

GST fermenting grounds for litigation?

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1. Prologue

India is celebrating the first anniversary of biggest tax reform after Independence i.e. Implementation of GST Act. GST was introduced in India with the main objective of One Tax One Nation, Simplified Tax Structure, lower legal compliances and reduction in litigations, transparency in tax structure and so on. However, the same was introduced by the Government in a haphazard manner, which resulted into the various glitches in its implementation. The so called Gabbar Singh Tax or Good and Simple Tax has found its presence in the life of an ordinary hawker and peddler to a 1000 crores business tycoon. It was expected that in the initial years there would be teething problems as the law will take years to settle or fully implemented. No doubt that the government has shown firm commitment to address various issues and is has been proactive in taking the corrective measures for its healthier implementation. For the better transparency and interpretation government has issued various circulars, notifications, public notices, FAQs etc. and amended the rules several times. Even after the various amendments still GST is yet to attain its ideal form. GST is suffering from various imperfections like multiple tax slabs, complex tax structure, complexity in tax returns and refund of taxes, complex rules and procedures and so on. All these have resulted in the various troubles to the tax payers and Indian economy suffered a great setback.

2. Taxes and Litigations – A never ending story:

According to the economic survey 2018, more than two lakh tax cases, including direct and indirect taxes were pending at various appellate legal forums at all levels of judiciary

across the country which amounting to nearly 4.7% of the total Indian GDP. This has not only pointed out the quantum of the dispute but has also pointed out the complexities involved in the Indian tax structure. The main reason for the increase in the more litigation is a slow decision by the appellate authorities, which not only increase the volume but quantum also. Delay in decisions leads to issue of tax notices by the tax officers and leave the final decision in the courts mainly when the demand is of recurring nature for all subsequent years till the litigation attains finality or is settled.

The economic survey also pointed out that nearly 65% of the cases were lost by the department and the success ratio of the department is continuously decreasing, which clearly indicate that the officers are not taking the decisions which is contradictory to the department, which creates unnecessary burden on the tax payers, which leads to wastage of time and money. No doubt that, the way in which the GST law is implemented, and developments are going on, it will aggravate the problem of litigation in the coming days.

3. GST fermenting grounds for litigation?

Despite efforts of the government and commitments in the last one year, GST law has witnessed many litigations and disputes from its implementation stage to the introduction of e-way bill system. Problems related to transition issues, non-filing of returns, refunds of taxes, export and import duties and complexities, penalties, e-way bill structures, Advance Rulings and related to many more areas are still under litigations and creating a scope for future dispute and litigations. A few areas where the maximum litigations were filled are transitional input credit of various cheeses imposed prior to the introduction of GST, anti-profiteering, transitional credit, e-way bills etc.

No doubt that the government has put in best efforts to clarify the issues to avoid litigations in the future, but no doubt that clarifications through informal channels like tweets, e-fillers, FAQs, press release etc. are not legally binding on either side i.e. Neither to tax authorities (government) nor to the tax payers. In many cases clarifications issued by the government or tax authorities were not in accordance with the legal provisions and contradictory to law. In various cases, Courts have even not accepted the Budget Speech of the Finance Minister as binding, since the same was not introduced or worded in the final Act which was passed by the parliament. Therefore, in the days to come, the scope of legal disputes and litigations are going to increase as the law will be implanted to its full swing, including audit, periodical and annual returns, full-fledged procedural compliances etc. One such fermenting ground for litigations is the Authority for Advance Ruling (AAR), although the main motto behind this is to reduce litigations but it has often

turned out to be on the contrary. In this article we have tried to enumerate the basic procedure for advance rulings under the GST, Challenge and reforms required to reduce the litigations around GST.

4. Rules for Advance Ruling, Appeal and Revisions

The concept of the advance rulings is not new under the Goods and Services Tax (GST) law. Advance rulings are aimed to bring clarity in determining the tax liability well in advance for the assessee and plan his transactions accordingly. Further, it aids in avoiding litigations later, which can be costly and time consuming. The main objectives of setting authority for advance ruling are;

- Provide a certainty in assessing the tax liability in advance, in relation to an activity proposed to be undertaken by the applicant;
- Reduce litigation;
- Pronounce ruling expeditiously in a transparent and economical manner;
- Attract FDI

Advance ruling means a decision provided by the Authority or the Appellate Authority to an applicant on matters or for questions specified in his application, in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant. The Provisions relating to Advance ruling are contained in Chapter XVII, Section 95 to 106 of the CGST Act.

Section 95 of the CGST Act defines applicant any person registered or desirous of obtaining registration under this Act, which applies that any person who has obtained registration or is desirous of the taking registration may can apply for Advance ruling.

► Matters on which Advance Ruling can be sought:

- Classification of any goods or services or both;
- Applicability of a notification issued under the provisions of this Act;
- Determination of time and value of supply of goods or services or both;
- Admissibility of input tax credit of tax paid or deemed to have been paid;
- Determination of the liability to pay tax on any goods or services or both;
- Whether applicant is required to be registered;
- Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term.

