INCOME TAX APPELLATE TRIBUNAL BAR ASSOCIATION

C/o. Income Tax Appellate Tribunal
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Date: 22.02.2021

To
Smt. Nirmala Sitharaman,
The Hon'ble Finance Minister of India,
North Block,
New Delhi – 110 001

Sub: An appeal to drop the proposed amendment to section 255 of the Income – tax Act, 1961

Ref.: The proposed Faceless Income Tax Appellate Tribunal in Clause 78 of the Finance Bill, 2021

Respected Madam,

I attach our Representation on the amendment proposed in the Finance Bill, 2021 concerning section 255 of the Income – tax Act, 1961, vide Clause 78 of the Bill, as we believe that the proposed amendment seeking to make the Income Tax Appellate Tribunal faceless has very far reaching serious implications.

As the amendment has been proposed, apparently, without prior consultation with the stakeholders, we request that the representation should be taken with earnest seriousness.

We are ready to meet personally or through virtual platform with any government functionaries in this regard, if required.

Yours sincerely,

For **ITAT Bar Association**

(Vipul B. Joshi)
President

INDEX

I. ABOUT THE ASSOCIATION AND NEED FOR THE REPRESENTATION

1. The ITAT Bar Association, Mumbai, is an Association formed by Advocates, Chartered Accountants and the Tax Practitioners practicing before the Income Tax Appellate Tribunal ["the ITAT'], mainly before Mumbai Benches. Among others, Late Mr. Nani Palkhivala, was President of the Association for almost 35 years. The Association has actively pursued numerous steps in the past with a view to, inter alia, protect and preserve the independence of the ITAT and ensure its smooth functioning.

2. Clause 78 of the Finance Bill 2021, introduced in the Lok Sabha on 01.02.2021, proposes an amendment to the Income – tax Act, 1961 ["the Act"] enabling faceless hearing of appeals by the ITAT, thereby substituting the open court oral hearing of appeals by the ITAT till now by mere representations in writing.

3. We have received numerous feedbacks not only from our members but also from others, expressing deep concerns, in unanimous voice, against this proposal. We feel that the proposed amendment will serve as a fatal blow to the very foundation of this glorious institution, incapacitating it for its core features. Implementation of this proposal would reduce the status of this live judicial body to an institution performing a mechanical back office functions. This would also result in drastic and irreversible loss of the trust and confidence that its stakeholders have in the Institution as of now and would have the effect of ultimately rendering it ineffective and purposeless.

4. Considering the serious adverse effects the implementation of the proposed amendment will have on functioning of the ITAT, an unanimous resolution was passed in the Urgent Meeting of the Managing Committee of the Association held on 04.02.2021, to the effect, inter alia, that a detailed representation be made to the concerned government functionaries with a request to drop Clause 78 of Finance Bill, 2021.

5. May it be appreciated that the present representation is not from the narrow point of view of merely some affected tax professionals with personal interest, but is made keeping in mind the larger interest of all stakeholders, including the ITAT itself.

II. IMPORTANCE AND PERFORMANCE OF INCOME TAX APPELLATE TRIBUNAL SO FAR

The importance of the ITAT as an appellate judicial forum gets reflected by the following:

1. The ITAT has been described as the Mother Tribunal of the Country, as it is the first of such Institutions in the country with its formation dating back to 1941. It is the role model for all other Tribunals presently functioning in India. Not only is its excellent services in the justice delivery system under the Act appreciated in India but its quality judgments have been taken note internationally as well with much appreciation.

2. The role and functioning of the ITAT have received uniform appreciation from all stakeholders, from all sections, including from the highest judiciary, the highest law officers of the country, legal luminaries and even from the executive – the concerned ministries – from time to time.

3. Limiting, in this representation, the laurels showered by the executive itself and, that too, very recently, suffice will be to refer here some of the observations made by the highest functionaries of the government, which are only representative illustrations.

