

## Faceless Assessments: Season I - Sweet or Bitter?

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The roadmap of conducting assessment proceedings in an entirely electronic mode reached its zenith with the roll out of the Faceless Assessment Scheme 2019, in August 2020. Interestingly, much before the pandemic set foot, the Central Government had already paved the path for carrying out assessments and other critical tax matters, from a safe distance, in early 2019. In normal circumstances, the implementation may have been undertaken in a phased pilot run manner, however, the COVID-19 impact perhaps preponed the process. The Central Government certainly took a bold step in launching this new and dynamic faceless regime on such a large-scale nation-wide basis (perhaps the first of its kind across the globe) with an aim to combine transparency with minimum human interaction.

The first season of the Faceless Assessment regime is nearing closure, however, not without its share of controversies. The substitution of “physical or face-to-face hearing system with complete virtual proceedings” has been an over-all sweet and bitter experience. Where on one hand the assessments went smooth as tax authorities were sensitive towards the information asked, responses filed and passed mindful orders, while on the other hand, there were serious lapses in following proper laid procedures. Some key issues included non-service of proper Show Cause Notice (**‘SCN’**) and / or Draft Assessment Order (**‘DAO’**) before directly issuing final assessment orders or even where DAO was served, fair and just opportunity was denied in many cases either by granting inadequate time to file responses; or where objections were filed, the same were simply overlooked in an arbitrary manner, rendering a well-conceived exercise faulty.

This brings us to one cardinal rule in tax proceedings namely the “Principle of Natural Justice” which appears to have been overlooked in some cases making the outcome litigation prone.

#### Audi Alteram Partem

•Audi alteram partem is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It entails that no person should be judged without allowing a reasonable hearing. Further, under the Income-tax Laws, this principle has been considered as a principle of fundamental justice and equity and vide many judicial precedents it has been held of prime importance and a key factor in determining the valid jurisdiction.

**At this juncture, it is important to understand and delve upon the major issues encountered during the first phase of faceless assessments and the views taken by various courts.**

*Whether the final assessment order passed without issuing draft assessment order, is valid.*

Here, it is relevant to note the relevant provisions of the newly inserted section 144B of the Act which has been introduced vide the Amendment Act, 2020:

*(xvi) the National Faceless Assessment Centre shall examine the draft assessment order in accordance with the risk management strategy specified by the Board, including by way of an automated examination tool, whereupon it may decide to—*

*(a) finalise the assessment, in case no variation prejudicial to the interest of assessee is proposed, as per the draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, along with the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment; or*

*(b) provide an opportunity to the assessee, in case any variation prejudicial to the interest of assessee is proposed, by serving a notice calling upon him to show cause as to why the proposed variation should not be made; or*

*(c) assign the draft assessment order to a review unit in any one Regional Faceless Assessment Centre, through an automated allocation system, for conducting review of such order;*

The section explicitly provides for issue of an SCN to provide an adequate opportunity to the assessee for placing its side of the story on the proposed additions/ disallowances. Accordingly, it can be inferred that issuance of SCN cum DAO by the National Faceless Assessment Centre ('NaFAC') to the assessee is mandatory as per the provisions of section 144B of the Act. Worthwhile to note that although this section was later inserted, however, Notification No. 61/2020 of August 13, 2020 (which provided guidelines of the scheme) emphasized on the requirement of issue of DAO to the assessee. Non-compliance of this procedure has forced some of the taxpayers to reach out directly to High Courts via writ petitions route challenging the principle of natural justice and valid jurisdiction assumed thereto:

**Globe Capital Foundation v. National E-assessment Centre (13.05.2021) [Delhi HC]**

- Writ petition filed against the National E-Assessment Centre seeking grant of stay on the operation of the assessment order dated 17.04.2021 which is said to be passed without giving an opportunity to show cause why the addition/ disallowance not be made as per the DAO. The assessee pleaded that assessment proceedings have violated the principle of natural justice on account of non-issue of SCN cum DAO.
- The writ petition accepted by the Delhi High Court.

**Trendsutra Client Services Pvt. Ltd v. ACIT (06.05.2021) [Bombay HC]**

- Writ petition filed as assessment order passed without issuing a DAO as mandated under faceless assessment proceedings.
- The writ petition accepted by the Bombay High Court.

