Dispute Resolution in Tax Matters

A Discussion Paper





Dispute Resolution in Tax Matters

A Discussion Paper

March 2013

Federation of Indian Chambers of Commerce and Industry

CONTENTS

From the President's Desk 5

Foreword 7

1 Background 9

2 Objectives of the Discussion Paper 13

3 Litigation Structure - Income Tax 14

4 Suggestions and Recommendations - Income Tax 22

5 Litigation Structure - Indirect Taxes 40

6 Suggestions and Recommendations - Indirect Taxes 46

7 Acknowledgements 67

From the President's Desk

Federation of Indian Chambers of Commerce and Industry ('FICCI') has been playing a proactive role in effective and constructive communication between the Government and the Industry. The collaborative working between the Government and FICCI has always fructified into best policies and has been appreciated by the businesses. It is important for us to represent the concerns of the trade and industry before the Government so that the same can be duly addressed.

One of the key concerns of our constituents today is the prolonged litigation on tax matters and the time it takes to resolve a dispute. At the same time substantial revenues get locked up in disputes; some of which could have otherwise accrued to the receipts of the Government. It is apparent that there is a need to address this issue.

In the above backdrop, FICCI has taken the initiative to analyse the existing system of resolving the disputes between the taxpayers and the tax administration, identify the shortcomings and suggest possible measures which could expedite the dispute resolution in a fair and transparent manner and consequently lessen the hardship of the taxpayers. The paper is aimed at initiating a discussion which could result in acceptable measures to improve the existing Dispute Resolution Mechanism in direct and indirect tax matters.

We would also be happy to be a part of discussions with the Government in taking this initiative a step further.

Naina Lal Kidwai
President, FICCI

FOREWORD

India has seen significant quantum of tax disputes in the recent past, many of which have made headline news globally. Understandably, this has raised alarm bells, particularly with foreign investors. One clear gap which needs to be bridged is the understandable effort by the tax authorities in India to maximize the revenue base by wanting to have source based taxation vis-a-vis the approach of the OECD countries (and therefore the expectation of the investors from these countries) to tax predominantly on the basis of residence. The constant evolution of what constitutes a Permanent Establishment and how does one attribute profits, the arms length margins for transactions between Associated Enterprises and characterization of income are the other ongoing points of dispute on the Direct Taxes side. A similar host of issues exist on the indirect taxes side.

While these ideological differences between the revenue and the taxpayer will likely get bridged over a length of time, the one immediate imperative is the need to find a faster way to resolve disputes. As a country, we have tax litigation which is almost unparalleled. It takes several years before a matter is finally resolved by a binding judgment of the Supreme Court. Until then, the tax payers carry a huge burden of contingent liability and the revenue is unable to fully collect what it believes are the just dues. A settlement of tax disputes through a process of negotiation, something prevalent in most countries, is almost absent in India.

In its interaction with the senior officials in the North Block, FICCI offered to come out with a detailed proposal on how tax disputes in India can be better and more effectively handled; the fact that the officials reacted very positively to this is not at all surprising. The Industry clearly welcomed this initiative. Over weeks of painstaking effort and interaction with various constituents, Sanjiv Chaudhary and Rajeev Dimri, along with the FICCI Secretariat, have put together this detailed thought leadership paper setting out several suggestions towards better, speedier and more effective Dispute Resolution. I thank them for their significant time and effort.

FICCI would welcome an opportunity to have detailed discussion with the Revenue Officials on the suggestions contained herein. FICCI believes that implementation of these suggestions will go a long way in creating a more conducive tax environment, will promote foreign investment in the country and will augment tax collections for the revenue.

Dinesh Kanabar
Deputy CEO, KPMG India and
Chairman, FICCI's Taxation Committee

1. BACKGROUND

Tax receipts are the primary source of revenue for India to meet its budgetary requirements and are collected by an established administrative and legal structure. The administration of tax laws has the intrinsic tendency to result in disputes and litigation, primarily due to differences in the interpretation of the law by the authorities and the taxpayers. As a result, significant amount of time, money and efforts are being employed both by the taxpayers and the Government with thousands of crores of taxes getting locked up in long-drawn litigations.

It was recently reported[1] that as per Centre for Monitoring Indian Economy (CMIE) database, Indian companies have a vast amount of money locked in disputed taxes. As per the said report, in financial year 2011-12, the 30 companies that make up the Bombay Stock Exchange Sensex had money locked in disputed taxes estimated at Rs. 42,388 crores– a 27% increase from the amount of Rs. 33,393 reported for the year before.

Disputes in Direct Taxes

In a written reply to the Lok Sabha in April 2012[2], Minister of State for Finance, Mr. S.S. Palanimanickam, stated that 5,943 direct tax cases were pending with the Supreme Court and 30,213 direct tax cases were pending with High Courts. In total, the disputed amount at various levels of the income-tax dispute resolution system was estimated at a whopping Rs. 4,36,741 crores as on 31 December 2011, a significant increase from Rs. 2,43,603 crores estimated as on 31 December 2010. The details of cases pending in various appellate forums are as follows:-

Amount locked in Income tax litigation appeals (As on December 2011)

Cases pending before	No. of pending cases	Amount disputed (Rs crores)
Commissioner of Income Tax (Appeals)	1,93,525	2,52,846
Income Tax Appellate Tribunal	29,842	1,21,559
High Court	30,213	58,033
Supreme Court	5,943	4,303
Total	2,59,523	4,36,741

[1] Source: Business Today article dated 24 December 2012

[2] As per reply made on 27 April 2012 in the Lok Sabha to question No.3734 raised by Shri N Cheluvaraya Swamy Swamygowda

The significance of this amount is startling when put in perspective to the net direct tax collection of the country for FY 2011-12 estimated at around Rs. 4,94,000 crores.

Disputes in Indirect Taxes

Number of cases in dispute involving indirect taxes, the amount of revenue involved therein and the period for which the disputes are pending resolution are indicated below:-

Cases pending at adjudication level

		Number of pending disputes	Amount (Rs. crore)
Customs	(as on December 31, 2012)	17,800	7,400
Central Excise	(as on October 31, 2012)	19,800	21,450
Total cases		37,600	28,850

Out of the 17,800 customs cases, approximately 6,300 cases (involving revenue of approximately Rs. 1080 crores) have been pending for decision between 1 to 3 years and more than 2,800 customs cases (involving revenue of approximately Rs. 1650 crores) have been pending adjudication for over 3 years.

Of the pending litigation under Central Excise, approximately 1,600 cases are pending for a decision for the last 1 to 3 years and 240 cases have been pending for decision for over 3 years. Added to this is the issuance of over 20,000 show cause notices (unconfirmed demands) involving revenue of Rs. 21,600 crores which are also pending adjudication with Central Excise Officers, out of which more than 2000 cases have been pending for more than 1 year.

Cases pending at appellate level (as on November 30, 2012)

	Number of pending disputes	Amount (Rs. crore)
Commissioner (Appeals)	33,135	8,529
Appellate Tribunal	58,994	74,986
High Court	14,654	12,126
Supreme Court	3,004	8,622
Total cases	1,09,787	1,04,263

The success rate of departmental litigation for indirect taxes in Courts and Tribunal during the last four Financial Years[3] as per table below makes an interesting reading:

Year	Supreme Court	High Court	CESTAT
2008-09	9.81%	29.6%	10.0%
2009-10	7.85%	35.10%	18.2%
2010-11	5.5%	27.8%	17.2%
2011-12	10.64%	29.85%	19.7%

The above table clearly shows that the success rate of a departmental appeal at Tribunal level, in the past 4 years, has varied from 10 to 20 percent. In other words, in more than 80 percent of the cases, the view of the department or the grounds on which the demand was sought to be imposed by the adjudication authority was not accepted by the Tribunal. This does provide support to the theory that matters at the adjudication level are often decided without any real analysis of the issue on merits; with fear of loss of revenue / increase in revenue collections being the driving factors.

Causes of disputes

There are several reasons for the inception and prolonged continuation of tax disputes at various levels in India. One of the main reasons for tax litigation is lack of clarity in law that makes it susceptible to multiple interpretations. Further, existence of multiple appellate levels through which a disputed issue has to pass before attaining certainty, and existence of conflicting opinions from various appellate forums / authorities across the country also contribute to delays / multiplicity of proceedings.

Another reason for the increasing number of tax disputes and litigation is an under-staffed, and in some cases, inexperienced tax administration in tackling the rapidly changing tax laws landscape and issues arising thereunder. This coupled with the fact that the same adjudication authorities simultaneously carry the burden of tax collection (to meet the revenue targets set by the Government) often results in the confirmation of demand at the assessment stage with the taxpayer being left with no other option but to enter the litigation stream.

On a related matter, in a recent note circulated during the annual conference of Chief Commissioners and Directors General of Customs, Central Excise and Service Tax, it was disclosed by the Government that, more often than not, appeals are filed on a routine basis (by the Revenue),

[3]Source: Unstarred Question No. 3966 answered in Lok Sabha, Ministry of Finance on 5.9.2012 http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=129095

to avoid any possible internal repercussions for the adjudication authorities, with a view to pass on the responsibility of deciding the issue judiciously to the appellate forum(s)[4].

The burden of high volume disputes has had the effect of straining the adjudication as well as the judicial system, which is already faltering under the weight of a significant number of unresolved cases. The addition of cases each year only exacerbates the issue besides adding to the inconvenience of the taxpayer.

This state of affairs creates an uncertain and destabilized business environment with taxpayers not being able to budget for tax costs. Importantly, such uncertainty is often two-fold: firstly, the law itself is complex and therefore uncertain and secondly, for an interpretation of the law to achieve a degree of certainty at the Apex court level, the same entails several rounds of litigation with the possibility of the entire effort being nullified by the armour of retrospective amendment.

In view of the above, the current scenario calls for certain reforms in the existing dispute resolution mechanisms, and introduction of conscious practices and procedures aimed at limiting the inception and prolongation of tax disputes.

Recognising that there is no quick-fix solution to this issue, given that it has several layers of complexity and a variety of stakeholders, not all of whom have the same objectives, we set-forth the existing dispute resolution mechanisms in India both for direct and indirect taxes and also discuss possible measures that can be taken to make the dispute resolution process more effective and smooth.

[4]Source: Article dated Jun 15 2012 in The Indian Express

2. OBJECTIVES OF THE DISCUSSION PAPER

Effective and timely resolution of tax disputes helps maximize tax revenues by ensuring that tax legislation is correctly applied and that non compliance is appropriately deterred efficiently and in a time bound manner. There is an urgent requirement for alternatives / modifications to the current Dispute Resolution Mechanisms ('DRM's') available under the income tax and the indirect tax regime of customs, central excise and service tax.

The objective of this discussion paper is to initiate a discussion and suggest measures on making the existing tax DRMs in India more effective and free of hassles keeping in view the following important aspects of any tax legislation:

- Fairness and Impartiality;
- Timeliness;
- Certainty; and
- Cost-effectiveness.

3. LITIGATION STRUCTURE - INCOME TAX

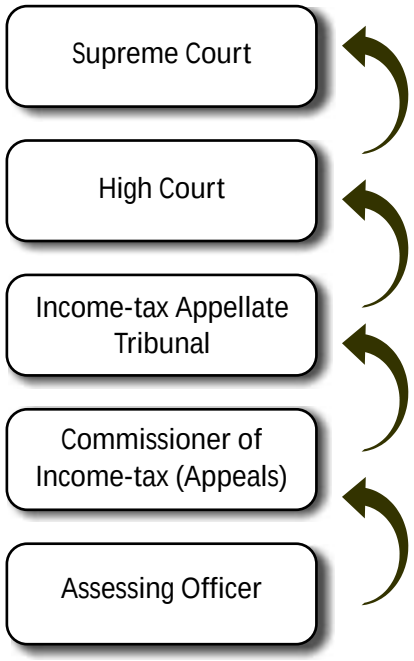
The Income-tax Act, 1961 ('the Act') currently provides for several mechanisms for resolution of tax disputes that may arise between the Revenue and the taxpayer. Typically, there is a five-tier structure for normal tax dispute resolution. Besides, the Act has also provided for certain alternate dispute resolution mechanisms for certain specified cases.

The various dispute resolution mechanisms which are prevalent in India for income-tax matters have been discussed below in brief.

3.1 Normal dispute resolution

3.1.1 *Background on the hierarchy*

As mentioned above, in a typical situation, the Act provides for a five-tier structure for income-tax dispute resolution in cases of conflict between the Revenue and taxpayer. A pictorial representation of hierarchical structure of the normal dispute resolution system is given below.



3.1.2 Understanding each level

Each of the levels of Dispute resolution is discussed in brief below.

Level 1 – The Assessing Officer

The first point of dispute resolution (as well as inception) is at the level of the Assessing Officer – this also includes the Centralized Processing Centre and the Transfer Pricing Officers. The Assessing Officer examines the return of income filed by a taxpayer, and frames his assessment by applying the provisions of the Act.

The Act and the general principles of natural justice mandate that the Assessing Officer gives the taxpayer adequate opportunity of being heard in case the Assessing Officer disagrees with the quantum of income and tax declared by the taxpayer, or certain positions adopted in the return of income. It is during the course of the assessment, where the taxpayer is expected to provide necessary clarifications to the Assessing Officer, that the points of dispute arise or potential disputes are averted through explanations and clarifications.

If upon the completion of assessment, the Assessee is dissatisfied with the assessment framed by the Assessing Officer, he is entitled to approach the next level of normal dispute resolution, who ordinarily is the Commissioner of Income Tax (Appeals) ['CIT(A)'][5]. In certain circumstances, the Assessee can also approach the jurisdictional Commissioner of Income-tax seeking a revision of the assessment order.

Level 2 – The Commissioner of Income Tax (Appeals) ['the CIT(A)']

The CIT(A) functions under the administrative control of the Ministry of Finance and is an officer of the Indian Revenue Service (or the 'IRS'). The CIT(A) is expected to act independently, fairly and judicially.

As in the case of the Assessing Officer, the CIT(A) is required to conduct hearings and duly consider the arguments of both the taxpayer and the Revenue. The decision of the CIT(A) could be wholly against the taxpayer or the Revenue or partly in favour of the taxpayer and partly in favour of the Revenue.

Ordinarily, the CIT(A) may take about six months to 2 years to dispose off a case lodged before him. It is worth noting that bulk of the cases of income-tax disputes, constituting around 75% of the total disputed cases, were estimated to be pending before the CIT(A) as on 31 December 2011. This also accounts for more than 50% of the total disputed tax dues as on that date[6].

Given that the CIT(A) also functions within the Income-tax Department, the CIT(A) level is the last forum of dispute resolution available within the Tax Department.

