BOARD OF ADVANCE RULING UNDER FINANCE ACT, 2021: A MEDIocre REPLACEMENT FOR AUTHORITY FOR ADVANCE RULING

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ABSTRACT
As propounded by Adam Smith, “Certainty” constitutes the cornerstone of a good tax system. Certainty on the tax incidence and tax rate is also very much desired by the taxpayers, as it intimates them of their tax liability and assists them in planning out their finances beforehand. The mechanism of Advance rulings ensures to provide such certainty to the taxpayers, especially for foreigners undergoing huge monetary investments in the country. It also helps to relieve the judiciary from being flooded with taxation dockets, as it provides finality to matters raised by the applicants. In India, the system is implemented through a quasi-judicial authority named Authority for Advance Ruling established under Chapter XIX-B of Income-tax Act, 1961.

Recently, the efficiency of the Authority for Advance Rulings (AAR) in India has been largely affected because of the Prolonged vacancy in the authority, resulting in a huge backlog of cases. In order to rectify this situation, the finance ministry, in its 2021 budget, had replaced AAR with the Board for Advance Ruling (BAR). This action on part of the Government doesn’t prove to be effective in overcoming the shortfall of AAR. This paper aims at comparing the efficiency of AAR and BAR in quick disposal of the case and providing certainty to the taxpayer. It also provides an outline of the concept of advance ruling in India and also discusses the existing mechanism of AAR and BAR in India. It tries to identify the issues with the new board and provide necessary suggestions.

Keywords: Authority for Advance Rulings, Board for Advance Ruling, AAR, BAR, Chapter XIX-B, Income-tax Act, 1961

INTRODUCTION
"Forewarned is forearmed". Especially when it comes to financial transactions, investors prefer to be made aware of their tax liabilities and duties. In recent years, as the world has become one global market, the conflict between international and domestic taxation seems to be never-ending and taxpayers are baffled by the myriad of laws and precedents. Not only the taxpayers, but even the government itself also seems to be perplexed while taxing a transaction as 87% of the suit filed by the Indian Government before the Supreme court pertains to tax disputes.1 Certainty in tax legislation is the primary goal of legislators and desired outcome by the taxpayers around the world. The system of advance ruling acts as a means to provide such certainty in tax administration.

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1 National Cooperative Development Corporation v. Commissioner of Income Tax, 2020 SCC Online SC 733
Advance ruling plays a pivotal role in reducing these tax complexities and in clarifying any ambiguities faced by taxpayers or authorities, thereby assisting foreign investors in avoiding costly tax litigation. The advance ruling also encourages voluntary compliance by taxpayers, thus reducing the workload of the tax administrators.

The system of Advance Ruling is widely prevalent in all the OECD member countries. Even the non-OECD countries offer similar mechanisms in their jurisdiction to provide the desired clarity to both the taxpayers and authorities.2 Thus, the advance ruling has emerged as a feature of the robust international tax cooperation regime reflecting the existence of a mature tax system.

India, keeping on par with the international standards, established Authority for Advance Ruling in 1993. This authority functions as per the provisions of Chapter XIX-B of the Income Tax Act, 1961. It functions as an independent adjudicatory authority whose rulings are final and binding on both parties. This feature increased the public confidence and faith in the authority and it was able to reduce the docket explosion before the court during the initial years.

However, over the past few years, lacunas in the office have resulted in delayed disposal of applications. Authority for Advance Ruling had fallen short of its purpose and objectives. The Finance Act, 2021, has sought to deal with this situation by forming another forum called the Board of Advance Rulings (BAR), replacing the existing AAR. The objective behind the new board is to provide advance rulings to taxpayers in a timely manner and ensure speedy disposal of the application. But even the new Board for Advance Ruling is not devoid of problems.

**ADVANCE RULING - DEFINITION**

An advance ruling is defined under section 245N(a) of the Income-Tax Act of 1961. It basically includes determinations by the authority on the tax liability of a resident or non-resident applicant regarding certain transactions undertaken or proposed to be undertaken by them.3

A technical note of the International Monetary Fund (IMF) describes advance tax ruling as:

“(an) advice that a taxpayer may seek from the tax authority in relation to the application of the tax law to their particular arrangement. 4

The OECD’s Glossary of Tax Terms defines advance rulings broadly as “a letter ruling, which is a written statement, issued to a taxpayer by tax authorities, that interprets and applies the tax law to a specific set of facts”.

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3 Income tax Act, 1961 (Act 43 of 1961), s. 245N(a),
5 OECD, Glossary of Tax Terms, available at http://www.oecd.int/ctp/glossaryoftaxterms.htm#A - accessed on 11.01.2022
International Bureau of Fiscal Documentation (IBFD) in its International Guide to Advance Rulings defines advance ruling as *A ruling is a statement issued, upon request, to a (potential) taxpayer indicating the tax administration's view of the tax treatment of a particular set of facts and circumstances contemplated, in the process of completion, or completed but not yet assessed.*

Based on the above definitions, the features for advance ruling can be listed as follows:

- It is a statement issued by the tax authorities
- Such a statement determines the tax treatment of transactions involved by the taxpayers
- It also includes any future transactions which may be carried on by the taxpayer
- It is binding on the taxpayer as well as the authorities.

