

Indirect Tax Dispute Resolution Scheme, 2016



"I'm the parliamentary draftsman, I compose the country's laws; And of half the litigation, I'm undoubtedly the cause" – Anonymous. Tax disputes highlight our collective failings and if one half of the litigation belongs to the draftsman then the other half must lie at the doorstep of the Subject. To trump these failings, the law provides a salutary recourse—appeal. But the nature of tax disputes speaks volumes as to whose failings are greater. Indirect Tax Dispute Resolution Scheme, 2016 proposed in the Budget of 2016 is now here to address these pending disputes from June 1, 2016 to all 'declarants' and this window remains open till December 31, 2016. The extent to which disputes will stand 'resolved' remains to be seen. After a brief statement about the framework of this Scheme, this article seeks to identify considerations of concern within this Scheme and the justice to society by the framing of such schemes. Read on...

Dispute Resolution Scheme contained in the Sections 212 to 218 of Finance Act, 2016 seeks to resolve 'indirect tax disputes' where the assessee is aggrieved by order of adjudication and has approached the Commissioner (Appeals) by offering rebate on penalty and immunity from prosecution. If the dispute is pending in appeal before the Tribunal then such dispute, having received the due consideration of the Principal Commissioner/Commissioner as the adjudicating authority or the Commissioner (Appeals) as the appellate authority, appears to enjoy the confidence

of the Central Government that the extent of relief offered by the Scheme may be excessive. That the Union is a compulsive litigator is an image that this Government appears to have accepted and taking decisive steps to reconcile disputes. In making an efficient business environment requires minimisation of disputes and most certainly the elimination of unproductive ones.

Framework

Disputes Covered

- Disputes may involve tax dues or violation of law where an order of adjudication is passed by officer lower in rank than Principal Commissioner or Commissioner.
- Appeals filed against such order under Customs Act, 1962, Central Excise Act, 1944 and Chapter-V of Finance Act, 1994 (s.213(1)(a)).
- Appeal is pending before Commissioner (Appeals) as on March 31, 2016 (s.213(1)(g)).

**CA. Jatin Christopher**

(The author is a member of the Institute who may be contacted at jatin.christopher@gmail.com)

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Disputes Excluded (s.215)

- Scheme excludes appeal if impugned order:
 - involves search or seizure proceedings.
 - prosecution launched (by June 1, 2016).
 - involves narcotics or prohibited articles.
 - involves offence under IPC or NDPS Act or Prevention of Corruption Act.
 - any detention order is passed under COFEPOSA.

Eligible Declarants

- Any person in a dispute under these Acts.
- Dispute for tax dues or for violation of law.
- Order of adjudication passed.
- Appeal filed before Commissioner (Appeals).

Ineligible Declarants

- Appeal not filed before March 31, 2016.
- Prosecution initiated before June 1, 2016.

Payment Required – $T+I+\frac{1}{4}P$

- Tax disputed – entire 100%.
- Interest disputed – entire 100%*.
- Penalty disputed – only 25%.

* Interest continues until payment of tax under the Scheme

Timelines

- Appeals pending as on March 31, 2016.
- Declaration filed by December 31, 2016.
- Acknowledge declaration – no time stated.
- Pay within 15 days of acknowledgement.
- Inform within 7 days of payment.
- Order-of-discharge within 15 days.

Process (s.214)

- Step 1 – File declaration.
- Step 2 – Collect acknowledgement.
- Step 3 – Pay “ $T+I+\frac{1}{4}P$ ”.
- Step 4 – Collect order-of-discharge.

Relief Granted (s.216)

- Permanent closure of the specific cases of indirect tax disputes covered by the order-of-discharge issued under s. 214(4).
- Bar on any further proceedings under the

Act (three specified Acts) in respect of the disputes covered including imminent threat of prosecution.

Relief to Declarant

- Non-binding closure of case on merits.
- 75 per cent concession in penalty imposed.

'To be' Prescribed

The 'form' as well as the 'manner' in which the following steps are to be taken will be prescribed:

- Declaration by declarant.
- Acknowledgement by designated authority.
- Order-of-discharge by designated authority.

