In the case of cash flow hedge, 'under hedge' is not considered as resulting in hedge ineffectiveness. 'Under hedge' in the 'first level relationship' may arise because of direction of change in basis spread. For example, if the basis spread at the end of P5 is 4 per cent, there will be under 'under hedge' in the 'first level relationship'. Alternatively, 'under hedge' may arise due to 'lot size' for the hedging instrument in the 'first level relationship', even if there is no change from basis spread. Here, there will be no cumulative hedge ineffectiveness in the 'first level relationship' at the end of the hedge period. In these situations, if the hedging instrument in the 'second level relationship' is for the quantity of aggregated exposure (or less than that) at the time of start of the hedge, there will be no cumulative ineffectiveness in the 'second level relationship' also. It is not necessary to analyse how the inventory cost is *effectively* arrived at in these situations. It is enough if the effective portion of cash flow hedging loss (gain) arising in both the 'first level relationship' and the 'second level relationship' is included in the cost of inventory. The analysis made in paragraph 5 of this article is just to explain the impact of hedge accounting for aggregated exposure for a particular fact pattern.

There can be scenarios where apart from cash flow hedge ineffectiveness arising in the 'first level relationship' (which ultimately survives), no additional cash flow hedge ineffectiveness arises in the 'second level relationship'. Generally, this is possible when cash flow variability of a FC denominated floating rate debt due to change in exchange rates alone is the hedged risk in the 'first level relationship', while cash flow variability due to change in functional currency interest rates is the hedged risk in the 'second level relationship'. This will be discussed in the final portion of my next article (wherein Example 17 will be compared with Example 16).

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(2021) 321 CTR (Articles) 13

ASSESSMENT

FACELESS ASSESSMENT—PRACTICAL CHALLENGES AND THE WAY FORWARD—*G.V. Gopala Rao, Preeti Kothari & Nihar Tank*

Every change comes with challenges and the system of faceless assessment is no exception. The scheme was introduced with the noble intention of curbing malpractices, easing compliance and making the tax assessment experience for taxpayers painless and faceless. However, there have been many occasions where assessments have been concluded contrary to the objective of the scheme. Explanint the various aspects of faceless

assessment scheme the learned authors give some suggestions to ensure that the objectives of the faceless assessment are achieved in true spirits.

SYNOPSIS

1. Introduction
2. Absence of Audi Alteram Partem ("let the other side be heard")
3. Crunched timelines
4. Arbitrary allotment of cases
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6. Incorrect taxpayers' database
7. Discretion for personal hearing
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1. Introduction

The introduction of faceless assessment was a landmark move by the Income Tax Department to honour the honest taxpayers and bring transparency to the entire tax litigation system. With the intent of "Minimum Government and Maximum Governance", the scheme was a paradigm shift in the tax assessment process. By introducing technology-driven interface, data analytics, artificial intelligence to eliminate human intervention, the program enhanced transparency, efficiency, and accountability. Though the computerisation in the tax administration arena had begun in October 2015 with the issuance of e-notices, the past year was crucial since the entire process was digitised. One could say that this change was timely as with the onset of the COVID pandemic the adoption of technology got fast-tracked and the virtual work environment became the new working norm.

Every change comes with challenges and the system of faceless assessment is no exception. The scheme was introduced with the noble intention of curbing malpractices, easing compliance and making the tax assessment experience for taxpayers painless and faceless. In that vein, even the standard operating procedures were drafted to facilitate the same. However, there have been many occasions where assessments have been concluded contrary to the objective of the scheme. Various High Courts have observed that assessments had been made in violation of the "principle of natural justice" and *prima facie* there were technical glitches in the faceless assessment process.

In this article, we have made an effort to highlight some major challenges faced by the taxpayers and Assessing Officers as well as a few important observations of High Courts, that need to be addressed to make the scheme more effective and achieve the desired objective.

2. Absence of Audi Alteram Partem ("let the other side be heard")

Faceless assessment eliminates human intervention thereby placing

substantial emphasis on written submissions. However, if the written submission is not perceived in the intended manner, it will lead to a lot of ambiguity and would not serve the envisaged purpose. At times, personal interaction is imperative to explain the facts, the issues and the supporting documentation so that the Assessing Officer gets a complete and correct perspective of the issue to enable a fair adjudication of the matter.

