IMC
Chamber of Commerce and Industry

8th August 2018

To,
Dr Hasmukh Adhia,
Finance Secretary,
Government of India
128-A North Block,
New Delhi

Respected Sir,

Sub: CBDT directive for offering incentives to Commissioners of Income-tax (Appeals) for passing quality orders based on Enhancement of assessment and imposition of fresh penalty and other issues

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Clarifications/ Initiatives of Government for "Taxpayer friendly atmosphere":

The Central Board of Direct Taxes ('CBDT') has time and again been issuing directions to the tax authorities to make the functioning of the tax authorities "non-adversarial" and "tax-payer friendly", which has been the motto of the current Government. The said directions act as a guidance to the tax authorities for smooth functioning and create confidence among the tax payers. All such actions of the CBDT have been appreciated by the Industry and stakeholders.

Suggestions invited by CBDT for simplification/ clarifications:

Similarly, CBDT has been inviting suggestions from stakeholders for simplification of tax laws, smoothening of return processing, issue of refunds, timely disposal of appeals etc., to which several organisations have been regularly providing their thoughts and suggestions to the CBDT.

CBDT circular regarding Central Action plan for appeals before CIT(A):

Recently, CBDT has issued a Central Action Plan 2018-19 wherein, in order to reduce the huge pendency before the Commissioner of Income-tax (Appeals) ('CIT(A)'), CBDT has assigned specific targets for disposal of appeals to CIT(A)s. The said direction of CBDT is highly appreciated, as this step of having specific disposal targets for CIT(A)s will facilitate reduction of pending litigation at the stage of first appellate authority.

Certain instructions contrary to government initiatives:

However, it has been observed that some of the directions/guidance issued by the CBDT to the tax authorities have been completely contrary to the steps taken in the recent past and the promises made by the Government of providing a “non-adversarial regime” to the Industry and stakeholders. Some of the examples are as under:

- CBDT Instruction dated 8th March 2018 – PCIT/ CCIT directed to monitor functioning of CIT(A)s under their jurisdiction;
- CBDT letter dated 7th March 2018 regarding initiation of prosecution proceedings; and
- CBDT Central Action Plan 2018-19

Monitoring of functioning of CIT(A):

CBDT had issued Instructions dated 8th March 2018 to the Principal Chief Commissioner of Income-tax (‘Pr.CCIT’)/ Chief Commissioner of Income-tax (‘CCIT’), wherein they were required to conduct regular inspection of working of CIT(A)s under them and keep watch on quality and quantity of orders issued by them.

Several representations were made by Industry and stakeholders before your Honour and before the CBDT chairman, since this instruction was likely to interfere with the independent functioning of CIT(A) which is a quasi-judicial authority constituted under the Act (representation made by IMC dated 16th April 2018 is enclosed for your reference by way of an example).

After, strong representations made by the Industry and Stakeholders, we felt that said instruction dated 8th March 2018, would be withdrawn by the CBDT.

However, in the recently issued Central Action Plan, the CBDT has again reiterated that Pr.CCIT/ CCITs have been assigned responsibilities to monitor and ensure that the CIT(A)s and AOs discharge their duties in the manner envisaged by the CBDT.

Incentives to CIT(A) for Quality orders:

Further, in the Central Action Plan, the CBDT has offered incentives to CIT(A)s for passing “quality” orders. The incentives have been offered where the CIT(A) :

i). enhances the assessment made by the Assessing officer (‘AO’) or

ii). strengthens the stand of the AO on the issues in appeals or

iii). levies penalty u/s 271(1)(c) of the Income-tax Act, 1961 (‘Act’) on the additions confirmed in the CIT(A) order.

Hence, by this action of CBDT under the Central Action Plan, CIT(A)s are incentivised to decide matters against tax payers. This completely erodes their impartiality and independence, and creates a bias in favour of the tax department in a quasi-judicial proceeding. Industry and stakeholders envisage that the functioning of CIT(A) as an independent judicial authority will be severely affected.