**SAS Finvest LLP v. National E-assessment Centre (04.05.2021) [Delhi HC]**

- Writ petition filed as assessment order was passed without issuing a SCN. Reliance also placed on the Central Board of Direct Taxes Instruction No. 20/2015, dated December 29, 2015 which provided that "the assessee would be given a fair opportunity to explain his position on the proposed additions/ disallowances in accordance with the principle of natural justice."
- The writ petition accepted by the Delhi High Court and operation of the order stayed. Matter listed for 10.08.2021.

**HONDA Cars India Ltd. v. DCIT (31.05.2021) [Delhi HC]**

- Writ petition filed on the ground that DAO u/s 143(3) r.w.s. 144C of the Act was issued without issuing an SCN u/s 144B of the Act.
- The writ petition accepted by the Delhi High Court and operation of the order was stayed. Matter listed for 31.08.2021.

A parallel reference may also be drawn from the provisions of section 144C of the Act, which provide a similar procedure of issuing the DAO before completion of the final assessment. It is settled law that when powers are accorded for executing certain matters in a particular manner, they should be performed likewise and deviations thereto are not permitted. In other words, if the assessment is not completed in the way it ought to be done, the result would be infected by infirmities of law. Similar issue was dealt in a recent judgement by Delhi High Court in *Headstrong Services India Pvt. Ltd.* [[TS-697-HC-2020\(DEL\)-TP](#)]. Relevant part of the judgment is reproduced below:

*"20. Now to accept the appellant's argument would be to permit the Assessing Officer to decide the objections filed by the Assessee - which power has been specifically denied by the statute.*

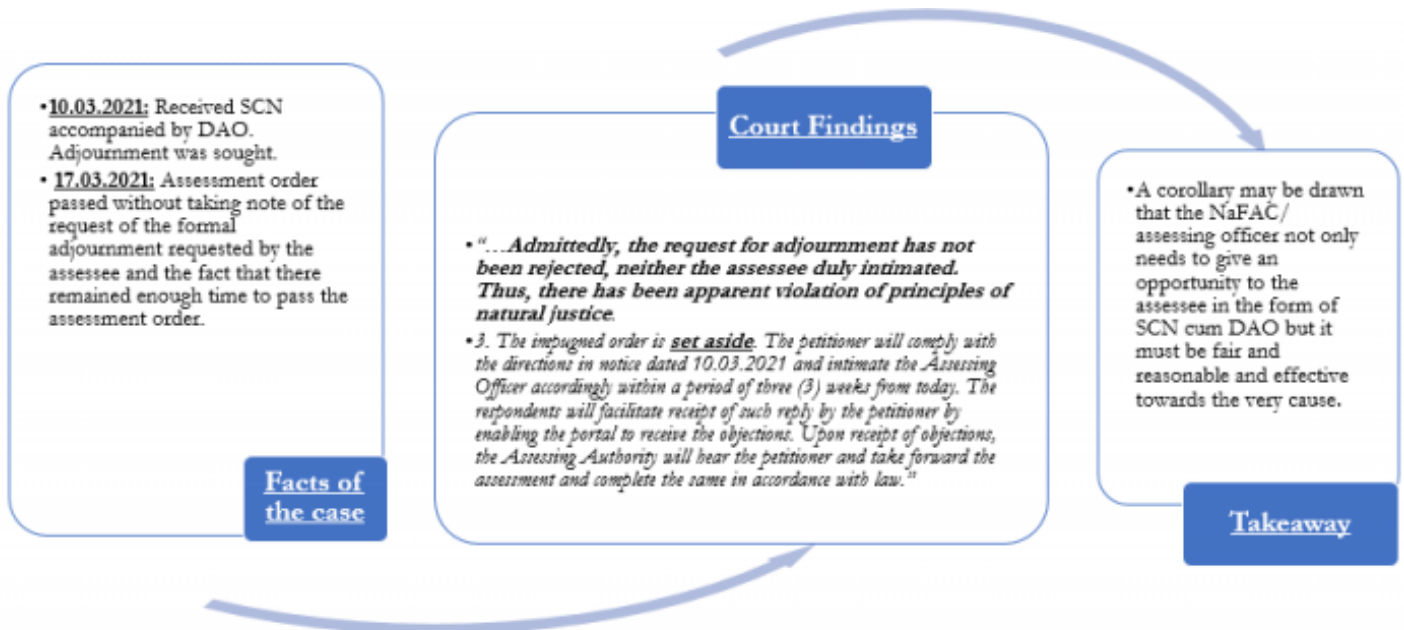
*It is a settled law that when a power is given to do certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are forbidden.*

Considering the above, it may be inferred that the requirement of law entailing issuance of SCN cum DAO, has been duly appreciated and emphasized upon in the judicial precedents observing that proper opportunity of being heard is a *sin qua non*.

