

Advance rulings in India

Delivering greater tax certainty
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Executive Summary

Countries recognise that while extensively cooperating on international tax issues to address the challenge of tax base erosion and profit shifting, providing tax certainty to business is important for promoting their investment and trade. This paper examines how a robust advance ruling regime can significantly promote tax certainty. A private advance ruling on the tax implications of a proposed transaction is useful for multinational enterprises, as it resolves complex interface between domestic tax laws and tax treaties for cross-border transactions.

In 1993, post the opening of the Indian economy in 1991, India introduced the scheme

of advance rulings. Advance rulings in India are delivered by a distinct quasi-judicial tribunal, Authority for Advance Rulings (AAR). In the initial years, with timely and noteworthy decision making, the functioning of the authority addressed the needs of the taxpayers. The AAR issues advance rulings on applications by taxpayers within six months. This paper analyses the factors causing AAR a delay in issuing timely rulings in recent years. It also suggests measures to remedy the situation so that India can offer an efficient advance ruling mechanism to promote the ease of doing business.

What matters most: Predictability

For many multinational companies, the frequency of change in today's world closely resembles sand shifts in a desert. Macro business environment and tax policies are constantly shifting and are subject to economic, financial, social and political circumstances in each country. Businesses have only a limited ability to influence these circumstances. It has long been said the only things certain in life are death and taxes. That said, what can we mortals do more to better enjoy life and live it to the fullest? Likewise, dealing with taxes, how can we increase the predictability of the tax cost that businesses are required to bear? These are the two profound and unassociated questions that I as a human being and a tax practitioner cannot help but often ponder over. As for the latter, I have been a strong believer that advance tax rulings have a very big role to play in helping businesses become more productive and more efficient.

A couple of years ago we surveyed 330 multinational companies doing business in Asia Pacific and asked them - What was the most important factor in business decision making when it comes to taxes? A majority of the respondents stated that predictability is the number one factor. Because of the dichotomy between governments wanting to attract investment on one hand while protecting their tax base on the other, many multinational companies have accepted the fact that tax rules are inherently complicated and will continue to be so. The recent developments in the G20/OECD recommendations, unilateral action by some governments, the US tax reform are just some examples.

When the external environment becomes challenging to predict, companies would naturally act more cautiously and seek certainty wherever they can. Therefore, all things being equal, economies that commit to provide

a transparent and predictable tax environment would generally be seen as more welcoming by investors. Furthermore, when managed properly, an advance tax ruling or an advance pricing agreement (regardless of whether it is bilateral or unilateral), can be a win-win proposition in elevating certainty, minimising controversy and helping to allocate the already limited resources of both the private sector and of government more productively.



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Background

Tax Certainty

To integrate with the global economy, India has built a comprehensive treaty network, with now over 100 treaties and has been an active participant (and observer at the OECD) on all significant international tax developments. The G20/OECD¹ Base Erosion and Profit Shifting (BEPS) project has since its inception in 2013, extensively addressed the issue of tax avoidance through 15 Action

Plans. These culminated in 2016 in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, in short, the Multilateral Instrument (MLI). Looking beyond the anti-avoidance goals of the BEPS project, the leaders of the G20 (in September 2016) emphasised the role of tax certainty to promote investment and trade globally and resolve to work towards this goal.²

¹ G20 is an international forum made up of 19 countries and the European Union, representing the world's major developed and emerging economies/ Organisation for Economic Co-operation and Development

² G20 Leaders' Communique, Hangzhou Summit, China, 4-5 September 2016:

"We emphasize the effectiveness of tax policy tools in supply-side structural reform for promoting ... the benefits of tax certainty to promote investment and trade and ask the OECD and IMF to continue working on ... tax certainty." Two Reports on Tax Certainty, i.e. Tax Certainty – IMF/OECD Report for the G20 Finance Ministers (March 2017) and Update on Tax Certainty – IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors (July 2018), have been subsequently released to promote this agenda.

A major source of tax uncertainty³ is the lack of a clear and timely dispute resolution mechanism, especially an advance resolution procedure, which reduces the likelihood of tax disputes arising in the first place. Tax authorities try to avoid tax disputes by issuing public rulings; in which they clarify the application of specific tax provisions to all (or a class of) taxpayers. Beyond this, recognising that individual taxpayers may need specific guidance, tax administrations also provide advance rulings through a mechanism of private rulings. On an application made by a taxpayer, the Authority provides an advance ruling on the tax treatment of a transaction. In most countries, the tax authorities themselves issue such taxpayer-specific private advance rulings.⁴ In India and Sweden, authorities that are independent of the tax administration issue the advance rulings.

Authority for Advance Rulings (AAR)

The purpose of this paper is to evaluate the performance of India's Authority for Advance Rulings (AAR) in providing timely and effective guidance to taxpayers and the tax administration through advance rulings. The paper highlights some of the lacunae in the system and suggests measures so that the private advance ruling system in India can better overcome the challenge of tax uncertainty in an increasingly complex business environment.

Tax Disputes in India – Extensive Litigation

In India, owing to historical and structural reasons, tax (as well as other) disputes take an inordinately long time to resolve. A tax dispute, if taken to the highest court (Supreme Court of India) may cumulatively take well over a decade for resolution (refer

to Annexure 1 for the timelines of a standard tax litigation process in India).⁵ Internal authorities within the tax administration examine the first level of "appeal" in a tax dispute.⁶ The other wings of the tax administration are statutorily empowered to appeal an adverse ruling of the internal authorities. As tax authorities have historically followed the approach of "when in any doubt, file an appeal," the tax administration is one of the most prolific litigants in India. The record of success when the judicial authorities decide these appeals is in Annexure 2. The proportion of cases resolved in favour of the tax administration is only 11.5 percent in India as against a global average of about 65 percent (refer to Figure 1). Consequently, a large number of disputes and a high quantum of tax are locked up in the litigation process (refer to Annexure 3).