   (i) The Souvenir published on the occasion of Platinum Jubilee Celebrations of the ITAT in the year 2016 confirms the above position. In the message published in the Souvenir, the Hon'ble Prime Minister observed ***"I am sure, the Tribunal will continue to play a pivotal role in speedy and impartial resolution of tax disputes."*** *(Emphasis supplied).* Similarly, in the message from the then Minister of Law and Justice, it has been observed *"I am happy to note that* ***the Income Tax Appellate Tribunal, which is one of the premier bodies in the hierarchy of dispute resolution system****, is going to complete 75 years in its long and eventful journey. ... ... It is said that a guardian should not praise his child beyond a limit lest he may develop over confidence. Equally well,* ***I cannot resist from mentioning the fact that the Income Tax Appellate Tribunal has earned praise of several jurists and law-makers in the past."*** *(Emphasis supplied).* In the message from the then Minister of Finance,

Corporate Affairs and Information & Broadcasting, Late Mr. Arun Jaitley (who was also a leading Senior Advocate) it has been observed *"... ... It is a trite position that Income Tax Appellate Tribunal, being an appellate authority under the Direct Tax laws,* ***has acquitted itself admirably considering that it has to cope with a maze of case laws as well as several amendments made each year in the Income-tax Act****. Income Tax Appellate Tribunal 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."*** *(Emphasis supplied).* The said Souvenir also has "Snippets from past Souvenirs" which is also revealing. The speech delivered by the then Law Minister in the Lok Sabha on 01.11.1976 in support of 42nd amendment to the Constitution, inserting Articles 323A and 323B which enabled legislation for formation of Tribunals, also appreciated the functioning of the ITAT.

(ii) In this regard, statements made by the high functionaries of the present Union Government, which depict their views and commitments with respect to the ITAT, may be also relevant:

(a) The Hon'ble Prime Minister in his message in the Souvenir published on the occasion of inauguration of the residential-cum-office complex of the Cuttack Bench in Odisha, i.e., on 11.11.2020 has acknowledged the importance of the ITAT by observing *"****Tribunals are torchbearer's of people's trust as their sensitive and humane approach in the administration of justice strengthens the mechanism of grievance redressal.****"*

(b) The Hon'ble Union Home Minister in his message in the said Souvenir has observed:

"आयकर अपीलीय अधिकरण देश का सबसे पुराना अधिकरण है जिसे अन्य सभी अधिकरणों की जननी कहकर भी संबोधित किया जाता है। निष्पक्ष, सुलभ और शीघ्र न्याय के लक्ष्य को आत्मसात किये हुए आयकर अपीलीय अधिकरण अपनी सतत् और उत्कृष्ट कार्य संचालन द्वारा

न्याय प्रक्रिया के क्षेत्र में पूरे देश के समक्ष एक उदाहरण है। इस संगठन के महत्व और कार्यकलापों को देखते हुए इसकी अजति और विकास के लिए भारत सरकार का विशेष ध्यान है और भविष्य में भी इस संस्था के निरन्तर उन्नति के लिए हर संभव प्रयास करते रहेंगे।"

(c) In the message from the Hon'ble Minister of Law and Justice as published in the said Souvenir, it has been stated *"The adjudication process of the Tribunal is marked by* ***easy accessibility and less expensive procedure making it a litigant friendly forum that strives to achieve*** *निष्पक्ष, सुलभ, सत्वर न्याय." (Emphasis supplied).*

As stated earlier, these are but sample observations coming from highest government and judicial functionaries very recently. Otherwise the list is endless; including: Presidents of India – Dr. Sarvepalli Radhakrishnan and Shri Pranab Mukherjee, Prime Minter of India Shri Atalji Vajpayee, Chief Justices of India, Attorney General of India, Uion Law Ministers and other high ranking officers of the Government, Shri Nani Palkhivala, international scholars, etc.