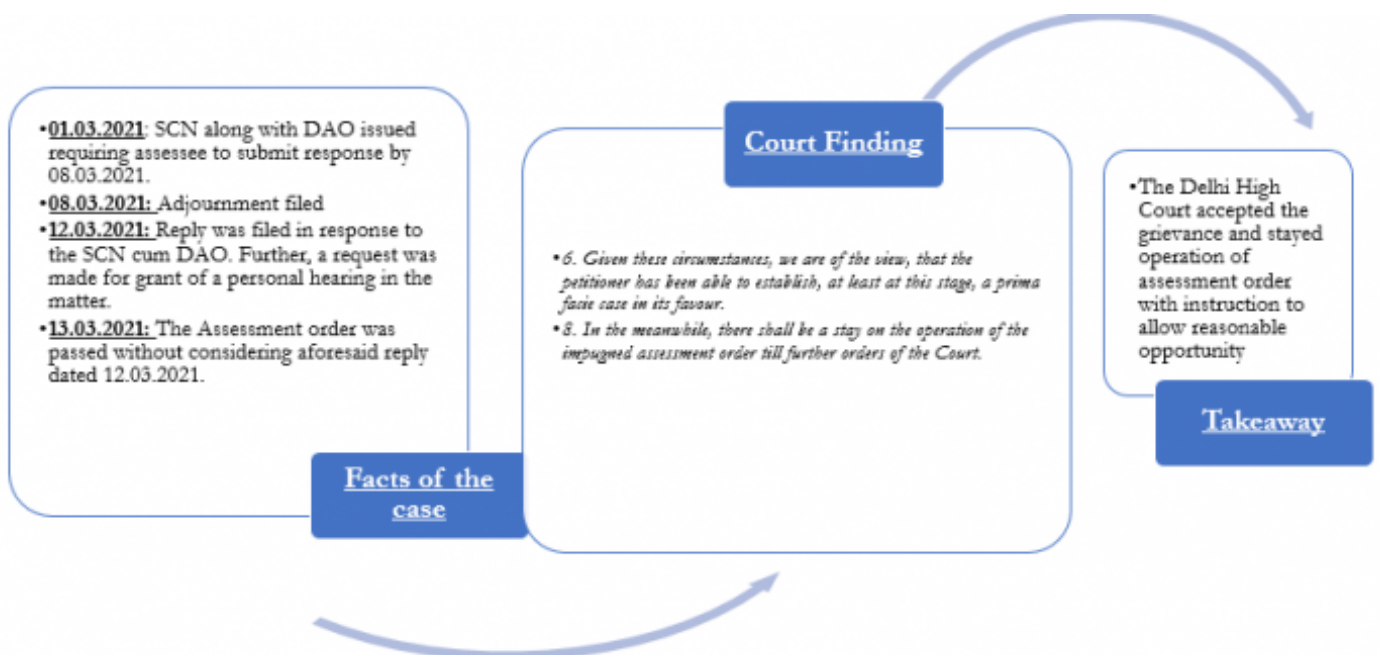
*Whether show-cause notice cum draft assessment order issued only for the sake of mechanical discharge of procedure - fulfil the requirement of law*

Taxpayers across the country have filed writs in respective High Courts citing breach of principle of natural justice since the NaFAC did not grant appropriate and fair opportunity of being heard and passed the assessment orders without considering the objections filed by the assessee. Let's see what the High Courts have held in various recent judicial pronouncements under these circumstances:

