Discretionary “Personal Hearing” under Faceless Appeals – Flouting the Principles of "Natural Justice"?

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1 INTRODUCTION

On 13th August 2020, the government unveiled another landmark reform in the taxation regime of India and with the launch of ‘Transparent Taxation–Honouring the Honest’, it ushered in major structural and procedural changes in the form of faceless assessment, faceless appeals and Taxpayer’s Charter. The objective of making such tactical changes are to eliminate physical interface, making tax assessments “seamless, painless and faceless’. To achieve such trajectory, faceless appeals are brought into effect from 25th September 2020. The Entire scheme provides for allocation of appeals, admission of appeal, admission of additional ground/additional evidences, procedure for passing appellate order by appeal units, enhancement of income, process of rectification of appellate order, passing of penalty order by appeal units etc. One of the vital aspect of disposal of appeal by appeal units includes providing “Video hearing” in certain cases as mentioned in scheme as against existing practice of providing “personal hearing’ and in this article, we have tried to point as to whether “personal hearing” in all cases are “Sine qua non” in all appellate hearing or not or case may be decided only on written submission.?

2 PROVISIONS RELATING TO “VIDEO HEARING’ IN FACELESS APPEAL SCHEME

Para 12 of the Scheme deals with following vital aspects of “Video Hearing”:

v A person shall not be required to appear either personally or through authorised representative in connection with any proceedings under this Scheme before any authority.

v The appellant or his authorised representative **may request for personal hearing** so as to make his oral submissions or present his case before the appeal unit under this Scheme.

v The Chief Commissioner or the Director General, in charge of the Regional Faceless Appeal Centre, under which the concerned appeal unit is set up, may approve the request for personal hearing if he is of the opinion that the request is covered by the circumstances referred to in clause (xi) of paragraph **13. (Such Circumstances are yet to be notified by CBDT). (Thus, in all cases and each stage of appellate proceedings, personal hearing in form of video hearing will not be provided)**

v Where the request for personal hearing has been approved, such hearing shall be conducted exclusively through video conferencing or suitable facilities as approved by board.

3 brief procedure for appellate hearing u/s 250 and CIT(a)/appeal units being quasi-judicial authority

3.1 Section 250 of the IT Act deals with the procedure to be followed by the CIT(A)/appeal units in disposing of the appeal. Intention of the legislature is clear from a plain reading of the section; sub-section (1) of section 250 mandates that the CIT(A) shall fix a day and place for the hearing of appeal, and shall give notice of the same to the appellant and to the AO against whose order the appeal is preferred. Sub-clause (2) therein states that the appellant/AO has a right to be heard, either in person or by an Authorized Representative, on the date fixed for hearing.

3.2 Hon’ble Supreme Court in the case of **Sirpur Paper Mill Ltd Vs CWT [TS-5009-SC-1970-O]** while adjudicating on powers conferred on Commissioner under section 25 of Wealth Tax Act, 1957 observed that “*The power conferred by section 25 is not administrative: it is quasi-judicial. The expression "may make such inquiry and pass such order thereon" does not confer any absolute discretion on the Commissioner. In exercise of the power the Commissioner must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consistent with the principles of natural justice;* ***he cannot permit his judgment to be influenced by matters not disclosed to the assessee, nor by dictation of another authority…*** *The orders, instructions and*

directions of the Board issued under section 13 may control the exercise of the power of the officers of the department in matters administrative but not quasi-judicial. The proviso to section 13 enacts that no orders, instructions or directions shall be given by the Board so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions. ***It does not, however, imply that the Board may give any directions or instructions to the Wealth-tax Officer or to the Commissioner in exercise of his quasi-judicial function***.".

3.3 The Hon'ble Supreme Court in the case of ***UOI Vs Madras Steel Re-Rollers Association*** in Civil Appeal No 1645 & 1646 of 2011 vide order dated 11/02/2011 at para 7 held that "Considering the facts and circumstances of the case and relying on the aforesaid decision of this Court, we hold that the Assessing Authorities as well as the Appellate and the Revisional Authorities are creatures of the Act and they perform the functions of the quasi judicial authorities and the orders passed by them are also quasi judicial orders. **Therefore, such orders are required to be passed by exercising independent mind and without impartiality and while doing so, such Authorities are required to consider various evidences made available to them."**

3.4 It is well-settled that the **proceedings before the CIT(A) are quasi-judicial proceedings** and therefore he is under an obligation to pass an order in conformity with the rules of natural justice. **The cardinal principle embedded therein is that no person should be condemned unheard**. Therefore, the appellant/AO or his representative has to be given proper opportunity of being heard.