[5] Section 246A of the Act

[6] As per reply made on 27 April 2012 in the Lok Sabha to a question raised by Shri N Cheluvaraya Swamy Swamygowda

Level 3 – The Income-tax Appellate Tribunal ('the ITAT')

Depending on the outcome at the CIT(A) stage, the Assessee or the Revenue, whoever is aggrieved by the order of the CIT(A), has the option of approaching the next level of dispute resolution being the Income-tax Appellate Tribunal ('ITAT')[7]. The ITAT is the final fact finding authority in the Dispute Resolution chain.

Unlike the CIT(A), the ITAT is placed under the Ministry of Law & Justice. The ITAT functions independent of the Revenue Department.

As on 31 December 2011, a total disputed tax amount of Rs. 121,559 crore is estimated to be locked up at the ITAT level[8].

A decision of the ITAT is typically binding on the Revenue and all the taxpayers within its jurisdiction, unless there is a contradictory decision of a higher authority.

Level 4 – High Court

An Appeal against the order of the ITAT lies before the Jurisdictional High Court[9]. A High Court would entertain an appeal only if it involves a substantial question of law.

A decision of the High Court would have a binding effect on the Revenue and all the taxpayers lying within its jurisdiction. In other words, unless reversed by the Supreme Court or by way of a retrospective legislation, a decision of the jurisdictional High Court attains finality within its jurisdiction.

Level 5 – The Supreme Court

The fifth and last tier of the litigation structure is the highest court of India – the Supreme Court.

A decision of a High Court on a question of law may be challenged by the Assessee / Revenue before the Supreme Court.

Under Article 141 of the Constitution of India, a decision rendered by the Supreme Court of India is the law of land and is binding on all courts and tribunals functioning in the country. In other words, dispute resolution is final at the Supreme Court level unless legislative changes are made to reverse the decision of the Supreme Court.

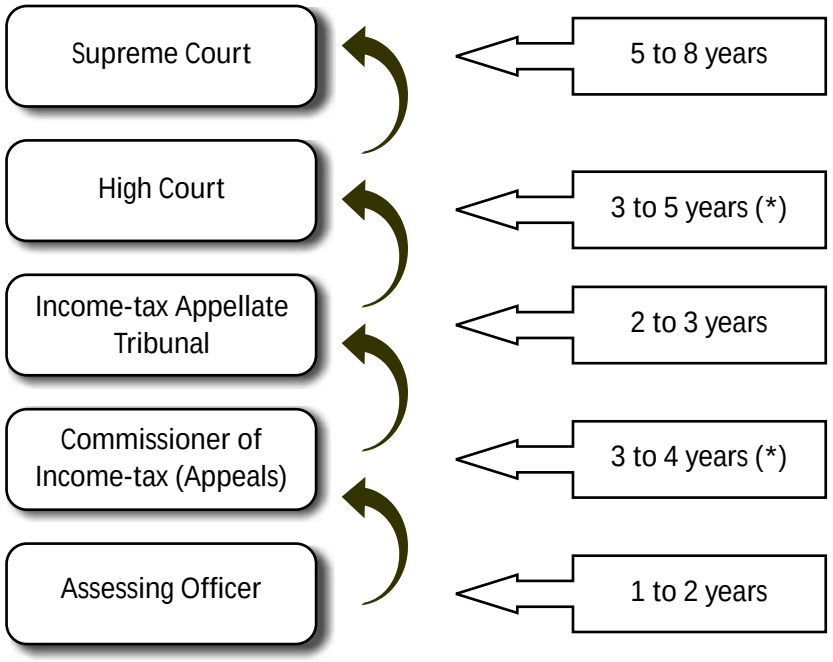
3.1.3 Timeframe

The approximate timeframe involved *at each level* is summarized below.

[7] Section 253 of the Act

[8] As per reply made on 27 April 2012 in the Lok Sabha to a question raised by Shri N Cheluvaraya Swamy Swamygowda

[9] Section 260A of the Act



(*) In certain jurisdictions, the time taken for adjudication of appeals has been observed as follows:

- By the Commissioner of Income-tax (Appeals) - 6-8 years.
- By High Court - 8-10 years.

As can be seen from the above, a dispute arising at the assessment stage may take anytime between 12 to 20 years approximately before it attains finality at the Supreme Court level.

3.2 Alternative dispute resolution

3.2.1 Settlement Commission

The Settlement Commission is a statutory body set-up under the Act to deal with cases involving undisclosed income and facilitate speedy settlement of such cases. An assessee can approach the Settlement Commission at any stage of the proceedings for assessment pending before an Assessing Officer, subject to certain prescribed conditions. For making an application for settlement, among others, the additional tax and interest thereon has to be paid before making the application.

The Commission has the power to grant immunity from prosecution from any offence under Income-tax Act, 1961, Wealth-tax Act, 1957, Indian Penal Code, 1860 or any other Central Act and also from imposition of penalty under the Income-tax Act, 1961. However, the immunity is available only in cases where the applicants make a full and true disclosure of their income or wealth and fulfill certain other prescribed conditions[10].

[10]Section 245H of the Act

The order passed by the Settlement Commission is conclusive as to the matters stated therein and no appeal lies to any authority against the order passed by the Settlement Commission[11].

In summary, for cases involving undisclosed income, the Settlement Commission offers an option of attaining speedy resolution.

3.2.2 Authority for Advance Rulings

The Authority for Advance Rulings ('the AAR') was constituted in order to provide the facility of ascertaining the income-tax liability in advance in cases of non-residents or for residents entering into transactions with non-residents in order to enable them to plan their Income-tax affairs well in advance, with certainty, and to avoid long-drawn and expensive litigation.

A non-resident or certain specified categories of residents can obtain binding rulings from the Authority on income-tax issues arising out of any transaction/proposed transactions.

Given that the rulings are binding in nature, no income-tax authority or even the ITAT can proceed to decide any issue in respect of which a resident has made an application for Advance Ruling. The ruling can however be challenged before the Courts at the instance of either the Revenue or the Applicant.

With a time-limit of 6 months for issuing a ruling from the date of the application, the AAR is expected to offer a speedy and reasonably certain resolution on issues for non-residents and certain categories of residents[12].

3.2.3 Dispute Resolution Panel

Vide Finance (No. 2) Act, 2009, the mechanism of Dispute Resolution Panel ('the DRP') was introduced for speedy resolution disputes for certain specified assesses.

The DRP is a collegium of three Commissioners / Directors of Income-tax. The DRP mechanism applies to Indian companies where the tax authorities have proposed to make an adjustment to the arm's length price in relation to their transactions with overseas affiliates. It also applies to all foreign companies who are assessed to tax in India.

The DRP mechanism has been brought in at the assessment stage itself to provide the specified categories of persons with a time-bound alternative mechanism instead of adopting the appellate route through the CIT(A).

The DRP has been set a specific time frame of 9 months from the date of end of the month in which the draft order is forwarded to the eligible assessee to issue its directions to the Assessing Officer to

[11] Section 245-I of the Act

[12] Section 245R of the Act

enable him to finalize the assessment order[13]. Such directions issued by the DRP are binding on the Assessing Officer who is required to pass the final order based on such directions.

The DRP has wide powers and can either confirm, reduce or enhance the additions proposed in the draft order. If the assessee does not get the relief as desired, an appeal against the final order lies before the ITAT.

The assessee is not required to pay the tax demand (if any) until the passing of the final assessment order subsequent to the directions of the DRP. The DRP mechanism therefore offers a benefit of timeliness and speedy resolution to non-residents and to certain category of residents. Further, the amendment made *vide* Finance Act, 2012, that even the Revenue can go in an appeal to the ITAT against the order of the DRP, is expected to add more balance to the DRP process. This would certainly add to litigation as well.

3.2.4 Mutual Agreement Procedure

The Mutual Agreement Procedure ('MAP') clause in various Double Tax Avoidance Agreements ('DTAA') entered by India and other countries/ territories allows designated representatives ('the Competent Authorities') from the governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of a convention.

Since most occurrences of double taxation are dealt with automatically in tax conventions through tax credits, exemptions, or the determination of taxing rights of the contacting states, the majority of MAP cases are situations where the taxation of an individual or entity is unclear.

The MAP article in most DTAAs does not compel competent authorities actually to reach an agreement and resolve their tax disputes. They are obliged only to use their best endeavors to reach an agreement.

3.2.5 Advance Pricing Agreement

The Finance Act, 2012, has introduced a framework for Advance Pricing Agreements[14] ('APA') to be entered into with the specified assessees. APA is an agreement between a taxpayer and a taxing authority on an appropriate transfer pricing methodology for a set of transactions over a fixed period of time in future.

APA shall be valid for such tax years as specified in the agreement which in no case shall exceed five consecutive tax years. The APA shall be binding only on the person and the Commissioner (including income-tax authorities subordinate to him) in respect of the transaction in relation to

[13]Section 144C(12) of the Act

[14]Section 92CC and 92CD of the Act

which the agreement has been entered into. The APA shall not be binding if there is any change in law or facts having bearing on such APA.

The APA mechanism is still at a nascent stage and its implementation is yet to be tested in the Indian context.

3.2.6 Voluntary Income Disclosure Scheme

On various occasions, the Government has come out with Voluntary Disclosure Schemes, primarily with the objective of collecting taxes on hitherto undisclosed / escaped income.

On the last occasion, the Central Board of Direct Taxes launched, on June 18, 1997, the Voluntary Disclosure of Income Scheme ('VDIS' or 'the scheme') which provided income-tax defaulters an opportunity to disclose their income at the prevailing tax rates under the umbrella protection of immunity from major laws relating to economic offences.

Those who opted for the VDIS were granted immunity from prosecution under the Foreign Exchange Regulation Act, 1973, the Income-tax Act, 1961, the Wealth-tax Act, 1957, and the Companies Act, 1956[15].

The scheme, which came into force from 1 July 1997, was closed on 31 December 1997. Those eligible under the scheme included persons who have failed to furnish I-T returns for any year or those who had disclosed their income partly in returns or if income had completely escaped assessment.

The VDIS was a very unconventional but successful measure contributing to the Indian economic policy. It gave an opportunity to the income tax / wealth tax defaulters to disclose their undisclosed income at the prevailing tax rates. This scheme also ensured that the laws relating to economic offences will not be applicable for those defaulters.

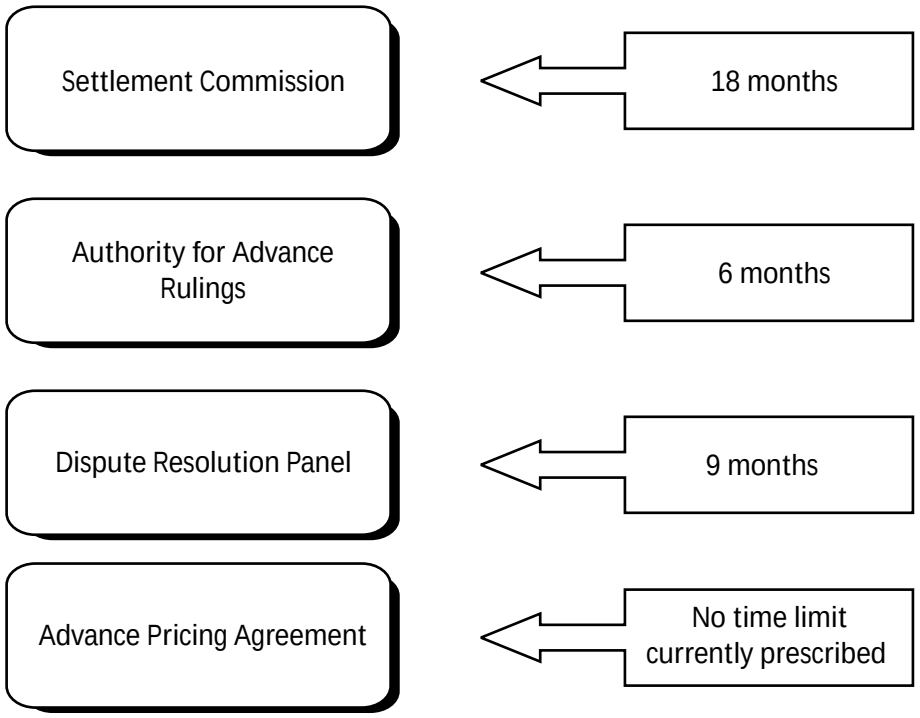
As per a report of Comptroller and Auditor General of India, the Scheme attracted 475,477 declarants of which 77,107 were new assessees. Total amount declared was Rs. 33,697 crore on which Rs. 9,729 crore were paid as tax[16].

[15]Source - www.capitalmarket.com/macro/vdis.htm

[16]Source: www.cag.gov.in

3.2.7 Time-frame

The individual time frames for the Alternative dispute resolution systems are given below:



4. SUGGESTIONS / RECOMMENDATIONS - INCOME TAX

In the paragraphs to follow, we have outlined some suggestions with the objective of making dispute resolution possibly more effective and smooth.

4.1 Issue 1 – Rectification procedures for returns processed at the Centralised Processing Centre (CPC)

Current scenario

Currently, the income-tax returns filed electronically by the taxpayers are first processed by a computerized Centralized Processing Center ('CPC'). The cases picked up for regular assessment are assessed by the jurisdictional Assessing Officers.

As CPC is a unit outside the (human / traditional) income-tax department, the taxpayers face difficulties due to lack of communications and alignment of procedures between the CPC and the income tax department.

For instance, during processing of an income-tax return by the CPC, certain errors appear in the Intimation, typically on account of non-grant of credit for tax paid, owing to mismatch of information at some level. The CBDT instruction dated May 25, 2012 on grant of TDS credit for AY 2011-12, permits to accept the TDS claim of the assessees only in cases where the difference between the TDS claim and matching TDS amount reported in Form 26-AS is not more than Rs. 5,000. The said instruction may provide relief to a few assesses only. As a result, a large number of intimations generated by CPC would throw an incorrect demand on various assessees.

As per the prescribed procedure, an online application is required to be made with the CPC for rectification of the errors. However, if the CPC fails to rectify the error in response to the application, there is currently no mechanism to enable the jurisdictional Assessing Officer to procure the file and rectify the error at his end.

As a result, a huge number of applications for rectification for simple cases of grant of credit for tax paid / tax deducted at source are pending at the CPC/Assessing Officer level.

There is another pertinent issue which is causing hardship to the large number of non-resident assessees and requires rectification in the software of the tax department. The provisions of section 206AA of the Act mandate deduction of tax at the higher of the following rates (a) rate prescribed

under the Act (b) rate or rates of tax in force (c) 20%, in case the person fails to provide Permanent Account Number to the payer of the sum. The adversity arises in situations where tax has been deducted and deposited by the deductor at the higher rate as stipulated by section 206AA of the Act, but however, he is unable to generate and grant the TDS certificate to the payee for the legitimate amount of taxes already deposited with the Indian Government Treasury in absence of PAN of the payee. The Tax Information Network (TIN) website of the tax department does not provide a mechanism to generate TDS certificate in such cases. It results in creating hardships for the foreign entities in availing appropriate tax credit in its country of residence for the tax deducted in India and thus discouraging foreign entities from entering into transactions with India.