The unique feature of the Advance ruling mechanism is that the taxpayers can have their prospective future problems resolved by an independent authority composed of experts from law and revenue.

**HISTORY OF ADVANCE RULING IN INDIA**

At the beginning, it was the 1971 Wanchoo Committee that recognized the need for introducing an Advance ruling mechanism in India, especially with regard to foreign transactions. Later, the Chokshi committee, in its interim report submitted during 1976, had also recommended that the CBDT must be empowered to give advance ruling regarding certain issues when approached by taxpayers. The committee directed the CBDT to take the necessary steps to establish such authority.

In 1991, the Indian economy was liberalized and Indian markets were opened to foreign investors. The inflow of FDI demanded the establishment of an Advance Ruling Authority to resolve the ensuing tax disputes. Thus in 1993, then Finance minister Dr. Manmohan Singh, during his budget speech, assured the implementation of a scheme of advance ruling to address the issue raised in transactions involving non-resident investors. But no further action was taken by the government to constitute such authority. Finally, the Tax reforms Committee (1993) criticized such inaction and called upon the government to set up an Advance ruling authority at the earliest.

Subsequently, The Income Tax Act, 1961 was amended by the Finance Act of 1993, to introduce a new chapter titled Chapter XIX-B. This chapter finally provided the mechanism for advance rulings in India. AAR was set up as a statutory quasi-judicial authority which came into effect from June 1st, 1993.

Initially the mechanism was brought only to address the issues brought by the non-residents. Subsequently CBDT through its notification expanded the scope of advance ruling to even include issues raised by Indian residents.

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8 Chokshi, C.C, “Direct Tax Laws Committee Final Report” (Ministry of Finance, September, 1978)
AUTHORITY FOR ADVANCE RULING: CONSTITUTION AND PROCEDURE

Chapter XIX-B under Income tax Act 1961 consists of 11 section (Section 245N to 245W) which deals with the matters such as establishment, procedure and power of Authority for Advance Rulings in India.

A bench for Authority for Advance Ruling is headed by a retired Supreme Court judge as the chairman or a retired High court judge as vice chairman, including two high-ranking members of the Indian Revenue Service and the Indian Legal Service as its members.\(^\text{10}\) The AAR is located in New Delhi. The CBDT through its notification established two additional benches at National Capital Region and Mumbai\(^\text{11}\).

Sec 245N(b) defines applicants. It includes residents entering into transactions with non-residents, non-residents entering into transactions in India and a notified public sector company. It also covers transaction entered by residents the value of which amount to ₹100 crores\(^\text{12}\). An application can also be filed to know whether a proposed transaction by a resident or non-resident is affected by the GAAR provision under Chapter X-A\(^\text{13}\).

The application containing questions must be submitted in a prescribed format\(^\text{14}\) along with the required fees (i.e.) ₹10000\(^\text{15}\) or as prescribed.\(^\text{16}\) The signed and verified application\(^\text{17}\) must be presented in quadruplicate before the authority. An option to withdraw the application within 30 days of filing is also granted.\(^\text{18}\)

Once the application is submitted it is initially accepted or rejected under section 245R(2). But if the application is accepted, the question raised in the application is adjudicated after providing an opportunity of hearing and the written rulings are passed as per Section 245R(7) read with Section 245R(4). The authority is bound to pass the ruling within six months of accepting the application.\(^\text{19}\) Such Ruling is duly signed by all the members of the bench and copies are forwarded to the parties including the Principal Commissioner or Commissioner.\(^\text{20}\)

The authority has all the powers of civil court and it is also empowered to regulate its own procedure.\(^\text{21}\) Thus the authority had passed under Authority for Advance Rulings (Procedure) Rules, 1996 which deals with the procedural aspects in detail.\(^\text{22}\)

Its rulings were binding on the applicant and the tax department, and could not be challenged unless there is change of law or fact which forms the basis for the ruling passed.\(^\text{23}\) Even Such a challenge of the advance ruling can be filed only in the form of writ petition under Art.226/227 before the

\(^{10}\) Supra note 3, s. 245O
\(^{11}\) Notification No. 1/2015, Dated: March 20, 2015, CBDT (2015)
\(^{12}\) Notification No. 73/2014, dated 28-11-2014, CBDT (2014)
\(^{13}\) Supra note.3, s. 245N(b),
\(^{14}\) Income Tax Rules, 1962, (SO 969, DATED 26-3-1962), Rule 44E and Form No.34C to 34EA
\(^{15}\) Supra note. 3, s. 245Q
\(^{16}\) Supra note 14, Rule 44E

\(^{17}\) Ibid rule 44E(2)
\(^{18}\) Supra note 15
\(^{19}\) Supra note3, s. 245R(6)
\(^{20}\) Ibid s. 245R(7)
\(^{21}\) Ibid ss. 245U & 254V
\(^{22}\) Authority For Advance Rulings (Procedure) Rules, 1996, [GSR 426(E), Dated 17-9-1996]
\(^{23}\) Supra note.3, s.245S
However Any order obtained by fraud shall be declared void ab initio under Section 245T.

