Faceless Procedure Before - ITAT - Whether Valid - Vice or Virtue

Ajay Wadhwa, *Advocate*

No professional practicing before the Assessing Officer or the Commissioner of Income tax (Appeal), (CIT(Appeal)) can ever forget instances of waiting outside the room of the concerned officer for hours together, with bags overflowing with books of account, vouchers and other documentary evidence and often being told to come back again the next day because the officer was busy with some important work or had more important hearings or was generally unavailable that day.

One cannot forget the times when numerous hearings would ensue and the file of the officer would be riddled with hundreds and thousands of papers and often one would be disappointed to receive an assessment order without much discussion on the taxpayer's contentions and entailing huge additions to income, divorced from the facts on record.

2. The senior officers were helpless and could not do much to mitigate the harassment since the law gave enormous powers to the Assessing Officer to enforce attendance of the taxpayer and seek any information that he deemed fit for the purpose of assessment.

Allegations of high handedness and corruption were commonplace and it was perceived that nothing in the department moved without consideration or personal relationships.

Successive Governments, though aware of this malaise were unable to provide succor and the taxpayers continued to suffer, often silently, due to the fear of retribution.

3. An out of the box thinking was required for putting an end to this wasteful, time consuming and rather demeaning exposure of taxpayers before the field officers which the Hon'ble Prime Minister, Shri Narendra Modi did by introducing and implementing the concept of faceless assessment.

4. Today, barring matters before the Central Circles, Transfer Pricing Division, and International Tax Division, assessment proceedings in all other cases are conducted through the faceless route wherein, the Assessing Officer's identity in terms of his name and location is unknown; the scrutiny is based on information flagged in accordance with risk management strategy formulated by the Board and the assessment is sought to be confined to examining the flagged information only. The taxpayer is required to furnish the required information sitting in his office and uploading it through the portal and the assessment order is to be passed only after the he is put to notice to explain the unresolved issues. There is a window of opportunity of personal hearing provided by way of video hearing if the taxpayer is able to tender credible and compelling reasons.

5. The above process is also sought to be replicated before the CIT (Appeal). In respect of proceedings before the CIT (Appeal), most in the professional community believe that for a fair

and a meaningful opportunity of being heard, the window of virtual hearing must be provided on mere askance by the assessees.

Income tax law is very complex. There are detailed factual explanations which involve complex cross referencing with documentary evidence and thereafter the need to show how the facts of the taxpayer's case are similar to the facts in respect to the decisions and judgments relied upon.

No matter how well one expresses himself in English, there can be no substitute to explaining the nuances of complex issues face to face, either in person or through the virtual mode. A situation whereby questions that could possibly remain unanswered while reading a submission can be obviated during a virtual hearing leading to a better understanding of the facts of the case and enabling the Commissioner in arriving at a factually correct decision.

6. Besides, India has 22 official languages and English is a language which is learnt over the years and that too by a fortunate few. Faceless appeals before the CIT (Appeal) pre-supposes an expertise in written English language. There is a vast majority of competent professionals who can better express themselves in Hindi or their naturally spoken language rather than English. Is it fair to insist that they either submit in writing in flawless English or suffer the consequences by way of an adjustment to the income of their clients due to their inability to effectively communicate in English in spite of having a good and a deserving case. Certainly income tax proceedings are not undertaken to punish a taxpayer. They are invoked to determine the real income in accordance with the provisions of the Income Tax Act. Therefore, if justice has to be seen to done, it is extremely important that, whenever requested, an opportunity of virtual hearing be allowed. This will ensure that the orders passed are reasoned and are after proper understanding of the facts and the legal provisions.

Besides, the principle of natural justice mandates a fair, transparent and a meaningful hearing. Mere filing of written submissions along with documentary evidence can never be considered as a complete substitute to a face to face hearing.

7. I am afraid that very soon, after the initial euphoria and the enthusiasm of making the faceless appeal process in the form that exists today a success begins to peter out and the Commissioners grow wary of reading hundreds of pages of submissions and perusing reams of documents, orders will be passed by taking the safer and easier route of agreeing with assessing officer and consequently litigation will only proliferate and the harassment in terms of recovery, penalty and prosecution would continue. This wonderful reform would have failed just because the window of virtual hearing could not be provided.