3.5 The Provisions of the Act provides for personal hearing (as per new appellate procedure "Video Hearing") and unless & until, such hearing is not provided to appellant/AO as the case may be in each cases or stages of appellate hearing where either party demands for such hearing as against Scheme providing video hearing only if conditions as would be provided by board is meet in particular case to the satisfaction of concerned authority as discussed above, it may lead to uncalled litigation at further appellate stage on the ground that **"reasonable opportunity was not provided"** by appeal units.

3.6 The Hon'ble Apex courts in our humble view have consistently held that CIT(A) being quasi-judicial authority need to pass appellate order by exercising independent mind and other authorities in no case have prerogative to decide as to whether particular case requires "personal hearing"(Video Hearing) or not. Even if such personal hearing is not provided as per existing scheme in each and every case, right to provide for personal hearing in any case should be with appeal units being authority passing appellate order and nor CCIT/DG in charge of RFAC. Reliance can be placed on decision of Hon'ble Supreme court in the case of **Union of India v. Jesus Sales Corpn. AIR 1996 SC 1509** observed that "the requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi judicial authority who is expected to apply his judicial mind to the issues involved. **Of course, if in his own discretion if he requires** the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide to the appeal or the application only after affording a personal hearing....."

4 JUDICIAL PRONOUNCMENTS DEALING WITH PERSONAL HEARING in context with income tax act

4.1 Hon'ble Madras High court in the case of **Gemini Film Circuit[2019]** held that "It is statutorily imperative to give a personal hearing while disposing of an appeal under section 250". In this case, notice of hearing sent to assessee had returned unserved and in interest of justice, the Hon'ble Court found appropriate to give another opportunity of personal hearing to assessee.

4.2 Hon'ble Madras High court while dealing with issue of cash deposits during demonetisation period in the case of **Salem Sree Ramavilas Chit Company (P.) Ltd [2020]** has pointed out that electronic assessment proceeding had been introduced, **but that could lead to erroneous assessment if officers were not able to understand transactions/statement of accounts of an assessee in absence of personal hearing.**

4.3 Hon'ble Delhi High court in the case of **Raj Kumar Mangla [2011]** has held that "Where Commissioner (Appeals) dismissed assessee's application under section 154 without giving him a personal hearing, said order so passed was to be set aside and matter was to be remanded back to Commissioner (Appeals) for disposal afresh in accordance with law.

4.4 Here it is relevant to consider decision of Hon'ble Supreme Court in the case of Carborundum **Universal Ltd. v. CBDT [1989] [TS-5054-SC-1989-O]**. In this case the assessee applied for waiver of interest under section 220(2A) of the Act. **It was contended before the Court that a request had been made to the Board to afford a personal hearing** before the petitions were disposed of, but no opportunity of personal hearing was afforded by the Board. The question, therefore, was whether refusal to

grant waiver was vitiated on the ground of oral opportunity of hearing not being given. The Court held as follows :

"… ***The legal position is that where a statutory provision does not exclude natural justice the requirement of affording an opportunity of being heard can be assumed, particularly when the proceedings are quasi-judicial. Exclusion, however, can either be by a clear provision or inferred from the scheme as also the nature of power which is being exercised.*** *We have already noticed that the power of the Board which was invoked was discretionary. It was to be exercised on the basis of the recommendation of the Commissioner and the material provided by the assessee. Personal hearing in every situation is not necessary and there can be compliance with the requirements of natural justice of hearing when a right to represent is given and the decision is made on a consideration thereof. Keeping the nature of the power invoked for exercise, the fact that the petitioner had an opportunity to represent its case in writing and the further fact that the Board had taken into consideration the report of the Commissioner in the background that it is not the allegation of the petitioner that the Commissioner's recommendations were different, we do not think, that in the facts of the case, it can be held that the petitioner was entitled to a right of being personally heard before its petition under section 220(2A) of the Act was disposed of....." (p. 174)"*