It has also been experienced that in a large number of cases, show causes notices for short deduction of tax are being served by the TDS Officers on the deductors based on the report generated by the computer systems. The short deduction of tax is automatically computed by the system without taking into consideration the fact that the lower deduction of tax can be on account of certificate under section 197 of the Act. As a result, undue demand is generated by the tax department on the deductor without even verifying and taking into effect the appropriate reason for short deduction. The issue is resulting into pointless litigation.

Our recommendations

a) We recommend that CPC procedures be reviewed to ensure that credit for tax paid by an assessee is appropriately granted at the time of processing the return. If there is a mismatch in the data available with the CPC (due to mismatch between form 26AS and the amount of TDS claimed in the tax return), credit should be allowed based on physical copies of TDS certificates / tax paid challans, along with the copy of indemnity bond mandated to be submitted by the deductee which can be filed either to the AO or with the CPC (scanned copies). The rectification application should be disposed off within a maximum period of 60 days from the date of filing the application. In case the application is not disposed off within such time limit, it should be deemed that the application has been accepted and allowed.

b) Currently, there is no human interface with the CPC. Appropriate relationship officers should be posted for dealing with communications / discussions relating to rectification applications. There should be a process in place evidencing the filing of application, recording the date and serial number and date of disposal of the same. The assessee should be given the serial no. / date etc. so that his subsequent application on the same can be tagged to the earlier application.

c) A copy of the rectification application should automatically be forwarded to the Assessing Officer who should have the authority to manually intervene in the processing of the rectification application. The system should be programmed to facilitate generation of TDS

certificate in cases where payee does not have a PAN, provided, tax has been deducted and deposited to the Indian Government Treasury on payments made to them.

Appropriate rectification be carried out in the software of the tax department to align it with the provisions of the current law so that it does not generate any demand for short deduction of taxes wherever lower deduction of tax has been made in accordance with the certificate under section 197 of the Act. This would help reduce unnecessary litigation currently prevailing due to this issue.

4.2 Issue 2 –Issues at the assessment stage

Current scenario

The following are some of the issues relevant in the context of assessment proceedings:

a) In many cases, the Assessment Orders are not comprehensive / well reasoned in arriving at the conclusions as the Assessing Officer may not possess the relevant industry knowledge to understand the nuances of the transactions / accounting treatment, and on the application of income-tax provisions to such transactions.

b) Humungous amount of information is sought by the Assessing Officers during the course of assessment proceedings (which in many a situations may not be relevant in the entire scheme of things) and may be driven by internal audit objections; and

c) There is a tendency to take up the assessments at the fag-end of the statutory deadline for completing the assessments.

d) The order of the competent authority obtained by the assessee determining his tax liability, by resorting to Mutual Agreement Procedure (MAP) in a particular year is not applied by the Assessing Officer in the subsequent years even when there is no change in facts or in the law. This creates unnecessary litigation on the same issue and poses severe hardship to the assessee.

These practices put unnecessary strain on the assessment process and the relationship between the taxpayer and the Assessing Officer.

Our recommendations

- Assessing Officers should not use a standard questionnaire for seeking information, and should customize the requirement based on the facts of each case (i.e. carry out an issue-based / risk-based assessment). The Revenue can consider implementing a *risk-based assessment strategy* as per which detailed assessments should be done only in high-risk cases, i.e. cases with the highest probability of underreporting. This will also result in better use of resources of the tax authorities in a focussed manner with fewer cases required for assessment.

- The process of internal audit within the Department should not be burdensome on the Assessing Officers requiring them to collect information which is more than necessary for completing assessments in regular cases.
- Appropriate procedural guidelines should be issued directing the Assessing Officers to start early on the assessments and avoid a last minute rush for completion of the proceedings. For instance, all non-transfer pricing assessments should be completed at least two months prior to the statutory due date, and the same can be spaced out evenly in the last six months. This would also give adequate time to appropriately complete the assessments involving transfer-pricing matters after the orders from the Transfer Pricing Officers are received.

  For the above purpose, appropriate guidelines should also be framed for reporting/ monitoring by higher officers.
- Appropriate guidelines should be issued directing the Assessing officers to assess the income of the assessee for the subsequent year by applying the directions of the competent authority for the earlier year, if there has been no change in facts and the law.

4.3 Issue 3 – Assessment of Large Taxpayer Units ('LTU')

The LTU, as a concept, was established to service large taxpayers paying taxes under a single window. Bangalore was the first city to have such a LTU in the year 2006 and subsequently such LTU's were set up in few other cities. Currently, many large companies are assessed at the LTU.

In our experience, taxpayers have faced difficulties during their income-tax assessment and related proceedings. Despite opting for the LTU process, taxpayers are put to substantial hardship by being asked to submit voluminous documentation by the Assessing Officers and also having to justify primary entries in the books of accounts. There is also a general resistance for accepting records and books of account maintained in electronic mode, with the expectation that complete set of documents and evidences be provided in hard copies.

This manner of functioning appears to be contrary to the objectives of the LTU scheme.

Our recommendations

- Taking into considerations the volume of transactions of the large tax payers and the amount of tax involved, the LTU should adopt a more focused approach by restricting scrutiny to only risk-prone areas identified for the specific case.
- Requests for documentation should be made only in cases of absolute necessity. In other cases, if required, information can be collected on a sample basis.

4.4 Issue 4 – Absence of time-limits under law in certain cases

Current scenario

- In cases of assessments conducted in relation to tax deduction at source ('TDS') proceedings, time-limits have been set under section 201(3) only to cases of non-deduction/short deduction of tax at source in case of payments to residents. However, there is no time limit prescribed under law for completion of TDS proceedings in cases relating to payments to non-residents and other cases of default in non-payment of tax within due dates.

  As a result, TDS proceedings have the possibility of being carried on indefinitely.

- Similarly, in the case of applications made to obtain a lower deduction / non-deduction certificate from the Assessing Officer under section 197(1) / 195 of the Act, no time-limit has been prescribed for issuance of the certificate.

  As a result, the assessees who experience delays in receiving the certificate from the Assessing Officers are put to undue hardship.

Our recommendations

- The time-limits which are currently applicable for passing TDS orders in cases of non-deduction / short-deduction of tax on payments to residents should be extended to all cases of TDS default in relation to all payments (i.e. both to residents and non-residents). This would help in achieving a time-bound closure to TDS proceedings.

- Time-limits should be set for issuance of certificate under section 197 / 195 of the Act. In order to provide an element of certainty in a timely manner in all cases, including cases of remittances to be made abroad to vendors within agreed credit period, a time-limit of say 2 months from the date of application for the certificate would be ideal. An additional period of one month may be given in exceptional cases, with prior approval of a higher officer, where the application relates to a complex matter.

4.5 Issue 5 –Format for Tax Residency Certificate

Current scenario

- The CBDT [*vide notification No. 2188 (E) dated September 17, 2012*] has introduced Rule 21AB with effect from April 1, 2013. As per the new rule, an Indian resident who wishes to obtain Tax Residency Certificate (TRC) is required to make an application in Form No. 10FA to the Tax Officer, containing prescribed details. It has been observed that certain overseas jurisdictions impose a requirement of furnishing the TRC in a specified format in order to

entitle the Indian resident to claim benefits under the treaty (which India has entered with that jurisdiction). However, the Tax Officers in India deny giving the TRC to the Indian resident in the format desired by the overseas jurisdiction. In the absence of TRC in the requisite format, the tax authorities of overseas jurisdiction refuse to bestow treaty benefits to the Indian resident for determining his tax liability in that jurisdiction.

Our recommendation

- In cases where specific format for tax residency certificate has been prescribed by the other jurisdictions, appropriate guidelines should be issued to the Tax Officers mandating them to issue the TRC's in the desired formats laid down by the respective jurisdictions. This would remove undue hardship being faced by the Indian residents in availing treaty benefits in overseas jurisdictions.

4.6 Issue 6 – Rising Transfer Pricing Adjustments

Current scenario

It may be pertinent to point out that heavy transfer pricing adjustments made by the Transfer Pricing Officers (TPO's) every year is one of the crucial causes for rising litigation in direct taxes. The white paper on black money released by the Ministry of Finance, Government of India in May 2012 reveals the trend of transfer pricing adjustments made during the financial years 2004-05 to 2011-2012. The table depicting the said numbers is reproduced below:

Transfer Pricing adjustments 2004 -2012

Financial Year	Number of TP Audits Completed	Number of Adjustment Cases	% of Adjustment Cases	Amount of Adjustment (in Rs Crore)
2004-05	1,061	239	23	1,220
2005-06	1,501	337	22	2,287
2006-07	1,768	471	27	3,432
2007-08	219	84	39	1,614
2008-09	1,726	670	39	6,140
2009-10	1,830	813	44	10,908
2010-11	2,301	1,138	49	23,237
2011-12	2,638	1,343	52	44,531

Source: White Paper on Black Money, Ministry of Finance, GOI May 2012

The number of cases in which transfer pricing adjustments have been made every year is progressively increasing and is a cause of concern for the taxpayer community who does not have any guidelines to follow while benchmarking the international transactions entered by them. Another factor which, at times, is contributing to the arbitrary adjustments being made every year is revenue biased approach of the TPO's and the lack of expertise in the revenue department to understand the business model of the assessee which is a pre-requisite to apply the transfer pricing law. It is certain that transfer pricing is one of the most contentious tax issues today, with lot of uncertainty prevailing over its application.

Our recommendations

- In order to enable the TPO to understand and appreciate the business rationale of the transaction, it would be essential to have an economist on board who can aid the TPO's while making transfer pricing assessments.
- The Government should in consultation with the stakeholders lay down guidelines on contentious transactions such as transaction involving intangibles; attribution of profits to permanent establishment, royalty transactions etc. and the taxpayers should be asked to apply the guidelines for benchmarking the transactions which come into effect after the date of notification of the said guidelines. Further from a taxpayer's perspective, some of the aspects that are not covered under the present rules and may entail litigation in future are roll back provisions under the APA regime, time frame to conclude an APA etc.
- Safe harbor rules for IT sector and other sectors/transactions involving litigation on transfer pricing aspects should be released at the earliest. This would help reduce litigation in a number of cases.
- DRP may be empowered to act as a Mediation Panel (also discussed in paragraphs below) and a mechanism may be developed to negotiate and close transfer pricing matters for a number of years.

4.7 Issue 7 – Transfer pricing assessment procedures

Current scenario

In cases where international transactions are involved, the AO, wherever applicable, makes reference to Transfer Pricing Officer ('TPO') for determination of arm's length price and adjustment, if any, to be made as per transfer pricing provisions of the Act.

Normally, the exercise of determination of arms length price is carried out separately for every assessment year on a standalone basis. Therefore, even in cases where the functions, assets and

risks of the industry lay substantially unchanged for a block of years, a separate transfer pricing assessment is carried out every year for similar set of transactions and comparables.

This has resulted in uncertainty as well as inconsistencies in arriving at the arm's length price by the TPO every year and long-drawn assessment procedures even when transfer pricing assessments have already been completed for previous years essentially under same set of facts.

Our recommendations

In order to achieve the objective of certainty and consistency, and avoid multiple appeals, the following may be explored:

- An option may be given to a taxpayer, at an appropriate stage of the assessment proceeding, to accept a mechanism for determination of the arm's length price for a block of assessment years (say 3 years), unless there are material changes in the nature of the transactions or in the market conditions.
- In the alternative, an option may be given to a taxpayer, at an appropriate stage of the assessment proceeding, to agree to application of the conclusions reached in the proceeding of an earlier year (say going back upto three years) in the proceedings of the current year, unless there are material changes in the nature of transactions or in the market conditions within the said block of years.

The following may be noted in the above context:

I) Even as per the current provisions in the Income-tax Rules, 1962, where an international transaction continues to have effect over more than one previous year, fresh documents need not be maintained unless there are significant changes in nature, assumptions, etc.

ii) For implementation of the above suggestions, it would also be important to build in appropriate safeguards / guidelines for:

— applying the appellate decision relating to the first year to the proceedings for all the covered years under the relevant block; and

— Enforcement of demand.

Among others, the following issues may be relevant while framing the guidelines:

— The manner of acceptance by the taxpayer to select the option – filing of necessary Forms/Undertakings (reference can be made to existing section 158A and Form 8 which deals with similar provisions relating to avoidance of repetitive appeals);

— The manner / mechanism for modification of the assessment order for all the

individual years (as falling within the block of years) upon receipt of subsequent decision of a higher authority (relating to the order passed on the basis of which the assessment has been framed); and

— The stage of the proceeding at which the demand would crystallize, and be enforceable by the Assessing Officer.

4.8 Issue 8 – Issues of delay faced post assessment

Current scenario

In cases where the assessment orders contain errors apparent on record resulting in a higher demand, the taxpayer typically files applications for rectification of such errors under section 154 of the Act. However, in many cases, such applications are not disposed off for substantial periods of time, even though the errors are evident and apparent.

Section 154 of the Act clearly specifies that an application for rectification should be disposed off within a period of six month from the date of application. However, there is no remedy / consequence, other than filing an appeal, in case the Assessing Officer fails to pass an order within the aforesaid time limit. As such, to be on the safer side, many taxpayers, simultaneously also prefer appeals on matters which can ordinarily be rectified under section 154 of the Act.

Similarly, many a times, there are delays in giving effect to the orders of appellate authorities and issue of consequent refunds.

The Act provides for interest to be granted on refunds at a low rate of interest, @ 0.5% per month, as compared to interest generally levied on taxpayers @ 1% per month.

Our recommendations

- Appropriate mechanism for tracking filing, progress and disposal of rectification applications should be put in place. For example, an assessee should be able to electronically upload rectification applications (in addition to hard copy filing) on the income-tax website, and the progress of the application can thereafter be monitored/ tracked by both, the assessee and the assessing officer through an appropriate work flow.
- The Assessing Officers should be instructed to earnestly follow the time limit prescribed under section 154 for disposal of rectification applications. In case the rectification application is not processed within a period of six months, it should be deemed that the application has been accepted and allowed.

  Further, it should be ensured that no demand, which is a subject matter of rectification, is enforced unless the rectification application is disposed off.

- A time limit should be prescribed (ideally 3 months, unless the matter requires further fact finding), and followed earnestly, for passing orders giving effect to the order of the appellate authorities.
- Refunds must be issued when due. In case of delay in the grant of refund for more than three months , the assessee must be entitled to interest at a higher rate of 1% per month. Further, where the delay is more than 12 months, the assessee should be entitled to a higher interest @ 1.5% per month. Further, in order to ensure that refunds are disbursed without time lag, provisions may be inserted to ensure that in cases where time lag between the date of grant and the date of disbursement of refund exceed 30 days, interest under section 244A of the Act should be made applicable till the date of disbursement of refund.