8. On 1st February, 2021, after being nearly one hour into the speech, when the Hon'ble Finance Minister, started to read para 158 of her budget papers and stated that for ease of compliance and to reduce discretion, the Income Tax Appellate Tribunal (ITAT) will also become faceless and when personal hearing is needed, it shall be done through video conference, our hearts sank.

The professional community across the board was of the view that with the Tribunal becoming faceless, justice would be the inevitable casualty.

9. The ITAT, referred to as the mother of all Tribunals, came into existence in the year 1941 and ever since its formation, it epitomizes fair, equitable and expeditious justice. It is the final fact finding quasi-judicial authority having the trappings of a Court. It is independent, in as much as, it is only administratively controlled by the Ministry of Law and there is not even an iota of interference from any quarter when it comes to passing of orders.

In fact, there is no system of writing annual confidential reports (ACR) of the Members of the Tribunal after the Madras High Court in the case of Uttam Bir Singh Bedi, (Writ Petition No.7715 of 2010) held that the President of the ITAT has

no power or authority to write the ACRs of the Members. It was further held that being a judicial body, the ITAT should have judicial autonomy and therefore, the President cannot act like a Reviewing Authority.

10. The taxpayers have full faith in this Institution as more than 70% of its decisions are accepted. Even the higher courts accept and approve most of its decisions.

The Members who are selected have rich and varied experience in the field of law and accounts and the Institution through the open court mechanism, referred to as 'in public hearings' dispenses justice freely and dispassionately day in and day out.

The professionals, the departmental representatives and the Hon'ble Members of the Tribunal deliberate in an informal manner in the open court and are not bound by the strict rules of evidence. The facts are assiduously gone into and doubts are allayed then and there through intensive questioning and cross questioning. Assistance of other counsels present in the open court is also taken and the prime emphasis is on understanding the facts.

Ample opportunity is given to the counsels to express their views and hearings are concluded only after the facts have been effectively and conclusively explained. Almost 40 to 50% of the cases are decided and pronounced then and there in the open court.

11. The orders passed by the Tribunal have won accolades across the cross section of society. I would not be doing justice to this article if some of the encomiums showered on the ITAT are not reproduced here for the benefit of the readers.

Late Sh. Pranab Mukherjee, Former President and Finance Minister of India

"Over the last more than seven decades, the ITAT has shown exemplary diligence in dealing with intricate domestic as well as international taxation issues rendering decisions which balance the interests of the taxmen and the citizens. The tribunal has been adjudicating disputes in the field of direct taxes in a fair and impartial manner. It has been discharging its functions not only to the satisfaction of the Executive but also that of the taxpayers at large."

Late Sh. Arun Jaitley, Former Finance Minister and Senior advocate, Supreme Court of India

"It is trite position that ITAT, being an appellate authority under the Direct Tax laws, has acquitted itself admirably considering that it has to cope with a complex maze of case laws as well as several amendments made each year in the Income Tax Act.

ITAT has conducted itself in an unbiased and fair manner in the discharge of its duty of adjudicating disputes under direct tax laws and is held in high esteem by the taxpaying fraternity as well as Revenue Department."

Justice Mr. Sanjay Kishan Kaul, Supreme Court of India on the occasion of Platinum Jubilee Celebrations for the Tribunal on 17th December, 2015

"This tribunal, which was one of the oldest judicial bodies in the country, founded in the pre-independent India of 1941, when there was no independent forum to adjudicate matters under the Income-Tax Act, with its motto "Sulabh Nyay, Satwar Nyay" meaning "Easy justice, Swift Justice", has been systematically adhering to the aforesaid principles and imparting justice – inexpensive, expedient, accessible and free from technicalities – adjudicating intricate tax related issues at the hands of experts having vast knowledge on the subject."

