assessees to produce any other document or examining any other witness would tantamount to travelling beyond the assessment order and would in fact amount to improving the assessment order. This is certainly not permissible and is well laid down in number of judgments. This also, would indirectly mean defeating the time limits prescribed to pass the assessment order.

8.3. When an assessee has to produce any additional evidence, he has to go pass the stringent conditions laid down in Rule 46A of the Income-tax Rules, 1962 ('Rules'). The assessee has to make out his case as to why additional evidences are required to be admitted in accordance with Rule 46A of the Rules. However, if the provisions of para 5(xv) are kept in juxtaposition with the provisions of Rule 46A, it appears that the Department are not required to pass the tests laid down in Rule 46A. This is absurd and incongruous. The Department should also justify as to why any additional evidence is sought from the assessee or why any examination of witness is required at the appellant stage and why the same was not sought for at the assessment stage. This would bring both the parties at par. With an already exiting handicap of having a departments employee acting as CIT(A), such further benefits should not be granted to the Department thereby making the entire process one-sided.

**8.4. Following is therefore, suggested:**

**a. Para 5(xv) of the Scheme should be scrapped**

**b. If at all, the AO wants to rely on any document or call for any document from the assessee which is not forming part of the assessment record or examine any witness not examined during the assessment proceeding then**

**he should be asked to justify his request in accordance with the provisions of Rule 46A.**

**9. <u>Communication of notices</u>**

9.1. In the faceless appeal scheme, as per para 9 read with para 11, all communications between the NFAC and the appellant, or his authorized representative, shall be exchanged exclusively by electronic mode. Further, such electronic communication is by three modes i.e. by way of placing an authenticated copy thereof in the assessee's registered account or sending a copy on the assessee's or authorized representative's registered email address or uploading on the assessees mobile app. Further, all three mode of communication is followed by a real time alert.

9.2. One of the modes of communication which is prescribed in section 282 of the Act is service of notice; order etc. on the registered email address of the assessee. Thus, the second option under para 11 of the scheme, appears to be in accordance with the provisions of section 282 r.w. Rule 127(2)(b). We therefore, request that this should be made the only mode of communication.

9.3. In so far as the first option is concerned i.e. placing the notice etc. on the registered account of the assessee, the same, in our humble opinion, would not amount to a proper service of notice. The provisions of section 13 of the Information Technology Act, 2000, are also to apply here as per para 11(4) of the Scheme and that serving of notice etc. on the registered account of the assessee will not satisfy the requirements of section 13 of the Information Technology Act (year?), unless such notice etc. is also issued by way of email on the registered email address. Paragraph 2(x) of the Scheme deems the registered account in the designated portal of the Income-tax Department as computer resource of appellant. This is in violation of the provisions of the Information Technology Act as it is for the addressee to designate its computer resource and the same can never be deemed by anyone and not by the originator in any case.

9.4. The third option of serving on the registered mobile app is not functional yet and therefore, we reserve our rights to make suggestions as and when the same becomes functional.

9.5. Also, in so far as the service of notice through email address is concerned, para 11(b) prescribes that service shall be made to registered email address of the appellant or his authorized representative. Registered email address of the appellant is defined in para 2(xxii) of the Scheme, wherein six alternate email addresses have been specified. We draw the attention of the Board to Form 35 notified for filing online appeal to the first appellate authority. In such form, the appellant is required to give one email address and then he has to also specify whether notices/ communication may be sent on email? In such scenario, if the appellant selects 'yes', then the communication should be first sent to the email address as specified in Form 35. This option is not available in para 2(xxii) of the Scheme. If the communication is first sent to such email address and the same remains unanswered, then the communication may be sent to any other alternate addresses prescribed in para 2(xxii) of the Scheme.

**9.6. It is therefore, suggested that:**

**a. The only mode of communication, if done electronically, should be by way of service to the email address of the appellant.**

**b. Service cannot be done by simply putting notice etc. on the appellant's registered account.**

**c. In case of service to the email address of the Appellant, where the option given under Form 35 of service to a particular email address as mentioned therein is opted for, then the said email address should be preferred over the addresses specified in para 2(xxii) of the Scheme.**

**d. If the communication is first sent to such email address and if the same remains unanswered, then the communication may be sent to any six alternate addresses prescribed in para 2(xxii) of the Scheme.**

## 10. <u>Rectification proceedings</u>

10.1. The scheme also deals with rectification proceedings before the CIT(A), wherefrom it can be discerned that the rectification proceedings in respect of an appeal already disposed of, will also be allocated randomly to any appeal unit, meaning thereby it may be heard by a CIT(A) other than the one who has passed

the order disposing of the appeal. It is a general practice that the rectification proceeding is heard by the same person who has disposed of the appeal.

**10.2. It is therefore, suggested that the rectification proceedings should be dealt with by the same appeal unit who has disposed of the main order, unless the same is not possible.**

**11. Penalty for non-compliance of notice etc.**

11.1. The scheme also provides for levy of penalty if the assessee fails to comply with any notice issued by the NFAC. There is no such provision in the Act in this regard. Thus, this is bad in law. If the assessee does not respond to the notice, the CIT(A) can adjudicate the appeal in an ex-parte manner, after giving reasonable chances to the appellant assessee. However, he cannot levy penalty. It is the prerogative of the appellant assessees whether to pursue his appeal remedy or not and for not pursing such remedy, he cannot be penalised.

**11.2. It is therefore, suggested that such penalty provisions, being ultra vires be removed from the scheme.**

**12. Composition of the Appeal Unit**

12.1. Attention is drawn to para 4(3) of the Scheme. It states that appeal unit shall have the following authorities namely one or more Commissioner (Appeals) and such other income-tax authority, ministerial staff, executive or consultant to assist the Commissioner (Appeals) as considered necessary by the Board.

12.2. There is no clarity on the meaning of the terms 'ministerial staff', 'executive' and 'consultant'. Also, there is no clarity on the role to be played by them in the Appeal unit. Further, these are to be appointed by the Board. Necessary clarifications are therefore, sought in this regard.

12.3. As already mentioned earlier, a CIT(A) is a quasi-judicial authority expected to work independently to adjudicate dispute between the assessees and the employer of the CIT(A). In such case, there is a reasonable apprehension that if people are appointed by the Board in such unit who are to render assistance to CIT(A), then such people may influence the decision-making process, which would lead to

compromise of independence of the appellate forum, making it meaningless. As a result, we strongly object to any such appointment.

12.4. **It is therefore, suggested that no such people should be appointed in the Appeal unit who may influence the decision of the CIT(A) thereby rendering the independence of the first appellate authority as nugatory.**

13. It appears that this scheme has been modelled on the faceless assessment scheme without appreciating the moot difference in the two proceedings i.e. an assessment proceeding versus an appellate proceeding. As a result, some major flaws have cropped in as pointed out earlier.

**14. In light of the above discussion, we request your learned self to kindly look into this issue on a priority basis and take appropriate measures in this regard. Further, if so desired, representatives from our organization can also personally meet and discuss the above referred issues.**

We look forward to your kind intervention and taking up our request for kind consideration.

Thanking you,

Sincerely,

For **The Chamber of Tax Consultants**

| | |
|---|---|
| Sd/- | Sd/- |
| Anish Thacker<br>President | Mahendra Sanghvi<br>Chairman<br>Law and Representation Committee |