Special Notes

This Scheme is expected to provide much needed relief to the large pendency of cases before the Commissioner (Appeals). However, there are yet various legal considerations both in respect of the Scheme itself that begs attention.

Tax under 'the' Act

Scheme applies to tax levied under the (three specified) Acts and pending in appeal before Commissioner (Appeals). So, tax (or duty) levied under these Acts is not the same as appeal filed under them. Taxes/duties imposed under other legislations (like Customs Tariff Act) that borrow appellate provisions from Customs Act* or Central Excise Act appear to be excluded from the scope of the Scheme.

In such instances, while the appeal may be under the 'Act', but it is not a 'tax' levied under the 'Act'. Therefore, Scheme applies only to disputes in respect of tax levied under the Act and pending in appeal before the Commissioner (Appeals). Appeals filed under Customs Act or Central Excise Act in respect of taxes levied under other legislations is somehow left outside the purview of this Scheme.

* Section 3(8), 8B(4A) or 9(7A) of Customs Tariff Act

Disputes involving independent appellate provisions such as those under section 9C of Customs Tariff Act are anyway also outside the purview of the Scheme.

Ranking of 'indirect tax dispute' or 'tax'

Often, indirect tax disputes in respect of a certain transaction may involve demands not only of taxes levied under the three Acts but also those levied under the other legislations (like Customs Tariff

Taxation

Act or additional duties of excise or cess levied under various legislations). And the appeal (that is pending) cannot be partly resolved by the Scheme but continue with regard to rest of the taxes. Such an undesirable and subverting consequence that defeats the purpose of this entire exercise can be resolved by:

- Amending the definition of 'tax' in section 213(1) (i) to include all other indirect taxes pending in appeal or
- Deriving support from the words 'unless the context otherwise requires', the definition of 'indirect tax dispute' (s. 213(1)(g)) may be supplied a meaning of a higher rank to include all disputes under these Act

Dispute pending 'as an' Appeal

Interesting description finds place in the definition of 'indirect tax dispute' (s.213(1)(g)). An appeal may have been filed but is liable to be dismissed for delay or non-payment of pre-deposit amount. Such appeals also appear to meet the requirements of indirect tax dispute. However, on examination of (say) section 35F of Central Excise Act, it becomes clear that the authority 'shall not entertain' the appeal unless these precedent conditions complied with. Hence, in order for the case to come within the Scheme, it must have been properly filed and admissible to be pending 'as an' appeal before the Commissioner (Appeals).

What happens to the Appeal?

Appeal filed continues but it may be prudent for declarant-appellant to notify Commissioner (Appeals) that declaration has been filed.

Appeal remains pending until issuance of order-of-discharge. If there is default in payment, as per acknowledgement, the appeal continues 'as if' no declaration was filed under the Scheme.

Order-of-discharge (s.214(4)) is not discharge of appeal but discharge of dues pending under the Scheme.

Passing of order-of-discharge does not render Commissioner (Appeal) functus officio. He would

dispose the appeal on-'no order on merits' basis—in view of order-of-discharge of dues passed by designated authority.

Point of 'no return'

Once the 'acknowledgement' under section 214(2) is issued, the tax administration is barred from denying the relief under the Scheme to the declarant because there is no further examination or inquiry that is authorised if payment by declarant follows.

Once payment under the Scheme is made, the declarant is barred from seeking relief except that available under the Scheme because occasion to consider the acceptability of extent of relief (and immunity) has passed after having filed the declaration.

Prosecution Bars Scheme

While there is no limitation for initiation of prosecution*, the Scheme is barred if prosecution has been launched under these Acts. Prosecution requires final determination about violation after exhausting last appellate remedy. It is interesting that the Scheme which is applicable to disputes pending at the first appellate level is barred where prosecution is prematurely launched. Premature prosecution is generally resorted to when there is risk of evading or absconding by offender.