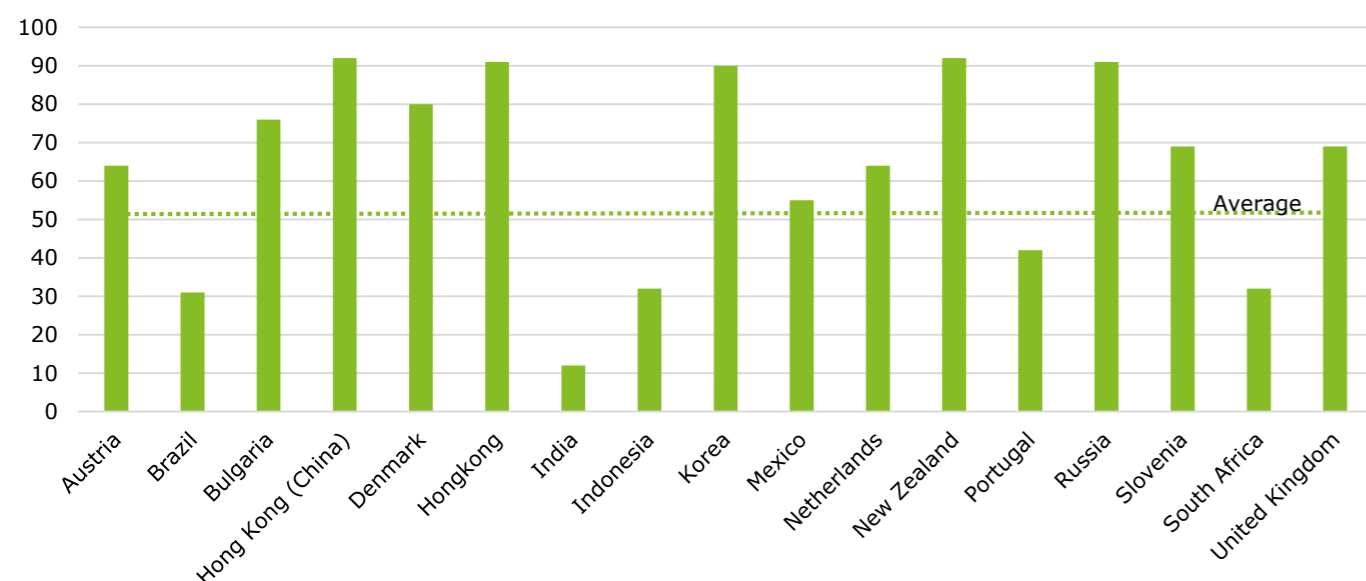
³ The main sources of tax uncertainty outlined in the Tax Certainty (March 2017) Report are : (1) Policy design and legislative uncertainty; (2) Policy implementation and administrative uncertainty; (3) Uncertainty around dispute resolution mechanisms; (4) Uncertainty arising from changes in business and technology; (5) Taxpayer conduct can contribute significantly to uncertainty; (6) International aspects of uncertainty

⁴ For example, United States of America, Netherlands, Australia, Japan, Canada, Hong Kong, Malaysia, South Africa

⁵ The hierarchy for tax appeals in India starts from the Assessing Officer – CIT (Appeals)/Dispute Resolution Panel (DRP) – Income Tax Appellate Tribunal – High Court – Supreme Court

⁶ Commissioner of Income-tax (Appeals) - CIT (Appeals)

Figure 1: Percentage of cases resolved in favour of tax administration



Source: Tax Administration 2017: Comparative information on OECD and other advanced and Emerging Economies @ OECD 2017, Page 115

It therefore, makes sense to have a system of advance rulings in India that eliminates reliance on this lengthy appeal process and provides certainty to taxpayers in a reasonable period.

Types of Advance Rulings

There are two categories of advance rulings:

• **Public Rulings** – The tax administration issues public rulings to clarify a particular provision of the tax law for all or a large class, in the form of interpretative ruling or clarification. In India, the Central Board of Direct Taxes (CBDT), the apex organisation of the tax administration, issues these as Circulars. These circulars are binding on the tax authorities, and taxpayers can rely on them if applicable to their facts. They are not binding on taxpayers.

• **Private Rulings** – These rulings are issued to a taxpayer regarding the tax treatment of a specific transaction. In India, the AAR, an authority independent of the tax administration, gives these rulings, which are typically made public albeit the identity of the taxpayer concerned is kept anonymous.

Both India and Sweden have authorities independent of the tax administration that issue these private rulings. Annexure 4 gives in detail the corresponding characteristics of the private rulings regime in these countries.

The private rulings and AAR regime in India is discussed in the following pages.



History, functions, structure and procedure

A. History

Taking note of the long drawn process for tax appeals in India, the Direct Taxes Enquiry Committee⁷ recommended a system of advance rulings, particularly in cases that involve foreign investments and collaborations as this would considerably reduce

the workload on the income-tax department and would diminish disputes and controversies. In 1993, the scheme of advance rulings came into effect. A new chapter (Chapter XIX-B) was inserted in the Income tax-Act, 1961 (the Act), establishing an AAR to provide certainty

⁷ In its Final Report under the Chairmanship of Dr. KN Wanchoo in December 1971, it was suggested: "Another form of taxpayer assistance which has been tried in some countries, is a system of giving advance rulings. Taxpayers are often perplexed by the complexities and uncertainties of the law and might with chagrin realise later that the taxing authorities do not see eye to eye with them when it might be too late to go back on the projects or ventures already initiated. At present, there is no system by which a taxpayer can get an advance ruling on the tax consequences of proposed transactions. It is felt that such a system will improve taxpayer relations and reduce litigation." The Wanchoo Committee has recommended establishment of a system of advance rulings, particularly in cases involving foreign collaboration, etc. giving advance rulings to assesseees or prospective assesseees would considerably reduce the workload on the department and would diminish disputes and controversies.

and avoid litigation related to taxation of transactions that involved non-residents. The scope of transactions on which an advance ruling can be sought from the AAR has been

gradually enhanced so that now both residents and non-residents can seek an advance ruling on any issue that has a substantial tax impact (refer to Table 1).