Shri J. S. Ranganathan, Formerly Judge, Supreme Court of India; Member, Law Commission of India & Chairman, AAR on the occasion of Platinum Jubilee Celebrations for the Tribunal

"The vast expansion in the number of benches of the Tribunal and of the institutions before it over the years no doubt speaks of its need as well as its great popularity. But, more than numbers, it is quality of the output (now running into several tones of legal journals every year) that is the true measure of its

contribution to tax jurisprudence. Interpretations of tax legislations with the frequency of amendments and the complexity of problems it posted was always difficult enough. The economic prosperity of India and the expansion of its commerce, the vast increase in global trade with the interaction of different currencies, the evolution of innovative transactions in international trade and increasing resort to internet, e-mail and transactions on the electronic media have exposed the Tribunal to new vistas of knowledge and the evolution of new legal concepts. The Tribunal has successfully attempted not only to match the speed of its disposals to the pace of the institutions but also risen to meet the fresh challenges."

Justice Mr Y.V. Chandrachud, former Chief Justice of India

"…The ITAT is a model administrative Tribunal whose illustrious example and commendable performance may well be emulated by similar other tribunals in different disciplines. There is uniform praise in the manner in which the Tribunal functions and I suppose it is one of the few quasi-legal institutions which is not plagued by the problem of arrears…."

12. Section 255 sought to be introduced by the Finance Bill, 2021 seeks to improve efficiency, transparency and accountability by converting the proceedings before this Institution from the open and 'in public hearing mode' to a faceless mode. Interface between the Members of the Tribunal and the parties in dispute is sought to be eliminated. Optimal utilization of resources is sought to be achieved and the concept of dynamic jurisdiction is to be brought in.

The ensuing paras will show that all the parameters and the objectives that this proposed section seeks to achieve are already being met and whatever else is sought to be achieved can be done by tweaking the existing procedures instead of resorting to this rather disruptive action of converting the proceedings to the faceless mode.

As far as the efficiency is concerned, pendency is a benchmark for measuring the same and statistics show that the total number of cases pending before the Tribunal are only 75,000 which is quite clearly a manageable number if the pending vacancies of Members are filled up. Matters are disposed of by the Tribunal within a year of the appeal being filed and not much time is taken to conclude the hearings. The delay in hearings, if any, is primarily attributable to lack of adequate number of Departmental Representatives and the near negligible assistance they get from the field formations which can be improved.

As far as transparency goes, there can be nothing better than an open court hearing where all deliberations take place in the presence of the public. In the Tribunal both the Department and the taxpayers through their counsels address their arguments openly and in an informal manner.

We fail to understand how filing written submissions through faceless mode would bring about greater transparency. In fact, this would make the system entirely opaque.

A Court cannot be likened to a machine where raw material is inserted and the final product comes out as expected. Complex issues involving facts and finer aspects of law can never be explained through written submissions alone. They have to be explained in person and face to face so that any doubt or misgivings are allayed then and there. Therefore, in my view transparency which is the hallmark of this Tribunal would be an inevitable casualty in a faceless hearing mode envisaged by the Government.

As far as accountability goes, the next higher authority, which is the High Court, is the best judge of the orders passed by the Tribunal. They set right the orders passed by the Tribunal and the fact that 90% of the orders are approved is reflective of the faith the higher appellate authority has in the Tribunal.

As a suggestion, in order to further improve accountability within the existing system,

the mechanism of using video recording of the hearing, which is already in place, can be formalized and put to use. The video recording can be relied upon by the Department, the assessee and the Hon'ble Members so that the facts stated during the hearing are duly considered while passing orders and are not missed out. This will ensure that both the Department and the assessee are reassured that all their arguments have been registered and will find place in the orders passed by the Tribunal.

13. The principle of audi alteram partem which essentially means that no one is to be condemned unheard, has not been derived through the Constitution of India. It has developed over time through the evolution of mankind. The right to be heard has to be meaningful, real and not illusory. This right has to be to the satisfaction of the aggrieved i.e., the Department or the assessee. Surely the objective of the Government is best served when the taxpayers are convinced that the tax payable by them is justified and is mandated by the law.

In my view the faceless system will seriously jeopardize this principle which is the bedrock of a free, fair and a transparent judicial system.