The Court in above case also observed that "*…Our conclusion is, however, confined to the facts of the case and as and when the question arises in a different situation, the matter may open to examination…(Page 174*)" . The issue before Apex court was with reference to power of board for waiver of interest vis a vis oral hearing and not in connection with proceedings with appellate authorities. **It is amply clear that no universal rule was laid down by the Supreme Court that no opportunity of oral hearing would be given when there was no such requirement under a statute.**

The Hon'ble Delhi High court in the case of **Moser Baer India Limited [TS-6234-HC-2008(DELHI)-O]** has after considering above observation of Apex court, at para 25 of its order observed that "**The foresaid observations of the Supreme Court make it quite clear that even where there is no provision for oral hearing it cannot be excluded specially when proceedings are quasi-judicial in nature. The exclusion of an oral hearing can only be where there is a clear provision to that effect or it can be inferred from the scheme of statute…"**

In above case before Delhi High court, the Transfer Pricing Officer determined the Arm's Length Price (ALP) in respect of international transactions without granting oral opportunity of personal hearing to the assessee. The Delhi High Court held that in such determination, there is a statutory obligation on the TPO to accord an oral hearing to the assessee. The Hon'ble Court at para 7.2.1 of its order made following important observation which is very significant to present issue:

"*It has been reiterated time and again by Courts in India and other jurisdictions all over the world that authorities which have a power to decide and whose decisions would prejudice a party, entailing civil consequences, would be required to accord oral hearing even where the statute is silent. See State of Orissa v. Dr. (Miss) Binapani Dei AIR 1967 SC 1269.* ***The courts have gone to the extent of holding that the right to oral hearing may not necessarily flow from a statute but flows from rule of law as enunciated by courts****. That brings us to the issue as to what could be regarded as 'civil consequences' in a given case. The expression of 'civil consequences' has been best explained by our Supreme Court in the case of Mohinder Singh Gill v. Chief Election Commission [1978] 1 SCC 405 at 440.* ***The Supreme Court has observed that civil consequences involve infraction of not only property and personal rights, but also, actions which impinge on civil liberty of an individual or result in material deprivation or even result in non-pecuniary damages.***

In their answer to the revenue's argument that there was no demand for oral hearing in above case, the Hon'ble Court at para 7.2.4 of the order pointed out as under:

"*The fact that a citizen is unaware of his legal right cannot be used as a plank to seek legal sustenance for its actions, which are otherwise invalid.* ***It is duty of the State, in its role as a litigating party, to inform the citizen of his right, i.e., to seek an oral hearing.*** *An enquiry of the kind which is contemplated under Chapter X by the* ***TPO will achieve a far more fair result if there is an opportunity for an oral hearing or personal representation****.* ***Therefore, the failure to demand an oral hearing would not necessarily lend sanctity or reinforce the validity of the impugned order*** *in view of the fact that while determining the ALP, the TPO is free to look at not only the material adduced by the assessee but also information and/or evidence gathered by the TPO. It would be difficult for an assessee to gauge before hand at the stage of filing a written response to the queries raised in the show-cause notice by the TPO, as to whether its response has been fully appreciated by him, and if there are any queries, whether it needs to supplement them or dilate upon them in the background of information and documents which may be available with the TPO of which the assessee has no notice. It is only when the TPO examines*

the response of the assessee in its or its representative's presence, would there be a meaningful and effective compliance with the requirement of fair procedure as contemplated in sub-section (3) of section 92CA."

Hon'ble Court further observed that the submission of the revenue, that the failure to grant an oral hearing is a defect which could be cured by providing such an opportunity in the appellate forum, is far too expansive and cannot be accepted.