Table 1: AAR – Scope of advance rulings

Who may seek a ruling?	Transactions on which advance ruling can be sought
Non-resident taxpayer	<ul style="list-style-type: none"> • Determination of tax liability for a transaction that has or is proposed to be undertaken • Since 2015, determination of whether a transaction proposed to be undertaken is an impermissible avoidance arrangement under the General Anti Avoidance Rules (GAAR)
Resident taxpayer	<ul style="list-style-type: none"> • Determination of tax liability of a non-resident arising out a transaction undertaken by the resident with such non-resident* • Determination of tax liability for one or more transactions (undertaken or proposed to be undertaken) valued at INR 1 billion (US\$ 14.5 million approx.⁸) or more in total • Determination of whether a transaction proposed to be undertaken is an impermissible avoidance arrangement under the GAAR
Resident taxpayer- Public Sector company	<ul style="list-style-type: none"> • Any issue relating to computation of total income, which is pending before any income tax authority or the appellate tribunal**
Cases where AAR will not issue a ruling	
<ul style="list-style-type: none"> • The issue is already pending (in case of the taxpayer) for adjudication before the income tax authorities or Appellate authorities*** • Determination of market value of any property • Transaction that is designed prima facie for avoidance of tax**** 	

* This would be relevant for withholding tax compliance by the resident
 ** Income Tax Appellate Tribunal (ITAT)
 *** Except in the case of a Public Sector Company
 **** Except where an advance ruling is sought regarding the application of the GAAR

B. Structure and Composition of the AAR

The AAR, which is set up as a statutory quasi-judicial authority under the Act functions independently of the tax department and its members work exclusively for the AAR.

Under the statute, the AAR consists of a chairman and such number of members (vice chairmen, revenue members, and law members) as the government may notify.

The posts of chairman and vice chairman can be held by a current or former judge of the Supreme Court (SC) or High Court (HC) of India. Revenue and law members of the AAR are appointed

from senior functionaries of the government’s tax administration service and legal service respectively.⁹ If any of these members are appointed when they are serving as judges or while in government service, they must resign from their posts prior to taking up the AAR membership. The current composition of the AAR is in Table 2.

Table 2: Current composition of the AAR

Chairman	1
Vice chairman	1
Revenue members	3
Law members	2

Note: All these appointments were made in Financial Year¹⁰ (FY) 2018-19.

C. Scope

The scope of the advance ruling regime in India is quite comprehensive. The class of taxpayers and the transactions on which an advance ruling can be sought are detailed in Table 1. A non-resident, a resident undertaking a transaction with a non-resident, a resident in whose case the value of a transaction is likely to equal or exceed INR 1 billion (US\$ 14.5 million approx.), and a taxpayer who wishes to confirm that his transaction is compliant under GAAR provisions may approach the AAR for an advance ruling. Besides this, a public sector company can approach the AAR even for an ongoing tax dispute with the government.

⁹ Chairman - A person who has been a judge of the SC or Chief Justice of a HC or for at least seven years, a judge of a HC. Vice Chairman - a person who has been a judge of a HC. Revenue Member - an officer, who is, or is qualified to be a member of the Central Board of Direct Taxes. Law Member - an officer of the Indian Legal Service, who is, or is qualified to be, an Additional Secretary to the Government of India
¹⁰ Financial Year (FY) starts from 1 April every year and ends on 31 March of the next year



⁸ SBI TTBR as at 30 April 2019 (INR/ 1 US\$) = 69.1 considered for exchange rate conversions in this paper.

D. Procedure

- a. Timelines:** The statute provides that the AAR should pronounce its ruling within six months of the receipt of the application.
- b. Rulings:** The AAR gives its rulings through a bench of three members: Chairman/vice chairman, revenue member, and law member. In specific circumstances, it can pronounce rulings through a two-member bench. In exceptional circumstances, the chairman is empowered to give a ruling on his own. The AAR can allow the applicant to modify or reframe the questions, agreements, or projects until the time of hearing. Such flexibility is generally not available before other courts or tribunals.
- c. Confidentiality and Publication of Rulings:** As the applicant seeks a private ruling, the proceedings before the AAR are not open to the public. The AAR maintains the confidentiality of the proceedings, as contents of the application are not accessible to any unauthorised person. The ruling of the AAR may (as decided by the chairman) be released for publication. A tax applicant can keep his name anonymous in a ruling published by the AAR.¹¹

- d. Fee:** The fee to seek an advance ruling ranges from INR 10,000–1,000,000 (US\$ 145–14,470, approx.) that depends upon the threshold of transaction and category of applicant.¹²
- e. Binding force and precedential effect:** The advance ruling is binding on both the applicant and the tax authorities as regards the relevant transaction. The ruling does not form a precedent for other taxpayers; persuasive value notwithstanding.
- f. Appeal/review:** Initially, the Act provided that the ruling of the AAR would bind the applicant as well as the tax authorities (in respect of the transaction for which the ruling has been sought) and did not provide for any appeal against the ruling.

However, in the absence of a statutory right to appeal, both taxpayers and the tax authorities started filing Special Leave Petitions (SLPs) directly to the apex court (i.e., the SC) against unfavourable rulings of the AAR. These appeals were filed to the SC as the Constitution of India vests the SC (under Article 136 of the Constitution) with special power to grant leave to appeal against any judgment or order or decree in any matter or

cause, passed or made by any Court or Tribunal in India. The SC ruled¹³ that an appeal against an AAR ruling should be first made before the HC. Subsequently, if either party desires, it can prefer an appeal to the SC. The original intention was to make the AAR ruling non-appealable by both the taxpayer and the tax administration. The actual situation now is that either party can institute an appeal against an AAR ruling - first, before a HC¹⁴ and subsequently before the SC.