4.9 Issue 9 – Issues relating to demands raised

In certain cases, significant demands are raised (especially on transfer pricing and international tax matters) where the law is still evolving, and both parties would want to keep their matter alive till the time the law attains certainty on the issue.

In such cases, there is significant strain on the relationship between the taxpayer and the Revenue on the matter of enforcement of demand. There are no clear guidelines on granting stay of demand even in cases where an appeal has been preferred against the adjustments and even when it is demonstrated to the Assessing Officer that the assessee has a strong case on merits.

In such situations, in many cases, taxpayers have to escalate the request for stay of demands with higher authorities, upto the level of the ITAT/ High Court. This process is time consuming, and strains resources on both the sides.

Our recommendations

- In order to prevent undue heartburns on both the sides, appropriate guidelines may be issued to the Assessing Officers relating to collection of demand on matters which are subject matters of appeal. Initially, there should be an automatic stay of demand where the subject matter is in appeal (in the same or earlier years).
- *Alternatively*, a system of progressive payment of demand can be brought in cases where appeals are filed before higher appellate authorities. For instance, when the AO raises the demand, he should be able to collect only a specified percentage of the demand and the balance should be automatically stayed. Subsequently, as the matter progresses before the appellate authorities, the percentage of the consequent demand that can be collected / enforced can increase. The access to the above process should be at the option of the

taxpayer, and should be without prejudice to the other legal remedies that the taxpayer may have for seeking a stay of demand.

The above mechanism will also help in active participation of both the parties (i.e. Revenue and taxpayer) in obtaining a speedy resolution of the matter before the appellate authorities.

However, for successful implementation of the above, appropriate safeguards would have to be built in to ensure non-filing of frivolous appeals just to defer the enforceability of demand. For instance, guidelines could be frame that if this route is taken, the Assessing Officer may, in line with the guidelines, be given an authority to ask for a bank guarantee for the unpaid demand, where justified.

4.10 Issue 10 – Disposal of appeals at CIT(A) level

Current scenario

Currently, in many cases, disposal of appeals filed before the CIT(A) take significant time. The Act prescribes an advisory time limit to decide the appeal, that as far as possible, the appeals should be disposed off within one year from the end of the financial year in which it is filed. However, for a variety of reasons, this time limit is not always followed.

Besides, frequent transfers of the CIT(A) also add to the delay caused in disposal of the appeals since the matter previously heard by one CIT(A) is re-heard by another CIT(A) to whom the case gets transferred. In some instances, cases have been heard by more than two CIT(A)s prior to its disposal.

Another possible reason for the delay in disposal could be the increasing number of cases allocated to each CIT(A). The issue of shortage in cadre at the CIT(A) was also discussed in the Lok Sabha by the Minister of State under the Finance Ministry[17] wherein the Minister has mentioned that cadre restructuring has been proposed by the Department envisaging increasing the number of posts at different levels with a view to help the Department to ensure speedy disposal of cases at CIT(A) level.

Presently, there is no express provision in the Act conferring power to CIT (A) to grant stay of demand to the taxpayer, although there are various judicial pronouncements on this subject holding that CIT (A) has the inherent powers to grant stay on disputed tax demands. The absence of clear provision under the Act extending powers to CIT (A) to stay demand in respect of matters

[17] As per reply made on 27 April 2012 by Shri S.S. Palanimanickam in the Lok Sabha to a question raised by Shri N Cheluvaraya Swamy

pending adjudication before him poses severe hardships for the taxpayers. The taxpayers are forced upon to pay the tax demand on their stay application being arbitrarily rejected by the AO. It has also been observed that the issue has lead to widespread litigation with vast number of writ petitions flooded before the High Court.

Our recommendations

In view of achieving the objective of timely disposal of appeals at the CIT(A) stage, we recommend the following:

- Cases already heard by a particular CIT (A) should be disposed off by the same CIT(A) before his / her transfer takes effect.
- It appears the delay in disposal by the CIT(A) is attributable to a variety of reasons, including increase in workload at the CIT(A) level. In this context, the following are recommended:
  a) The number of CIT(A) in each jurisdiction may be increased to ensure that each CIT(A) is allocated with a manageable number of cases.
  b) The administrative support available to CIT(A) should also be sufficiently beefed up.
  c) If the current advisory time limit of one year is considered to be short, a reasonable time limit may be set (say 18 months) for mandatory disposal of appeals.

Here, it is worth noting that the Minister of State under the Finance Ministry in his reply to another question raised in the Lok Sabha[18] has mentioned that the disposal of appeals, especially the high value cases, by the CIT(A) is being monitored regularly by the Ministry. An effective implementation of this action (using automated systems) would help in achieving timely resolution of disputes at the CIT(A) level.

In view of bringing fairness in the dispute resolution mechanism and to ensure speedy resolution of the cases by CIT (A), it would be appropriate to provide for an express provision in the Act enabling CIT (A) to grant stay of demand in cases of matters pending adjudication before him/her akin to the powers bestowed upon ITAT under the Act. Further, in such cases where a stay has been granted, it should be provided that CIT(A) is mandatorily expected to dispose off the appeal within the period for which stay is granted which should not in any case exceed the time limit prescribed for disposal of appeal by CIT(A) [18 months as suggested above]. The strict adherence of the provision would provide impetus to the working of the CIT (A) and would be an aid in speedy resolution of cases.

[18] As per reply made on 7 December 2012 by Shri S.S. Palanimanickam in the Lok Sabha to a question raised by Shri Ratan Singh

4.11 Issue 11 – Proceedings before the ITAT

Current scenario

In cases of matters pending adjudication before the ITAT, the taxpayer has the option of seeking a stay of collection of outstanding demand for a total period extending upto a maximum 365 days[19]. Further, in such cases where a stay has been granted, the ITAT is expected to dispose off the appeal within the period for which stay is granted.

However, practically in several cases, the matter covered by such stay does not get disposed off within the period for which stay is granted, and since the ITAT is not vested with the power to grant further stay, the taxpayer would in such case be exposed to initiation of recovery proceedings by the tax officer upon the expiry of the stay.

In such a scenario, the taxpayer would be put to financial hardship due to:

a) non-disposal of the matter by the ITAT within the period covered by stay (not owing to any fault on the part of the assessee);

b) limitation on the power of the ITAT to grant a stay beyond the period of 365 days.

In such situations, the taxpayer may be forced to look for other legal remedies to obtain further stay of the demand.

Further, many a times, there is high work load on the Commissioners representing the Revenue before the ITAT, forcing them to obtain adjournments in a routine manner.

Another pertinent issue which needs consideration is that in many instances the ITAT sets aside the matter and restores the case back to the AO for afresh consideration after appropriately considering the facts of the case. This, at times, is done without giving any specific direction to the AO. In such a scenario, the AO in absence of specific directions invariably assesses the taxpayer in the same manner as was done at the time of original assessment. As a result, the taxpayer has to yet again appear before the ITAT on the same matter. This leads to lot of wastage of time and resources both on the part of the taxpayer and the tax department.

Further, for cases falling within the purview of Section 153(3) of the Act, wherein no fresh assessment has been directed but the higher Appellate Authority directs the AO to reconsider some aspects after proper investigation or to recompute the income as per the their finding or directions, no time span has been specified under the Act for their disposal. Hence, if the complete assessment is not set aside but only a few matters are set aside for re-examination, there is no time limit for

[19]Section 254(2A) of the Act

passing orders to give effect to such direction. Consequently, it is seen that there is a tendency on the part of AO to defer such assessments resulting into matters pending for an unduly long period. As a result, refunds due are locked-up for no fault of the taxpayer.

Our recommendations

- In the interest of fairness, and to avoid financial hardship to taxpayers whose matters are pending adjudication at the ITAT, the provisions of the Act should be amended to enable the ITAT to grant additional stay beyond the period of 365 days. However, the same should be subject to the condition that the matter should mandatorily be disposed off within such extended period of stay (beyond 365 days) and no party should be allowed any adjournment during such extended period of stay beyond 365 days.
- Further, the number of Commissioners representing the Revenue before the ITAT should be increased to ensure proper and timely representation.
- In the interests of the taxpayer and the tax department and with a view to conserve the valuable time and resources involved in the appellate process, the provisions of the Act be amended. It should provide that the ITAT, whenever, restores/sets aside the matter back to the AO for afresh consideration, shall provide clear directions to be followed by the AO while assessing the taxpayer in the second round of assessment proceedings.
- Also, to expedite the speedy disposal of matters concluded by higher Appellate Authorities, it is suggested that the Legislature should either provide for a mandatory time limit in Section 153(3) of the Act for matters partially set-aside by higher Appellate Authorities or enlarge the scope of Section 153(2A) of the Act so as to also encompass such matters which are partially set-aside by higher Appellate Authorities.

4.12 Issue 12 – Procedures at the DRP level

Current scenario

The system of DRP was instituted to provide certain category of assesses with an option of an alternative dispute resolution system that is time-bound, certain and fair.

However, at a practical level, several taxpayers have experienced certain issues in the DRP procedure such as delays in disposal of matters and scheduling of hearings close to the deadline for issuing directions. Besides, the directions of the DRP are often not well-reasoned and not in consonance with legal precedents on issues.

Another issue faced by the Assessees is the time-limit of 30 days[20] set for filing Objections before

[20]Section 144C (2) of the Act

the DRP from the date of service of the draft assessment order. Given that the Objections are required to be detailed covering not only the grounds and facts but also the legal arguments and submissions which the Assessee wishes to rely on, drafting and filing of the Objections becomes a voluminous & time-consuming exercise. Further, in case of non-resident Assessees, given the forms and papers related to the Objections are invariably required to be signed outside India and then sent to India by post/ courier for filing in India, postal delays also reduce the time available to the Assessees to prepare their detailed Objections effectively.

Our recommendations

In order to strengthen the DRP system, the following recommendations may be considered:

- The existing time-limit of 30 days for filing the Objections before the DRP should be extended to a period of 60 days from the date of service of the draft assessment order. A period of 60 days should provide sufficient time to the Assessees to prepare and file their detailed written Objections;
- The DRP hearings should be spaced out to provide the taxpayer with adequate opportunity to present its arguments and submissions and also that the DRP has sufficient time to pass the orders; and
- The directions of DRP must be speaking, taking into consideration legal precedents on issues involving questions of law.
- DRP may be empowered to act as a Mediation Panel ('Panel') for discussion/settlement of certain types of tax disputes. An option may be given to the taxpayer to make an application to the Panel for settlement of the issue at any stage of the proceedings before DRP.

For instance, Panel may entertain applications for conciliation relating to:

a) Cases involving high-pitched demands (such as transfer pricing matters); and

b) International taxation issues (including Permanent Establishment and attribution related issues).

The idea is to settle across the board tax liabilities in complicated and complex cases in order to avoid prolonged litigation and strain on resources of both sides. The following would be recommended in this respect:

a) A minimum threshold may be prescribed for an assessee to be eligible to apply to Panel. For instance, a minimum tax incidence of Rs. 3 crores may be prescribed.

b) The Panel should ideally consist of DRP members (three member bench who has been authorized to decide on the objections filed by the assessee), including the following:

- A retired Judicial Member from the ITAT;
- Senior representative from the Revenue;
- A Senior expert from outside the Revenue having background of tax law.

c) The Panel should dispose off the application in a timely manner (say 9-12 months from the date of application). The order of the Panel should mention the issues on which the parties have reached an agreement, and also the issues where they have failed to reach an agreement.

4.13 Issue 13 – Constitution of the Authority of Advance Rulings (AAR)

Current scenario

The recent vacancy in the appointment of Chairman of the AAR led to delays in the disposal of the applications pending before the Authority. Further, it is seen that in many cases, the applications filed before the AAR are not disposed off within the time limit of six months as prescribed under section 245R of the Act.

Our recommendations

- In view of the achieving the objective of timely disposal of issues in the case of investors / non-residents, the Government should ensure that the AAR post is not left vacant for long and that the position is duly filled up by a Judge with rich experience in the field of taxation.
- In order to curb the delays in the disposal of applications, the Government could consider setting up more Benches of the AAR to hear and dispose pending matters expeditiously.
- If the delay is attributable to high workload, the time limit for disposal of applications may be changed to 9 months or one year, with clear directions to dispose off the applications within that time, so that there is certainty in the minds of the applicant.

4.14 Issue 14 – Judicial discipline

Current scenario

In many cases, the income-tax authorities refrain from following the decisions of higher authorities, primarily on the basis that the Revenue has not accepted the position upheld by such decisions. The Supreme Court in the case of *Kamalakshi Finance Corporation AIR 1992 SC 711* has held that orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

Further, many a times the appellate authorities, do not decide on consequential/alternative grounds of appeal. As a result of which, in case the appellate orders are reversed by a higher

authority, the matter comes back to the earlier authority for adjudication on the unresolved grounds of appeal.

Our recommendations

- The authorities should be instructed to follow decisions rendered by higher authorities, to ensure consistency in the proceedings.
- As far as practical, the appellate authorities should adjudicate on all grounds of appeal raised.

4.15 Other General recommendations

- *Awareness on recourse to section 158A*

  Section 158A provides an option to an assessee to agree to the application of the decision of a High Court / Supreme Court relating to an earlier year to the proceedings of the subsequent years where identical question of law is involved. Section 158A can be invoked at the assessment stage and upto the ITAT level.

  General awareness about this provision should be increased. Further, the Assessing Officers should identify such cases and advise the respective assessee on the option available to them. This can help in avoiding repetitive appeals.

  Further, currently the provisions of section 158A allows the assessee to seek application of the decision of, *inter alia*, the Supreme Court only if the question of law is pending before the Supreme Court in an appeal filed under section 261 of the Act. However, in a case where the question of law is pending before the Supreme Court upon acceptance of petition for Special Leave under Article 136 of the Constitution of India, the provisions of section 158A cannot be made applicable to such matters.

  Therefore, in order to bring cases pending before the Supreme Court under the SLP route also within the purview of section 158A of the Act, the provisions of section 158A should be appropriately amended to enable the application of section 158A of the Act even in relation to those cases where a question of law is pending before the Supreme Court under Article 136 of the Constitution.

- *Clarifications from CBDT on specific issues*

  One of the main reasons for litigation is the lack of clarity on the stand of the Revenue on certain specific issues. As a result, tax authorities of different jurisdictions adopt different stands in dealing with such issues, thereby resulting in lack of consistency and unnecessary litigation.

Therefore, in order to provide clarity and uniformity in resolving tax disputes, the CBDT should, from time to time, provide clarifications on its stand on certain contentious issues after inviting views from various stakeholders. Some of the issues that could be considered for this purpose include:

a) Guidelines on applicability of TDS provisions on reimbursement of salary expense to overseas entities for employees seconded to Indian group companies;

b) Issue surrounding computation of total income of banking companies;

c) Guidelines on allowing / computing credit for taxes paid in overseas jurisdictions;

d) Issues relating to computation / carry forward of MAT Credit.