4.5 In another decision of a Division Bench of the Punjab and Haryana High Court in the case of **Ram Saran Das Kapur v. CIT [1970] [TS-5081-HC-1969(PUNJAB)-O]** , the learned judges of the Division Bench on a construction of sections 28 and 5(7C) of the Indian Income-tax Act, 1922, came to the conclusion that **the hearing contemplated under section 28 of the Act is a personal hearing** . At page 303, the said Division Bench held as follows:

"***It is well-known that no amount of written representation, howsoever detailed, can, in all cases, be treated as an equally effective substitute of a personal hearing. 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.*****"**

4.6 Hon'ble Patna High court in the case of **CWT Vs Sri Jagdish Prasad Choudhary [TS-5348-HC-1994(PATNA)-O]** has held that "**An oral hearing is necessary not only on grounds of fairness but also for enabling the assessee concerned to record his case which has been described as to 'blow off steam'** . Such an oral hearing is necessary on grounds of public policy and in public interest. Therefore, having regard to the developments of the principles of natural justice as well as the dynamic interpretation of article 14 of the Constitution by the Apex Court in a series of decisions, it is no longer open to the wealth-tax authorities acting under section 18(1)(a) read with section 18(2) of the said Act to decide the liability to penalty of an assessee merely on the basis of consideration of a written representation given by the assessee. **He must offer the assessee an opportunity of oral hearing and if that opportunity is not availed of by the assessee, that is of course a different matter but without offering the assessee an opportunity of oral hearing, the decision made on the basis of consideration of the written representation only, is bound to be an unfair one and such a decision does not satisfy the mandatory requirement of section 18(2).**"

4.7 Hon'ble Bombay High court in the case of Mrs. Mugdha Shirish Agarkar [2018] , Aamby Valley Ltd [2013] , Sunisha Impex (P.) Ltd [2014] , Shailesh J. Shah [2014] , Hon'ble Karnataka High court in the case of Smt. Joshna Rajendra[2013] and Hon'ble Delhi High court in the case of General Talkies Ltd [1987] [TS-5442-HC-1986(DELHI)-O], Hon'ble Madhya Pradesh High court in the case of Acme Fabrik Plast Co [TS-5038-HC-1995(MADHYA PRADESH)-O] has also recognised importance of personal hearing.

4.8 Hon'ble Allahabad High court in the case of **Mool Chand Mahesh Chand [TS-5277-HC-1978(ALLAHABAD)-O]** observed that "*It is well settled that the requirement of the rules of natural justice are that a man shall not be a judge in his own cause and, secondly, that a man may not be condemned unheard without his being made aware of the charge which he has to meet. The requirement of giving a hearing flows from the principle of fairness which has to be observed in administrative as well as quasi-judicial proceedings.* ***Normally, a hearing means oral hearing at which the party may be legally represented.*** *But in a suitable case the hearing may be held on paper by permitting the person concerned to make his representation and the arguments in writing. A personal hearing is not always a concomitant of the principles of natural justice.*"

Though in above case, court observed that personal hearing is not connected with natural justice but hearing means oral hearing.

5 relevant decisions rendered by apex court with reference to personal hearing under different act

5.1 In Union of India v. J. P. Mitter the court refused to quash the order of the President of India in a dispute relating to the age of high Court judge on the ground that the President didn't allow an oral hearing. The court was of the view that when the person has been given an opportunity to provide his submissions in writing, there is no abrogation of the principles of natural justice even when an oral hearing is not granted. The administrative authority too must provide full opportunity to testimonial or documentary evidence.

The Hon'ble Court in above case observed that except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. In this case, the President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not

constituted by the Constitution a Court. In faceless appeal scheme, appeal units being quasi judicial authority and functioning like a court, need to give personal hearing when assessee makes requests for such hearing.

5.2 **In case of Union of India v. Jesus Sales Corpn. AIR 1996 SC 1509** in the context of contention of denial of opportunity of personal hearing before rejecting the prayer for dispensing with pre¬deposit of the penalty, "Such authorities which shall be deemed to be quasi judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi judicial authorities must hear the appellants or the applicants, as the case may be.. But, any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded."

In the above case, a penalty of Rs.6 lakhs was imposed against the said respondent under Imports and Exports (Control) Act, 1947 and appeal was filed on behalf of the respondent along with an application for dispensing with the pre- deposit. The appellate authority directed assessee to deposit 25% of the penalty amount or bank guarantee for the same amount and such direction was challenged before court on the ground that appellant authority has not given oral hearing. In this context, Hon'ble Apex court observed that "**As such it can be said that the statutory requirement is that before an appeal is entertained, the amount of penalty has to be deposited by the appellant…**" *and court further held that appellate authority has given direction to deposit only 25% of the amount of the penalty and such direction being reasonable and should not have been held to be invalid by the High Court merely on the ' ground that before passing the said order the respondent was not given oral hearing, which amounted to violation of the principles of natural justice*.

