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Editorial

To

Hon'ble Ravi Shankar Prasad,
Union Minister of Law and Justice,
Government of India,
New Delhi,

**Subject: Finance Bill 2021 - Direct Taxes Cl. 78 - Section 255 -
proposal to convert proceedings before the Income Tax Appellate
Tribunal (ITAT) into faceless mode.**

May it please Your Excellency,

We hope and pray that this finds you in good health and spirits.

The Income Tax Appellate Tribunal Bar Association, Delhi (ITAT Bar) comprises of more than 1400 senior tax practitioners who are primarily engaged in practice before the Income Tax Appellate Tribunal.

The ITAT Bar is deeply concerned about the recent proposal of the Government to convert the open court proceedings before the Tribunal to the faceless mode.

This is being sought to be done through an Amendment proposed in section 255 of the Income Tax Act. The Hon'ble Finance Minister also, in her budget speech stated that she proposes to make the Tribunal faceless and establish a National Faceless Income Tax Appellate Tribunal Centre to implement the proposal.

2. We had a meeting of the Bar Association and all members were unanimous in their view that such a move will destroy the very purpose

Board

**Satyajeet Goel
Gaurav Jain
Gautam Jain
Tarandeep
Singh
Ruchesh
Sinha
Gaurav Gupta**

for which this Institution was created and justice will be the biggest casualty.

3. Income Tax Appellate Tribunal came into being in the year 1941 and is referred to as the Mother of all Tribunals in the Country. All proceedings/hearings take place in open-court and the rules provide for “in public hearings”. Because of this important and salutary attribute of transparency in proceedings, the Tribunal has made its mark and has been a success story in the Country.

The tax-payers, the counsels and the department alike have full confidence in its efficiency, impartiality and fairness. In nearly 40 percent of the cases the decisions are pronounced soon after the hearing in open court and on an average, each hearing, after the pleadings have been completed does not take more than 30 to 40 minutes.

The Tribunal, being the final fact finding authority, the facts are gone into deeply and their correct understanding is the paramount objective of the Court. Intensive cross questioning, free and open exchange of views and ideas and detailed discussion on facts and the law applicable is a given in almost every proceeding before the Tribunal. This process takes-place in an informal manner so as to render substantive justice. Technicalities are not given much importance.

Nearly 30 to 40 hearings take place daily in each court and the courtroom is often packed with counsels, both young and senior. This fora provides an excellent ground for law to develop and for youngsters to see how the seniors argue and articulate their thoughts. Facts and the applicable law is discussed and complex issues are thrashed out leading to well-reasoned judgments. Your Honour is aware that more than 90 percent of the decisions of the Tribunal are accepted by the Higher Courts which in itself is vindication of the fact that this institution has met the expectations of the tax-payers, the Government and the higher judiciary alike.

4. The Hon'ble Finance Minister in her speech stated that the faceless mode of representation is sought to be resorted to in order to improve transparency and reduce discretion. The new section 255 also seeks to impart greater efficiency, transparency and accountability by elimination of inter-face between the appellant and the Tribunal and the parties to the appeal to the extent technologically feasible.

At the very outset, we respectfully submit that converting the proceedings before this venerable institution into the faceless mode will go against all the aforesaid objectives stated in the proposed amendment to section 255 and so also by the Hon'ble Finance Minister.

What greater transparency can there be than in an open-court mechanism. In an open Court the parties as well as the Honorable Members are bound by the facts stated and the precedents cited. It is impossible to ignore the binding precedents and where important arguments or case laws or sections cited are missed out, the same are promptly rectified through miscellaneous applications.

As far the aspect of discretion is concerned, there can be no curb to judicial discretion and any such measure will be destructive of law and its development and consequently justice will suffer.

We may also state that the desire of the Government to eliminate inter-face between the Tribunal and the parties in appeal cannot be achieved through this measure. The applicant may not know who is hearing the matter but the Hon'ble Members who are deciding the issue will know the applicant.

Besides, how will the efficiency improve through written submissions? Income Tax law is highly complex and there are hundreds of judicial decisions on virtually every section. Transfer pricing and International tax are laws which have a global prospective and their evolution and development is also dependent on how the law develops in the other parts of the world.

Merely by writing hundreds of pages on facts and law as submissions, can justice be done? It will be impossible for the judges to decide in absentia, without seeking assistance of the counsels and the departmental representatives on various issues that are sought to be raised in the pleadings. The tax-payer may write his side of the story and the department will write theirs. There may be difference in facts and difference in interpretation of law. The correct facts will have to be culled out. How can they be done sitting in the chamber and going through the written submissions alone?

Your Honour will also appreciate that in a Court proceeding, one judge may understand and issue while the other may not. Instead of the differences remaining unresolved and remaining closeted in their chambers, would it not be better if they are addressed by both the parties to the lis in an open court, so that when the judges go back to their chambers with their mind are clear and ready for a considered decision to be taken.