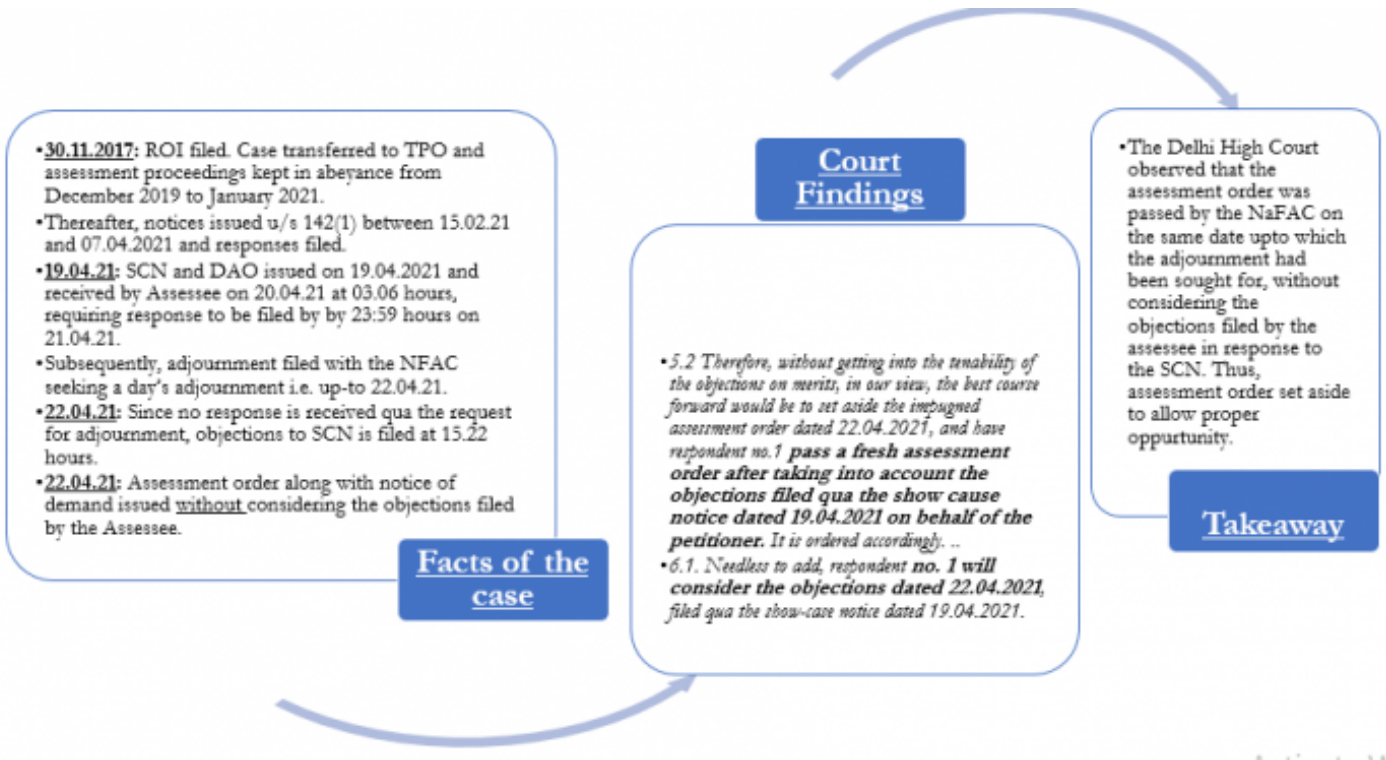
**Madras High Court ruling in *M/s. Magick Woods Exports Private Limited* [TS-343-HC-2021(MAD)]**