(iii) These laurels have been given by the highest functionaries in the Union Government from the present ruling party, who are directly concerned with the functioning of the ITAT. Emphasis has been laid in the above paragraphs on the acknowledgments received by the ITAT from the administrative side of the Union Government. Reference has been made to these acknowledgements only to draw attention to these recent views of the Prime Minister and other Ministers with respect to functioning of the ITAT. These references have been made to demonstrate that the ITAT has been consistently meeting its objective of providing 'easy, speedy and impartial justice'. Based thereon, one wonders whether the ITAT really lacks the features of efficiency, transparency and accountability that this proposed amendment is seeking to supply? It requires consideration whether making the ITAT faceless reflects a step in the direction of its progress and development which has been unconditionally committed in the aforesaid messages or do it reflect loss of confidence by the Government in

the impartial functioning of the appellate Institution. Surely, this cannot be a reward for an Institution which has successfully stood by its objective of easy, speedy and impartial justice now for almost eighty years in the past. It is submitted that the proposed amendment unnecessarily tinkers with the functioning of the ITAT and would adversely affect the cause of justice.

4. This does not at all mean that the higher judiciary, the professionals and the assessees – litigants have any lesser degree of regard and confidence in the Institution. As per the statistics available in the Souvenir published by the ITAT in the year 2016, 72.98% of the orders passed by the ITAT are accepted by the taxpayer as well as by the Revenue and no further appeal is filed therefrom before the High Court. Further, out of the balance matters which reached the High Court, in almost two third thereof the orders passed by the ITAT have been upheld. With this rich pedigree, we feel that it does not seem appropriate to disturb the present set up. The question that arises is: whether the proposed amendments strengthens or lowers the status of ITAT?

5. The ITAT has a unique role to play. It is the final arbiter of facts in an appeal. The issues involving purely question of facts get finalized here, once for all, as an appeal lies before High Court only on a question of law. Further, on account of the huge pendency in the High Courts and the Supreme Court with regard to the tax disputes, the time taken by them for disposal of such disputes and also the costs involved in pursuing these remedies, for most assessees, otherwise also the ITAT is the final court of appeal. Statistics show that appeals are filed against the judgment and order of the ITAT in less than 30% of cases. This is the degree of trust and confidence which the stakeholders presently hold in this appellate Institution.

6. Without any disrespect to the CIT (A) who functions as the first appellate authority or the Dispute Resolution Panel for redressal of grievances at the first level, it is submitted that it has been the experience of the assessees and the professionals that, especially in the matters involving high stakes, relief is often not obtained by the assessees and that they have look to the ITAT for justice. It is felt that these authorities appear to be an extended arm of the Income Tax Department, though it ought not to be so. Statistics also reveal that the number of appeals filed before the

ITAT stood at 48,328 in the year 2016-17, 49,693 in the year 2017-18, 50,735 in the year 2018-19 and 45,842 in the year 2019-20 and the numbers are simply on the rise. This not only shows the general dissatisfaction with the Tax Department amongst the taxpaying community but also the importance of the ITAT in the administration of justice in Direct Tax matters. Therefore, it is extremely essential that any step which would shake the public confidence in the effective functioning and the ability to deliver quality justice by the ITAT should be avoided, as, for majority of the assessees, this is the only forum they look upon for speedy and efficient justice.

7. The position of the ITAT is also unique compared to other Tribunals. Every citizen of India with an income over Rs. 2.50 lakh is chargeable to income-tax under the Act. Such citizen is often listed as an appellant/respondent before the ITAT. Further, orders passed by the ITAT have wide ramifications as they are binding on the Income-tax Authorities functioning under the Act while discharging assessment, appellate and other functions under the said Act in respect of other assessees where similar issue arises.

8. Its constitution is also unique with a judicial member and an accountant member. The qualifications for being appointed as a judicial member are the same as for appointment as a judge of the High Court [section 252 (2) of the Act]. To be appointed as an accountant member, a person is bound to have exposure to tax for at least 10 years [section 252 (2A) of the Act]. The unique position of a Member of the Tribunal gets reflected from the fact that a Judicial Member can be, and is often, appointed as a High Court judge. Statistics show that 33 Judicial Members of the ITAT have been so far elevated to the High Courts.

In view of the importance of the role played by the ITAT in the administration of justice, it is essential to consider whether the proposal to make it function in a faceless manner is justified.