*Schedule to Economic Offences (Inapplicability of Limitation) Act, 1974

Binding timelines

Certain key steps in the Scheme are attached with timelines which are of binding nature, namely:

- Appeal pending as on March 31, 2016.
- Declaration filed by December 31, 2016.
- 15 days to pay after acknowledgement – if made a 'condition' for validity.

Non-binding timelines

If there were any default in the following timelines, the process involved would not be disturbed even though remedy for bona fide lapse is not prescribed:

- 7 days to inform payment— when payment has been made within the time permitted (15 days), any delay in intimating the fact about such payment is only ancillary.
- 15 days to pass order-of-discharge— except for verification of the fact of payment and to the correct extent, no other examination or inquiry is required to be undertaken and any delay in

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Inequality is not only when equals are treated unequally but even when unequals are treated equally. To permit those found to be in tax default without a heavy incidence of penalty is injustice to the rest of the law abiding citizenry. Justice towards society at large demands imposition of penalty on defaulters.

issuance of this order does not occasion any additional liability to declarant.

Interest upto 'when'?

Interest is very often not quantified in the impugned order in view of the continuing nature of the default even during pendency of appeal. Under the Scheme, full extent of interest is to be paid. Therefore, interest involved in the 'indirect tax dispute' must be paid upto the date of payment against the acknowledgement issued.

There is no provision authorising the stoppage of interest payment up to any earlier date such as date of appeal or date of declaration under the Scheme.

Payment

If making payment is made a 'condition' of acknowledgement then:

- Delay in payment may annul acknowledgement received if issued with 'valid only if paid by' condition. No remedy for bona fide delay provided in the Scheme.
- Short payment against acknowledgement may also have effect of annulment if payment is made a 'condition precedent'.
- Non-payment may operate 'as if' no declaration had been filed.

If making payment is NOT made a 'condition' of acknowledgement then:

- Delay or shortfall in payment would not be fatal to the declaration and consequent benefit of the Scheme. Since no remedy for bona fide delay is provided in the Scheme, the continuation of interest liability itself may be adequate compensation.
- Non-payment may operate 'as if' no declaration had been filed and the appeal pending before Commissioner (Appeals) continues undisturbed.

Rules to be 'laid' before Parliament

Laying down of rules is a salutary measure of exercise of superintendence by Parliament over

authority delegated to the Executive (s. 24 General Clauses Act). The degree of superintendence here is of a 'lower' grade because no affirmative action is required after its 'laying down' (required for 30 days). Only modification or deletion, if any, agreed by both Houses will be given effect to and that too only prospectively.

'Jus in rem'

Inequality is not only when equals are treated unequally but even when unequals are treated equally. To permit those found to be in tax default without a heavy incidence of penalty is injustice to the rest of the law abiding citizenry. Justice towards society at large demands imposition of penalty on defaulters. And introduction of such Schemes fail in this duty towards tax paying citizens. Those who may have missed qualifying for the Scheme due to the binding timelines prescribed may also feel wronged. But the justification for this is a matter of policy and wisdom of legislature.

Now, the extent of burden—of penalty and prosecution—that a defaulter has escaped presents the extent to which the Central Government is really interested in enforcement of the law on all defaulters. This has significant value and can be pressed for by those who miss the opportunity of this Scheme.

Cross purpose with Settlement Commission

Relief available under this Scheme appears to be at cross purposes with the relief available from Settlement Commission. However, the fixed rate of penalty at 25 per cent ensures there is no discretion available to the designated authority unlike the Commission which can allow more equitable relief.

Conclusion

Disputes are the outcome of two opposing and unreconciled views. Appeal is the general recourse. Balancing the scales of justice often leads to pile up of cases. Tackling pendency very early in the path of litigation has long term benefits. Rigid language used in drafting provisions on penalty that enjoys favour of the highest Court to eschew use of discretion in its imposition can itself compel litigation in the hope of appellate relief.

Indirect Tax Dispute Resolution Scheme, 2016 is an olive branch that the Central Government is extending to make peace and discharge disputes that are neither productive nor purposive in making India the destination of choice. The enthusiasm anticipated from industry will only be known in early 2017. ■