I believe that hearings can be made more effective and meaningful within the existing system itself by accepting written submissions and continuing to allow oral submissions and also by giving statutory recognition to the video recording in every hearing. Representation through mere filing of submissions will be counterproductive and will leave a large section of the litigating public dissatisfied and aggrieved. The principles of natural justice in terms of the right to be heard will be compromised and the higher courts will invariably set aside matters to the Tribunal to be decided after affording a meaningful opportunity.

"It is easier for an assessee to persuade an assessing authority to his point of view by removing his doubts and by answering his questions at a personal hearing, than by merely availing of the cold effect of a written representation." This was held in the case of *Ram Saran Das Kapur reported in 77 ITR 298(P&H) at page 303*. The above settled principal of natural justice is also echoed by Hon'ble Apex Court in case of Automotive Tyre Manufactures Association reported in 263 ELT 481(SC) at para 59

14. The highest court of the land, through their various judgements, have held the ITAT to be a Court. In the case of Ajay Gandhi reported in 265 ITR 471, it was held that the Appellate Tribunal is the same as the court of appeal under CPC and its powers are identical to that of an Appellate court.

In fact, in the case of *ITAT v. V.K. Aggarwal reported in 235 ITR 175*, before the Supreme Court, the Department conceded that the ITAT is a Court performing judicial functions. The department had initially contended that the Income-tax Appellate Tribunal was not a Court, and was also not a Court subordinate to the Supreme Court. Hence the Supreme Court had no Jurisdiction to issue a suo-moto notice of contempt in respect of a matter pertaining to the Income-tax Appellate Tribunal. However, subsequently, the counsel for the department conceded that the Income-tax Appellate Tribunal did perform judicial functions and was a Court subordinate to the High Court. The statute also in terms of section 255(6) specifically vested powers of Court under CPC to the ITAT for the purposes of conducting the proceedings before it; and also deemed it to be a civil court for the purposes of Cr.PC.

Since the Tribunal is indubitably a court, wouldn't the Governments intervention by prescribing the mode and manner of representation tantamount to interference in its fairness and independence and making it an adjunct of the executive.

15. A court of justice is a public forum. Open courts foster public confidence and ensure that the Judges apply the law in a fair and impartial manner. It is through publicity that the citizens are convinced that the court renders even-handed justice, and it is, therefore, necessary hearing trial should be open to the public.

The Supreme Court in the case of *Naresh Shridhar Mirajkar v. State of Maharashtra, 1966 SCR (3) 744* was of the opinion that public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear cases in open and must permit the public admission to the court-rooms.

The Supreme Court while hearing the case of *Swapnil Tripathi v. Supreme Court of India*, (Writ Petition (Civil) No. 1232 OF 2017) on the issue of live streaming of its proceeding held that that access to justice can never be complete without the litigant being able to see, hear and understand the course of proceedings first hand. The Court also acknowledged that the principle of open court hearings would have to be adhered when rules for live streaming of court proceedings are made.

There can no denial to the fact that Tribunal has been a public forum and proceedings before it has been through an open court mechanism. Any attempt to guillotine this mechanism would be nothing short of taking away the voice of the taxpayers, as decision making would be behind closed doors which would be a retrograde step.

16. Article 145(4) of the Constitution of India provides that no judgment shall be delivered by the Supreme Court other than in open court. It further, provides that no report shall be made under Article 143 other that in accordance with an opinion also delivered in open court.

When the Constitution of India mandates the highest court of the land to pronounce judgments in the open court, it is manifest that the lower courts must also exhibit the same transparency to ensure that the confidence of the public as to the independence and fairness of the judiciary remains paramount.

17. In the common-law system which India follows, decisions are relied upon as precedents, and there are rules and policies with just as much authority as a law passed by a legislature. This system of stare decisis is sometimes referred to as "judge-made law," as the law (the precedent) is created by the judge, not by a legislature.