- *Implementation of Committee recommendations*

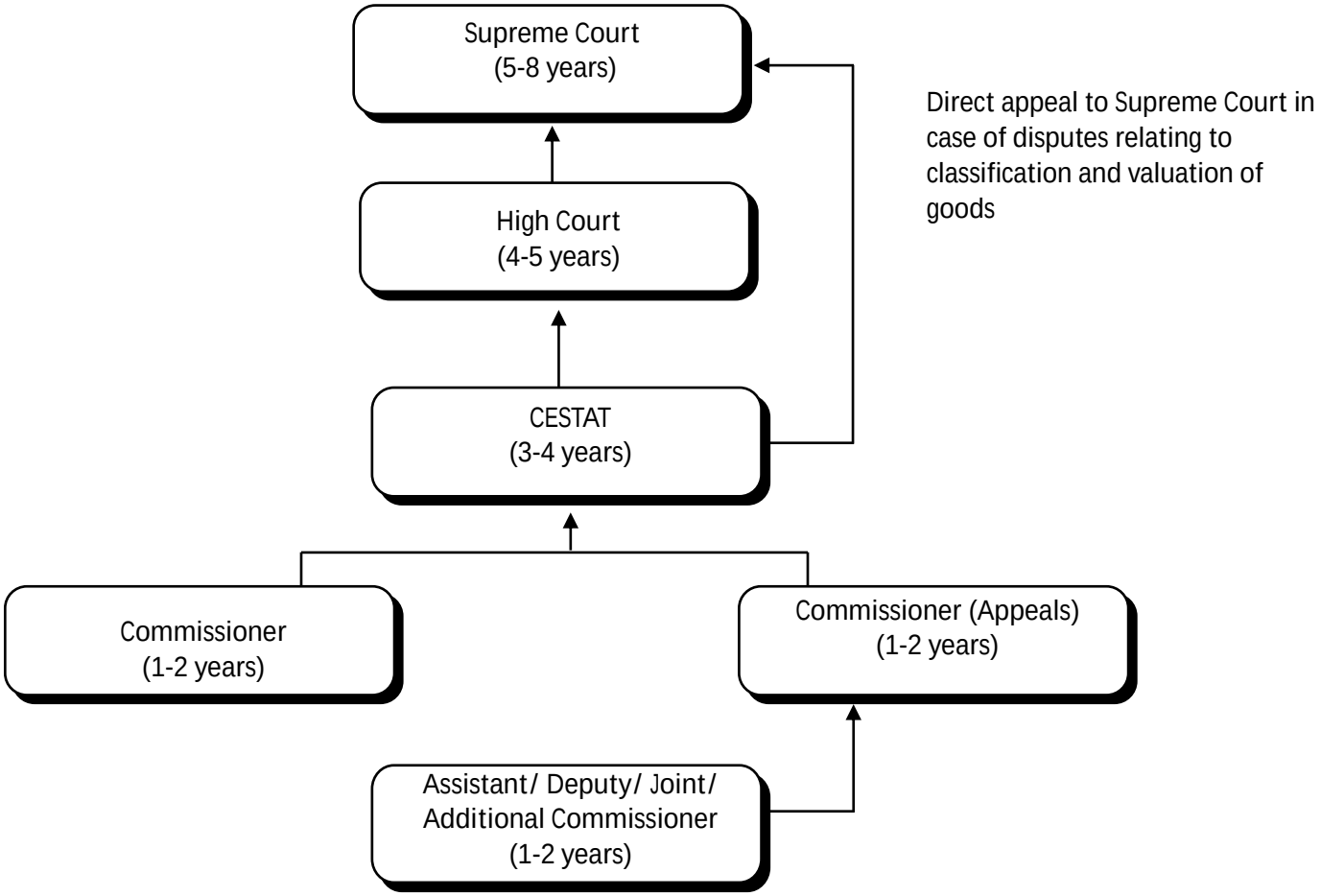
Expert Committees are set-up by the Government in order to examine certain specific issues and to report their findings and recommendations. Expert Committees such as the recent Shome Committee take into account the views of various stakeholders affected by such issues and submit their detailed reports to the Government for its further consideration and action.

Once the expert committees submit their report to the Government for its consideration, the Government should expeditiously examine the report, form its opinion after discussions with the stakeholders, present its views and expeditiously implement the recommendations accepted by the Government.

5. LITIGATION STRUCTURE - INDIRECT TAXES

Indirect tax laws in India, at the central level, provide for various avenues for resolution of tax disputes. While the norm is a five-tier appeal process mandated by customs, central excise and service tax laws, the legislation(s) also provide for certain alternate Dispute Resolution Mechanisms (DRMs) under specific circumstances.

A pictorial representation of the structure of the normal dispute resolution framework and the approximate (broad estimate) timeframe involved at each level is given below.



5.1 Understanding each level of normal dispute resolution

Level 1- Assistant / Deputy / Joint / Additional Commissioner or Commissioner

Under central indirect tax laws, the first level of adjudication is by a Superintendent, Deputy/Assistant Commissioners, Joint/Additional Commissioners or Commissioner depending on the quantum and nature of dispute involved.

For instance, under service tax, the process of adjudication is as under[21]:

S.No.	Central Excise Officer	Amount of Service Tax or CENVAT credit (demand) specified in the Show Cause Notice (SCN)
(1)	Superintendent of Central Excise	Not exceeding Rs 1 lakh (excluding cases relating to taxability of services or valuation of services and cases involving extended period of limitation)
(2)	Assistant Commissioner or Deputy Commissioner of Central Excise	Not exceeding Rs 5 lakhs (except cases where Superintendents are empowered to adjudicate)
(3)	Joint Commissioner of Central Excise	Above Rs 5 lakhs but not exceeding Rs 50 lakhs
(4)	Additional Commissioner of Central Excise	Above Rs 20 lakhs but not exceeding Rs 50 lakhs
(5)	Commissioner of Central Excise	Above Rs 50 lakhs

The original adjudicating authorities have the right to and they typically seek copious additional information / documentation from the taxpayer during the course of adjudication of a claim. Such additional information and documentation is sought and scrutinized in the context of adjudication of demands as well as refunds filed by the taxpayer. Such adjudication proceedings culminate in either confirmation of the demand (i.e. tax / duty, interest and penalty) or rejection of refund on a host of legal / technical, procedural and documentation based reasons.

In the context of issuing demands, adjudicating authorities are allowed to issue Show Cause Notices (SCNs) within a period of 1 year from relevant date[22]. However, in cases where the department is in a position to substantiate that tax / duty has not been paid by reason of fraud,

[21] Vide Notification No. 30/2005 – Service Tax, dated August 10, 2005 last amended on September 8, 2010

[22] Relevant date varies for each statute

collusion or any willful mis-statement or suppression of facts etc, then a larger period of limitation of 5 years could be invoked.

The taxpayer, upon issuance of SCN, is expected to provide necessary clarification to the adjudicating authorities (in writing and in the personal hearing granted) rebutting the allegations in the SCN / substantiating the tax position adopted by the taxpayer. At this stage, the adjudicating authorities are required to judiciously analyze the submissions made by the taxpayer and arrive at a conclusion in confirming / dropping the proposals in the SCN.

Upon the finalization of first level of adjudication proceedings vide an "Order-in-Original", the dissatisfied party (in most cases the taxpayer) can prefer an appeal before the next level of dispute resolution which is either Commissioner (Appeals) (in case of orders passed by Additional Commissioner or officers below him) or Customs, Excise, Service Tax Appellate Tribunal (in case taxpayer is aggrieved by the order passed by the Commissioner).

Ordinarily, the original adjudicating authority takes around one to two years to adjudicate a SCN issued by the said authority.

Level 2- Appeal to Commissioner (Appeals)

Against an Order-in-Original passed by adjudicating authorities below the level of a Commissioner, an appeal lies to the Commissioner (Appeals). The Commissioner (Appeals) is required to consider the arguments of both the Revenue and the taxpayer and decide the matter judiciously and by following the principles of natural justice. The proceedings at this level culminate in an "Order-in-Appeal" being issued by the Commissioner (Appeals). The time typically taken for the resolution of an appeal at the level of the Commissioner (Appeals) is approximately 1 to 2 years.

Level 3- The Customs, Excise, Service Tax Appellate Tribunal ('CESTAT')

An appeal lies before the CESTAT against an Order-in-Appeal passed by the Commissioner (Appeals) or an Order-in-Original passed by the Commissioner, as the case may be. Except for matters relating to classification and valuation of goods, the CESTAT is the final Appellate Authority in all customs, excise and service tax matters, although a reference to the High Court can be made on a "Question of Law". In classification and valuation matters, the appeal against the order of the CESTAT directly lies to the Hon'ble Supreme Court. The time typically taken for a resolution of an appeal at the level of the CESTAT is approximately 2 – 3 years.

The CESTAT as well as the Commissioner (Appeals) have the power to dispense with the requirement to pre-deposit tax, interest and penalty arising out of the order appealed against where the said appellate authority is of the view that such deposit shall cause undue hardship to the taxpayer / shall not adversely affect the interests of the Revenue.

The CESTAT has established coordinate benches across the country and an order of an earlier

coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than the one taken by the earlier bench, the proper course is for it to refer the matter to a larger bench for decision.

Level 4- High Court

An appeal against the order of the CESTAT lies before the jurisdictional High Court on issues involving "substantial questions of law" except issues relating to classification and valuation where, as mentioned earlier, the appeal lies directly before the Supreme Court.

A decision of the High Court would have a binding effect on the Revenue and all taxpayers lying within its jurisdiction. In other words, unless reversed by the Supreme Court or by way of a retrospective legislation, a decision of the jurisdictional High Court attains finality within its jurisdiction and has a reasonable persuasive value in other jurisdictions.

In relation to the above, disposal of an appeal at the level of High Court level could entail many years (between 3 and 5 years).

Level 5 – The Supreme Court

The fifth and last tier of the litigation structure is the highest court of India – the Supreme Court.

A decision of a High Court on a question of law may be challenged by the taxpayer/ Revenue before the Supreme Court. Further, as discussed in the previous paragraph, an appeal against the order of the CESTAT on issues relating to classification and / or valuation also lies directly to the Supreme Court.

Under Article 141 of the Constitution of India, a decision rendered by the Supreme Court of India is the law of the land and binding on all courts and tribunals functioning in the country. In other words, dispute resolution is final at the level of the Supreme Court unless legislative changes are made to reverse the decision of the Supreme Court.

In relation to the above, disposal of an appeal at the level of the Supreme Court could entail several years (between 5 and 8 years).

5.2 Timeframe

As can be seen from the above, a tax dispute may take anytime between 12 to 20 years before it attains finality at the Supreme Court level.

5.3 Alternative Dispute Resolution Forums

5.3.1 Settlement Commission

The Settlement Commission is a statutory body set-up inter alia to facilitate speedy settlement of specified types of cases and as an alternative to the normal appeal process. The Settlement Commission has power to grant immunity to the taxpayer from infliction of fine and penalty once

taxpayer makes a true and full declaration of his duty / tax liability. Prior to 2012, such mechanism was available only for disputes under the central excise and customs laws. However, with effect from May 28, 2012 the provisions relating to Settlement Commission have been made applicable to disputes involving service tax demands as well.

No application is entertained by the Settlement Commission where cases are pending before the CESTAT or any court. Further, no appeal lies against an order passed by the Settlement Commission except in certain situations where a writ petition can be filed to the High Court under Article 226 of the Constitution of India.

The basic objective of setting up of the Settlement Commission is to expedite payments of taxes and duties involved in disputes by avoiding costly and time consuming litigation process and to give an opportunity to taxpayers to come clean by making a true and proper disclosure on payments that they have not made in the past. While the Settlement Commission is an efficacious DRM in cases of taxpayers who admit to tax liabilities, the Settlement Commission has not evoked the intended response either in quantum or in repute as approaching this authority per se implies non compliance on the part of the taxpayer.

As on November 30, 2012 there were around 133 cases which were pending settlement before the Settlement Commission for excise and customs involving tax quantum of Rs 886 crore approximately.

5.3.2 Authority for Advance Rulings

The Authority for Advance Rulings (AAR) for Central Excise, Customs & Service Tax was set up in 1999 (extended to service tax in 2003) to pronounce, in advance, binding rulings, on the applicability or otherwise of duty / tax in relation to a proposed activity to be undertaken by foreign investors[23] intending to set-up a joint venture in India or notified public sector companies.

Specified class of applicants are permitted to raise the specified questions relating to classification, applicability of exemption notification, valuation etc before the AAR. However, an advance ruling cannot be sought in a case where the question is already pending in the applicant's case before adjudicating authorities, CESTAT or any court. Similarly, advance ruling is not admissible when the issue involved has already been decided by the CESTAT or any Court.

With a time-frame of 90 days having been prescribed for pronouncing the ruling, advance ruling acts as an effective and speedy mechanism to usher in certainty in the tax position to be adopted by the taxpayer.

[23] Including specified residents

5.3.3 Indirect Tax Ombudsman

The Indirect Tax Ombudsman is an institution created with an objective of enabling resolution of complaints relating to public grievances against the tax department and to facilitate the settlement of such complaints.

One of the main grounds on which a complaint can be lodged before the Ombudsman is delay in issuance of refund or rebate by the Department beyond the prescribed time limit. The Ombudsman has powers to receive and consider complaints from taxpayers, to call for any information from concerned authorities, facilitate the satisfaction or settlement of the complaint by agreement, through conciliation and mediation or by passing an "award", and further suggest remedial measures for redressal of grievances. The Ombudsman is empowered to recommend abolition or amendment of provision and procedures that cause harassment to the taxpayers and further recommend action against the delinquent officers.

This concept has been introduced in the year 2011, implemented in some cities in 2012 and consequently, the effectiveness of the mechanism thereby remains largely untested as on date.

6. SUGGESTIONS / RECOMMENDATIONS - INDIRECT TAXES

We have outlined below, some suggestions with the objective of making dispute resolution more effective, timely and smooth. We have provided our suggestions in the following three broad headings:

I. Prevention of litigation

II. Resolution of emerging disputes

III. Resolution of ongoing disputes

6.1 Measures to Prevent Litigation

6.1.1 Drafting of fiscal laws

A key factor which gives rise to litigation is divergent interpretation of a complex and rapidly changing law by the authorities and the taxpayers; given that there is a natural divergence of interests, any opportunity for differential interpretations is often exploited.