- g. Exchange of rulings:** One of the BEPS common minimum standards is a transparency framework that applies to tax rulings. This includes the spontaneous exchange of certain categories of rulings that includes Permanent Establishment (PE) rulings. Accordingly, India exchanges PE related rulings issued by the AAR with the relevant countries of residence of the applicants. Besides, Action Plan 14 recommends improving dispute resolution which means the mutual agreement procedure (MAP), Advance Pricing Agreements (APA) as well as AAR for avoiding double taxation, which is expected to accentuate after rollout of BEPS.



Performance and areas of concern

A. Receipt of Applications

From its inception (FY 1993-94) until FY 2009-10, the number of applications received annually by the AAR was in two digits. From FY 2010-11 the number crossed three digits up until FY 2013-14. This, in some ways, reflected the popularity and the high level of acceptance of the authority by taxpayers. The applications received by the AAR decreased to two digits from FY 2014-15 onwards. Annexure 5 gives the details of applications received,

disposed, and the pendency in the AAR.

B. Disposals

Figure 2 shows the disposals, i.e., the rulings issued by the AAR as a percentage of total cases pending at the beginning of the year plus cases filed during the year. The disposal rate was 80 percent in FY 2006-07. From FY 2010-11 onwards the disposal rate came down as low as 6 percent in FY 2010-11 and 7 percent in 2014-15.

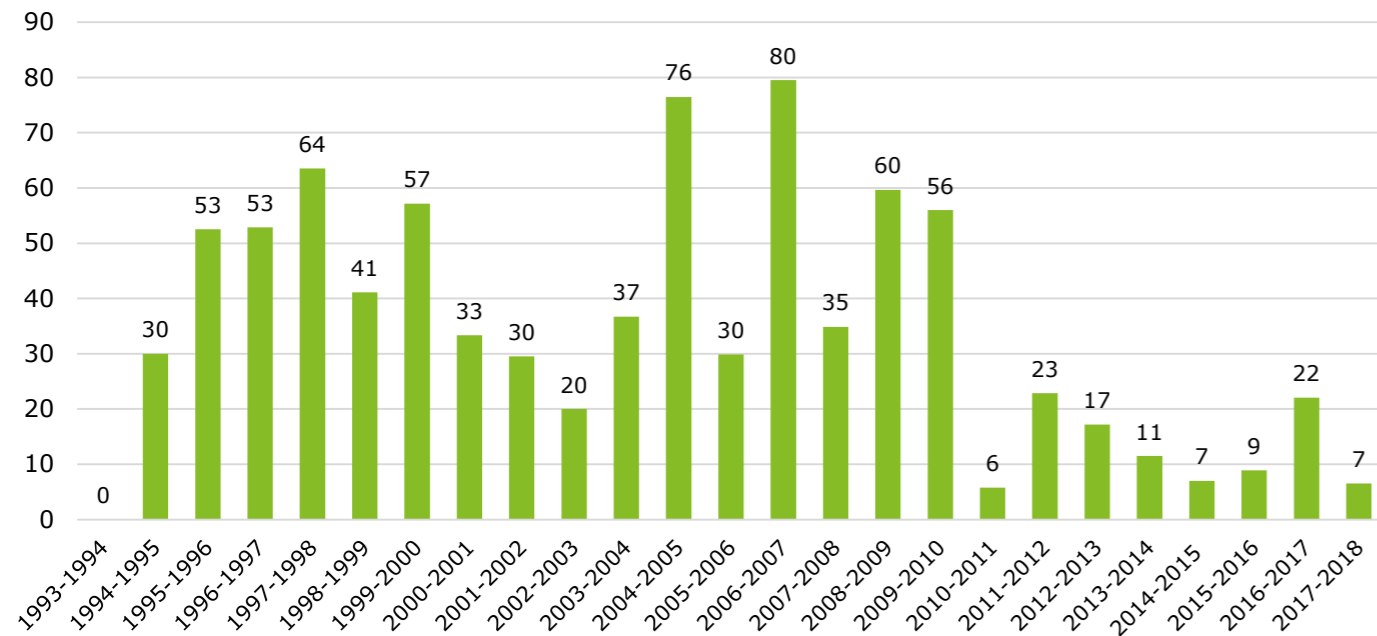
¹¹ Rule 25 of Authority for Advance Rulings (Procedure) Rules, 1996

¹² Rule 44E of Income-tax Rules, 1962

¹³ Special Leave Petition (C) No. 31543 of 2011 in the case of Columbia Sportswear Company vs. DIT, Bangalore

¹⁴ AAR hearings before HC are listed in ordinary course, which takes 4-7 years to achieve finality depending on the jurisdiction of the taxpayer

Figure 2: Disposal rates of the AAR



Source: Per Annual Reports of Ministry of Finance. (Refer Annexure 5 for the numerical data.)

As a result, the total number of applications pending before the AAR continues to increase even though the number of new applications has reduced in the past five years.

There are no publicly available statistics of monthly disposals of the AAR. However, an analysis of published rulings of the AAR (from the AAR’s website¹⁵), shows that in a 108 month period (from FY 2010-11 to FY 2018-19), the AAR did not publish any rulings for 45 months.

Although the statute states the AAR will give its rulings in six months; the average time to pronounce a ruling now stretches for more than three to four years. In some cases, the pendency is more than six to eight years. This pendency defeats the very purpose of having an AAR, as no business will wait for that long to get tax certainty before making a major transaction.