Judges are generally expected to follow earlier decisions, not only to save themselves the effort of working out fresh solutions for the same problems each time they occur but also, and primarily, because the goal of the law is to render uniform and predictable justice. Fairness demands that if one individual is dealt with in a certain way today, then another individual engaging in substantially identical conduct under substantially identical conditions tomorrow or a month or year hence should be dealt with in the same way.

The legal pronouncements made by the Appellate Tribunal have a binding precedent as is in the case of higher courts.

Hence it is of utmost importance that the decisions by the Tribunal are well reasoned, replete with facts and contentions raised by both parties and the law is interpreted in accordance with the principles of interpretation and the precedents are duly considered and applied.

To interpret law is a huge responsibility cast on the Tribunal and it is my belief that the same can be effectively discharged only through deliberations and discussions in an open court. Seeking decisions only through written submissions will have a deleterious effect on the development of law and will lack the aspect of humanness and equity.

18. Article 14 of the Constitution of India grants "right to equality" to any person within the territory of India, which includes the right to be treated equally before law and/or equally protected by the laws within the territory of India. It may be appreciated that, other than the Income Tax Appellate Tribunal, there is no proposal to prescribe similar faceless mode of conducting proceedings to any other Tribunal in the country. The ITAT therefore has been clearly discriminated from other Tribunals while the

judicial functions imposed on it remains onerous and complex. Such discrimination, in my view, is not only discrimination vis-a-vis the ITAT, but also discrimination against citizens of the Country by providing them a different mode of representation for administration of other laws vis-à-vis tax laws. Such discrimination can, therefore, be considered as violative of 'right of equality' enshrined in Article 14 of the Constitution of India.

19. I often wonder how efficient would the faceless mode be? Currently, matters are decided in a few hearings in the open court once the pleadings in the form of paper books and submissions are completed. The faceless mode would involve filing of submissions by the assessee and submissions by the Department followed by counter submissions by the assessee or the Department over a period of time. It would then be expected from the Hon'ble Members to peruse the submissions of the assessee and the Department and then the counter submissions of both the parties alike and then arrive at a conclusion. And all this without the assistance of the counsels to explain complex facts and to allay any doubts. This would be a near impossible task and would compromise on the quality of the orders.

20. Faceless hearings before CIT (Appeal) were somewhat justified because they used to take place in a closed door environment with only the counsel and CIT(Appeal) being present. The department was rarely represented through its officers. This was the main cause of harassment and resentment because the hearings were in camera and not public. The Courts all across the world owe their success to in public hearings. Transparency is manifest in a public hearing and the scope of discretion is also minimal. The case laws cited and the facts narrated have necessarily to be incorporated in the order and due consideration is given to the same.

21. The present rules of the ITAT are salutary in as much as, rule 33 provides that the proceedings shall be open to the public and the Tribunal in its discretion may direct that proceedings before it in a particular case will not be open to the public.

Admittedly, the Tribunal is a creation of the Income-tax Act and the Act empowers the Government to frame rules. However, this power should be used carefully and by visualizing the long term effects of a decision. Faceless mode can happen with the swish of a wand but the consequences of this decision could be disastrous. An Institution which has been built brick by brick over 79 years and is doing extremely well should not be dismantled in this manner.

The fallacies in the existing system should be removed to make it more efficient rather than experimenting with a system where what the assessee does not know what happens after submissions have been filed.

22. Section 255 recently introduced permits the use of technology in the ITAT to the extent possible. Let all filings be online; let the software decide the constitution of benches; let there be a uniform transfer policy of the Members of the Tribunal and let there be video recording of all hearings to ensure that all pleadings are effectively addressed in the orders. This will effectively deal with the word 'discretion' referred to by the Hon'ble Finance Minister in her speech referred elsewhere in this article.

23. I would also suggest that one needs to wait for at least two years to see the results of the working of the faceless system introduced before the CIT (Appeals) before putting in place a similar system for the Tribunal.

24. The Tribunal functions as an open court and is efficient, effective and enjoys the confidence of the taxpayers and professionals alike.

Kindly do not destroy it merely because the mantra of faceless appeals sounds good.

Faceless cannot be a panacea to redress all the ills in a judicial forum.

❍□❍