III. THE PROPOSED AMENDMENT

1. Clause 78 of the Finance Bill 2021 enables the Central Government to make a scheme by notification in the Official Gazette, for the purposes of disposal of appeals by the ITAT. The stated objective behind this amendment is to impart greater efficiency, transparency and accountability by eliminating the interface between the ITAT and the parties to the appeal in course of the appellate proceedings, optimizing utilization of the resources through economies of scale and functional specialization and introducing an appellate system with dynamic jurisdiction. As stated hereafter in greater detail, the effect of this amendment shall be contrary to what is sought to be achieved. It is also proposed that for the purpose of giving effect to the scheme, the Central Government may issue directions before 31.03.2023 that any of the provisions of the Act shall either not apply to the scheme or will apply with such exceptions, modifications and adaptations as may be specified. This will provide the Executive with the authority to amend or to make inapplicable the law as made by the Legislature. This amendment enables the Central Government to notify a scheme for faceless disposal of appeals by the ITAT. This will substitute the present open court oral hearing to mere representation in writing, with hearing by way of video conferencing being given only in exceptional cases.

2. The Finance Minister while speaking on the occasion of introduction of the Finance Bill observed that the aforesaid move will ease compliance and reduce discretion. It is further observed that after having introduced faceless assessment and appeal at the first appellate stage, the next level is the ITAT.

3. In the Memorandum explaining the provisions of the Finance Bill, 2021, it is further clarified that the above amendment will reduce cost of compliance for taxpayers and will achieve even work distribution in different benches of the ITAT.

4. As stated hereafter in greater detail, on the contrary, the proposed amendment would have a reverse effect.

IV. WHY THE PROPOSED AMENDMENT SHOULD NOT BE IMPLEMENTED

1. ITAT IS NOT A PART OF THE TAX ADMINISTRATION

1.1 The proposed amendment proceeds on the basis that ITAT is a part of the Tax administration and this is a further step in the reforms initiated by the Department to reduce human interface at the assessment and first appellate stage being taken to the next level. First of all, ITAT is not a part of the Tax administration. As stated in greater detail hereafter, the appellate proceeding before the ITAT is not a part of the compliance provision but is a judicial body that provides a mechanism for redressal of grievances of the affected parties.

1.2 ITAT has all the trappings of a Court and its proceedings are judicial in nature as has been accepted by the Hon'ble Apex Court in various cases. Section 255 (6) of the Act also statutorily recognizes this position. This peculiar feature makes it amenable to supervision by High Courts under Article 227 of the Constitution of India. In fact, it is this position that led the Apex Court to deliberate about installation of CCTV camera in the court rooms of the ITAT, among other Tribunals.

1.3 Presently, the ITAT functions under the Ministry of Law and Justice. Also, as per the Income Tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963 appointment of a Member to the ITAT is made by Selection Committee headed by a sitting Supreme Court Judge to be nominated by the Chief Justice of India. The proposed amendment overlooks that the ITAT does not form part of the Income Tax Department and is independent of it. It is this independence which is the hallmark of its success, giving it the ability to render impartial justice. Ministry of Finance through the Income Tax Department is a party / litigant in all the appeals that come up before the ITAT. It has been repeatedly held by the court, that the Tribunals can be effective only when they function independent of any executive control. Needless to remind, the motto for any justice delivery system is: Justice not only be done, but it should seem to be done. With a view to retain its independent status, its functioning should be independent of the Tax Department. Considering the importance of the ITAT and the role played by it in the justice delivery system, it is extremely important that its independent status continues to be maintained.

2. EFFECTIVE JUSTICE DELIVERY SYSTEM IS AN ESSENTIAL OBLIGATION OF A SOCIAL WELFARE STATE

2.1 Indian political system is that of a social welfare state. It is also a fact that, in each year, on an average at least 50,000 orders passed by the Income Tax Authorities on an all India basis are challenged before the ITAT, either by the Assessees or by the Tax Department. These disputes between the Government and the assessees need an easy and speedy disposal in an impartial manner. It is one of the prime responsibilities of the Government to provide an effective platform where these disputes could be effectively and satisfactorily resolved. It is submitted that the proposed amendment seeking to make the disposal of appeal in a faceless manner will fail to achieve this purpose. Any reasonable person having experience of court proceedings would appreciate that it is not possible to do justice based only on written representations and without hearing the parties. The faceless method of disposal of appeals would render the proceedings mechanical which would hamper the interest of justice. It also requires consideration that presently when a unanimous opinion is shared by the higher judiciary, the professionals, the public at large as well as Constitutional Functionaries in the Union Government, that the ITAT is successfully discharging its functions, where is the need to disturb the present system?

