ICRIER: Release of book ‘Challenges of Indian Tax Administration’

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SESSION DETAILS

SUBJECT: ‘Tax Dispute Resolution in India – Challenges and Opportunities’

CHAIRPERSON AND SPEAKER: Mukesh Butani

PANELISTS:
• Bela Mao, Tax Head, Shell India
• Rekha Shukla, CIT (Int. Taxation), CBDT
• Sachit Jolly, Advocate
CONTENTS

I. TAX LITIGATION – TRENDS & TRIGGERS
II. BEST PRACTICES AND SOME LEARNINGS
III. ALTERNATE DISPUTE RESOLUTION
   - EXISTING FRAMEWORK
   - EMERGING LANDSCAPE
TAX LITIGATION – TRENDS & TRIGGERS
• Estimated ~ INR 8,000 Bn of tax revenue locked up in litigation before Courts /Appellate authorities

Snapshot of cases pending at various levels

<table>
<thead>
<tr>
<th>Direct tax</th>
<th>Cases pending on March 2015*</th>
<th>Amount involved* (INR Mn)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commissioner (A)</td>
<td>232,000</td>
<td>3,837,970</td>
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<tr>
<td>ITAT</td>
<td>37,506</td>
<td>1,455,347</td>
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<tr>
<td>HC</td>
<td>34,281</td>
<td>376,840</td>
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<tr>
<td>SC</td>
<td>5,661</td>
<td>46,545</td>
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</table>

<table>
<thead>
<tr>
<th>Indirect tax</th>
<th>Cases pending on December 2015**</th>
<th>Amount involved** (INR Mn)</th>
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<tbody>
<tr>
<td>Commissioner (A)</td>
<td>41,224</td>
<td>100,927</td>
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<tr>
<td>CESTAT</td>
<td>77,501</td>
<td>1,613,522</td>
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<tr>
<td>HC</td>
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<td>287,034</td>
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<td>SC</td>
<td>3,007</td>
<td>122,005</td>
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</tbody>
</table>

*Source: Department of Revenue, Report No. 3 of 2016
** Source: Ministry of Finance, Department of Revenue, Annual Report 2015-16
• India host to ~ 70 percent of TP disputes globally

• FY 2014-15 TP audit stats
  • Audits completed – 4,290
  • Audits with adjustments – 2,353 (55 percent!)
  • Quantum of adjustments – INR 464.66 Bn
• Lack of stakeholder engagement
• Retrospective amendments – *practice fading away!*
• Inadequate subordinate legislation
• Non-mandatory timelines

• Target driven assessments
• Fixing accountability
• Differences in central and state level authorities
• Quality of assessment
• Invoking extended period of limitation

• Inefficient refund mechanism
• Frequent transfer of tax officials
• Failure of LTU
## Traditional Forums for Tax Dispute Resolution – Challenges

### Commissioner (Appeals)
- Frequent transfers
- Inadequate infrastructure
- Delay in disposal

### SC and HC
- Ineffective performance of lower authorities
- Lack of permanent /dedicated tax bench/es
- Vacancies

### ITAT /CESTAT
- Over burdened – inadequate benches
- Absence of mandatory time limits
- Shortage of specialised benches
- Conflicting rulings
- Frequent rotation of bench members
- Increasing tendency to ‘set aside’ matters

**KEY CHALLENGES**
BEST PRACTICES AND SOME LEARNINGS
INTERNATIONAL BEST PRACTICES

**Canada**
- Publishing Interpretative Bulletins
- Majority disputes resolved at audit stage
- Appeals branch - independent function of CRA

**US**
- Publish treasury regulations
- Official tax guidance
- Issue private letter ruling

**UK**
- Technical guidance issued along with draft legislation
- Tax issues of large businesses resolved by negotiation/agreement
- ‘Collaborative Dispute Resolution’ approach

**Australia**
- Publish Interpretative Decisions
- Independent review of audit position
- Right to object ATO’s decision
LEARNINGS FOR INDIA

