Bombay Chartered Accountants' Society

THE CHAMBER OF TAX CONSULTANTS

Chartered Accountants Association, Ahmedabad A Passion to Perform

Lucknow Chartered Accountants' Society

13th September, 2016

Ms Rani Singh Nair
Chairperson
Central Board of Direct Taxes,
Ministry of Finance
New Delhi.

Dear Madam

Sub: **Direct Tax Dispute Resolution Scheme, 2016**

We write to you on behalf of members of our respective organisations and also on behalf of the citizens of India at large.

We wholeheartedly support the initiative of the Government of India for reducing the huge backlog of litigation by providing a window to the litigants to settle the matter by paying some amount of tax/penalty/interest and withdraw the pending appeal(s).

In principle, the Direct Tax Dispute Resolution Scheme, 2016 is a step in the right direction for achieving the stated objective. In order to make the Scheme more successful and thereby reduce the backlog of pending appeals as well as unblock the massive amounts of disputed tax demands in the country, in the interest of the tax paying community and in the larger interest of the nation, we would like to drawn your kind attention to certain issues that arise from the Scheme. These issues have not been addressed in the clarifications issued on 12th September.

We earnestly request you to kindly issue clarifications on these issues at the earliest. Upon receipt of the same, we shall give it extensive publicity amongst our members as well as amongst the tax paying community.

Assuring you and the Government of India our fullest support in the massive nation building exercise that is in progress,

We remain,

Yours sincerely,

Chetan M. Shah
President,
Bombay Chartered Accountants' Society

Raju C Shah
President,
Chartered Accountants' Association - Ahmedabad

Hitesh Shah
President
Chamber of Tax Consultants

Raghavendra Puranik
President
Karnataka State Chartered Accountants' Association

Dhruv Seth
President,
Lucknow Chartered Accountants' Society

1. Eligibility

1.1 Partial disputed amounts

Issue

Where part of the demand determined for a year is undisputed and remains unpaid, it is not clear as to whether the declarant is entitled to waiver of interest/ penalty on the total outstanding amount or can the penalty be levied on the undisputed amount?

In this regard useful inference can be made to Instruction u/s 96 of the Finance (No. 2) Act, 1998. The Question 8 of Clarification 1 of the Circular: Samadhan 2/98 dated 3-9-1998 under Kar Vivad Samadhan Scheme, 1998 [KVSS] is reproduced:

"Q 8. Where only certain items of addition are in dispute can the assessee take advantage of the Scheme for the entire demand of the year?

Ans. Yes. The Scheme is applicable to the entire demand of an assessment year."

Suggestion

It is suggested that necessary clarification in this regard should be issued keeping in view the intention and the objectives to be achieved in this scheme.

1.2 Relevant cutoff date

Doubt have arisen as to whether a declaration can be filed in a case where assessment order was passed on 15th February 2016 and appeal filed on 1st March 2016 within the due date?

In respect of an appeal filed after 29th February 2016 but within the time limit specified u/s 249 of the Act, the non-eligibility of making declaration under the Scheme may lead to discrimination.

Suggestion

It is suggested that necessary clarifications in this regard be issued.

2. Refund of Interest and Penalty

Issues

2.1 If the demand raised on assessment has been paid / adjusted and interest u/s 220 of the Act has also been charged/paid, whether the declarant will be entitled to refund of the interest u/s 220 since u/s 202(I)(a) of FA, interest is payable only upto the date of assessment?

Section 206 of the Scheme states that any amount paid in pursuance of a declaration made u/s 202 of the FA shall not be refundable under any circumstances. However, in the cases referred in 2.1 above, the interest / penalty etc paid is not in pursuance of a declaration u/s 202, and hence refund should be granted in such cases.

Suggestion

It is suggested that necessary clarification and instructions in this regard should be issued, considering the objects and intent of the Scheme.

3. Penalty appeal pending before CIT (A) and quantum appeal pending before ITAT

3.1 Where the appeal against levy of penalty is pending before the CIT(A) and the quantum appeal is pending before the ITAT or higher forum, whether the ITAT appeal has to be given up in order to avail of the benefit under the Scheme for the penalty?

There are no provisions in the scheme to suggest that.

Section 203(2) provides that when declaration is in respect of tax arrear, consequent to such declaration the appeal filed before CIT (A) would be deemed to be withdrawn. The said deeming fiction does not refer to appeal before any other level / any other appeal other than the appeal for which declaration is made under the Scheme.

3.2 Further, in the above referred cases whether the declarant is required to pay only taxes or interest u/s 220 of the Act? The relevant Clause 3 (b) and (c) of Form 1-Part A relating to penalty order prescribed under Rule 3(1) of the Direct Tax Dispute Resolution Scheme Rules, 2016 [the Rules] seems to lack clarity in this regard.