3. IMPORTANCE OF ORAL HEARING AND WHY WRITTEN REPRESENTATION IS NOT A SUBSTITUTE

3.1 It is a fundamental principle of law and jurisprudence, accepted universally, that an adjudicating authority should pass its order only after giving an opportunity of being heard to the concerned parties. In fact, the requirement of granting an opportunity of hearing and, that too, fair hearing, is an essence of a healthy justice delivery system. A fair hearing postulates giving adequate, proper, effective and reasonable hearing. This is also a part of the basic and fundamental principles of natural justice. It is also a part of the fundamental rights under the Constitution of India. One of the essential requirements of giving opportunity of being heard, is giving an opportunity to aggrieved person of presenting his case in person / giving him oral hearing. In case of a court, like the ITAT, where such hearing is generally to be given by a Bench

consisting of two Members, such opportunity of personal hearing become inevitable. The decision to grant hearing through writing in a case, if at all and if any, is better left to the sole discretion of the adjudicating authority who is hearing that particular matter; nothing beyond. This fundamental requirement is guarded zealously by the Courts all over and any attempt to curtail it or to render it merely a formality has been frowned upon. In fact, the open court system of hearing, as a part of Common Law System and existing over centuries, has proven very effective and meaningful system to the satisfaction of all; the normal rule being to grant oral hearing in a judicial process and a curtailment, if any, should be a matter of unusual exception.

3.2 This principle is also given statutory recognition in sub-sections (1), (2) and (2A) of section 254 of the Act read with Rule 33 of ITAT Rules, 1963. It is submitted that the natural meaning of the expression 'hearing' can never mean mere representation in writing. In any event, this should not be allowed to be done with the ITAT considering its importance in the appellate machinery. Based thereon, it is submitted that the faceless scheme of hearing the appeal shall be violative of this well-settled principles as well as the express requirement of the statute.

3.3 It is also a well known principle that *"Justice should not only be done but it should also be seen to be done."* The effectiveness of any judicial system lies in the trust and confidence that it creates in the minds of the parties litigating before it. Utmost care has to be taken that this trust and confidence in the justice delivery system by the ITAT is not lost or in any way adversely affected. Hence, the least that is required is an effective opportunity of hearing to the parties concerned.

3.4 The scheme of faceless appeals does away with the requirement relating to giving opportunity of physical hearing and, instead, reduces the rights of the concerned parties to merely filing a response in writing, with an opportunity of hearing through the medium of video conferencing to be granted only in exceptional cases and, that too, at the discretion of, presumably, some other authority and not the Bench hearing the appeal. Any reasonable person having knowledge or experience of the court proceedings would vouch for the necessity of oral hearing in a judicial proceeding. Some of reasons thereof are referred as under:

(a) It cannot be disputed, and it has been repeatedly acknowledged, that writing is an imperfect medium to express one's view, as it has its inherent limitations. Expressing a point by means of speech in person is different from expressing the same point in writing. Based on human abilities, it is easier to express a point in speech in person, than in writing. An oral / personal hearing, which is live and real, conveys the message more effectively and also invokes better reception in the minds of the listener. A written presentation, however well drafted, does not have such advantage. Further, an argument can be lost if the written text is not able to convey it with the same degree of effectiveness.

(b) This aspect becomes more serious, with tendency to have far reaching effects, when one is concerned with a justice delivery system. Reading arguments put in writing and listening to the arguments from both sides in an open court format are bound to have different impacts. In fact, there is, really, no comparison. It is a common experience that the same text when read on different occasions by the same person could convey a different message. It is also not necessary that the same text is understood by two different persons in the same manner. However, this is overcome when the arguments are heard in person. The speaker has the opportunity, based on the reaction and the gesture of the listener, to calibrate his arguments to convey the point that he is seeking to make effectively. Certainly, the cause of justice cannot be made to suffer due to the limitations with which a point is expressed in writing or understood by the reader thereof.