Further, a significant part of the legislation is not a single, easy-to-understand piece of drafting, but is often a weakly worded, multi layered statement which sometimes makes it difficult to understand for the unsophisticated taxpayer; and more importantly, difficult to implement for the revenue. Legislation is often supported by explanations, proviso, circulars, explanatory memoranda etc. While the intention is laudable, and there has been some improvement in the past few years, reality is that, a lot of litigation has arisen due to the gaps between legislative intent, letter of the law, and the mode of its implementation.

Additionally, usage of certain new expressions not recognized by the trade as well as specification of definitions that are divergent from other allied laws is also a cause for fueling litigation. By way of illustration "business support service" is not a type of service that is recognized by the trade; coupled with this is the wide definition accorded to this expression under section 65(104c) of the Finance Act, 1994 resulting in interpretative issues on the nature and scope of services covered therein. Another example, in the context of usage of divergent definitions, is the definition of "capital goods" under the CENVAT Rules, 2004 which only covers goods which fall under the specified chapters of the Central Excise Tariff Act, 1985; whereas under common parlance "capital

goods" would mean all goods which a taxpayer capitalizes and claims depreciation on under Income Tax laws.

There are numerous other examples, like the ones discussed above, and they all contribute to a strong case to be made for re-orienting legislation drafters to align drafting with commonly accepted and standard definitions / expressions.

Our recommendations

- The tax provisions should be structured, drafted and presented in ways that make the law easy to read, understand and implement. Further, the law should have a logical and coherent structure:
  - The structure of a law can be tested by checking whether it is easy to find provisions in the text and whether it is easy to move logically and progressively from one provision to another;
  - Proposed provisions / laws / policies should be reviewed and simplified having regard to their logic and coherence; and
  - The laws should be written in plain text form; provisos and circumlocutory language should be avoided
- The content and language should be used in ways that promote effective communication:
  - The law should contain provisions that are precisely drafted;
  - Terms should be sufficiently defined, particularly when they may have substantial consequences; and
  - Internal consistency in the use of language is important. In particular, different words and expressions should not be used for the same thing.
- In relation to the above, it is recommended that, for drafting of legal provisions, a separate and dedicated "nodal" team comprising of senior officers with prior drafting experience should be formed in the Department of Revenue. Where possible, a dedicated nodal team could be set up for each of the indirect tax laws; and, each piece of proposed legislation ought to be vetted by this nodal team of officers before being forwarded to the Law Ministry for approval.
- While drafting the legal provisions, the focus of this nodal team should be to ensure inclusion of well-defined terms from a tax as well as from commercial (common parlance) perspective.
- Further, each new (significant) piece of legislation (an Act of Parliament, a notification, a rule, regulations or amendments thereof) should be accompanied by a detailed explanatory note that clearly articulates the legislative intent. The current format of

explanatory memorandum (that accompanies amendments to laws / notifications typically as a part of the Union Budget proposals) ought to be suitably strengthened to include specific comments on the rationale for the new provision / amendment in an existing provision; precise scope of the legislation including specifying areas sought to be covered, areas that shall remain outside the proposed law / amendment as well as the intention of the policy maker. The detailed explanatory note should be issued along with the legislation.

- It is further suggested that the above recommendation of issuance of a detailed explanatory note be implemented on every occasion of a change in the law and not merely at the time of announcement of Union Budget proposals as is being done presently.
- Queries raised by taxpayers on any new piece of legislation should be responded to by the Ministry of Finance / Central Board of Excise and Customs by issuing an appropriate circular expeditiously. The queries and the responses should be tracked on the website.

The above proposals, if implemented, shall preclude unwarranted litigation caused by lack of clarity in the law / misinterpretation of the intention of the lawmaker.

6.1.2 Instilling awareness in the adjudication authorities

One key issue in the adjudication of complex and recurring issues is the grasp and exposure of the adjudicating authority to that particular industry / stream of law and specific issues arising thereunder.

Pertinently, officers are posted on rotation basis across customs, central excise and service tax departments and further mandated roles in varied disciplines such as adjudication, special valuation, investigation cell, audit wing etc. Each law and role demands a different kind of experience and expertise which is many a times lacking amongst new officers / transferees.

This causes delays in explaining the background of the case / issue, the relevant legal provisions as well as interpretative issues involved therein to the adjudicating authority.

Our recommendations

- At the outset, it is recommended that induction training be provided to all new joiners / transferees to apprise them of the technical aspects (including latest developments and issues) in the laws they are expected to handle in their new posting. Such training (for a prescribed number of hours) should be a mandated item for all officers assuming new roles and responsibilities. In this regard, a "Training Cell" could be set up in all Commissionerates to impart the required training to new officers having regard to their role and profile of cases / issues they are likely to handle. This shall ensure that officers at the ground level are aware of relevant legal provisions / issues as well as equipped to deal with the same from the date of assumption of their responsibilities.
- Additionally, industry interactions should be encouraged through regular scheduling of RAC

meetings as well as participation by senior departmental officers in interactions organized by industry associations. This will promote exchange of interpretations / tax positions and ensure greater transparency and trust between the revenue and the taxpayer on the reasons as well as reasonableness of interpretations / tax positions being taken.

- The Revenue must have a standard position on issues that is periodically compiled and circulated to field formations as well as made available to the taxpayer (by way of publication in the website), such that it leaves little scope for differential interpretation of law, and makes it easier for taxpayers to comply as well as for the department to (uniformly) implement the law. Specifically, the policy wing should on a quarterly basis (or at such other frequency) release a compendium of key tax positions / interpretations being applied including key precedents (with specific emphasis on rulings of Tribunal / Courts accepted by the department) on all industry-wide issues so that a uniform approach is adopted across jurisdictions.
- Sharing of adjudication / appellate orders could be encouraged at the jurisdictional Commissionerate level to ensure that a uniform approach is adopted in the resolution of disputes / adjudication of matters.
- Field officers should be encouraged to have their doubts on any industry issue clarified from the Ministry / CBEC.

The objective should be to disseminate information and explain the policy objectives in clear terms to prevent litigation ab-initio. Towards this, the policy wing of the Ministry of Finance should be adequately staffed to enable a timely flow of information and sharing of knowledge.

The above proposals, if implemented, shall address the issue of unnecessary litigation arising on account of lack of knowledge / experience on the part of authorities at the ground level and thereby prevent litigation to a large extent.

6.1.3 Invocation of extended period should not be considered as a default measure

Under the current environment, the invocation of extended period for recovery of disputed tax dues has become a default action and adjudicating authorities resort to this, often without analyzing whether the matter involves fraud, collusion, mis-statement and whether the provision of law, authorizing invocation of extended period of limitation, is attracted or not. With this, the burden of establishing *bonafide* is sought to be shifted onto the shoulders of the taxpayer in contravention of the provisions of law.

This manner of invoking the extended period of limitation not only enhances the period under adjudication but also increases the value of taxes/ duties under adjudication. In most cases, relief is ordinarily granted to the taxpayer only at the appellate level, since the first level of adjudication rarely supports the taxpayer's position. In the process of seeking appellate remedy, the taxpayer is

required to pre-deposit (at least part of) the amount of tax / duty including interest and penalty which, even if the taxpayer eventually succeeds, is refunded after a protracted period of time and significant effort.

This entire process serves nobody's interest, and the revenue and the taxpayer, are both embroiled in needless litigation, not to mention the entirely unnecessary strain it puts on the judicial system.

Our recommendations

- At the outset, given that the entire concept of extended period of limitation hinges on whether the department is aware or has been made aware of the tax position adopted by the taxpayer, it is recommended that the format of the return be amended to enable the taxpayers to set out and disclose their tax positions, including the basis for the same. Towards this a specific "disclosures column" or "any other declaration by the tax payer" may be provided in the bill of entry / shipping bill as well as the central excise and service tax returns enabling the taxpayer to fill in the basis for various tax positions adopted under the relevant law(s).
- Further, the law should be amended to preclude the revenue from invoking extended period of limitation, on areas actively disclosed by the taxpayer in the return. This will promote an environment where taxpayers will fully disclose their tax positions by filing returns. Such specific disclosure will also enable the department to immediately proceed against the taxpayer in case it disagrees with a tax position; it would also ensure that the taxpayer is not slapped with a demand for a period of 5 years on a tax position that went uncontested for the previous 4 years.
- It should further be internally mandated that the adjudicating authority should invoke extended period of limitation only when the said authority has the grounds to prove that the taxpayer did not pay tax by reason of fraud, collusion or mis-statement. Further, the justification for invoking extended period should be clearly mentioned in the SCN. An officer who disregards such mandate ought to be appropriately reprimanded by way of internal strictures.
- Where the taxpayer can prove that the taxpayer was of the bona-fide belief that no tax is leviable, for instance, if any clarification was provided by the Central Board of Excise and Customs ('CBEC') on the same issue in favour of the taxpayer, or where the taxpayer did not pay tax due to any favorable judgment on the same issue, then the adjudicating authority should not be allowed to invoke the extended period. As mentioned above, an officer who disregards such mandate ought to be appropriately reprimanded by way of internal strictures.

The above recommendations, if implemented, have the potential to substantially reduce the volume as well as value of taxes that enter the litigation stream.

6.1.4 Show Cause Notices (SCN) based on the findings of Comptroller & Auditor General (CAG)

SCNs are routinely issued based on CAG Audit observations / objections even where such CAG observations are contrary to judicial rulings / clarification issued by the CBEC. Even though the CBEC has in the past discouraged blind adoption of CAG objections and issuance of SCN on the basis thereof, as a general practice, all CAG observations are converted into SCN allegations immediately on receipt of the CAG audit observations to prevent "loss of revenue" because of 'time bar'.

In this regard, it is noteworthy that more than 6,500 cases involving revenue of Rs 16,000 crores have reportedly arisen because of and based on objections by the audit wing. These cases do not figure in the pendency because these have been transferred to the "call book" till the pendency of the final decision of CAG.

Our recommendations

- The law could stipulate that all audit reports under service tax, central excise including post clearance customs audit must be made available to the assessee within a time bound manner to ensure that taxpayers are made aware of potential issues that they could be faced with and further given time to prepare for a timely resolution of the ensuing adjudication. This provision should be made applicable to CAG audit report as well.
- Further to the same, the practice of issuing protective SCNs / demands following objections by the CAG needs to be reviewed. Once an objection has been raised, the department should evaluate the objection and decide whether the objection is sustainable or not. Such evaluation should be completed within a prescribed time limit (of say one month) of the receipt of the audit report. In case the department agrees with the CAG, a show-cause notice should be issued within a period of 1 month from such evaluation / agreement.
- In case, the department does not agree with the Audit contention, no notice should be issued to the taxpayer. In such a case, the department should convince the CAG about the correctness of the decision made by them. In case no consensus is reached between the department and the CAG on the merits of the issue within a prescribed time frame (say 3 months), an SCN could be issued with the adjudication being undertaken by the Special Adjudication Cell (please refer details in paragraph 6.2.4) on a fast track basis.
- The question of whether the CAG objection is sustainable or not should be examined at a pre-decided level (say Commissioner or Chief Commissioner, as the case may be), with a confirmation of such decision (where the department does not agree with the CAG) being obtained from the Ministry of Law.
- The practice of issuing a show-cause notice as soon as the Audit report is received, without examining the merits thereof, should therefore be discontinued. It is suggested that these modalities be settled between the department and the CAG.

It is felt that these measures shall result in preventing / reducing litigation and improving the DRMs and mitigating unwarranted disputes between the taxpayer and the department.

6.1.5 Streamlining of Instructions / Circulars by issue of Annual Master Circulars

A key reason for litigation is the lack of clarity on the stand of the Revenue on certain specific issues (including contrary stands being taken by various officers within and across jurisdictions). As a result, tax authorities of different jurisdictions adopt different stands in dealing with similar issues, thereby resulting in lack of consistency and unnecessary litigation.

Taxpayers are often confused about what position to adopt, and are often forced to litigate (by the revenue) in case they adopt a beneficial "no tax position", based on available precedents.

On a related matter, even where instructions are issued, adjudicating authorities in certain situations refrain from following the instructions / clarification provided by the CBEC (potentially those in favour of the taxpayer), which they are otherwise bound to follow, as per the legal provisions. This approach adds to litigation, which is otherwise avoidable.

Our recommendations

- As a step towards improving taxpayers' services it is requested that a master circular be issued on 1st April of every year consolidating / replacing individual circulars issued in the preceding year. A master circular attempted a few years ago in respect of service tax, was an excellent start, however, it has not been since updated. This exercise needs to be revived not only for service tax but also for customs and central excise for the benefit of taxpayers. This will make taxpayers as well as departmental officers aware of the necessary technical positions as well as procedural requirements.
- On a related matter, the Revenue must be encouraged to follow instructions / clarifications issued by the CBEC. In case an exception is made, there should be an approval mandated from the Chief Commissioner or CBEC. Further, no SCN should be allowed to be issued (under the normal as well as extended period of limitation) when the taxpayer did not pay tax following a clarification provided by the CBEC. In case a SCN is issued in contravention of this principle, the relevant officer must be made answerable to a specific panel / his superiors for his / her actions with appropriate penal action being initiated against such errant officer.

The above recommendations, if implemented, shall ensure clarity in the law as well as uniform implementation of the same, and thereby mitigate unwarranted disputes between the taxpayer and the Revenue.

6.1.6 Committee to provide clarification on frequent tax developments

Lack of clarity in the face of rapidly changing indirect tax procedures is in itself a reason for disputes between authorities and the taxpayer leading to prolonged tax controversies. Anticipating the fast

evolving indirect tax regime, there is a need to address the changing regulatory landscape and issues arising there-from.

Specifically, there is a requirement for transparency, cooperation and collaborative approach between the taxpayer and the tax administration. A case in point being the sea change in the manner of taxation of services effective July 1, 2012 and the consequent interpretative issues that have arisen with regard to service tax compliances as a result thereof.

In this regard, it may be noted that a procedure for obtaining a clarification from the Commissioner is available in some of the State VAT laws and is used by taxpayers as an effective mechanism to have their doubts clarified. A similar procedure exists even in VAT / GST laws of other countries whereby the taxpayer can approach the jurisdictional tax authority for a formal / informal clarification on issues of interpretation. By way of illustration, the Australian, German and Canadian VAT laws envisage a "formal" ruling to be obtained by the taxpayer with the French VAT law permitting "formal" as well as "informal" clarifications being obtained from the tax authority. Pertinently, a common practice in Japan is for "informal verbal" clarifications or rulings to be obtained by taxpayers.