C. Reasons for low disposal

The authority becomes non-functional over extended periods because of vacancies of members. This is the primary reason for the inordinate delay in disposals and consequently the pile up of pendency at the AAR. Vacancies of members was highlighted by a Chairman of the AAR as a primary reason for the Authority not being able to function efficiently.¹⁶

Though the government has powers to appoint as many members as are necessary, it has been unable to appoint the minimum quorum (comprising a chairman and two members) regularly. Neither the AAR nor the government’s websites give the dates of appointment and tenure of the AAR members. Therefore, there is no official data in the public domain about the periods when it was not operating due to lack in the requisite number of members. The practical experience of applicants has been inordinate delays owing to the lack of requisite members. During a two-year period (between August 2016 and July 2018) after the incumbent chairman’s

retirement, the AAR operated without a chairman as no appointment was made. Taxpayers had to take up this issue (through public interest litigation) before the court, as the AAR could not issue any ruling in the absence of a chairman. As an interim measure, the court directed that one of the members would carry out the functions as the in-charge chairman so that the AAR functions without a halt.¹⁷

Therefore, while there are other challenges that the advance ruling regime faces, the primary one is the failure to appoint an adequate number of members to the AAR so that it can issue rulings expeditiously. The government has now taken an action to fill the vacancies and appointed five members between November 2018 and April 2019. The other significant reason for delay is tax department’s objection to every application considered as being for ‘avoidance of tax’.



¹⁵ <http://aarrulings.in/>

¹⁶ <https://www.thehindubusinessline.com/economy/policy/over-500-applications-pending-before-authority-for-advance-rulings/article7739126.ece>.

¹⁷ Patna High Court in Civil Writ jurisdiction Case No. 17261 of 2016



Suggestions

A. Addressing the high pendency

The current challenge before the AAR is the high pendency (close to 500 cases) against an average annual disposal of about 60 (in the five-year period from FY 2013-14 to 2017-18). If the AAR is to meet the statutory commitment (and business need) of pronouncing rulings within six months, it needs to dispose this pendency at the earliest. The AAR currently has three benches, two in Delhi, and one in Mumbai. Going forward, it should have three benches each in Delhi and

Mumbai. The government has statutory powers to appoint the chairman and as many vice chairmen and members as it sees fit. **There is an urgent need to appoint four vice chairmen (as against one currently) and twelve members (as against five currently) to liquidate the pendency and restore the smooth working of the AAR so that, going forward, it is able to pronounce rulings within six months.** If there is any delay in appointment of the chairman or vice chairman of the AAR, a senior member should be designated as the

officiating chairman/vice chairman so that the work is not impacted. Currently, the members are appointed for a maximum tenure of up to three years; this could be increased to five years.

B. Composition of the AAR

The tax administration itself issues advance rulings in most countries, hence, most often the serving tax officials carry out the actual analysis and pronouncement of ruling. Sweden has an advance ruling authority¹⁸ independent of the tax administration. The Swedish advance ruling authority can have (a maximum of) 14 members besides (a maximum of) 10 substitute members. The Government appoints these members not only from within the judiciary and the tax authority but also from the non-government sectors such as representatives of the legal profession and industry organisations such as Swedish Federation of Industries. **Including industry/tax experts¹⁹ from the non-government sector as members of the AAR will be ideal to bring in specific expertise. This would also expand the pool of eligible experts who can be appointed as members of the AAR considering the urgent need to liquidate the high pendency, which it currently faces.**

C. Binding nature of ruling and appeal

Given the primary emphasis on avoiding long drawn litigation, AAR rulings were made binding on both the taxpayer and the tax administration. Besides this, there was also no statutory appeal provided against the ruling. The Constitution allows all decisions of subordinate courts and tribunals to be appealable when a substantial question of law arises. A foreign company took this issue before the SC, which had received an adverse ruling from the AAR and thereafter, filed an appeal before the SC under Article 136 of the Constitution.

The SC held²⁰ that the AAR is a judicial tribunal, which has the power to pronounce upon rights or liabilities arising out of the Act. The court noted and affirmed that the advance ruling of the AAR is binding on both the applicant and the tax administration for the transaction in question. Also, it has persuasive (as opposed to precedential) value as regards third parties. Considering the Constitution, the SC held that an AAR ruling could be appealed (by either party) to the HCs. To provide an expeditious ruling to the applicant, the SC directed that an advance ruling of the AAR, when challenged before a HC, be heard by a Division Bench of the court rather than through

the general process of a single judge and then a Division Bench. The SC also held that, while, in general appeals would need to be filed before a HC, in an exceptional case where it appears that an appeal raises a question of principle of great importance or if a similar question is already pending before it, the court will accept a direct appeal to it (as provided in the Constitution).

In jurisdictions where the tax authority itself issues an advance ruling, the ruling is binding on it but not on the applicant taxpayer. The taxpayer can choose not to follow the ruling and if the tax authority proceeds to determine the taxability on the basis of the advance ruling, he can pursue the usual avenue of appeal open to all taxpayers.

The process in India has to be seen in a different light as an independent authority issues the ruling. The current situation, as it has evolved, is that the ruling of the AAR can be appealed to the HC (and later to the SC) both by the applicant taxpayer as well as by the tax authorities. Given the backlog of cases before these courts, it would take three to four years for a HC to pronounce its decision on an appeal. The SC would take the same time to pronounce its judgment (if it finds the appeal fit to admit) in case

¹⁸ Skatterattsnamnden

¹⁹ There is a precedence for appointing an independent renowned person like in the GAAR panel

²⁰ Supreme Court in SLP (C) No. 31543 of 2011

any of the parties decide to appeal the decision of the HC. In Sweden (which also has an independent advance ruling authority), both parties have the right to appeal directly to the apex court. In India, one of the possible solutions for the tax authority is not to appeal before the HC while the taxpayer retains that right. The logic is that the ruling of the AAR applies to the applicant taxpayer only in relation to the specific transaction and has no precedential value in case of other tax litigations argued before the courts. The absence of the right to appeal should therefore not cause prejudice to any stand it takes before Courts regarding the interpretation of the provisions of the income tax law. **Making the AAR ruling not appealable by the tax authorities**

would substantially restore the original policy and legislative thrust of providing expeditious rulings.