Hence, we would like to draw your attention to the following:

Monitoring of CIT(A) functioning by Pr.CCIT/ CCIT

1. CIT(A) is a quasi-judicial authority. It functions independently from the tax administration authorities. Accordingly, on account of the directive given in the Central Action Plan and earlier CBDT direction dated 8th March 2018 to the effect that the Pr.CCIT/ CCITs will monitor the functioning of CIT(A)s, there is a strong apprehension that monitoring of CIT(A)s' orders by Pr.CCIT/CCIT having administrative functions as well, will severely impact the judicial decisions making by the CIT(A) as their decision making would get influenced by the fear that their orders would attract attention of CCITs if taxpayer is given relief. This, in our opinion, is against the principles of judicial independence. The very purpose of the first appellate authority, being an independent judicial functionary, would be defeated if the qualitative aspects of the decision is monitored/ influenced by any senior officer of the Department.

2. It is important to note that monitoring of "qualitative" aspect of the CIT(A) orders are not even within the jurisdiction of Comptroller and Auditor General ('CAG') during the annual audit proceedings. CAG only monitors the quantitative aspect of the CIT(A)'s functioning and whether it has been effectively monitored by the CCIT in charge.

3. A few years ago, the then CCIT 1, Mumbai, had issued similar instructions that CCIT should monitor orders passed by CIT(A)s and this was later withdrawn after strong protests made to the CBDT by professionals and industrial organisations. We also believe that on strong representation made by professionals and industrial organisations against CBDT Instruction dated 8th March, 2018, the same was withdrawn. However, instead of that the Central Action Plan has made the intentions of the CBDT very clear.

   Accordingly, it is apprehended that bringing in Pr.CCIT and CCIT to monitor qualitative aspects of CIT(A) order is likely to encroach the independent functioning of CIT(A) as a judicial authority and hence, such directions issued by CBDT should be withdrawn immediately.

Incentives provided to CIT(A)s under Central Action Plan for enhancement of assessment and initiating penalty proceedings

4. The incentives for passing "Quality" order being offered to CIT(A) based on enhancement criteria and imposition of penalty is likely to affect the judicial decision making process of CIT(A). In this scenario, a CIT(A) is bound to act as quasi-revenue authority and more likely than not, function as a "Revisionary Authority" (like Commissioner of Income-tax in exercise of power under section 263 of the Act) and not like an independent appellate authority.

5. It is to be noted that under the Act, the CIT(A) has no power to look for new source of income, i.e. he can enhance the assessment only on the issues which are subject matter of AO's order. The said position has been affirmed by various courts in several decisions:

- Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC),
- CIT v. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC)
- Sterling Construction & Trading Co [1975] 99 ITR 236 (Kar)
- CIT v. Associated Garments Makers (1992) 197 ITR 350 (Raj),
- CIT v. Sardari Lal & Co (2001) 251 ITR 864 (Del) (FB), and
- CIT v. B. P. Sherafudin (2017) 399 ITR 524 (Ker).

Accordingly, this action plan virtually makes the CIT(A) travel beyond the role/ responsibility of CIT(A) enshrined in the Act and this is likely to impact the judicious functioning of CIT(A).

6. The number of appeals being filed with the CIT(A)s in high demand cases and transfer pricing matters were reduced on account of introduction of Dispute Resolution Panel ('DRP') by Finance Act, 2009. Many taxpayers used to opt for DRP route as it was a time bound dispute resolution mechanism and fast track route for appeals to ITAT. The DRP orders were not appealable by department from 1st April, 2009 to 1st July, 2012. Consequently, DRP virtually functioned as an approving authority. However, once the DRP orders were made appealable by the Department, the DRP started functioning as a judicious authority during the period of 1st July, 2012 to 1st June, 2016. With the amendment made by Finance Act, 2016 whereby the powers of department to appeal against the order passed by DRP have been withdrawn, DRP has once again become an approving authority or enhancement authority and also acting for improving the draft orders passed by the AO.