It is pertinent to note here that, the questions regarding the determination of the place of supply cannot be raised with the AAR or Appellate Authority for Advance Ruling (AAAR) as confirmed in one of the recent Advance ruling order discussed later in this article.

► **Applicability and Scope of AAR:**

Section 96 provides that, the AAR and AAAR shall be constituted under the respective State Goods and Service Tax Act. This signifies that the ruling given by the AAR and AAAR will be applicable only within the jurisdiction of the concerned state or union territory. Since the Advance ruling authorities are State Specific, the questions on determination of the place of supply cannot be raised with the AAR or AAAR.

Section 103 envisages that order of advance ruling shall be binding only on the applicant who had sought it and the concerned officer or the jurisdictional officer in respect of the applicant.

► **Procedure for obtaining Advance Ruling, Appeal & Revision:**

➤ **Advance Ruling**

Any applicant may apply for an advance ruling electronically in form GST ARA - 01, stating the question on which advance ruling is sought along with the relevant documents as may be required. Application should be accompanied by a fee of Rs 5000/-.

Authority on receipt of an application shall send a copy of it to the concerned jurisdictional officer of the applicant and call for all relevant records. Thereafter the authority may verify the application along with the records and pass an order either admitting or rejecting the application.

The application shall not be admitted if the question raised is already pending or decided in any proceedings in the case of an applicant under any of the provisions of CGST Act. The application may be rejected only after an giving an opportunity of being heard to the applicant and by way of a speaking order giving along with the reasons for rejection. Once the application is admitted, the AAR shall pronounce ruling within 90 days of receipt of application.

If there is a difference of opinion between the two members of AAR, they shall refer the point or points on which they differ to the AAAR for hearing the issue. It shall be deemed that no advance ruling can be given in respect of the question, if the

members of AAAR are also unable to come to a common conclusion in regard to the point(s) referred to them by AAR.

➤ **Appeal against Advance Rulings:**

An aggrieved applicant or the concerned jurisdictional officer may file an appeal against the advance ruling pronounced to AAAR within 30 days from the date on which the ruling sought to be appealed is communicated. The time period can be extended further by 30 days. The aggrieved applicant shall file an appeal in GST ARA-02 along with a fee of Rs. 10,000/.

Where the appeal is preferred by the concerned jurisdictional officer the same shall be filed in in Form GST ARA-03 and no fee shall be payable.

The AAAR shall pass the order within 90 days from date of filing of Appeal.

➤ **Revision of Advance Rulings:**

The authority or the Appellate Authority may amend any order passed by it, so as to rectify any error apparent on the face of the record, on its own accord, or is brought to its notice by the concerned jurisdictional officer or the applicant or the appellant within a period of 6 months from the date of the order.

However, without giving an opportunity of being heard, no rectification that has the effect of enhancing the tax liability or reducing the amount of admissible input tax credit shall be made.

Where the AAR or AAAR finds that advance ruling pronounced has been obtained by the applicant or the appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab-initio, and all the provisions of this CGST Act or the rules shall apply to the applicant or the appellant as if such advance ruling had never been made

It is important to note that, the assesee cannot file an appeal against the AAR or AAAR order in High Court and Supreme Court.

5. Challenges and Reforms:

AAR has been set up in all the states and as much as 111 advance rulings were issued till 5th August 2018, reported in TIOL. Many of them involve some important issues, including the ones like recovery from the employee for canteen services, outdoor

catering service provided to factory owner, supply of goods with brand name or otherwise, supplies being composite or mixed, etc. Given the budding stage of GST law, the questions brought before AAR and the rulings, provide some insight into divergent practices, the perspective of the department and interpretation of various provisions of the youngest tax law. Moreover, it is evident through the recent order of Advance rulings that there are various challenges before the government and require various reforms to achieve the desired result of the AAR mechanism.

► **Contradictory ruling of two states one similar issue:**

In the recent ruling given by the State specific AAR, it is witnessed that the two States have given the contradictory ruling on the similar issues, which creates confusions between the tax payers especially when the taxpayer operates across different States.

In the case of *Giriraj Renewables Pvt Ltd, (2018-TIOL-12-AAR-GST)* the Karnataka AAR held that a contract for construction of a solar power plant is not a composite supply and hence photovoltaic modules should be taxable at 5% and other items at their respective GST rates, whereas Maharashtra AAR in the case of *Fermi Solar Farms Pvt Ltd (2018-TIOL-17-AAR-GST)* held it to be a works contract of immovable property and taxable at 18%.

In another case of *Sino Resources (2018-TIOL-76-AAR-GST)*, Andhra Pradesh AAR has not accepted the application on the transitioning clean energy cess stating that the issue is not covered in the scope of AAR. Whereas the Maharashtra AAR in the case of *Kansai Nerolac Paints Ltd (2018-TIOL-09-AAR-GST)* has held that Krishi Kalyan Cess credit cannot be transitioned.