Our recommendations

- An Expert Standing Committee could be set-up by the Government to offer clarifications to the taxpayer in case of introduction of a new legislation / amendments in existing legislations or new procedures to be followed by the taxpayer. This will help in mitigating disputes by virtue of clear cut guidelines being offered to the taxpayers in the matter of compliance with various legal, procedural as well as documentation requirements
- The Expert Standing Committee could consist of members from the Board / Chief Commissioners and jurisdictional Commissioners to ensure that the opinion issued by the Expert Committee is aligned to taxpayer and Revenue interests. The Expert Standing Committee should further be permitted to hold stakeholder consultations and further allowed to co-opt experts for specific issues. More than one Expert Committee could be constituted for different areas of indirect taxes.
- A mechanism could be devised where the taxpayer could approach the Expert Standing Committee and, upon payment of a fee, seek clarifications on a new law / amendment, to understand the intention of the law maker while introducing such amendment and to discuss any interpretation issues. The Expert Standing Committee should provide a framework for dialogue with the taxpayer with a view to resolve taxpayer doubts and disputes (especially misinterpretations and misunderstandings) early in the process. The amount of fee could approximate to the cost incurred in providing a clarification.
- Pursuant to the discussion with the taxpayer, the Expert Standing Committee should issue

its opinion on the taxability of the transaction or the procedure / documentation to be adopted, as the case may be. The opinions issued by the Expert Standing Committee should be captured online and be accessible to the public at large.

- The view / opinion of the Expert Standing Committee on any issue referred to it should be publicized and issued as a Board Circular/ Clarification and with the same status.
- In all its activities, the Expert Standing Committee should give special attention to developing laws and the existing laws where lack of clarity in law makes it susceptible to multiple interpretations.

The above recommendations, if implemented, shall ensure clarity in emerging laws and thereby reduce disputes unnecessarily arising on account of misinterpretation / misapplication of the same.

6.1.7 Expanding the scope of the Authority for Advance Rulings ('AAR')

The concept of advance rulings under indirect tax laws earlier was restrictive to the extent that resident taxpayers (other than specified residents) cannot apply to AAR. However, in the current Budget 2013, the Finance Minister has proposed to extend the benefit to resident public limited companies. Further, earlier the ruling could be obtained only for prescribed questions pertaining to proposed businesses / transactions; however in this Budget, under excise and customs, a taxpayer already in business would also be allowed to apply for the Advance Ruling with respect to a new business venture. While these expansions in scope are a welcome measure, there is a need for further relaxation in the norms for applying for advance ruling.

On a related matter, currently, the provisions permit appointment of a retired Judge of the Supreme Court as the Chairperson of AAR. Limiting the appointment of Chairperson to a retired Judge of Supreme Court at times results in delay in constitution of the authority and consequent delay in the disposal of applications.

Our recommendations

An effective advance ruling machinery contributes to reduction of disputes by eliminating potential disputes prior to inception. It affords both the taxpayers as well as the tax administration, the advantage of certainty in taxation and of lowering the cost of compliance as well as reducing significantly the potential for litigation.

As mentioned above, while the recent budget amendments introduced in the Advance Ruling Scheme are welcomed by the Industry, there is still a need to further revisit the approach towards the scope of matters handled by the AAR.

- The facility of advance ruling should be made available universally to all taxpayers wishing to seek clarity on the taxes / duties applicable on their transactions. It is accordingly recommended that the resident private companies should also be allowed to approach AAR in respect of indirect tax implications on transactions proposed to be entered into by them

- Further, the taxpayer should be permitted to approach the AAR for even ongoing transactions to confirm the indirect tax implications arising thereon pursuant to a change in the provision of law / emergence of a significant ruling impacting the position taken etc. While there may be some need for safeguards to protect Revenue (such as a case that is already under audit or scrutiny by the Revenue), there is a strong case for enabling existing taxpayers to avail of the benefit of advance ruling even in respect of on-going transactions.
- Further, with a view to expand the reach of the AAR, the number of AAR benches may be increased to address the increased workload consequent to the proposed amendments. Further to the same, to ensure that only credible taxpayers approach the AAR, in respect of matters involving a substantial question (and the AAR does not in effect replace the routine appellate process), a suitable fee may be prescribed as a filing fee for approaching the AAR. For example, the fee could be bench marked to the cost for providing the ruling through this mechanism.
- The Revenue has instituted the concept of Large Tax Payers ("LTU"). Given that for these taxpayers, the taxes at stake are very high, there could be a special dispensation for all taxpayers who have opted for the LTU facility, to be able to approach the AAR to determine taxability of a wide range of tax issues in respect of ongoing as well as proposed transactions. This will serve the dual purpose of popularizing the LTU scheme, and also provide a separate dispute resolution channel for what could potentially be high tax revenue litigation.
- It is further recommended that the Government should consider appointing retired judges of the High Court in addition to the Supreme Court as Chairman of the AAR so as to ensure that the AAR is not left vacant for long and that the position is duly filled up by a Judge with rich experience in the field of taxation.
- It is further suggested that a panel of appointees to the AAR be constituted in advance so that there is at all times a sufficient quorum to conduct proceedings.

The above suggestions shall strengthen and expand the scope of the AAR and aid in nipping potential litigation in the bud.

6.1.8 Introduction of Advance Pricing Mechanism in Customs Law in line with Transfer Pricing Regulations of Direct Taxes

Advance Ruling Mechanism facilitates ruling on principles to be adopted for valuation of imported goods in terms of the provisions of the Customs Act, 1962. However, very few applications on valuation have been dealt with by the AAR, till date.

With the opening up of the Indian economy, the volume as well as value of transactions of import and export between related entities have gone up substantially. The existing mechanism of

examination of such transactions by the Special Valuation Branches (SVBs) in the Custom Houses is inadequate to determine the true price of the goods imported or exported.

Our recommendations

- It is suggested that an Advance Pricing Agreement (APA) Mechanism along the lines of the one recently notified by the Central Board of Direct Taxes, Ministry of Finance ('CBDT') under Transfer Pricing Regulations may be considered for the purpose of customs laws as well. This shall also ensure that a diverse approach is not adopted on these international transactions from a direct and indirect taxes perspective.
- Alternatively, prices as agreed under the Transfer Pricing regulations of CBDT may be adopted since those regulations also require determination of arm's length prices in the course of international transactions of goods and services between related persons.
- It may also be provided that the SVB of Custom Houses and Transfer Pricing Officers (TPO) of CBDT should reconcile the determination made by each other in respect of the transactions examined by them and accordingly finalize the appropriate assessable value for imported goods.

The above suggestions shall ensure uniformity in approach across allied tax laws and further mitigate litigation on the aspect of valuation of goods.

6.2 Resolution of Emerging Disputes

6.2.1 Detailed evaluation at the adjudication level

At the ground level, SCNs once issued are rarely dropped. In an attempt to confirm the SCN, orders issued by the adjudicating authorities are often not comprehensive / well reasoned while confirming demands (or rejecting refunds). On many occasions, the adjudicating authorities tend to ignore settled judicial precedents and demand notices are confirmed / refund applications are rejected even where the law is settled by a ruling of the Tribunal or a clarification by the CBEC.

Often, adjudication orders are 'non-speaking' that do not clearly articulate the reasons for ignoring a judicial decision except for stating that the facts of the case are distinguishable. Further, in many cases, details called for and submitted are not considered while passing the order. There is a perception of Revenue bias in the adjudication process, but that is sometimes difficult to accurately pinpoint.

The aforesaid factors severely impact the tax environment for a business as there is no clarity/ finality on the tax liability of a business entity; contingent liabilities keep accumulating disproportionately and the compliance burden/ litigation costs keep escalating.

Our recommendations

- Tax laws are to be applied to a specific set of facts and circumstances. Therefore, before the tax consequences of a given transaction or issue are determined, the relevant facts must first be established and reviewed. Therefore, the facts and the applicable law should be analyzed by the adjudicating authority in greater detail before issuance of a show cause notice. This is especially important in high stake matters where the facts disclosed in the adjudication order are subject to further review only by the Tribunal which is the ultimate fact finding authority. Towards this, a specific format of SCN / order-in-original may be prescribed to ensure that the authorities mandatorily outline the facts therein.
- The information required for adjudication of the matter should be asked for in writing (instead of asking for information through verbal communication). This would not only enable the taxpayer to maintain a record of all the information that has been asked for by the adjudicator; this would also help the adjudicator in a situation where the taxpayer defaults in submission of the requisite information. By way of illustration:
  - All correspondence at the stage of the adjudication process (such as direction to submit additional documentation etc. after issue of a show cause notice) should be in writing; and
  - Record of personal hearing shall mandatorily be made available to the taxpayer at the end of every hearing documenting the additional information / documentation required to be furnished by the taxpayer.
- With the rapid development of web based technologies as well as rapid automation of the Department's functioning, the adjudicating authority should verify the applicable tax position with the other jurisdictional authorities, so as to follow consistent practices across multiple locations.
- If a SCN is issued, the authority should judiciously delve into the correctness of the show cause notice and an adverse order should only be passed with the detailed reasoning and findings of the authority. Appropriate guidelines must be issued to adjudicating authorities to refrain from issuing adverse orders where the taxpayer has a genuine case merely on account of the stakes involved. Towards this, a Review Panel may be constituted to internally review all SCNs that have been confirmed with the relevant officer being taken to task where an SCN has unjustly been confirmed disregarding settled precedents.
- Under the current regime, routine rejection is the order of the day in matters involving high stakes. Therefore, it is suggested that while the adjudication authority below Commissioner level may do the fact finding and issue SCN, the matter should be referred to

the Commissioner or Chief Commissioner for the final adjudication:

Disputed tax amount (without including interest and penalty)	Adjudication Authorities
Up to Rs.25 Lakhs	Authorities below Commissioner
More than Rs.25 Lakhs but upto Rs.1 crore	Commissioner
More than Rs.1 crore	Chief Commissioner

- The Department has successfully established an advanced system of automation covering customs, central excise and service tax assessments processing several thousand online transactions of import and export consignments per day apart from the excise and service tax returns of lakhs of taxpayers. As a next step, it is recommended that, a compendium of all adjudication including appellate orders be published in the departmental intranet for the reference of the departmental officers so that the same are uniformly applied and followed by authorities across the country, during the course of adjudication proceedings. Further to the same, a summary of the key findings/ rulings could be posted in the CBEC website for public access. This shall ensure confidentiality of parties / sensitive data being maintained and at the same time make available to the taxpayers the emerging trends in precedents.
- Further, there is a perception that Adjudicating officers tend to display a revenue bias in adjudicating tax disputes because of the pressure of maximizing revenues owing the yearly targets for collection of duties / taxes assigned to them, which results in show cause notices / demands getting confirmed and refunds rejected even when the same are legally untenable. It is therefore suggested that the Adjudication Authorities should be divested of the responsibility of revenue collection. This suggestion has been further discussed in detail in Para 6.2.4 below

6.2.2 Strict timelines for finalization of matters

Adjudication proceedings are not time bound for disposal by the Revenue.

Similarly, the refund proceedings are often delayed for an indefinite period of time, sometimes by requiring vast amounts of information / documentation from the taxpayer. While the CBEC has sought to address this squarely, there are many instances where implementation of these guidelines at the ground level, has been lacking.

As a result, taxpayers are put to undue hardship due to continued delay in adjudication proceedings. Therefore, at the adjudication stage itself, matters take 1 to 2 years to get finalized. In fact, refund cases at times take a longer period of 2 to 4 years to attain finality at adjudication level.

Our recommendations

- Timelines should be introduced for finalization of a matter, say 1 year for finalization of the matter at adjudication stage and guidelines must be framed to ensure strict adherence to such prescribed timelines:
  - — In case the adjudicating authority does not pass an order within 1 year from the date of issuance of SCN, the proceedings should be deemed to have been dropped; and
  - — The current provisions of not more than 3 adjournments to be sought for by the taxpayer at the initial adjudication level (post which the matter could be decided "ex-parte") could be continued to ensure that there is no protraction of the adjudication by the taxpayer.
  - — Where a case against a party is strong the party tends not to participate in the initial round of proceedings because that is the easiest manner to postpone the adverse consequence of the proceeding and it is easy to plead at appellate levels about denial of natural justice. In order to protect the revenue's interests, once the ex-parte order has been passed after granting three adjournments to the taxpayer, the taxpayer's plea of denial of natural justice should not be accepted at the Tribunal / court level.
- It should further be ensured that SCNs questioning eligibility for refunds are issued within a period of three months from the date of submission of a complete refund application so as to ensure timely disbursement of refund amounts. Further to the same:
  - — If SCN is not issued within three months of filing the claim, 50 percent of the refund amount claimed should be sanctioned; and
  - — Further, if SCN is not issued within six months of filing the claim, the entire 100 percent of the refund amount claimed ought to be sanctioned with applicable interest.
- Once an SCN is issued, the same ought to be adjudicated and orders passed within a period of six months from the date of its issuance. In case of delay in passing orders and in granting of refund beyond the prescribed period of six months, interest at the rate prevailing for belated payment of duty / tax should become payable to the taxpayer. In other words, there should be parity between interest demanded of a taxpayer (in case of delayed payment of tax) and interest payable to a taxpayer (in case of delayed disbursement of refunds by the Department)

  This would help in achieving time bound closure of the matters at adjudication level. Further, considering that under the GST regime, it is proposed that all exemptions shall be

routed through a refund mechanism, it is essential that the refund mechanism is made completely robust to avoid unnecessary hassles for taxpayers / exporters, thereby, defeating the entire purpose of the exemption / refund mechanism.

- On a related matter, while the efforts of the CBEC in providing details of pendency in refunds across jurisdiction on its website is indeed laudable, it is requested that the data be updated across all jurisdictions on a monthly / quarterly basis so that trends in sanction of refund are captured in a timely manner.
- It is absolutely necessary that all the processes involved in adjudication are captured online and are accessible to the public at large. The data capture should start from the stage of issue of show-cause notice, the date on which a reply has been furnished by the assessee, the date of personal hearing, the date of issuing the adjudication order, the stages in the first appeal, second appeal etc. An important field of data capture should be the name of the officer designated to adjudicate that show-cause notice. In case the officer gets transferred, the system should capture the name of the new officer to whom the case has been assigned along with the date of such assignment. Apart from enabling monitoring the progress of adjudication, such a system should also enable evaluation of the quality of orders passed by each officer since the system would record the outcome of appeal if any filed against the said order. Such a system would enable the department to assess the judiciousness of each adjudicating officer at any point of time in his career. In the long run it is expected that such an exercise would help improve the quality of decision making by the officers.

These recommendations shall aid in the streamlining of the initial adjudication process and in minimizing entry of matters into higher litigation streams.

6.2.3 Dispute arising out of legal interpretation of the provisions

A trend has recently emerged, where significant litigation matters are arising due to legal and very technical interpretations of the law. One officer/ wing of the department may examine or interpret the law in a specific manner and issue SCN on the issue arising there-from to raise a demand on the taxpayer and soon other officers follow suit across the country. A case in point being a spate of SCNs being issued a few years ago, under service tax (pursuant to audit observations), on grounds that CENVAT credit is not eligible to be availed in respect of service tax paid on reverse charge basis. The controversy was addressed via clarifications issued by the CBEC confirming CENVAT eligibility and further by incorporation of a retrospective amendment in the law clarifying such eligibility.