D. Timelines

There is an express mandate in the legislation for the AAR to pronounce its ruling on each admitted application within a period of six months from receiving the application. However, as mentioned earlier in a majority of the cases, it currently takes several years to obtain advance ruling. In other jurisdictions, where the tax authorities themselves issue the advance ruling, the pronouncement of a ruling (which is binding on the tax authorities) takes lesser time, i.e., on an average about two months.²¹ The AAR seeks the views of tax department on questions raised in the

application. To ensure timely and transparent progress, it is recommended that these comments are sought in writing within a time-bound period and these comments are made available to the tax payer. A time line of 15 days from date of application for comments on the admissibility of the application and 60 days from date of application on merits should be prescribed and enforced.

The six-month timeline mandated in India for pronouncing an advance ruling by the AAR is compatible with its judicial functions and procedures. Obtaining a ruling from the AAR within this statutorily recommended timeline of six months will greatly help the taxpayers. This can be achieved by augmenting

the numerical strength of the AAR to 12 members. **On the basis of an enhanced working strength and supporting infrastructure, the following timelines are feasible:**

- **Admission of an application - within a month of receipt of the application**
- **Passing of the final order - within six months from the receipt of the application**

To maintain these timelines, the AAR can prescribe strict timelines for both the applicant and tax authorities to reply to each other's submissions besides any other information.

If, in exceptional circumstances, the AAR takes longer than six months to pronounce its ruling, it should convey the reasons and the new timeline proposed to the concerned parties.

E. Interest liability owing to a delay in pronouncement of rulings

An applicant can approach the AAR for an advance ruling:

- Before undertaking a transaction; or
- After undertaking one, if the tax authorities have not initiated proceedings to determine the tax liability arising from the transaction

Where the applicant has undertaken a transaction (and sought an advance ruling), the law provides that the tax authorities will keep the determination of the tax consequences related to the transaction in abeyance until the AAR has pronounced its ruling. Currently, AAR rulings are being issued much beyond the mandated six-month period. Invariably, by the time the AAR issues the ruling, all

applicants must have filed a return of income for the relevant FY related to the transaction. The applicant may have paid no tax, or tax on the income arising from the relevant transaction based on its stand before the AAR. Any proceedings regarding this return of income is kept in abeyance by the tax authorities until the AAR ruling is issued. If the AAR ruling, when issued a few years later, is adverse, the applicant is liable for both tax and interest on the income in relation to the transaction. In all such cases, the interest liability is significant because it is levied for the entire period from the date of the transaction and the date of the AAR ruling which is iniquitous. If the ruling had been pronounced within the mandated six-month period, the applicant could have paid the tax immediately with negligible interest and no

²¹ UK - within 1 month; Denmark, Malaysia, and South Africa-within 2 months; Finland - within 4 months



such interest liability would have arisen.

The current provisions could be amended to enable the AAR to consider each case on merits and waive the interest for the period of delay beyond the six-month period mandated for issuing a ruling. The interest waiver could be for the entire period or a lesser period, as the AAR sees fit. The AAR can take into account any delay owing to non-functioning of the AAR bench and adjournments sought by both tax authorities and the applicant. This would put the onus on both the tax authorities and the applicant

to provide time bound responses to the AAR to issue timely rulings.

F. Other suggestions

To promote accountability and transparency, the Parliament could seek annually from the AAR a report on the advance ruling regime in India. The report should detail the composition of the AAR, appointment of members and indicate the periods of vacancies during the year. It should also give the statistics on applications received, nature of cases disposed and pendency for the year. There should also be information about the number of cases

where rulings were issued within six months, beyond that until 12 months etc. besides a root cause analysis regarding significant delays. The website of the AAR must be updated frequently to provide relevant information and statistics.

Separately, a system of formal communication/guidance on a six-monthly basis from the AAR to the Ministry of Finance could be instituted. In this communication, AAR can highlight the challenges faced and provide suggestions to improve the efficiency of the advance ruling regime.

Table 3: Summary of suggestions

Issue	Suggestions
A. Addressing the high pendency	There is an urgent need to appoint (besides the chairman and vice chairman) 12 members (as against five members currently) to liquidate the pendency and restore the smooth working of the AAR so that, going forward, it is able to pronounce its rulings within six months.
B. Composition of the AAR	Including industry/ tax experts from the non-government sector as members of the AAR will be ideal to bring in specific expertise. This would also expand the pool of eligible experts who can be appointed as members of the AAR considering the urgent need to liquidate the high pendency, which it currently faces.
C. Binding nature of ruling and appeal	Making the AAR ruling not appealable by the tax authorities would substantially restore the original policy and legislative thrust of providing expeditious rulings.
D. Timelines	On the basis of an enhanced working strength and supporting infrastructure, the following timelines are feasible: <ul style="list-style-type: none"> • Admission of an application - within a month of receipt of the application • Tax department to provide comments within 15 days from the receipt of the application • Passing of the final order - within six months from the receipt of the application • Tax department to provide comments within 60 days from the admission of the application

Issue	Suggestions
E. Interest liability owing to delay in pronouncement of rulings	The current provisions could be amended to enable the AAR to consider each case on merits and waive the interest for the period of delay beyond the six-month period mandated for issuing a ruling. The interest waiver could be for the entire period or a lesser period, as the AAR sees fit. The AAR can take into account any delay owing to non-functioning of the AAR bench and adjournments sought by both tax authorities and the applicant. This would put the onus on both the tax authorities and the applicant to provide time bound responses to the AAR so that it issues timely rulings.
F. Other suggestions	<ul style="list-style-type: none"> • The AAR should issue an annual report on the advance ruling regime in India. The report should detail the composition of the AAR, appointment of members, and indicate the periods of vacancies during the year. It should also give the statistics on applications received, disposed, and pendency for the year. There should also be information about the number of cases where rulings were issued within six months, beyond that up till 12 months, etc., besides a root cause analysis regarding significant delays. • The website of the AAR must be updated frequently to provide relevant information and statistics. • The AAR must give a formal communication/guidance on a six-monthly basis to the Ministry of Finance highlighting challenges faced and suggestions to improve the efficiency of the advance ruling regime.