3.3 In case of penalty which is not relatable to income such as penalties under sections 271A, 271B, 271BA, 271BB, 271D, 271E etc, whether the quantum appeal pending has any relevance? Clause 3 of the Declaration Form 1-Part A regarding penalty appeal, requires details of tax and interest determined on total income and outstanding demand as on the date of declaration, to be given. As per clause 3(g), the amount payable u/s 202(1)(b) would include outstanding demand plus 25% of minimum penalty.

Suggestion

It is suggested that necessary clarifications in this regard should be issued.

4. Determination of outstanding demand in cases where rectifications are pending

For the purpose of determining the “tax arrear”, what would be the manner of determining the ‘demand outstanding’ where rectification application is pending for non-grant of credit for TDS / tax payments or other mistakes apparent from record?

Suggestion

The demand outstanding should be determined after granting credit for legitimate TDS/ tax payments and rectifying other mistakes apparent from record.

It is suggested that necessary clarification in this regard should be issued.

5. Specified Tax

Specified Tax is defined u/s 201(1)(g) as tax determined in consequence of retrospective amendment and relating to a period prior to the date of assent of President for amendment which is under dispute in respect of which such tax is pending as on 29th February 2016.

5.1 If the dispute is pending before the ITAT or higher forums and part of the demand is not on account of retrospective amendment but in the nature of "tax arrear", not eligible for declaration since it is not pending before CIT(A)). Can a declaration under the Scheme be made only in respect of specified tax by withdrawing the relevant grounds in appeal and continue the litigation for the balance demand relating to other issues?

Or can the assessee, if he so wishes, take benefit of the Scheme in respect Specified Tax as well as tax determined in respect of other issues in the appeal? In this regard useful inference can be made to Instruction u/s 96 of the Finance (No. 2) Act, 1998, Question 8 of Clarification 1 of the Circular: Samadhan 2/98 dated 3-9-1998 under KVSS, which is reproduced in point 1.2 above.

Suggestion

It is suggested that necessary clarification in this regard should be issued.

5.2 The undertaking u/s 203 of FA, in Form 2 refers to waiver of rights in respect of Specified Tax. Is there any procedure to be followed for waiving rights and timelines for the same?

Suggestion

It is suggested that necessary procedures and time lines in respect of the same should be laid down.

5.3 If the declaration under the Scheme is not accepted can the dispute be reinstated?

Suggestion

Section 203(5) of the FA lays down criteria where the declaration shall be presumed to be withdrawn and the pending proceedings against the declarant shall be deemed to be revived.

It is suggested that necessary clarification in this regard should be issued.

5.4 The Form of declaration u/s 203 of FA, Form 1-Part B-Clauses 4 to 7 - apparently refers to `amount payable as per assessment order' i.e. to entire demand and not relating to specified tax only.

Suggestion
It is suggested that necessary clarification in this regard be issued.

6. Dilution of Assessee's claim

Whether filing of the declaration under the Scheme, would result in diluting the claim of the assessee on similar issues in subsequent years assessment proceedings?

In this regard useful inference can be drawn from the following:

i. Instruction under section 96 of the Finance (No. 2) Act, 1998, Question 21 of Clarification 2 of the Circular Samadhan 3/98 dated 7-10-1998 under KVSS which is reproduced as under:

"Question 21: By filing declaration under Samadhan Scheme for one assessment year, does the taxpayer forego his right of appeal on the same issue in other assessment years?

Ans.: No. The order under the Samadhan Scheme does not decide any judicial issue. It only determines the sum payable under the Scheme with reference to tax arrears."

ii. Clarification 5 vide Letter: Do [No. 3372 - CH (DT)/98, dated 22-12-1998] under KVSS which is reproduced as under:

"Your understanding that, if an assessee comes under the Kar Vivad Samadhan Scheme for some years this fact will not amount to a decision of the Issue involved and therefore no prejudice will be caused to the declarant in respect of that issue for any other assessment year in any other proceeding which might be pending under the Income-tax Act, is correct. The Board has already clarified this point in a reference which had been received earlier."

iii. Clarification 6 vide Letter: Dated 22-12-1998 under KVSS which is reproduced as under:

It has already been clarified in Question No. 21 and answer thereto issued by the Government with reference to Kar Vivad Samadhan Scheme, 1998 that the order passed by designated authority under the Scheme does not decide any judicial issue. It only determines the sum payable under the Scheme with reference to tax arrears. If the assessee goes for Samadhan Scheme for some years, the decision in other years not covered under Samadhan will not get prejudiced either against the assessee or against the revenue, even though the issues remain the same.