The ratio laid down by Apex court was with reference to specific issue and direction of appellate authority and cannot be made applicable to faceless appeal scheme wherein appeal units are judiciously deciding orders passed by lower authority.

5.3 In case of **Travancore Rayons Ltd. v. Union of India** , Apex court held that *"No personal hearing was given by the Government of India to the appellant Company even though the matter raised complex questions. It is true that the rules do not require that personal hearing shall be given, but, if in appropriate cases where complex and difficult questions requiring familiarity with technical problems are raised,* ***personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievances of citizens"***

5.4 In case of **State of U.P. v. Maharaja Dharmander Prasad Singh,** it was held that "….On a matter of such importance where the stakes are heavy for the Lessees who claim to have made large investments on the project and where a number of grounds require the determination of factual matters of some complexity, the statutory authority should, in the facts of the case, have afforded a personal hearing to the lessees…."

6 OTHER RELEVANT OPINIONS/POINTS

6.1 Professor de Smith in his famous treatise in Judicial Review of Administrative Action (Fourth edition), 1980, at page 201 pointed out that when the words 'hearing' or 'opportunity to be heard' are used in legislation, they nearly always denote a hearing at which oral submissions and evidence may be tendered. He further at page 201 of the same treatise written that "In the absence of clear statutory guidance on the matter, one who is entitled to the protection of the audi alteram partem rule is now prima facie entitled to put his case orally."

6.2 Reference may be made to the decision of the U.S. Supreme Court in Goldberg v. Kelly [1970] At page 269 of the report, the law has been so stated:

"*The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. Written submissions are an unrealistic option for most recipients who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.* ***Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipients to mould is arguments to the issues the decision makers appear to regard as important. Particularly where credibility and veracity are at issue, as they must be, in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision***." (emphasis* supplied).

6.3 Hon'ble Supreme Court in the case of C.B. Gautam Vs UOI [TS-5043-SC-1992-O] has held that *"A plain reading of the provisions of Chapter XX-C clearly shows that they do not contain any provision for giving the*

parties an opportunity to be heard before an order for compulsory purchase of the property by the Central Government is made. It must, however, be borne in mind that Courts have generally read into the provisions of relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This will be particularly so in a case where the validity of the section will be open to a serious challenge for want of such an opportunity. It is true that the time frame within which the order for compulsory purchase has to be made is a fairly tight one but the urgency is not such as will preclude a reasonable opportunity of being heard or to show-cause being given to the parties likely to be adversely affected by an order of purchase under section 269UD(1)"

The ratio of decision can also be applied for personal hearing(video hearing) in present scheme.

7 SUMMARY

(i) In the true spirit of the Faceless Appeal Scheme, personal hearing through vide hearing should be allowed in each case where assessee or AO during the course of hearing demands for the same more particularly when appellate order is going to be against assessee.

(ii) It is equally important to note that certain issues/clarifications as required by appeal units are easily resolved in appeal hearing only rather than appeal units asking clarifications on certain issues to assessee in writing and appellant replying the same and repeating again and again like passing ball in football match and same will easily save substantial time of judiciary and assessee. In many cases, contentions of assessee are easily understood by appeal units only hearing in few minutes, or some of the issues involved in appeal can be easily explained by appellant or his authorised representative if personal hearing is granted rather than making long submissions on the issues.

(iii) In the present scheme, it seem that no opportunity of being heard is likely to be provided by appeal unit reviewing draft order passed by other unit or final appeal unit passing revised draft order to assessee (except in the case of enhancement of income), proper opportunity of being heard including video hearing need to be provided to assessee in the scheme as per ratio laid down by Hon'ble Supreme court in the case of C.B. Gautam [TS-5043-SC-1992-O].

(iv) Like present scheme of Faceless Appeal Scheme, personal hearing through video hearing is also provided in the Faceless Assessment Scheme (only in circumstances as would be listed) and even AO being qusai-judicial authority, clarification also needed from CBDT regarding allowing personal hearing(through video conferencing) in all the cases where assessee asks for such hearing.

In view of above discussion, it is our opinion that requirement of oral hearing (video hearing) is implicit with the concept of fairness in quasi-judicial functioning.