FACELESS ASSESSMENT

and

FACELESS APPEALS

with

DRAFTING OF SUBMISSIONS

CA Sharad Vaze

ASSESSMENT

Income Tax Act 1961 has only two sections dealing with assessment of income. Sec 143(3) and sec 144. The communication u/s 143(1) is not an assessment order but it is called an “intimation”. Other sections *dealing* with assessment are not applied independently but in conjunction with either sec 143(3) or Sec 144 like assessment u/s 143(3) / sec 144 rws 147 or 143(3) rws 153C, sec 143(3) rws 250 etc.

Before commencement of any assessment notice u/s 143(2) is mandatory. Failure to give notice u/s 143(2) before assessment, makes the assessment void i.e. bad in law. Even the failure to serve notice issued u/s 143(2) to the assessee is not a curable defect even u/s 292BB

CIT vs Lakshmandas Khandelwal 417 ITR 325 (SC)

A precaution to be taken in respect of change of address or change in name. The assessee must change the PAN data as early as possible. Change of name and/or address with the Registrar of Companies will not serve the purpose.

Notice to AO in writing may not be sufficient.

PCIT vs I-Ven Interactive Ltd (2019) 418 ITR 0662 (SC)

Reassessment

Notice issued u/s 148A or directly u/s 148, ensure its validity. Many a times reassessments have been declared bad in law because of notice of reassessment is not proper.

Notice may be bad on account of :

a) Beyond the time allowed and within the time limit but below the threshold.

b) Approval of higher authorities u/s 151A

c) Change of opinion

d) Assessment u/s 147/153C

FACELESS ASSESSMENT

Sec 143(3A) was introduced by Finance Act 2018 wef 01/04/2018 enabling the Central Govt to notify a Scheme for faceless assessment. Initially, it was titled as “E-assessment Scheme, 2019. The word ‘e-assessment’ is now changed to ‘Faceless Assessment’ wef 13th August 2020.

The avowed objectives of Faceless Assessment is :

a) Greater efficiency;
b) Transparency and
c) Accountability.

These objectives are to be achieved by :

a) Elimination of interface between AO and assessee;
b) Optimising utilisation of resources through economies of scale and functional specialisation; and
c) Team-based assessment with dynamic jurisdiction.

Features of Faceless Assessment :

- Selection only through system using data analytics and AI;
- Dynamic jurisdiction. Given rise to legal issues;
- Automated random allocation of cases;
- Central issuance of notices with DIN;
- No physical interface;
- Team based assessments and Team based review;
- Draft assessment order in one city, review in other city and finalisation in third city, and
- Objective, fair and just order;

Benefits of Faceless Assessment :

- Travelling hassles; Assessments / Appeals in different places can be attended simultaneously.
- Time constraints;
- Bureaucratic issues removed,
- Corruption.
- Preserving trail of all assessment records.
- Consultation from senior professionals in assessment as also in appeals.

Shortcomings of Faceless Assessment :

- Not all assessees are well versed with computers;
- Connectivity issues;
- Voluminous document uploading;
- Size of documents;
- Touch of personal hearing and ease of explaining complex issues.
- Quality of written submission;
- Communication

i) From Dept to assessee; - Clarity in seeking information;
ii) From assessee to Dept - Time to comply the requirements;

- Communication (language) barrier
- Local practices
- High pitched / unreasonable assessments.

To overcome the last issue of high pitched / unreasonable assessments sec 144B is introduced in the Act.

Salient features of sec 144B :

a) Selection through automated allocation system;
b) Intimation that assessment shall be completed under FAS, 2019;
c) Notice u/s 143(2) or 142(1) seeking response from the assessee within the date specified in the notice;
d) To obtain such further information, documents or evidence from assessee or any other person;
e) Response by assessee or such other person before a specified date;
f) Failure to comply with the notice, SCN for assessment u/s 144; Response to be given by specified date or extended date;
g) SCN for proposed variation in the returned income;
h) Response to SCN by specified date or extended date;
i) Failure to give response,
j) Assessment Unit to prepare income or loss determination proposal;
k) Such proposal to be forwarded to Review Unit;
l) Receipt of Review Report;
m) Assessment Unit to accept the Review Report or reject some or all of the modifications. Assessment Unit to record reasons for rejection;
n) Assessment Unit to send Draft Order to NFAC;
o) NFAC to serve Draft Order on the assessee;.
p) Assessee file his acceptance to the variations proposed in the returned income or file objections within specified period;

q) If variation is accepted by assessee, NFAC shall intimate the Assessment Unit to complete the assessment on the basis of draft order;
r) If objection is filed against the proposed variation, a SCN will be issued by Assessment Unit dealing with only that issue.
s) Assessment Unit to pass the assessment order and initiate penalty proceedings. Send the same to NFAC.
t) NFAC to serve the assessee assessment order and demand notice along with notice for penalty;
u) NFAC after completion of assessment shall transfer the electronic records of the case to the jurisdictional assessing officer;
v) NFAC is to have power u/s 142(2A). Special Audit.