3. Crunched timelines

Faceless assessment demands timely compliances as the portal does not allow assessees to upload any response beyond the specified time. Also, the time available to make submissions is very limited; generally, 15 days for the first submission and 7 days for subsequent submissions. Often the taxpayers have limited time to respond to show-cause notices which is one of the critical steps in the entire assessment process. If the taxpayer is not able to detail out the arguments in support, given the paucity of time, it leads to erroneous adjustments as these orders are then passed with limited information.

4. Arbitrary allotment of cases

Currently, the delegation of cases by the National e-Assessment Centre (NeAC) to the Assessment Unit (AU) is done arbitrarily through an automated system and not based on the experience or expertise of a particular Assessing Officer. This sometimes results in allocating some complex case to a relatively less experienced officer or vice-versa. This results in an inappropriate disposal of the case as the Assessing Officer will not be able to appreciate the facts of the case due to lack of requisite experience and knowledge to assess the case thereby resulting in more litigation.

5. Technical challenges

The information sought in the notices are very bulky and voluminous but there is a restriction in uploading documents beyond a particular size in one submission. This leads to a significant waste of time in scanning documents in a manner that does not exceed the prescribed size limit. There are also numerous technical glitches that are faced by the Income-tax Department. Further, the Assessing Officer is unable to access the case records of the assesses which are lying with the Jurisdictional Assessing Officer which inhibits better understanding of the case by the Assessing Officer

6. Incorrect taxpayers' database

The *modus operandi* of the faceless assessment scheme is no human intervention. Accordingly, it is very important that the email ID of a taxpayer is updated as it is the only mode of communication between the tax department and the taxpayer. It has been observed that in some cases the email IDs of taxpayers were not updated due to change in the concerned person or the Authorised Representatives' resulting in non-submission or delays in submitting the information sought.

7. Discretion for personal hearing

Faceless assessment provides an option to the assessee to request video conferencing in case of a complex issue or in cases where the assessee may feel it necessary. However, it is at the discretion of the Income-tax Department to allow video conferencing or not which may give rise to a violation of constitutional right as the hearing opportunity is denied to the assessee.

8. Violation of principle of natural justice

There have been several instances in which assessees have complained that the assessment order was passed without considering assessee' s request for an adjournment or without cancelling the request or without considering/ignoring an assessee's submission. The assessment orders have been issued within 2-3 days of issuance of show-cause notices thereby not giving enough opportunity and time of being heard to the assessee. In some cases, the assessment has been finalized without the assessee being able to submit any response. Given this, many writ petitions have been filed with the jurisdictional High Courts on this matter wherein the High Courts have stayed the demand and allowed assessees to make submissions. In fact, in many cases, the High Courts have even ruled that the assessment has been concluded contrary to the "principle of natural justice" and hence the order was quashed, set aside or stayed. In the following cases, the High Courts have decided against the NeAC.

• The Delhi High Court in the case of *Renew Power (P) Ltd.* [Writ Petn. No. 5235 of 2021) quashed the faceless assessment order. While doing so, the High Court referred to the Supreme Court decision in the case of *Calcutta Discount Co. Ltd. vs. ITO AIR 1961 SC 372* and *Whirlpool Corpn. vs. Registrar of Trademarks* (Civil Appeal No. 5201 of 1998) and held that "the denial of opportunity to the petitioner to place before the Assessing Officer, its objections and/or Explanations by way of a response has led to breach of principle of natural justice, resulting in grave civil consequences for the petitioner". Thus, the High Court concluded that the impugned assessment order which was passed before the expiry of time accorded to the assessee to file response was not in accordance with the law.

• The Delhi High Court in the case of *Blue Square Infrastructure LLP vs. National Faceless Assessment Centre, Delhi & Anr. (2021) 321 CTR (Del) 102* set aside the assessment order as the same was passed without considering the request for adjournment and without waiting for the expiry of the time limit given under the show-cause notice.

• The Delhi High Court in the case of *KBB Nuts (P) Ltd.* [Writ Petn. (Civil) No. 5234 of 2021] has set aside the assessment order as the same was concluded without considering the assessee's request for adjournment and assessee's response to the show-cause notice. The High Court rejected the assessment without getting into the merits of the objection

and direct the Assessing Officer to pass a fresh assessment after considering the assessee's response and granting a personal hearing.