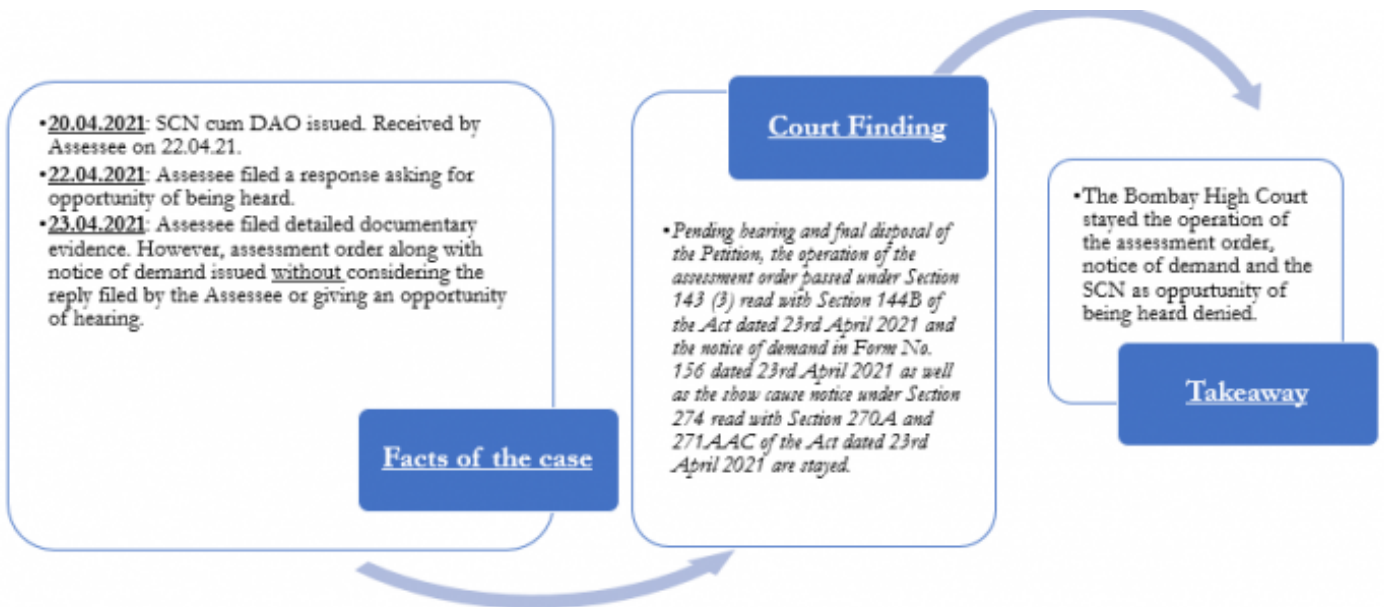
**Delhi High Court ruling in *DJ Surfactants* [TS-6014-HC-2021(DELHI)-O]**



**Delhi High Court ruling in *KBB Nuts Private Limited* [TS-347-HC-2021(DEL)]**



**Bombay High Court ruling in Raja Builders [TS-5636-HC-2021(BOMBAY)-O]**

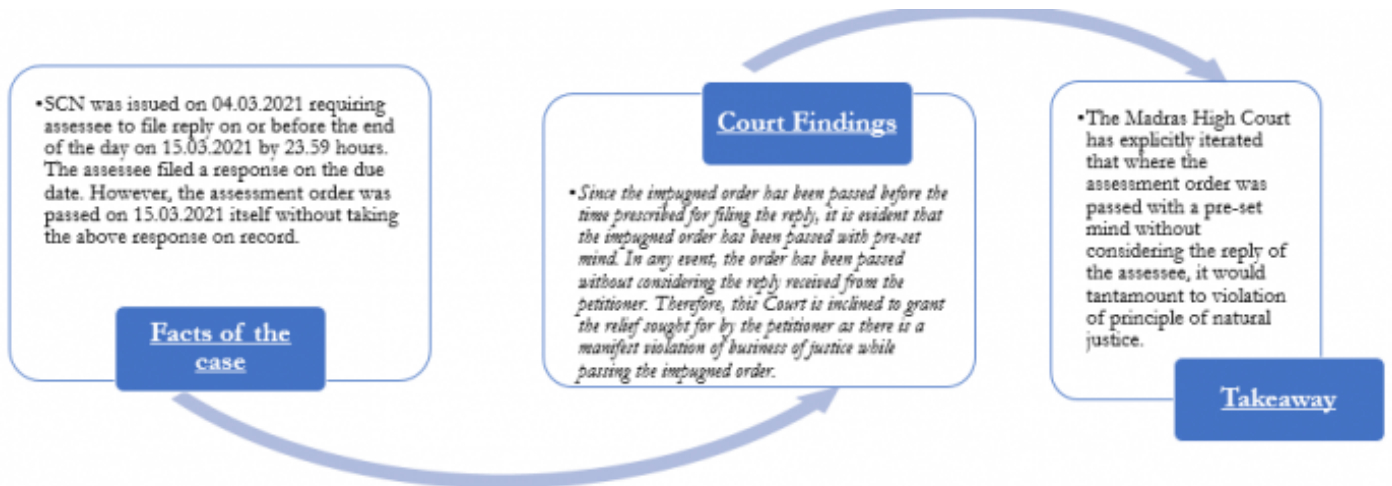


In the above backdrop, it can be deduced that mere issuance and discharge of compliance procedures for the sake of conformity alone does not fulfil the requirements of law. The actual cause and intention behind law is to be carried out in substance before an opportunity may qualify as “just and fair”. The opportunity of being heard must be real, reasonable and effective and not namesake. This would involve allowing adequate turn-around time, asking for appropriate and relevant details after considering the taxpayers assertions.