Personal Hearing :

No personal hearing except when a SCN is issued for modification in draft assessment order.
Request for personal hearing by the assessee or Authorised Representative. Only video conferencing is permissible.

Exceptions to Faceless Assessment :

Cases assigned to Central Circle;
Assessment assigned to International Tax Charges.

Evidence :

Make full/complete disclosure of facts. Production of invoices/vouchers of expenses called for, balance confirmations iro unsecured loans, clarification for any entry from 26AS/AIS not considered as income, TDS reconciliation etc. Give maximum possible information.

You can submit additional evidence before the First Appellate Authority (FAA). However, it is subject to provisions of Rule 46A of the Income Tax Rules 1962.

Re-read the written submission before uploading.

FACELESS APPEALS

An appeal shall lie against the assessment order passed by NFAC. Appeal can also be filed against an intimation issued u/s 143(1).

Appeal to be filed within 30 days from the receipt of demand notice. A notice by email is permissible as per sec 282(1)(c) of the Income Tax Act 1961. Sec 282(1) reads "communication may be made by ***delivering or transmitting*** a copy thereof, ***to the person*** therein named ". In my opinion, merely uploading the notice will not serve the purpose. It will not be considered as '*delivery or transmission to the person*'.

Appeal is to be filed online.

The appeal shall be accompanied by :

a) Assessment Order / Intimation;
b) Notice of Demand / Intimation;
c) Statement of Facts and
d) Grounds of Appeal.
e) Challan for appeal payment.

Statement of Facts should be complete. It should bring out all the facts elaborately. If the matter travels to the High Court then for understanding the question of law well drafted statement of facts serve as best aid to explain background to judiciary.

If any additional facts / new evidence can be brought on record before the First Appellate Authority i.e. CIT(A). [Rule 46A(1)] While admitting the additional evidence, the FAA shall state the reasons therefor [Rule 46A(2)]. The FAA shall not take into account the additional evidence unless a reasonable opportunity is given to AO to examine the evidence or documents or to cross examine the witness produced by the assessee. [Rule 46A(3)]. We call it Remand Report.

A claim which remained to be made in the return of income and which could not be made during assessment, such claim can be made before the FAA. CIT(A) is bound by law to accept such claim.

Submissions :

Either total or partial, but must be before the date mentioned in the notice. Otherwise, the button will get deactivated and the submission may not be possible at all, unless NFAC gives one more opportunity for submission.

A Written Submission (WS) should invariably be prepared. The WS should not be cryptic but elaborative and precise. It should not be too lengthy. Various annexures to be prepared and to be properly referred in our WS.

If the document to be submitted is in regional language, its translation in English needs to be given especially sale deed, 7 x 12 extracts, partnership deed, final accounts etc.

One can also add the Authorised Representative through income tax web portal. You are also required upload the Power of Attorney executed on a stamp paper of Rs 500/- in Maharashtra.

In the old system, it was possible to give the documents asked by CIT(A) in appeal hearing. The documents submitted can be easily explained across the table. Such facilities do not exist now. One has to visualise likely questions that may arise from our WS. A reply thereto should also be included in the said WS.

An addition was made on the basis of TDS data in 26AS. An advance of Rs 67.50 lakhs (net of TDS) was received by the assessee. TDS @ 10% i.e. Rs 7.50 lakhs was reflected in 26AS. Based on that AO made the entire addition of Rs 75.00 lakhs in the returned income. Before, the FAA, the assessee stated that the TDS is made at accrual basis by the Payer. It was on provision made in accounts by the Payer. The amount of Rs 75.00 was included in the receipts of the next financial year on execution of professional assignment.

Nonetheless, the FAA confirmed the addition because the assessee had not proved that said Rs 75.00 lakhs were offered to tax in the next assessment year. The matter is now before ITAT.

If the assessee wishes to quote the judgements, one should upload the full judgment. Merely giving references may not be sufficient, because the FAA may not be having all judgments at his hand. To stress the issue, the ratio in the judgement should be highlighted. The highlighted portion should be included in the WS with proper reference like para number and page form the judgement.

Wherever possible the WS may be linked by citing reference of page number from the paper-book. This will ease the understanding of facts and contentions of appellant by the appellate authority.

Drafting of submission

Keep yourself in the chair of appellate authority and then decide what you would have expected from the appellant while deciding the issues raised in appeal and accordingly draft your submissions.

Become a devils' advocate and address issues *suo-moto* which will minimise scope for further clarifications.

Reply to SCN and other legal submission

- Facts i.e. Views of Assessing officer
- Legal submission - answering categorically misleading/ wrong finding of facts and observations of the assessing officer
- Precedents, if any relied upon.

Use of AI :

Use AI with caution. The output depends on your questions – prompts. Unless, you have fully understood the issue, the incorrect / inadequate / improperly drafted prompts will give wrong output. It is blindly copied and submissions uploaded.
IMO, machine/software cannot overcome your BRAIN.