An effective advance ruling mechanism – Improving tax certainty

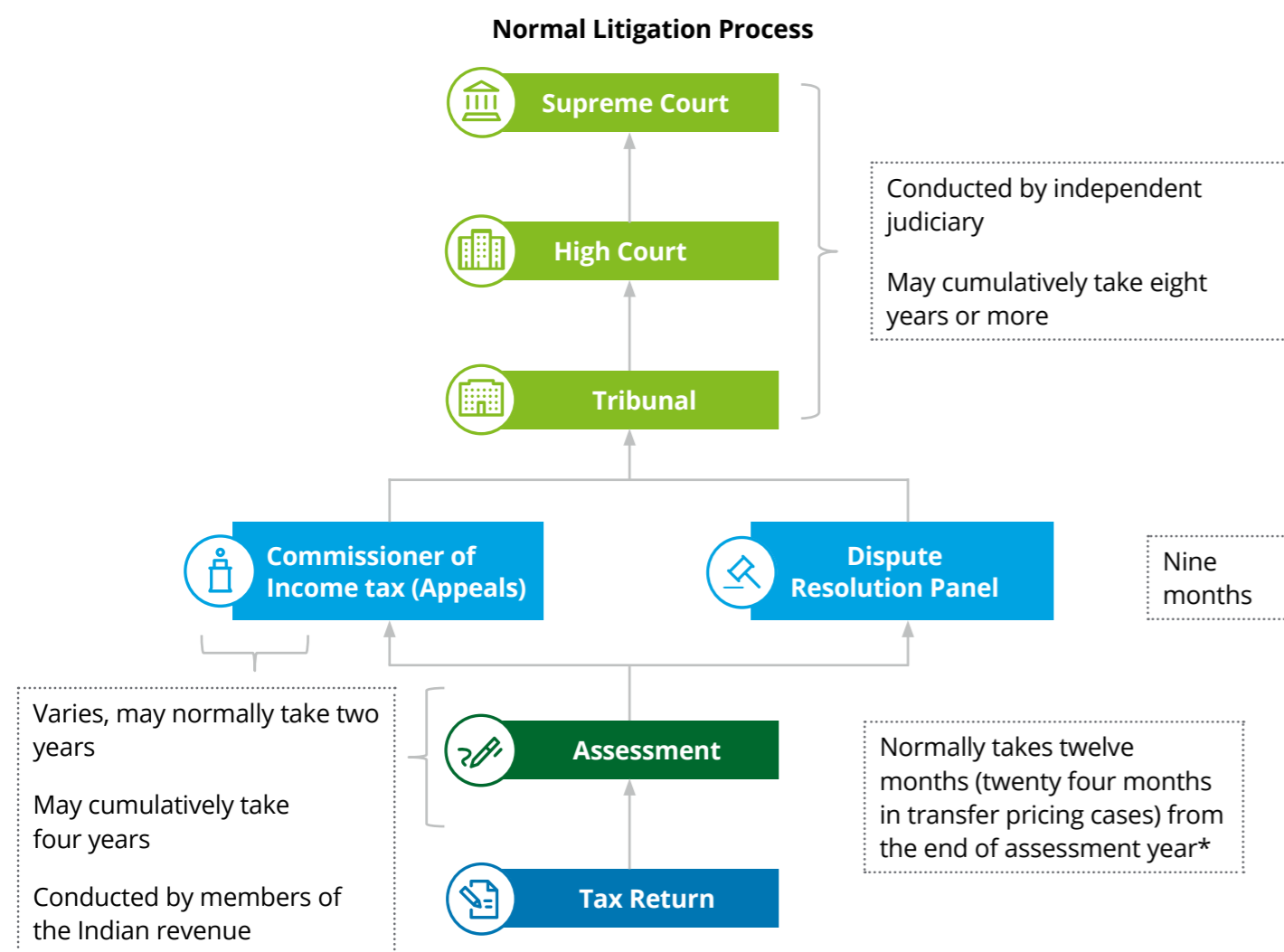
India was ranked 77 (among 190 countries assessed) in 2018 in the Ease of Doing Business in the latest Doing Business Report²² of the World Bank. It has gone up 23 positions against the rank in 2017. However, the litigation process (on tax matters and otherwise) is an impediment to the ease of doing business. Any effective

alternate dispute prevention and resolution mechanism such as the AAR would enhance business productivity if it reduces the time taken to achieve certainty in tax matters. It is therefore imperative that the efficiency of the AAR mechanism is restored with adoption of aforesaid suggestions to enhance accountability and address taxpayers/investors concerns arising from delays.

²² Doing Business 2019, Training for Reform (16th Edition) – A World Bank Group Flagship Report

Annexures

Annexure 1: Tentative timelines for standard litigation process in India



*Timelines from Assessment Year starting from 1 April 2019 and onwards.

Annexure 2: Success and petition rate of tax department at ITAT, HC, and SC level as on 31 March 2017

Courts	Success Rate	Petition Rate
SC	27%	87%
HC	13%	83%
ITAT	27%*	88%*

* Provisional estimates.
Source: Economic Survey 2017-18, Ministry of Finance (Page 138)

Annexure 3: Pendency of appeals and tax effect locked up

(Amounts in INR billion)

FY	CIT(A)		ITAT		HC		SC	
	No. of cases	Amount	No of cases	Amount	No. of cases	Amount	No. of cases	Amount
2014-15	232,126	3,839	Data not available		34,281	377	5,661	46
2015-16	258,898	5,162	91,971	1,360	32,138	1,614	5,399	70
2016-17	290,227	6,112	92,388	1,438	38,481	2,878	6,357	80
2017-18	262,617	4,747	94,481	1,660	38,864	3,151	5,876	99

Source: Annual Report 2017-18, Ministry of Finance (Page 152)

Annexure 4: Advance Ruling authorities independent of the tax administration - India and Sweden