• The Bombay High Court in the case of *Raja Builders* [Writ Petn. (L) No. 11224 of 2021] stayed the assessment order and penalty notice as the same was passed without considering assessee's detailed response to the show-cause notice and request for a personal hearing. The assessee also contended that the show-cause notice dated 20th April appeared on the portal for the first time only on 22nd April.

• The Bombay High Court in the case of *Praful M. Shah* [Writ Petn. (L) No. 11143 of 2021] stayed the assessment order, where the same was passed in "stark violation of principles of natural justice" as the assessee was not heard at all with respect to the new additions. The assessee also contended that "there are a lot of glitches on operation of faceless assessment scheme". The matter is still pending before the High Court.

• The Madras High Court in the case of *Magick Wood Exports (P) Ltd.* [Writ Petn. No. 10693 of 2021] set aside the assessment order as the same was passed in violation of the "principle of natural justice" since the assessee's request for adjournment was neither rejected nor considered before concluding the assessment. Accordingly, the High Court directed the Revenue to enable the portal for the assessee to submit a response and conclude assessment after considering assessee's response to the objections to the draft assessment order.

• The Delhi High Court in the case of *DJ Surfactants* (Writ Petn. No. 4814 of 2021) granted interim stay on the assessment order passed on the premise that it was concluded prima facie in violation of 'principles of natural justice'.

• The Bombay High Court in the case of *Shelf Drilling Offshore Services* [Writ Petn. (L) No. 10949 of 2021] set aside the assessment order and stated that there were a lot of glitches in the faceless assessment scheme and accordingly, the assessment was kept in abeyance for the time being.

As can be seen from the aforesaid rulings, although video conferencing or personal hearing is at the discretion of the Assessing Officer, however, Courts have unanimously considered the same as a violation of "principle of natural justice" when the assessment is concluded without providing an opportunity of personal hearing to the assessee.

9. The way forward

Having said the above, the Income-tax Department should deliberate on the following aspects to ensure that the objectives of the faceless assessment are achieved in true spirits :

• *Rational distribution of cases*

The allotment of the cases should not be random rather it should be done keeping in mind the specialisation, experience and seniority of a

particular Faceless Assessing Officer while maintaining anonymity and the objectives of the scheme. This will result in the appropriate distribution of cases resulting in the disposition of cases based on merits and thereby reducing litigation.

• *Robust infrastructure*

The Information Technology system managing the faceless assessment should be made more robust through improvisation in the technical specifications for effective functioning of the faceless assessment scheme. The IT system should be changed appropriately to support the uploading of large size files for both the Assessing Officer as well as the assessee. This shall help in mitigating the system inefficiency and make the process and experience better for all stakeholders.

• *Updating taxpayers database*

The taxpayers' information especially the email IDs should be updated on a continuous and timely manner so that the process is smoothened, and the information sought by the Faceless Assessing Officer is submitted on time.

• *Taxpayers awareness program*

A structured and appropriate awareness program should be designed for the taxpayers/ professionals to ensure active participation in the faceless assessment process. A proper orientation around the objective, approach and technology could bring in overall efficiency to the whole process and bridge the gap arising due to technology.

• *Opportunity of personal hearing through video conferencing*

Where there is a request by the assessee, minimum of two personal hearings should be allowed to such assessees through video conferencing. This will enable assessees to present and explain their case appropriately and thereby ensure the fundamental or constitutional right of the assessee while maintaining transparency.

• *Strengthening of Review Unit*

It is very important to have skilled and experienced officers at the Regional e-Assessment Centre (ReAC) and NeAC who play an anchoring role in the whole process and ensure that there is proper co-ordination between all the units of the structure. The officers of the Review Unit are expected to discharge their functions in a manner so that the intended objectives of the Review Unit are achieved. It is important that such officers ensure that before finalising the assessment due consideration is given to all the submission made by the assessee and the assessee is given an opportunity of being heard with respect to any additions sought in the assessment. This will ensure that the assessment is concluded in accordance with the law and thereby reduce litigation.

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