Dos

- Timely submission
- Submission in part, if not complete
- Seek adjournment if submission is not ready
- Precise and concise facts
- All factual documents may be placed on record through paper-book where all pages may be serially numbered.
- All the issues and legal propositions are raised
- All relevant judgments are brought on record.

Don’ts

- Repetition
- Bulky submission
- Submission of unnecessary details and documents. Avoiding citing of any case law which do not cover directly legal issue raised in appeal
- Circular submission
- Too many judgments. – given a choice give jurisdictional ITAT & High Court judgement first if the issue is not covered by any Supreme Court judgement.

JURISDICTION

The authorities passing the order are subject to which jurisdiction?

Assessee at ‘A’.
Assessing Officer at place ‘B’

Jurisdiction for assessment ‘A’ or ‘B’, where both are not in the same State.

CIT(A) at place ‘C’.

Jurisdiction for CIT(A) when Assessee, AO and FAA are in three different States!

JUDICIAL DISCIPLINE

Judgments of Supreme Court i.e. ratio decidendi and even obiter dicta are binding on all courts and Tribunals within the territory of India as laid down in Article 141 of the Constitution of India.

- Whether decisions of the privy council prior to 1950 are binding as precedents on the Supreme Court? It has been held that they are not binding and had only persuasive value.

- The Supreme Court is not bound by its own previous decision.

- Judgment of one bench is binding on another bench, of lesser or equal strength. However, if the Division Bench of two judges differs from decision of another Division Bench of two Judges, it has to make reference to the Chief Justice to refer the matter to the bench of more than two Judges.

- **Judgment *per incurium* :** The precedent may not be binding when the judgment is *per incurium* i.e. in ignorance of the law or contrary to the law or its own earlier decisions of own or by inadvertence.

- In Nandanam Construction vs. Asst. Commissioner (1983) Tax L. R. 2816, the A. P. High Court has taken the view that in the case of conflicting decisions of the Supreme Court rendered by two Benches of equal strength the subsequent or later decision should be followed.

- **Stare decisis :** In *CIT vs. Balkrishna Malhotra 81 ITR 759* the Supreme Court held that if a decision has held the field for long and citizens as well as tax department have acted upon it, the Court will not disturb the law so laid down even if it comes to the conclusion that earlier decision was wrong.

- ***Res Judicata*** **vis-à-vis Consistency : While "res judicat**a**" does not apply to income-tax matters, the principles of consistency does. If the Revenue has accepted a practice and consistently applied and followed it, the Revenue is bound by it. The Revenue can change the practice only if there is a change in law or change in facts and not otherwise. PCIT vs Quest Investment Advisors Pvt Ltd** (**Bom HC)**

- **SLP :** If the court gives reasons while dismissing the SLP, it becomes law declared and, therefore, binding under Article 141 of the Constitution.

- If however the Supreme Court dismisses the Special Leave Petition without reasons, it will not operate a binding precedent to other courts. The only effect of such dismissal is that for that particular High Court the decision has become final.

- Whether decision of another High Court is binding to all High Courts. It has been well accepted that though legally judgment of another High Court is not a binding precedent, judicial comity or judicial discipline is invoked by court that in respect of interpretation of Central Statutes a decision of another High Court should be followed though judge may have a different view.

- However, In the case of *N.R.Papers and Board Ltd. vs. Dy. CIT (1998) 234 ITR 733 (Guj)* the court observed that "decisions of other High Courts have great persuasive value but if it becomes impossible to agree with or if there are no reasons and only pronouncement of legal principles, the court is free to give its own reasons not coinciding with conclusion reached by another court in graphic language. It is said that "the decisions of any High Court are after all not intended to be gag order for other High Courts and do not have the effect of freezing judicial thinking on the points covered by them.

- *Interpretation of statutes—Taxing provision—Two reasonable constructions—Construction which favours the assessee must be adopted*

  CIT vs Vegetable Products Ltd (1973) 88 ITR 192 (SC)

- An authority like an Income-tax Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question

  CIT vs Godavaridevi Saraf (1978) 113 ITR 589 (Bom)

- The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

Union of India vs Kamalakshi Finance Corporation AIR 1992 SC 711.

- **It is well settled that the Tribunal is exercising judicial functions and has all powers of a Court.** The proceeding before the Tribunal are deemed to be judicial proceedings. It appears to be the impression/ misunderstanding of some tax officials that the orders of the ITAT interpreting the law cannot be binding as it is a fact finding authority. However, this is not correct because the decision of a higher authority in the judicial hierarchy is binding on all the lower authorities below the line. Hence, **the AO & CIT (A) are bound by the decision rendered by the jurisdictional Tribunal.** *Refusal to follow the order of the ITAT would render that authority guilty of committing contempt of Tribunal for which the concerned authority is liable to be proceeded against*. If the decision of the Tribunal is found to be unacceptable to the authorities below, the right course to follow is to carry the matter in appeal to the High Court and to seek suspension of the operation of the order of the Tribunal.

Cargo Handling Private Workers Pool vs DCIT (Vizag ITAT)

NOTES

Thanks !!