Particulars	India	Sweden ²³
A. Issuing authority	The issuing authority is known as Authority for Advance Rulings and is independent of the tax authorities. The ruling pronounced is known as advance ruling.	The issuing authority is known as Skatterattsnamnden and is independent of tax authorities. The ruling pronouncement is known as advance notice.
B. Scope of regime	<p>Who may seek an advance ruling</p> <ul style="list-style-type: none"> • Non-resident • Resident • Notified Public Sector Company <p>Scope of questions</p> <p>Advance Ruling can be requested for the following matters:</p> <ul style="list-style-type: none"> • By Non-resident <ul style="list-style-type: none"> - Determination of tax liability in relation to a transaction undertaken or proposed to be undertaken - Whether an arrangement proposed to be undertaken by him is an impermissible avoidance arrangements and may be subjected to GAAR or not 	<p>Who may seek an advance ruling</p> <ul style="list-style-type: none"> • All taxpayers • General representative of the Tax Agency <p>Scope of questions</p> <p>Advance notice can be requested for tax or fee referred to in:</p> <ul style="list-style-type: none"> • By all taxpayers <ul style="list-style-type: none"> - The State Property Tax - Tax on returns on pension funds - Special payroll tax on pension costs - General pension Fee Act - Income tax Act - Municipal property tax - Excise duty - VAT Act - Property Tax Act - Coupon tax law

²³ <http://skatterattsnamnden.se/>

Particulars	India	Sweden
	<ul style="list-style-type: none"> • By Resident <ul style="list-style-type: none"> – Determination in relation to tax liability of non-resident arising out a transaction undertaken by resident with non-resident – Determination of tax liability in respect of a transaction undertaken or proposed to be undertaken for one of more transactions valuing INR 1 billion (US\$ 14.5 million approx.) or more in total – Whether an arrangement proposed to be undertaken by him is an impermissible avoidance arrangements and may be subjected to GAAR or not • By Notified Public Sector Company <ul style="list-style-type: none"> – For an issue in relation to computation of total income that is pending before any income tax authority or ITAT <p>Matter that cannot be considered:</p> <ul style="list-style-type: none"> • Question is already pending before the income tax authorities or appellate authorities • Determination of market value of any property • Transaction that is designed prima facie for avoidance of tax 	<ul style="list-style-type: none"> • General Representative of the Tax Agency <ul style="list-style-type: none"> – If there is dispute between the Tax Agency and the taxpayer as the issue is of importance for a uniform team interpretation or application of law

Particulars	India	Sweden
C. Composition	<ul style="list-style-type: none"> • Chairman-A judge of the SC or the Chief Justice of a HC or a person who has for at least seven years been a Judge of a HC. • Vice chairman-A judge of a HC. • Revenue member-Indian Revenue Service officer • Law member-Indian Legal Service officer 	<ul style="list-style-type: none"> • Members-Maximum 14 • Substitutes-Maximum 10 <p>The members and deputies are appointed by the government who are tax experts with experience from various business areas such as courts, authorities, universities.</p>
D. Binding force and precedential effect	<p>The advance ruling shall be binding on the applicant in respect of transaction to which ruling has been sought and also binding on tax authorities.</p> <p>The rulings do not have a precedential effect but provide persuasive value in other cases.</p>	<p>Upon the applicant's request, the advance notice is binding on the Swedish Tax Agency and the general administrative court.</p>
E. Subject to administrative and/or judicial review	<p>The tax law does not contain provisions for appeal against advance ruling. However, this does preclude the applicant and tax authorities from exercising their constitutional right to file a writ before the HC or file a SLP before the SC of India.</p>	<p>An advance notice can be appealed to the Supreme Administrative Court by applicant and Swedish Tax Agency.</p>
F. Publishing of Rulings	<p>Order by the AAR, as the Chairman deems fit for publication in any authoritative report or press, may be released for such publication on such terms and conditions as the Chairman may specify</p> <p>[Rule 25 of Authority for Advance Rulings (Procedure) Rules, 1996]</p>	<p>Following the rules on confidentiality, the authority may decide not to publish an advance notice. In case of those advance notices that are published, the name of the applicant is kept anonymous.</p>

Annexure 5: AAR – Pendency position per Annual Reports (Ministry of Finance) of 2010-11, 2015-16, 2016-17, and 2017-18

Period	Opening balance	Applications received	Total	Decisions	Closing balance	Disposal rate (in percent)*
1993-1994	0	5	5	0	5	0
1994-1995	5	15	20	6	14	30
1995-1996	14	66	80	42	38	53
1996-1997	38	66	104	55	49	53
1997-1998	49	69	118	75	43	64
1998-1999	43	47	90	37	53	41
1999-2000	53	31	84	48	36	57
2000-2001	36	39	75	25	50	33
2001-2002	50	55	105	31	74	30
2002-2003	74	16	90	18	72	20
2003-2004	72	26	98	36	62	37
2004-2005	62	23	85	65	20	76
2005-2006	20	67	87	26	61	30
2006-2007	61	22	83	66	17	80
2007-2008	17	26	43	15	28	35
2008-2009	28	34	62	37	25	60
2009-2010	25	75	100	56	44	56
2010-2011	44	182	226	13	213	6
2011-2012	213	246	459	105	354	23
2012-2013	354	158	512	88	424	17
2013-2014	424	133	557	64	493	11
2014-2015	493	79	572	40	532	7
April 2015-Dec 2015	532	52	584	52	532	9
April 2016- Nov 2016	540	27	567	125	442	22
April 2017- Nov 2017	434	71	505	33	472	7

Source: Per Annual Report (Ministry of Finance) 2010-11, 2015-16, 2016-17, and 2017-18.

* Disposal Rate = Decisions/Total *100

Note 1: FY means financial year and covers the period from 1 April to 31 March of the succeeding year.

Note 2: The "closing balance" and "opening balance" for figures in the last three rows are mismatched as there is a break in the relevant "period."

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