

The Curious Case of Advance Rulings under GST – Are they really effective?

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So far, the GST Law has faced its own share of criticism in the Judgments passed by several High Courts for its inefficient and incompetent software interface which is causing enough harassment to the taxpayers. We are three years down the line, but yet to have a fully functional GST Tribunal as on date! ...And this is resulting into series of Writ Petitions being filed before various High Courts of this Country. On the other hand, on matters that have an absolute conclusion, the adjudicating authorities are passing orders at their own free will, with no knowledge of the law and without applying their minds. Thankfully, some of the Appellate Authorities are negating the Orders of the Adjudicating Authorities and remanding the matters for fresh consideration. However, this too is adding on to the harassment already being faced by the registered taxpayers due to delay in achieving the results which were not even a cause of concern in the first place.

On the other hand, the GST provided for establishment of Authority of Advance Rulings (AARs) and Appellate Authority of Advance Rulings (AAARs) and even a National Appellate Authority of Advance Ruling (NAAAR), with the idea of reducing litigation, expenses and providing a platform where there is a certainty of tax implication on an existing or proposed transaction of a tax payer, thus acting as the brains of GST law. However, the plight of these AARs and AAARs is far from the esteemed position they were meant to be. Moreover, the establishment of NAAAR is yet to see the light of the day.

Constitution of AAR – No Judicial Members!

It is interesting to note that, AARs and AAARs consists only of Revenue Members thus, lacking the experience and knowledge of Judicial Members. This has resulted in a pandora's box of misinterpretation and a complete legal hara-kiri caused by the half-baked and mismanaged dispute resolution process and judicial practices adopted by the AARs and AAARs, in absence of NAAAR alongside the pro-provisions supporting the outcomes of the AAARs under the GST Statutes.

On the point of AARs and AAARs having no judicial members, it is also interesting to note that recently, the Hon'ble High Court of Rajasthan has admitted the Writ in the matter of **JVS Foods Private Limited vs. Union of India**, wherein the petitioner pleaded that Section 96 of the CGST Act, 2017 [providing that the AAR established under State GST law will be the AAR for that particular State] and Section 96(2) of the Rajasthan GST Act, 2017 [providing the constitution of AAR] are unconstitutional and also relied on the Writ proceedings in the case of **Chambal Fertilizers and Chemicals Limited vs. Union of India** before the very same Hon'ble Bench. The Hon'ble High Court has called for tagging the matter of Chambal Fertilizers and Chemicals Limited along with JVS Foods and has listed the matter on 08th June, 2020. The outcome of these matters will decide a very important aspect of the constitution of AARs and AAARs. We hope that judicial members are a necessary requisite so that there is some sense of certainty in the outcomes of these authorities.

The effect of AAR

To take this discussion a little further, it may be noted that the AARs and AAARs are constituted under the provision of Chapter XVII of the CGST Act, which enunciates the provisions for overall establishment, constitution, powers and functioning of these bodies. An applicant may approach AARs for obtaining views on GST implications on their existing and/or prospective supply of Goods and/or Services, only with respect to the selective question of law entailed in the provisions of Section 97(2) of the CGST Act such as classification of any goods/ services, determination of time and value of supply, admissibility of input tax credit, determination of the liability to pay tax, etc. Also, as per the provisions of Section 103 of the CGST Act, the advance ruling pronounced by the AARs or the AAARs shall be binding only on the applicant and on the concerned Jurisdictional authority in respect of the applicant alone. It is pertinent to note that there is a provision of establishing a NAAAR under the aforementioned Chapter, which would consist of a Judicial Member (who has earlier served as a Supreme Court Judge or a Chief Justice of High Court or a Judge of High Court for at least 5 years), but it is yet to be established in India just like we are awaiting the establishment of GST Tribunals. Thus, so far, the advance ruling passed by the AAARs are non-appealable under the CGST Act and seals the fate of an applicant, keeping the writ jurisdiction of the High Court and Supreme Court as the only remedy.

Since the GST regime was pitched as a completely new regime and was promoted by the Department of Revenue, the AARs were welcomed with overwhelming reception and support from the industry and therefore, thousands of applications were filed before the AARs. Surprisingly, the AARs of various States had not only come up with contradictory rulings on the same subject, but also, most of the rulings were alleged to be prejudiced and decided in favor of the Revenue and thereby, the applicants rarely got any relief before the AARs and/or AAARs.

This brings us to a major question to which need a perfect answer: viz., **do we really need AARs? And if so, are they really serving the purpose of which they were introduced?**

Recently, many of the Companies would have received notices from the GST authorities with respect to payment of GST on Salaries and Consideration paid to the Directors of the Companies/Firms. In the present scenario, almost every AARs and AAARs established across India, have passed a ruling only to contradict themselves from each other. For instance, in the ruling of **In Re: M/s. Anil Kumar Agrawal; 2020 (5) TMI 221 AAR, Karnataka** and in the ruling of **In Re: M/s. Clay Craft India Pvt. Ltd.; 2020 (4) TMI 228 AAR, Rajasthan**, completely different interpretation has been adopted by the respective AARs with respect to the consideration paid to the Directors of a Company, in terms of its taxability and inclusion under Schedule III of the CGST Act. Be informed that, this is only one instance cited here and there are a plethora of conflicting rulings on different issues, which is yet to attain finality or settled by a superior Court established under the law. These conflicting decisions of different AARs and AAARs are creating a lot of confusion, unrest and harassment for the *bona fide* taxpayer, who merely wanted to evaluate their business transaction while *suo moto* filling the motion for advance ruling. To add on to this harassment, one may note the decision in the case of **JSW Energy Limited vs. Union of India; 2019 (6) TMI 717 Bombay HC**, wherein, the Hon'ble Bombay High Court refused to entertain the

appeal on merit on the ground that there is no appellate provision under the CGST Act for any remedies against the advance rulings.

At present, the GST authorities are at their liberty to choose the precedent which they wish to follow in order to initiate recovery of taxes, which is creating a situation of prejudice for one or the other taxpayer. The principle of Judicial Discipline is being applied without its appreciation. The fact that the advance ruling is binding only on the applicant and the applicant's jurisdictional authorities on the said issue, is being ignored completely and the outcome of such rulings is being used by the quasi-judicial authorities to recover taxes in the name of judicial discipline. Taxpayers are also no less; where there is a favourable ruling given to an applicant, they use the said Ruling as a base to argue their own matter and ignore the others.

This has created a scenario of complete chaos among the taxpayers, as the NAAAR is yet to be constituted, which is keeping them devoid of their right to Appeal. As per the provisions of Section 101B of the CGST Act, appeals against these conflicting advance rulings shall lie before the NAAAR which, if constituted, would consist of Judicial Members too, who have been Judges of Supreme Court.

This inconsistency continues, and infact will only worsen, till the date NAAAR is not established. The grievances would only pile up in time and would welcome the NAAAR by becoming their backlog. The same can be seen with respect to setting up of GST Tribunals. The easing of doing business in India and GST un-complexifying (I think it's a word) the tax regime, is only becoming a distant dream.

As an alternative, the Department of Revenue could circulate a consolidated Ready Reckoner or a FAQ or a booklet like the 'Education Guide' issued during the Service Tax regime, to provide for the settled precedents and clarification on various issues which are originating out of these conflicting rulings of the AARs / AAARs or in fact even the judicial decisions. This problem needs to be resolved at the earliest by intervention of Central Board of Indirect Taxes (CBIC), Department of Revenue and Ministry of Finance in consultation with the Trade and Tax Consultants.

Disclaimer: The above are personal views of the author/s and shouldn't be considered as a legal opinion.