Efficient Dispute Resolution

- Engage stakeholders in law making
- Encourage enhanced relationships
- Empower ombudsman
- Delink revenue collection from assessment
- Induction training
- Develop pre-dispute consultation mechanism
- Issue interpretation statements / SoPs
- Enhance IT’s role
REFORMS FOR TRADITIONAL FORUMS

Commissioner (Appeals)
- Strengthen functional independence
- Replace by collegium of three commissioners
- Right to further appeal - exceptional situations
- Strengthen cadre
- Beef up administrative support
- Introduce mandatory time limit

ITAT /CESTAT
- Sufficient budgetary allocations needed
- Develop e-Tribunal
- Automatic constitution of special bench
- Lay out formal process for examining expert witness

SC and HC
- Permanent tax bench in SC
- Club matters on common issues
- Direct appeal to SC on complex issues
- Efficient deployment of judicial resources
- ‘Judicial impact assessment’
ALTERNATE DISPUTE RESOLUTION
EXISTING FRAMEWORK FOR TAX DISPUTES
ADR FRAMEWORK

ADR FORUMS

- AUTHORITY FOR ADVANCE RULINGS
- ADVANCE PRICING AGREEMENTS
- MUTUAL AGREEMENT PROCEDURE

- DISPUTE RESOLUTION FORUMS
- SETTLEMENT COMMISSION
AAR – CHALLENGES & RECOMMENDATIONS

Key challenges

- Limited precedence value
- Slow disposal of cases
- Vacancies
- Scope of taxpayers covered is restricted

Key recommendations

- House in Ministry of Law
- Widen reach
- Facilitate ‘product ruling’
- Constitute AAR in other metros
- Direct appeal to SC
DRP – CHALLENGES & RECOMMENDATIONS

Key challenges
- Lack of well-reasoned orders
- Absence of independent experts
- Limited access and restricted powers
- Rarely affirms taxpayers position

Key recommendations
- Expand reach and powers of DRP
- Induct at least one technical member to bench
- Widen reach to all resident taxpayers
- Make DRP proceedings amenable to conciliation
APA – CHALLENGES & RECOMMENDATIONS

Key challenges

- ‘Confidentiality’ concerns
- Maturing regime
- Tepid progress with conclusion of APAs

Key recommendations

- Address ‘confidentiality’ concerns
- View on treaties where Article 9(2) absent - reconsider
- Expedite process

Article 9(2) absent – Bilateral APAs?
**ITSC – CHALLENGES & RECOMMENDATIONS**

**Key challenges**

- Interpretation conflicts – ‘true and full disclosure’
- Non-accessibility of forum if case has reached appellate forum
- Limited bench; delay in disposal
- Trust deficit

**Key recommendations**

- Widen reach to include dispute under appeals
- Consider ‘true and full disclosure’ met where material facts disclosed
- Allow frequent access to taxpayer
- Revenue to desist from challenging orders
MAP – CHALLENGES & RECOMMENDATIONS

Key challenges

- Bureaucratic overhang hampers negotiation
- Determining date of first action to invoke MAP
- Automatic suspension of demand largely missing
- Absence of defined timelines
- Taxpayer involvement

Key recommendations

- BEPS AP 14 – Best practices to strengthen MAP forum
- MAP outcome to carry precedential value for other years
- Incentivize MAP route vis-à-vis domestic law remedies
- Mandatory timelines
- Consider mandatory MAP arbitration in tax treaties
ADR – EMERGING LANDSCAPE
Implement of Article 25 in good faith
– *resolve in 24 months!*

- Eligible taxpayers’ access to MAP to be ensured
- Automatic suspension of tax demand
- Building adequate infrastructure
- Countries to agree for peer review
- Enhanced CA relationships
- Publish guidelines/procedures

BEPS AP 14 – EFFECTIVE DISPUTE RESOLUTION
• Enhanced emphasis on ‘taxpayer focused’ administration

• Efficacy of traditional appellate forums in dealing with complex cross-border tax dispute?

• Consultative approach at the core of dispute resolution globally

• Independence of the forum has emerged as key ingredient of efficient dispute resolution framework

• Need of hour – more sophisticated ADR forums, eg Arbitration /conciliation /negotiation, etc

• Entertain tax disputes under BIT framework?
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