Suggestion

It is suggested that necessary clarification in this regard be issued.

7. Waiver of interest and penalty in Form 3 – Certificate of Intimation

Section 204(1) of the Scheme provides that the designated authority shall, within a period of 60 days from the date of the declaration, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed, to the declarant setting forth therein the particulars of the tax arrear or the specified tax, as the case may be, and the sum payable after such determination.

Rule 4 of the Rules provide that the designated authority shall issue a certificate referred to in sub-section (1) of section 204 in Form 3.

On an analysis of Form 3, it is observed that the Certificate does not include a waiver of interest and penalty.

Suggestion

It is suggested that the Certificate should specifically include a waiver of interest and penalty.

8. To cover appeals pending at any Forum

The object of the Scheme is to reduce huge backlog of appeals and to enable the Government to recover its dues expeditiously. Further, a lot of time, cost and energy of the Revenue are being blocked as also wasted in pursuing a large number of pending appeals before various appellate forums.

The present Scheme covers only the appeals pending before the first Appellate Authority in case of tax arrears and only limited issues with respect to specified tax pending before any Appellate Forum. As can be seen, restricting the scope of the Scheme to the above referred pending appeals runs contrary to the objects and intent of formulating the Scheme.

Suggestion

In order to reduce pending litigation to a great extent as also to unlock the revenue blocked due to such pending appeals, the Scheme may be made applicable to tax arrears in all the appeals pending before any Appellate Forum.

9. Appeals set aside by higher appellate authority with a direction to CIT(A) to decide the appeal *denovo*

The present Scheme requires the pendency of appeal before the first appellate authority as on February 29, 2016. However, the Scheme does not cover a case where

appeals are set aside by a higher appellate authority to CIT(A), in case of the following instances:

a. Where a higher Appellate Authority like Income Tax Appellate Tribunal **("ITAT")**, High Court, Supreme Court has set aside the order of the first Appellate Authority with directions to hear the entire appeal *denovo*;

b. Where the higher Appellate Authority has set aside some of the grounds of appeal to the file of the first Appellate Authority to decide the same *denovo*;

c. Where the first Appellate Authority decided the appeal based on the grounds of appeal filed originally without admitting additional grounds of appeal raised by the assessee in the course of the appellate proceedings and the ITAT has set aside the appeal to the file of the first Appellate Authority to hear the additional grounds of appeal and decide the same on merits;

d. Where the higher Appellate Authority has passed the order on or before February 29, 2016 whereby it has set aside the appeal to the file of the first Appellate Authority to decide the same *denovo* but the order with respect to same has not been received by the declarant assessee or the first appellate authority on or before February 29, 2016;

e. Where the higher Appellate Authority's order has been received on or before February 29, 2016 by the assessee whereby the appeal is set aside to the file of first Appellate Authority to decide the same *denovo, b*ut, the first Appellate Authority was not intimated about such order by the assessee; and

f. As an extension to (e) above, the first Appellate Authority was intimated about the order of higher Authority for setting aside the same to his file to decide the appeal *denovo,* but the first Appellate Authority has not initiated any action.

Suggestion

If all such appeals are pending before the first Appellate Authority on or before February 29, 2016 then, the same may be considered as fit appeals for the purposes of taking benefit of the Scheme.

10. Determination of tax and interest

The Scheme covers tax, interest and penalty as per assessment order and penalty order respectively. However, it does not cover following:

Where the First Appellate Authority has decided the appeal with respect to grounds of appeal filed by the assessee originally without admitting the additional ground of appeal raised by the assessee in the course of appellate proceedings and subsequent to such order, the assessing officer passes an order giving effect to the order of first Appellate Authority which results in reduction of tax, interest, vis-a-vis penalty. Now, on further appeal by the assessee, the ITAT directed the first Appellate authority to hear the additional grounds of appeal on merits. In this case, the reduced tax and interest based

on order giving effect to the order of the first Appellate Authority needs to be considered instead of figures as per assessment order. Similarly, the penalty to that extent will get reduced, hence, penalty as per penalty order should not be considered in this kind of cases.

Suggestion:

The above situation requires attention and needs to be clarified.

11. When a person is barred from making declaration under the Scheme:

Clause (c) of section 208 of the Finance Act, 2016 provides that prosecution under a specified enactment must be instituted on or before filling of declaration by the declarant to bar such person from making declaration under the Scheme. However, clause (b) of section 208 does not stipulate as to when order of detention should be made i.e. such order should be before declaration under the Scheme or any time thereafter.

Suggestion

Clause (b) of section 208 should specify as to when the detention order should be made. It is suggested that it should be made before filling declaration under the Scheme.