   On account of this, several taxpayers having huge tax demand have preferred to file an appeal before CIT(A) instead of approaching the DRP. This has been the case because the CBDT had issued directions to AOs for granting of stay of demand on collecting 15%/ 20% of the demand when appeal is pending before the first appellate authority i.e. CIT(A). This approach was adopted by taxpayers since it has been observed that more often than not, CIT(A) has been a judicious authority and was likely to follow orders passed by Tribunal/High Courts, unlike the DRP, on account of which taxpayer would get necessary relief.

7. Thus, on account of this directive by the CBDT of offering incentive based on enhancement done to AO order or initiation of penalty proceeding, it is likely that the CIT(A) will also become an extension of Assessing officer, similar to the DRP. Taxpayers will then have no confidence at all in the judicial process, as this will in effect make the entire First Appellate Authority an ineffective forum. The taxpayer would therefore be left high and dry and have no recourse to get justice.

Hence, it is strongly suggested that the said Action Plan should be withdrawn/ modified and the incentives to the CIT(A) may be linked to number of cases disposed off, quality of the orders based on how many orders have been sustained at Tribunal and High Court, rather than the enhancement criterion laid down in the Action Plan.

<u>Non-taxpayer friendly steps/ Action - experience of last 1 year:</u>

<u>Guidance on launching of prosecution proceeding vide letter dated 7th March, 2018</u>

8. The CBDT Chairman had addressed a letter dated 7th March, 2018 to the PCITs in which he had observed that the work relating to the filing of prosecution complaints and disposal of compounding applications "is not up-to the mark". CBDT Chairman had opined that prosecution proceedings can be successfully initiated in several cases and he had directed the officers to put in their best and expedite filing of prosecution complaints and disposal of compounding applications. These type of directions by the CBDT are likely to create distrust among the taxpayers. We understand that in view of this instruction, several prosecution notices were issued and a large number of prosecution cases were launched by PCITs and AOs without considering the "merits" or "making qualitative analysis of defaults", just to meet their "targets" of prosecution. This has led to a large number of prosecution notices being mechanically issued and prosecution proceedings being launched for the smallest of TDS defaults or additions to income or non-filing of return of income or non-payment of taxes on time. Intimation received in response to an RTI query shows that around 1 lakh notices have been issued to show action taken in response to such instruction by the CBDT. This has led to fear in the minds of taxpayers as they are being prosecuted for smallest of the additions without considering the legal position of the claims made by them. Many notices were also issued to non-resident directors of Indian subsidiaries of foreign companies. This high handed approach has also led to fear amongst foreign investors coming into India.

Revision and Recovery proceedings

9. Also, there are several instances wherein the CITs have issued revision notices under section 263 in the garb of "Erroneous Order" passed by the lower authorities. Statistics show that a majority of such notices have been issued as a direct fall out of queries raised by the audit team. It is a well known fact that more than 75% to 80% of these orders have ultimately been quashed by the Tribunals. Such actions of CITs have already created lot of distrust of the tax department in the minds of taxpayers.

10. Also it is to be noted that the tax authorities have been regularly causing havoc by coercive recovery measures taken every year during the period from October to March to achieve revenue targets set for their respective charges. It is seen that on several occasions, High Courts have come to the rescue of the taxpayer and have taken action against the tax authorities.

Request to keep larger interest of the country in mind by avoiding frivolous litigation or creating fear psychosis:

In view of the above, it is shocking that when, on the one hand, the Hon'ble Prime Minister and Hon'ble Finance Minister talk of a tax payer friendly and non-adversarial tax regime, the CBDT on the other hand, issues directions which are completely contrary to the vision of present government. **It is imperative that necessary directives be issued to the CBDT by the Ministry that no steps be taken by CBDT whereby the actions cause harm to taxpayers and the promise of non-adversarial tax regime is broken**.

We humbly request your Honour to resolve the above issues at the earliest in order to avoid unnecessary hardship being caused to the taxpayers.

Thanking you,

Yours sincerely,

Raj Nair
President,
IMC Chamber of Commerce and Industry

Sunil Gabhawalla
President,
Bombay Chartered Accountants' Society

CA. Chintan M. Doshi
President,
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