(c) In so far as the ITAT is concerned, the problem gets confounded where, generally, a Bench consists of two human beings [Members of ITAT] hear the cases. Each Member may have a different mindset and thought process. As such, in a typical hearing before the ITAT, there are involved four main individuals in the process of justice delivery system, with each individual having distinct thought process – often in contradiction and conflict with each other – and all such thought processes are required to be reconciled / resolved with optimum utilization of time and energy. Further, the manner in which an

argument is to be put forward at the time of hearing may require variation based on the reaction of the listener (Members) / the other side. At times, one may need to go into greater detail on a particular aspect of an argument based on the experience at the time of hearing, as the proceeding progresses. Certain aspects require discussion [arguments and cross arguments] which otherwise was felt unnecessary to start with. Conversely, a matter which appears to be complex and lengthy gets resolved in no time upon concession being given by the either side or both the sides. It is also a common occurrence in courts that an argument which was not acceptable to the Bench on first reaction gets upheld after listening to the detailed arguments from both the sides. The Bench also has the benefit of voicing, and clearing, all their doubts on the spot. These are various facets connected with oral hearing which will be absent in the faceless disposal of appeals.

(d) In an appeal which is physically heard, the parties to the appeal and the ITAT have to apply their mind only once, i.e., when the appeal is heard. A faceless appeal will require application of mind to the same matter on multiple occasions. For example, in an appeal where there is a delay in filing the appeal, first, the ITAT will have to first consider whether the delay could be condoned. If the same matter involves additional grounds and/or additional evidence, it will then have to separately adjudicate on such admission aspects thereof. At each stage, i.e., for condonation of delay or for admission of additional grounds / additional evidence, separate orders will have to be passed. Now, this is not so when an appeal is physically heard where a single order is passed dealing with all these aspects. Proceeding further with adjudicating the appeal on merits, after going through the response received from both the parties, the ITAT may need some more clarifications, which require further written communication, back and forth. The information so received will have to be then shared with the other side calling for its comments. These steps will involve considerable period of time, as sufficient time will have to be allowed to the party from whom information is sought and

then to the other party for giving its comments thereon. The information / response so received may also give rise to a further requirement for other connected information / further responses, and so on. At all these stages, each of the parties and the ITAT will have to repeatedly apply their mind to the same issues. Further, in this back and forth movement at multiple stages spread over a period of time, the effectiveness of the submissions of a party may also get diluted. This multiple stage application of mind is not required when an appeal is heard in a physical form.

(e) There are occasions when an appeal can be disposed of only based on a jurisdictional / technical issue. Where a particular appeal involves grounds dealing with jurisdictional issue as well as the merits, the Bench may not want to get into the merits if it is convinced that the assessing authority lacked jurisdiction. In a case of oral hearing, once this is found, and accepted by both the parties immediately, it may not be necessary to go into the merits of the case at all, being academic. This is not possible in the faceless regime. Further, there could be occasions where a particular ground, based on multiple independent arguments, is found not required to be adjudicated. In a physical form of hearing, going into all the arguments may not be necessary if the Bench has made up its mind on the preliminary issue itself at the time of hearing, which is a common phenomenon. Further, there may be a ground which may require adjudication based on multiple independent reasoning to start with. In an oral hearing, the Bench is able to express itself and conclude the hearing at a stage where it is convinced with the manner in which the ground is to be disposed of. However, in the faceless appellate scheme, this will not be possible and both the parties will have to labour on all the issues and express their detailed arguments in writing which will then have to be considered by the ITAT which would otherwise not be necessary.

(f) Majority of the appeals before ITAT involve verification of facts. An appeal which requires voluminous reference to documents and case laws, oral arguments made by the parties enable the Bench to identify the issues, the

relevant part in the documents and the relevant considerations to be applied. Further, even the other party gets an opportunity to rebut / explain the contents of such documents / case laws on the spot, bringing quick clarity. However, in the faceless scheme of disposal of appeals, the Bench will have to invest its precious time and efforts to go through all the documents and jurisprudence on the subject. On certain occasions, after putting in the time and effort, it may be later realised that it was not necessary.

