



Authority for Advance Ruling: Rules of the Game Altered

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Constitution of the Board for Advance Ruling and the need to pronounce rulings in advance?

Union Budget 2021 *inter-alia* proposes to take the agenda of the Government of making the tax payer and the tax department interactions faceless and also the time and again emphasized objective of minimizing tax litigation. Various steps are proposed to be taken towards these twin objectives viz.:

- Constitution of a Dispute Resolution Committee for small and medium taxpayers;
- Reduction in time limit for reopening of assessments;
- Replacing the Authority for Advance Rulings ['AAR'] with the Board for Advance Rulings ['BFAR'];
- Scrapping of the Income Tax Settlement Commission;
- Provision for faceless proceedings before the Income Tax Appellate Tribunal in a jurisdiction less manner.

In this Article we have made an attempt analyse the implications of scrapping the AAR and replacing/substituting it with the BFAR.

Background:

In his Budget Speech for 1992-93, the then Finance Minister had assured that, in the interest of avoiding needless litigation and promoting better taxpayer relations, a scheme for giving

advance rulings in respect of transactions involving non-residents was being worked out and would be put into operation. In pursuance thereof, a new Chapter XIX-B was introduced in the Income-tax Act, 1961 ("the Act") on Advance Rulings in respect of transactions involving non-residents. "Advance Ruling" was defined to mean the determination, by an authority constituted by the Central Government and known as the AAR, of a question of law or fact in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident.

The AAR consists of a Chairman and various Vice-Chairman, revenue members and law members. In times to come, the law also expanded the scope of the AAR to enable it to decide an issue in the case of residents subject to the threshold prescribed.

Substantive provisions of law relating to the AAR are contained in section 245N to 245V of the Act and the procedure is spelt out in Rules 44E and 44F of the Income-tax Rules, 1962 as also the "Authority for Advance Rulings (Procedure) Rules, 1996" notified.

The AAR is prohibited from allowing the application where the question raised is pending before any income-tax authority or an Appellate Tribunal or where the question relates to determination of fair market value of any property or in cases where the transaction or issues designed prima facie for avoidance of income-tax.

The advantages with which the AAR was envisaged were:

- Surety for the tax payer about its income-tax liability;
- Ability to avoid long-drawn litigation;
- Ability to sort out complex issues of income-tax including those concerning Double Tax Avoidance Agreements;
- Binding nature of the rulings on the Applicant Tax payer as also the Commissioner of Income-tax and authorities below him, not only for one year but for all the years unless there was a change in facts and law;
- Time limit of six months provided for the AAR for pronouncing its Rulings.

In its initial days, the AAR saw a lot of tax payers approaching it. The AAR also pronounced many major rulings on the complex issue of taxation in the international tax domain in its hey days. These rulings are still used as a reference material by the tax payers and / or the appellate authorities to decide particular aspects.

Need for change – legislative intent of the proposal:

Over a period of years, for various reasons there has always been a substantial amount of pendency before the AAR. This was due to the number of cases / applications filed as also due to the inherent composition of the AAR.

Recently, even the Supreme Court in the case of *National Co-operative Development Corporation v. CIT* (2020) 427 ITR 288 had an occasion to comment as under:

The ground level situation is that this methodology has proved to be illusory because there is an increasing number of applications pending before the AAR due to its low disposal rate and contrary

to the expectation that a ruling would be given in six (6) months (as per section 245R(6) of the IT Act), the average time taken is stated to be reaching around four (4) years! (See Deloitte Report on Advance Rulings in India: Delivering Greater Tax Certainty (Deloitte Tax Policy Paper 5, 2019)). There is obviously lack of adequate numbers of presiding officers to deal with the volume of cases. Interestingly, the primary reason for this is the large number of vacancies and delayed appointments of Members to the AAR (ibid.). In view of the time taken, the very purpose of AAR is defeated, resulting in the mechanism being used infrequently as is evident from the ever-increasing tax related litigation.

Actual reason given in the Memorandum Explaining the provisions of the Finance Bill, 2021, which has necessitated the need to look at an alternative method of providing Advance Rulings, is reproduced hereunder:

“A bench cannot function if the post of Chairman or Vice-Chairman is vacant. As per section 245-O of the Act, persons eligible for appointment as Chairman of AAR are retired judges of the Supreme Court, retired Chief Justice of a High Court or retired Judge of a High Court who has served in that capacity for at least seven years. Similarly, the persons eligible for appointment as Vice-Chairman are retired judges of a High Court. As per past experience, the posts of Chairman and Vice-Chairman have remained vacant for a long time due to non-availability of eligible persons.

This has seriously hampered the working of AAR and a large number of applications are pending since last many years. There is, therefore, a need to look for an alternative method of providing advance ruling which can give rulings to taxpayers in timely manner.”

It with this background that the Budget, 2021 has proposed to constitute a new authority viz., the Board for Advance Ruling and to amend the existing provisions of the AAR.

The Budget proposals:

It has been proposed that the AAR will cease to operate with effect from a date to be notified by the Central Government, which will constitute one or more BFAR for giving advance rulings on or after the notified date. Each such BFAR will consist of 2 Members each being an officer not below the rank of Chief Commissioner.

It is also proposed that the Ruling given by the BFAR shall not be binding on either parties i.e. the Applicant or the tax department and if aggrieved, either of the parties can file appeals before the High Court(s). This appeal can be filed within a period of 60 days from the date of communication of the Order or Ruling or which period can be extended by the High Court by a further period of 30 days at its discretion.

Enabling amendments are also proposed to transfer the applications pending with the AAR to the BFAR alongwith all the records, documents, etc.

Other existing provisions in section 245R of the Act, which deal with the procedure on receipt of application, powers of the Authority, obtaining a Ruling by misrepresentation / fraud, etc. are proposed to be made applicable mutatis mutandis to the BFAR.

The Budget also proposes to empower the Central Government to make a scheme by notification in the Official Gazette for the purpose of giving advance ruling by the BFAR. The scheme will impart greater efficiency, transparency and accountability by eliminating interface to the extent technologically feasible, by optimizing utilization of resources and introducing dynamic jurisdiction. The Central Government may, for the purposes of giving effect to this

scheme, by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification. However, no such direction shall be issued after the 31 March 2023.

Implications and comments:

While the intent of the Government of giving speedy advance rulings to the tax payers/ applicants is laudable, the effectiveness of BFAR would be tested in times to come.

In our view, for the BFAR to be a success as desired, the following factors amongst others would be necessary:

- Approach and attitude of the Members on the Board;
- Time taken for disposal of applications;
- Consistency in the Approach of pronouncing Rulings on identical issues across the Country;
- Success of the faceless mechanism in the process which may involve understanding of complex factual pattern and innovative legal arguments;

While the road ahead seems to be bumpy and tough for the BFAR in the ever-evolving world of technology and fast changing dynamics of tax jurisprudence, India continues to be a fascinating investment destination. Having an effective mechanism of an Advance Ruling is the need of the hour and it is with this that one can only wish that the BFAR does not go on the path of its predecessor AAR but works out as effective and efficiently as it is envisaged by all.