5. The basic principal that justice must be seen to be done, will be a major casualty if the inter-face between the Tribunal and the parties is given a go-bye. Predictability, which is the hallmark of a robust judicial system, will also be lost. In fact, through the faceless mode, the concerns of the Finance Minister of reducing discretion will be belied. In closed doors, exercise of discretion, in the context the Finance Minister was perhaps alluding to, will be difficult to control.

6. The Government is seeking to replicate the system of faceless communication which is in place in case of representations before the assessing officers and Commissioner Appeals. Before the Assessing Officers, prior to the introduction of the faceless mode, the proceedings used to be in a closed room with no one else except the taxpayer being present. The Assessing Officer (AO) had unfettered powers and discretion to ask whatever he wanted related to the case. There were often allegations of the discretion being misused. Same was the case

with the Commissioners (Appeals), where the tax-payer or his counsel were the only parties present in the room. Hence, the Government in its wisdom thought it best to convert the proceedings before the AO's and Commissioner (Appeals) to the faceless mode. We must however state here that we feel that even the present process of faceless hearings may not be very successful in the case of Commissioner Appeals. Here also a window of virtual hearing on askance must be provided in order to clarify doubts as to the facts and law.

Be as it may, this problem of closed door hearing is never so in the Tribunal. At any given point of time, in the open-court there are more than 25 to 30 counsels present, including the department representatives. Everything as already stated is discussed in the open and duly recorded by the Honorable Members and invariably finds place in their appellate orders. The attempt to convert these open-court proceedings into a faceless mode is a retrograde step and will be the end of transparency and efficiency. Accountability will also be compromised because the accountability factor is best governed through an open court mechanism rather than in closed confines of an office.

7. We are also concerned about the fact that the faceless mode is being advocated by the Finance Ministry which is the biggest litigant in the proceedings before the Tribunal. It is the inherent right vested in every citizen of the Country to argue or speak out against a decision which has gone against him and it is the solemn duty of the judge to decide the matter. What better way than to address one's grievances, in an open court through a physical hearing mechanism, where one can demand the attention of the judge on the issues one seeks to plead. It appears that the Finance Ministry which is the biggest litigant is seeking to control judicial discretion by insisting on a faceless mode, which certainly should not be permitted.

8. Your Honour is aware that in every civil society, including the United

States and United Kingdom, time is allowed for oral arguments. In the United States, the time for oral arguments is mostly utilized by the judges to allay their doubts and ask questions, while in United Kingdom, few days are allowed to parties to lead arguments after the pleadings have been completed.

9. India has 22 major languages as per the Schedule VIII of the Constitution of India and English doesn't come naturally to a new born. It is learnt over a period of years. This faceless mode presupposes that every taxpayer/counsel is an expert in English language. This is highly unjust and unfair. On one hand the Government is promoting Hindi language and on the other hand, by way of written submissions everybody is expected to write copious facts and law in flawless and impeccable English. Surely this could not be the intent.

10. Your Honour is an eminent jurist and has practiced law at the highest level. Can law develop through written submissions alone? How will the juniors learn the court craft, the mode and manner of arguments and the finer aspects of law and facts?

Justice mechanism cannot be compared to a machine, where raw material in the form of submissions are put in, and well-reasoned orders are the resultant.

11. Your Honour is also aware unlike the Commissioner (Appeals), the Income Tax Appellate Tribunal is an independent body and has been held to be a Court. Before the Hon'ble Supreme Court in the case of ITAT v. V.K. Aggarwal reported in 235 ITR 175, 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 and 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 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.

The ITAT is under the superintendence of the jurisdictional High Court and is governed by the principles of a Court. How can the legislature transform the entire process of pleadings before a Court and subject it to the writing mechanism only. This runs contrary to the Constitution of India.

12. We also fail to understand why the ITAT has been singled out for this mode of proceedings. There are more than 26 Tribunals in the Country and none of them seem to have been subjected to this mode of hearing. This selective imposition is quite clearly discriminatory.

We would have appreciated if the Government had thrown open this idea for discussion and then decided to take a considered view. Through this mechanism of introducing the faceless mode, a very disruptive change is sought to be brought in which appears to be a harbinger of the change to come, perhaps in the higher judiciary as well.

13. This present system of open-court proceedings has been continuing to the satisfaction of all for nearly 80 years. It is not fair to dismantle the same with a stroke of a pen by compromising the basic principle of natural justice referred to as *aud- alteram- partem*. We are of the considered view that the present system is working very well and can be further improved if the Government so chooses. There is already a system in place where by, the proceedings before the Tribunal are video recorded. These proceedings could be put to use by allowing the tax payer, the department and the Hon'ble Members alike to place reliance on the same so that all the facts narrated and the laws cited are captured and discussed in the order and nothing is

missed out. In this manner, greater efficiency, transparency and accountability can be achieved.

We humbly request to your good self to intervene in the matter and ensure that this great Institution which has made brick by brick over the last 80 years is not dismantled in one stroke.

Thanking You,

Yours faithfully,

Ajay Wadhwa

R.S. Ahuja

Ranjan Chopra

President

Vice President

General Secretary

Gurmeet Grewal

Rajeev Sabharwal

Secretary

Treasurer

Copy to:

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Hon'ble President, ITAT