The list of such issues where different AAR has framed the different views goes on and creates confusions in the mind of tax payers and snags in tax compliances.

Suggested Reforms: National Advance Ruling Authority, which would be a centralized Authority similar to erstwhile tax regime to be constituted.

Section 103 of CGST Act may be amended to provide that, the Advance Ruling pronounced in one State should be binding on other States as well.

► **An appellate mechanism for filing appeals against AAR rulings**

An appellate mechanism for filing appeals against AAR rulings is not yet in place. As there is still no mechanism for filing appeal against AAR, the tax payers have no other option to follow the same because none following the advance ruling will lead to intentional tax evasion, which may lead to heavy penalty.

Suggested Reforms: The provisions contained in Section 100 of the CGST Act to be implemented at the earliest and National Appellate Advance Ruling Authority to be constituted.

► **Multiple authorities for AAR (State wise)**

There is a separate AAR in each State as there is a separate GST Act and rules for each State. An assessee cannot squarely apply the advance ruling obtained in one State to his business practice in another State as it is not binding on the other state. This will lead to the delicacy of the work as even the matter is covered by some other state still one has to file the application on the similar issue. Such decisions among AARs of different States opens a Pandora's box for businesses with multi-State presence on what final tax position to take.

Suggested Reforms: National Advance Ruling Authority, which would be a centralized Authority similar to erstwhile tax regime to be constituted.

Section 103 of CGST Act may be amended to provide that, the Advance Ruling pronounced in one State should be binding on other States as well.

► **Ambiguity in Law:**

The very purpose of the Advance Ruling is to bring clarity on various tax issues and reduce litigations. Although Advance rulings have been given in cases like Battery sold with inverter is a mixed supply or not, as the usage of the battery varies from purpose to purpose or whether a water bottle can be classified as a storage container or a water bottle, the ambiguity continues to prevail around

these issues. Since the tax rate is different, the assessee's will approach the AAR for further clarity. Since this is an ambiguity in the law, there cannot be

Suggested Reforms: Classification of goods to be done in such a way that there cannot be any tax arbitrage, or the item cannot fall under two tax slabs or merge the tax slabs to neutralize the tax arbitrage.

any clear guidelines, and everyone will try to interpret the same in their favour, resulting in further litigations.

► **Composition of the AAR:**

The AAR team consists of one member each from Central and State government. The members of AAR are of the rank of Joint Commissioner or above. As since they are from the tax department, their decision or ruling is likely to be with the biased mind. This is also evident from the, recently pronounced AAR orders wherein majority of them were in favour of the revenue.

Suggested Reforms: The team of AAR should include one judicial member or setting up a National AAR with a judicial member where the centre is to be considered as a national level authority.

► **Rejection of Application for Advance Rulings:**

In few advance ruling orders, it has been decided that the matter is not covered under the AAR or AAR are not authorized to give any rulings on the issue. In the case of *M/s Pon Pure Chemical India Pvt. Ltd. (2018-TIOL-52-AAR-GST)* Gujarat AAR has rejected the application stating that "*As the 'place of supply' is not covered by Section 97 (2) of the Acts, this authority is helpless to answer the questions raised in the application, as it is lacking jurisdiction to decide the issues and Issue of High Sea Sale falls in the domain of Customs and not under the Goods and Services Tax.*" This will lead to the issue being left unresolved and boost the scope for litigation.

Suggested Reforms: All issues related to GST should be brought under the ambit of Advance ruling.

► **Assessee Specific Advance Rulings:**

The Advance rulings are specific to each Assessee and are not binding on other assessee's and/or jurisdictional officers. Where the facts of the case are same, this will lead to duplicacy of rulings and higher quantum of applications pending with AAR, which would in turn lead to delay in AAR orders.

Suggested Reforms: The AAR order to be binding on other Assessee and/or Jurisdictional officers unless otherwise the fact of the case are different.

6. Conclusion:

The Advance Ruling System is introduced and implemented to smoothen the dispute resolution process and to reduce the litigations. Moreover, the global experience shows that during the initial year of GST implementation tax litigations has drastically shoot up. Looking at the last one-year experience, it is very unlikely that the India will be an exception to this. Many gray areas like backward area incentives, state government incentive schemes, audit and tax assessments, different advance rulings by different states and countries, difference state GST Act and rules mainly on e-ways, etc. will leads to more tax litigations. The government is looking keen to simplify the tax law and make it user-friendly, which not only reduce the litigations but also make it as a part of the ease of doing business policy. In an Interview, Finance Secretary Hasmukh Adhia said that the proposal of setting up centralised AAR is under consideration.

Looking on the recent advance rulings, which are more in favour of the revenue or creating confusions, the majority of the taxpayers are now choosing not to file an advance ruling as it will further create litigations in spite of giving any clarity on the same. Therefore, the way in which the AAR mechanism is functioning, it will over the period remain as the elephant teeth only and would not serve the purpose unless and until the