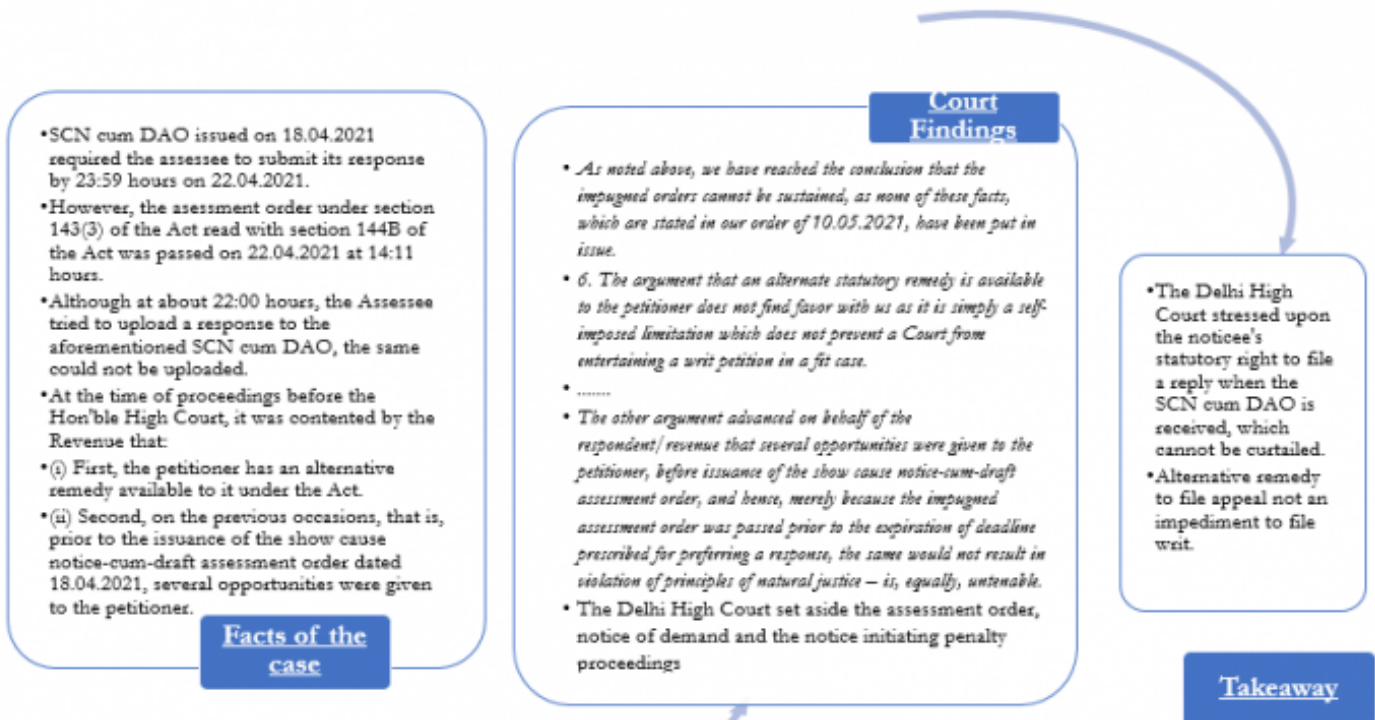
Due Consideration to the objections filed towards Draft assessment order.