(g) Some matters require inspection of the case records on the spot by all the parties concerned to conclude an issue on the spot. For example, calling for the assessment records, calling for the reasons recorded, and sanctioned accorded, while initiating reassessment proceeding, etc. This will not be possible in faceless regime.

(h) It should also be appreciated that the ITAT is bestowed with some of the powers which are given to a civil court. This includes the power to summon a witness and to examine such person. In practice, there have been cases where such power has been invoked in effective discharge of justice. This will not be possible in faceless regime.

(i) Especially when now the assessment proceedings and the first appellate proceedings before CIT (A) are made faceless, the importance of giving personal hearing before the ITAT has become the most important requirement from the point of view of the litigants as, it is the first available opportunity for a litigant to present his case effectively and meaningfully before a judicial forum. In view of the fact that this may also be his last forum / hope to redress his grievances [on account of limitations of High Court and Supreme Court appeals], giving personal hearing has, in fact, become the most precious rights and the only hope for the litigants.

(j) Last but not the least, the oral hearing gives a human touch to the entire proceeding, which helps to keep the law human and adopted to the needs of life.

These are just few illustrative deficiencies in the proposed system for kind consideration and it is submitted that there would be several others but which details are not being gone into at this stage. This is because the emphasis is that a faceless adjudication of appeal cannot be a substitute to a hearing in a physical form. The purpose is to show that the changed system would adversely affect the administration of justice and certainly the Government also would not want to compromise on the same as the proposed system would adversely affect both the sides, the Government being always one side. The proposed system would place an avoidable burden in terms of time and effort involved and connected costs on the taxpayer as well as the Revenue. Notwithstanding the effect of this on the efficiency of the ITAT, it certainly will reduce the efficiency levels of all the stakeholders – including the Income Tax Department – because they would be applying their time and resources on academic issues. Further, one should also accept the limitations of the litigants as well as of the network conditions. Needless to say that, the small leeway, that too the discretion of the government to grant hearing through video conferencing, does not at all mitigate the above issues.

4. SPEEDY JUSTICE

4.1 The above discussion would also depict that the substitution of the present system with faceless regime would, as a matter of fact, counterproductive and would hamper speedy justice.

4.2 It should be appreciated that in most of the cases, the appeal proceeding gets concluded in one oral hearing, on the date of the appeal hearing itself and, in many cases, the decision is indicated there and there only. This will not be possible in faceless regime.

4.3 Further, there are many situations where instant hearing and instant pronouncement is a must. For example, urgent stay matters, other urgent matters requiring urgent mentioning, etc. Here not only the matters are taken up for urgent hearing – sometime merely on the basis of mentioning – but also the orders are passed on the spot to mitigate the hardship. This will not be possible in faceless regime.

4.4 Sometimes, even while entertaining an adjournment application, if the Bench finds that the appeal can be disposed of on merits either way without further hearing (say, for example, the issue is a covered issue) or the appeal requires remitting back, with the concurrence of both the litigants, this is done on the spot with satisfaction of both the parties. This will not be possible in faceless regime.

4.5 It should be appreciated that the pendency of the appeals before the ITAT has come down drastically from – as given to understand - its pick of around 3 lacs about a decade ago to about 80,000 at present. This shows not only that speedy justice is the hallmark of the present ITAT but also that the present system does not require any disturbance, which would, in fact, put a spanner in the wheel of speedy justice.

5. PROPOSED AMENDMENT WILL NOT ACHIEVE THE STATED OBJECTIVES, INSTEAD WOULD BE COUNTER – PRODUCTIVE

5.1 Inefficiencies in the proposed system

It is submitted that instead of achieving efficiency, the faceless scheme shall have the effect of making the system inefficient. It appears that the amendment has been proposed without a proper appreciation of the manner of functioning of the ITAT or for that matter of any Court of law. This has already demonstrated in the earlier paragraphs. It is reiterated that in an oral hearing, the Bench can obtain clarifications from the parties and resolve the doubts which may arise in their mind at the time of hearing itself. In the faceless method, notices will have to be issued by the ITAT seeking clarifications. For this, sufficient time will have to be given to the concerned party. Thereafter, the information so obtained will also have to be shared with the other party with a view to obtaining its response. Further, doubts may also arise in the mind of the Bench based on the clarification so obtained where the same procedure will have to be repeatedly followed at each occasion. This would result in repeated application of mind by the Bench as well as by both the parties to the same issues at multiple stages of the proceeding.