Conversely, if an assessee discovers a loophole in the law and pays no / low tax, often administrative / judicial intervention is required to validate the same. A case in point being non-payment of service tax on telecommunication services received from a foreign telecom company (under the reverse charge mechanism for the period prior to June 30, 2012) as the same did not fit within the definition of a "taxable service" under the Act. To recapitulate, the definition of a "taxable service"

in the context of telecommunication services required for the service to be provided by a licence holder under the Indian Telegraph Act, 1885. Given divergent views being taken on this across jurisdictions, the CBEC had to step in and clarify on the eligibility and validity of the "no tax"/ exemption claims filed by taxpayers.

The hyper-technical and narrow interpretation of provisions leads to uncertainty in the taxpayer's mindset, and causes an upsurge in litigation matters. Disputes can come down if such disputes are identified in the early stage of their life cycle. On such issues of countrywide ramification there should be a willingness to deal with the issue at the highest level (CBEC or the Ministry) as soon as the issue is identified and if need be law should be amended to clarify the position.

Our recommendations

- While the recommended approach should be to refrain from very technical and narrow interpretation of beneficial provisions, even assuming such interpretation is warranted, such interpretative issues should be identified and communicated to the industry at an early stage.
- Where appropriate, prompt action should to be taken by the CBEC or jurisdictional Commissionerate by issuing a clarification or recommending necessary amendment in the laws.
- Further, such matters should be referred to a "Special Adjudication Cell" for speedy and consistent final adjudication.

These recommendations shall also aid in the streamlining of the initial adjudication process and in minimizing entry of matters into higher litigation streams.

6.2.4 Constitution of a Special Adjudication Cell

As highlighted above, one of the key issues emerging in the adjudication of complex and recurring issues is the grasp and exposure of the adjudication authority to specific industry issues. Coupled with this is the issue of ground level authorities engaging in routine rejections in cases that involve high stakes given their revenue accountability. The adjudicating authority, namely, Assistant Commissioner / Deputy Commissioner / Joint Commissioner / Additional Commissioner / Commissioner / Superintendent (Adjudication) all have a dual role to play - that of a tax collector as well as adjudicator of disputes. Adjudicating officers therefore often tend to display a revenue bias in adjudicating tax disputes because of the pressure of maximizing revenues owing to yearly targets for collection of duties / taxes assigned to them. This results in show cause notices / demands getting confirmed and refunds being rejected, sometimes on frivolous grounds. (as is evident from the statistics of appeals decided in favour of the Department or against it).

Consequently the taxpayers are required to litigate, and this only adds to the huge backlog for dispute resolution.

Our recommendations

Formation of a Special Adjudication Cell

It is recommended that a 'Special Adjudication Cell' (more than one cell may be constituted if the need arises) be formed for the adjudication of high stake matters. To ensure continued unbiased adjudication of matters, the Cell should not be given any revenue targets. In this context, we suggest the following two options for the formation of Special Adjudication Cell:

> The Special Adjudication Cell should be set up as a separate body under the Ministry of Law and should comprise of officers of the level of senior Commissioners or Chief Commissioners on deputation from CBEC and an official in the rank of a Joint Secretary from the Law Ministry. It is a fundamental legal principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Hence, even at the time of adjudication it is imperative that the taxpayer should feel that he has been given a fair trial, his matter has been heard properly and then the order has been passed. If the Special Adjudication Cell works under the Ministry of Law, then the taxpayer would have an assurance that the matter has been given a balanced approach
>
> OR
>
> The Cell may, as the next best option, be constituted under the auspices of the Ministry of Finance but with the Cell reporting directly to the CBEC without any reporting to any Commissioner / Chief Commissioner with a revenue target to achieve.

Such an arrangement is expected to ensure fairness, expeditious adjudication without a revenue bias thereby lowering the number of cases that enter the litigation stream.

The Order of the Special Adjudication Cell could be made appealable to the Tribunal, similar to the order of the Commissioner / Commissioner (Appeal)

Members of the Special Adjudication Cell

The Cell should be manned by select Commissioners / Chief Commissioners with an established track record of subject matter experience as well as a revenue neutral approach in adjudicating cases being officers who have a judicial bent of mind. A Joint Secretary from the Ministry of Law could also be included in the Cell.

Further, members who have once been appointed to the Special Adjudication Cell should to the extent possible not subsequently be brought back to the Revenue Stream. The career path of such members should be towards the judiciary; in other words, after the completion of their term in the Special Adjudication Cell, they should be considered for appointment as judicial members in the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT'), Settlement Commission and / or Authority for Advance Rulings. This would entirely delink them with the revenue collection mechanism and their entire focus would be on the adjudication of matters in a judicious manner.

Issues to be handled by the Special Adjudication Cell

The focus of the Special Adjudication Cell should be to adjudicate cases where:

- The demand is in excess of Rs 5 crores; or
- The SCN is issued to a taxpayer pursuant to objections raised by the CAG where the department does not agree with the CAG or is unable to agree with the CAG after a prescribed period (say 3 months); or
- Disputes arising out of legal interpretation of the provisions which could have all India ramifications,

Orders of the Special Adjudication Cell

Orders passed by the Special Adjudication Cell may be made available to adjudicating authorities across various jurisdictional Commissionerate(s) of customs, central excise and service tax for being followed and implemented. Periodic sharing of the Special Adjudication Cell orders may be enforced at the jurisdictional Commissionerate level to ensure that a uniform approach is adopted in the resolution of disputes / adjudication of matters with the focus being prevention of further litigation / appeals. Towards this, the policy wing of the Ministry should be adequately staffed if so required to enable such a timely flow of information. Given the electronic means of communication at their disposal, timely flow of information and sharing of knowledge can prevent litigation to a large extent.

This suggestion if implemented could aid in the passing of judicious orders without revenue bias thereby reducing needless litigation arising from high pitched demands/ rejection of refunds.

6.2.5 Ironing out other operational issues at the field level on account of transfers etc

Sometimes the delay in adjudication as well as audits is caused due to the frequent re-allocation / transfer of the adjudicating officer. There are many instances where the entire audit process as well as adjudication process is repeated on account of transfer of the officer handling the case during the final stages of completion of the audit / adjudication. This creates unwarranted lapses and delays in the timely completion of the adjudication as well as audit process (which typically culminates into an adjudication process).

Our recommendations

- The following approach could be mandated in the wake of reassignment or transfer of officers handling audits / adjudication proceedings.
  - All reassignments / transfers should be disclosed at least 3 months in advance thereby enabling the relevant officer to finalize pending matters in final stages (being cases where personal hearing has been held and orders are to be passed); and

— Alternatively, the officer may be relieved of his normal duties by the new incumbent but the officer be legally empowered to continue at the station for two months or lesser period to complete the adjudications where personal hearing has been concluded.

- Guidelines must be issued to ensure proper handover of files / briefing of the basis of SCN in case of re-location of officers to avoid duplication of efforts. For instance, in case any information is pending at the taxpayer's end, details of information / explanation already provided by the taxpayer, findings of the officer, pending information and the purposes for such information should be provided by the adjudicating officer and documented in the relevant adjudication file before re-allocation.

This will help in reducing the time spent in adjudication of matters and further result in a proper and comprehensive disposal of matters at the ground level.

6.2.6 Disposal of appeals at the Appellate level

Currently, in many cases, disposal of appeals filed before the Appellate authorities i.e. Commissioner (Appeals) and CESTAT take significant time with regard to their resolution. The laws often prescribe an advisory time limit to decide an appeal, that as far as possible, the appeals should be disposed of within six months from the date of filing at the Commissioner (Appeal) level and within three years from the date of filing at the CESTAT level. However, for a variety of reasons, this time limit is unable to be followed by the appellate authorities, largely also due to the sheer volume and workload and inadequacy of the number of forums available for appeal disposal.

Our recommendations

In view of achieving the objective of timely disposal of appeals, we recommend the following:

- If the current *advisory* time limits are considered to be short, a reasonable increased time limit may be set for *mandatory* disposal of appeals and such timelines should be strictly adhered to.
- To address issues arising out of increase in workload for various commissioners, the administrative support should be enhanced.
- Further, the number of Commissioner (Appeals) in each jurisdiction and Commissioners representing the Revenue before the CESTAT should be increased to ensure that each official is allocated with a manageable number of cases.
- Further the number of benches at the CESTAT could be increased with benches being stationed in cities like Hyderabad, Lucknow, Ranchi, etc. With decentralization, pendency at existing Benches as well as cost of litigation can be expected to diminish.

These recommendations are aimed at enhancing the speed of disposal of cases and thereby reducing pendency at the appellate level.

6.3 Resolution of Ongoing Disputes

6.3.1 Panel for settlement of pending cases

While the above discussed measures suggest dispute resolution going forward, the need of this hour is to settle the huge pendency of indirect tax cases at various tax forums. There is a need for an Alternate Dispute Resolution Panel for settlement of the current pending litigation matters. The processes to be adopted by the Panel may include negotiation or mediation between the taxpayer and the Department based on a neutral evaluation process. The panel may take following steps to resolve pending matters:

- Provide opportunity to the participants (i.e. taxpayers and department) to present the facts and their analysis of the law and applicability thereof and enable the participants to reach an outcome that better meets their needs.

  The Panel may facilitate mediation with the objective of the underlying needs and interest of the taxpayer and the department without getting into the legal rights or obligations. In this case, the panel may act as a mediator for an "out of court settlement".

- In certain cases, the Panel may also evaluate the matter technically where the objective is to reach a settlement based on the parties' legal rights and obligations.

- After the discussions and evaluation, the Panel may offer an agreement that is more likely to be complied with and which may more likely finally resolve the dispute.

- The above measure to resolve the dispute would be a cost and time effective and a less laborious option for resolution of the pending disputes. At the same time, it shall not have the negative perceptions associated with a Settlement Commission.

The basic objective of setting up of the Settlement Commission was to give an opportunity to taxpayers to come clean (i.e. taxpayers who may have evaded payments of duty) and therefore, approaching the Settlement Commission carries with it a perception of negativity. This suggested option shall provide an alternate forum for taxpayers who have a strong case on merits but do not want to proceed with long drawn litigation and hence show their willingness to resolve the matter by settlement with the Department. Further, unlike under Settlement Commission, the proposed Panel shall offer the possibility of pending litigations / appeals being settled at mutually acceptable specified percentages of the tax being paid depending upon the merits of the taxpayer's case thereby bringing to an early termination, existing litigations.

6.3.2 Alternate Dispute Resolution Scheme

In 2008, under service, tax the Government introduced a Dispute Resolution Scheme for a short duration of 3 months for the small taxpayers, where the tax outstanding was less than Rs 25,000. The scheme provided for payment of 50 percent of the tax involved, 25 percent of interest and penalty etc. No appellate authority could proceed against the issues which were disposed of under the above scheme. This was an effective scheme for quick disposal of low value cases to offer respite to the taxpayer, department and importantly save on the litigation time and costs.

In the current Budget 2013, another Voluntary Compliance Encouragement Scheme is proposed to be introduced under service tax laws, wherein the taxpayer is allowed to disclose its undisclosed / unidentified pending issues from October 1, 2007 to December 31, 2012 and deposit the same in two installments and the taxpayer would in turn get (i) waiver of interest and penalty; and (ii) immunity from prosecution. However, the benefit of this scheme would not be available if an investigation, adjudication has already been initiated by the Department on the taxpayer. Further, this shall not be available to a case which is already covered by a notice/ order.

While the above scheme is welcomed and would allow taxpayers to discharge their pending dues, the scheme may not facilitate resolution of all pending disputes. The current tax environment has all the justifications for the introduction of a similar scheme in respect of all pending disputes and litigation matters.

Our recommendations

- A one-time Dispute Resolution Scheme for all the indirect tax matters should be announced and implemented, wherein the pending dispute involves tax limit of Rs 50 lakh or Rs 1 crore. The scheme should cover cases where the matters are pending adjudication with the Authorities
- A taxpayer should be required to file a declaration with the adjudicating authority, to show his willingness to go for the dispute resolution mechanism and the matter should be settled between the taxpayer and authorities within the specified time period
- The revised scheme should not only cover cases where the taxpayer is at default but should also cover cases where the taxpayer has strong case on merit but does not want to proceed the long drawn litigations and hence shows his willingness to resolve the matter by settlement with the Department
- No appellate authority should be allowed to proceed against the matters which are disposed of under this scheme.

The scheme can be expected to not only receive a good response from the taxpayers but would also facilitate Government to realize the tax revenues locked in litigation.

7. ACKNOWLEDGEMENTS

FICCI would like to acknowledge the contribution made by Mr Sanjiv Chaudhary, Partner, KPMG and his team for preparing the draft of the document on Direct Taxes. Likewise, acknowledgements are due to Mr Rajeev Dimri, Partner, BMR Advisors and his team for the initial draft of the document on Indirect Taxes. The drafts were discussed in a special meeting of the FICCI's Taxation Committee. FICCI would like to acknowledge the contribution made by the following members of the Taxation Committee and the special invitees who participated in the discussions:-

Mr Rajeev Dimri, Partner, BMR Advisors and Co-Chairman, FICCI's Taxation Committee

Mr Sanjiv Chaudhary, Partner, BSR & Company

Mr Ganesh Raj, Partner, Ernst & Young Private Limited

Mr S C Agarwal, Partner, BMR Advisors

Mr Bimal Jain, Managing Partner, A2Z Taxcorp LLP

Mr Sachin, Jindal Stainless Limited

Ms Vanita Bansal, Head - India Tax, Cargill India Pvt. Ltd.

Mr S Madhavan, Ex. Senior Partner, PricewaterhouseCoopers

Mr T R Rustagi, Chief Commissioner of Customs and Central Excise (Retd.)

Mr B K Singh, Chief Commissioner of Customs and Central Excise (Retd.)

Mr Pratik Jain, Partner, KPMG

Mr V Lakshmikumaran, M/s Lakshmi Kumaran & Sridharan

Mr Vivek Mishra, Partner, PwC

Ms Anshul Agrawal, Associate Director, BMR Advisors

FICCI would also like to thank Mr Mukesh Butani, Partner, BMR Advisors for his written comments on the draft document. Contribution made by Ms Jayashree Parthasarathy, Director, BMR Advisors in providing supplementary suggestions also deserve a mention.

FICCI would also like to place on record its appreciation for the contribution made by Mr Dinesh Kanabar, Deputy CEO, KPMG and Chairman of the FICCI's Taxation Committee, under whose overall guidance and supervision the document was prepared.



Federation of Indian Chambers of Commerce and Industry

Federation House, Tansen Marg, New Delhi - 110 001

Phone : 91-11-23738760-70 (Extn. 296)

Fax : 91-11-23721504 / 23320714

Email : ficci@ficci.com

Website : http://www.ficci.com