Now comes the latter stage, where post issue of DAO, the taxpayer files its objections, however, these objections are not taken on record / considered, while passing the final assessment order. This issue has been a matter of litigation in many cases.:

**Madras High Court ruling in *Antony Alphonse Kevin Alphonse* [TS-399-HC-2021(MAD)]**

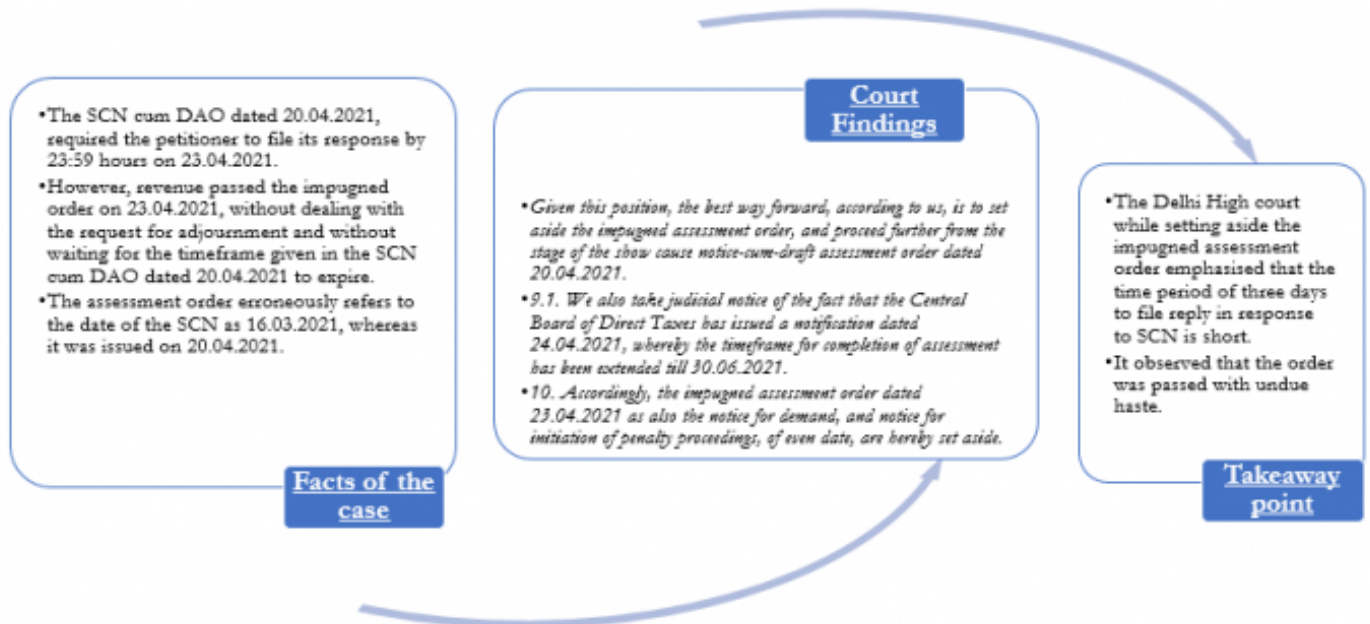


**Delhi High Court ruling in *Renew Power Private Limited* [TS-391-HC-2021(DEL)]**



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**Delhi High Court ruling in *Blue Square Infrastructure LLP* [TS-392-HC-2021(DEL)]**



### Conclusion

Simply put, the rules of representation under faceless assessments have been re-written whereby traditional face-to-face physical interactions with tax officers for discussing / explaining the case in hand has been substituted with “written submissions”. Hence, precise yet comprehensive written submissions with underlying documentary evidence are currently the ‘heart and soul’ of the assessment proceedings. Where the submissions are simple, easy to comprehend and give a holistic view to the examiner, half of the battle is already won. Having said so, while significance of well-articulated written submissions under new faceless regime cannot be undermined, the pitfall associated with nil / inadequate opportunity to file contentions or ignorance of the filed submissions proved fatal for the tax-payers. Moreover, even in cases where video conferencing was opted, this alternative was either not granted or rendered meaningless owing to technical glitches, which further aggravated the just cause of natural justice.

The transition aimed at being a faceless, seamless and painless experience altogether, however, with the teething issues, the complete success of Season 1 has been elusive. The multiplicity and complexity of writ petitions all over the nation has in fact compelled the Government to recently come up with SOPs as internal instructions to the tax department for dealing with such matters.

As we look forward to a more mature faceless regime, the incumbent assessment framework has made a significant headway in achieving the goal of transparency with minimal human interaction while bringing PAN India assessment units working together for a common cause. We hope that “Season 2” will be more tax-payer friendly, will strictly adhere to all procedural protocols and give the stakeholders respite from unintended and costly litigation.