It is submitted that these are normal experiences in any court and the list can simply continue. In these circumstances, it will only result in multiplicity of efforts

and costs of all parties, including the ITAT, and certainly will not improve the efficiency, either of the ITAT or the proceedings.

5.2 **Proposed amendment will make the proceedings opaque**

Presently, in the open court manner of hearing of an appeal by the ITAT, any member of the public can enter the court room and witness the proceedings. In terms of the observations of the Supreme Court, now there also exists CCTV Camera System in the court rooms. This is true transparency in any court proceeding. One wonders how the faceless disposal of an appeal, which will be carried out in a closed environment, would result in transparency. Rather, it will make the entire judicial system to be opaque. It requires consideration that transparency of a court proceeding is extremely essential for creating public trust and confidence in the Institution.

5.3 **Optimised utilisation of resources**

It is also claimed that the faceless scheme shall result in optimised utilisation of resources. The Memorandum explaining the provisions of the Finance Bill, 2021 clarifies that this system will achieve even work distribution in different benches resulting in best utilisation of resources. Section 255 (5) of the Act enable the ITAT to regulate its own procedure. It is certainly mature enough to deal with this situation on its own and, therefore, this matter should be left to its wisdom. If the Benches at a particular location are in excess of the requirement, the President of the Tribunal can allocate more Benches to a location having higher pendency, even for temporary or short durations. Further, the manner of achieving this object is not clear from the proposed amendment. If the Central Government or the Tax Administration is made to play a role on this aspect, the independence of the judiciary shall also stand compromised.

5.4 **Simplification of tax administration and reduce litigation**

Further, it is stated that the proposed amendment will simplify the tax administration and reduce litigation. In fact, if in the faceless scheme of disposing the appeal where justice is to be rendered in a mechanical manner, the dissatisfied party will have to approach the higher appellate forum in large numbers. This would further increase the workload of the already over burdened High Court and the Supreme Court.

Hence, as is clear from the discussion in the earlier paragraphs, the new regime would make the administration of such appeals more complex rather than simplifying them leading to more litigation.

5.5 **Reduction of discretion**

The speech given by the Finance Minister in the Lok Sabha while introducing the Finance Bill, 2021 also refers that one of the objects is to reduce discretion. It is not clear which discretion which presently vests in the ITAT is sought to be reduced and the manner in which this object shall be achieved. Whether the reference is to 'judicial discretion' or 'discretion in administrative matters' which inheres in any judicial body, it cannot be allowed except at the cost of compromising on the independence of the Institution.

6. REMEDY THE IMPERFECTIONS

6.1 We do appreciate that no institution can claim to be faultless or perfect and the ITAT may not be an exception. There may be some issues concerning functioning of the ITAT that require attentions and corrections. However, we believe that with the help of all stakeholders, the desired changes and reforms can very well be introduced in the existing system itself, without disturbing its core. But in no case the remedy lies in bringing down the very foundation of the ITAT.

6.2 It is a common understanding that a remedy should not be disproportionate to the ailment. In the proposed faceless scheme, the perceived remedy will, in fact, worse than the perceived disease.

V. OUR SUGGESTIONS

1. The proposed amendment, being clause 78 of the Finance Bill, 2021, be dropped.
2. In case it is felt that the present system lacks in something or requires corrections, the required reforms can be introduced in the existing system itself, with the help of all stakeholders.
3. In any case, if it is still felt that the present system is not effective, even with the reforms, the entire issue may be referred to the Law Commission and, thereafter, to Parliamentary Select Committee to address such issues after consulting all stakeholders. Till then, this proposed amendment should be deferred.
4. From our side, we pledge our full support, help and assistance to the government for any step taken to ensure that the ITAT remains the role model Institution of the country and retains its independence and glory.