**EFFECTIVENESS OF AUTHORITY FOR ADVANCE RULING**

Central Board of Direct Tax (‘CBDT’) vide its circular no. 657 of 1993 declared the intent of introducing the chapter XIX-B as follows

"(To) entrust the power of giving advance rulings to an independent adjudicatory body and to ensure further that the procedure is simple, inexpensive, expeditious and authoritative."25

True to the above statement, the authority for advance ruling has been functioning effectively for the past 28 years by reducing the burden of the court as most of the rulings are mutually accepted by the parties. only a fraction of its rulings gets challenged before High Courts through writ petition. The rulings of AAR have a persuasive value and High court and supreme court refer to those rulings to resolve the tax disputes before them. These rulings are also reported in numerous journals across the country, making it an integral part of Indian taxation jurisprudence.

By appointing retired judges as chairman or vice-chairman, The Authority was conferred judicial independence and kept outside the administrative control of the Central Board of Direct Taxes (CBDT). This in turn ensured the public's confidence in the unprejudiced nature of the authority to dispose off the applications.

Dealing with the efficacy of the Authority, the Finance Ministry in its Annual Report for 2019-2026 stated that:

"The functioning of the Authority has been found to be very useful, particularly to the non-resident entities doing business in India.

The Supreme Court addressed the significance of the Advance Ruling mechanism in the case of National Co-operative Development Corporation v. Commissioner of Income Tax.27 The court added a post-script to its judgment and recommended that the

"Central government must consider the efficacy of Advance tax ruling system and make it more comprehensive as a tool for settlement of disputes rather than battling it through different tiers, whether private or public sectors are involved. A council for Advance Tax Ruling based on the Swedish model and the New Zealand system may be a possible way forward."

However, in the last 3 years, the annual disposal rate of AAR has been less than 25%. The prolonged vacancy in the office of the Chairman and Vice-Chairman because of the non-availability of eligible persons is the main reason for such a low disposal rate. In fact, AAR was functioning without a chairman for two years (August 2016 to July 2018) as no appointments were made. When this issue was raised by means of PIL before the Patna High court, the court provided an interning measure by directing one of the

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27 Supra note 1
members to carry out the functions as the in-charge chairman.\(^{28}\)

Owing to such vacancies, the benches do not function for months together thereby increasing the average time to pronounce a ruling to go beyond 3-4 years.\(^{29}\) This defeats the very purpose of having Authority, as it is undesirable for the taxpayer to wait for so long to get clarity as to the taxation of transactions undergone by them.

**BOARD OF ADVANCE RULING - AN OVERVIEW**

The Finance Act 2021, in order to overcome the shortfall of AAR, abolished the Authority and replaced it with a new authority named Board for Advance Ruling. This authority is aimed at the timely disposal of the Advance ruling applications. The CBDT through its notification established 3 Boards for Advance Ruling Having its headquarters at Delhi and Mumbai\(^{30}\) The previous existing AAR system shall cease to operate from 1st September,2021\(^{31}\) And for those applications in which order has not been passed by the AAR before the said date, they shall be transferred along with all Relevant records and documents before the BAR.\(^{32}\)

Every such Board for Advance Rulings shall consist of two members appointed by CBDT, each being an officer not below the rank of Chief Commissioner.\(^{33}\) It also provided the right to prefer appeals against the rulings of the Board. The appeal can be filed by both the applicant and the authorities before the High court within 60 days from the date of communication of order in such form as may be prescribed.\(^{34}\) If the parties were barred from filing the application on time due to sufficient cause, an extension of 30 days is also provided under the

Section 245W also recommended the central government to prepare a scheme for filing appeal before The High court which ensures your transparency and accountability by optimising utilisation of resources through economies of scale and functional specialisation and introducing a system with a dynamic jurisdiction.

Except for the above provisions, the remaining provisions under Chapter XIX-B dealing with the procedure and power of AAR tends to applies even to BAR

**ISSUES WITH BOARD OF ADVANCE RULING**

The BAR was established with the intent to overcome the defects of the AAR by providing the rulings in a timely manner. But there are a few innate issues in the system of BAR which are against the essential features of a successful Advance ruling system.

- **No finality for the rulings passed**

Unlike the Rulings passed by AAR, the advance ruling of BAR is appealable. Thus, such rulings are not completely binding upon the parties and This fails to provide the taxpayers with any certainty or finality which are the primary objectives of the Advance ruling system. Moreover, the legislators, while defining advance ruling under section 245N(a) of IT act, used the expression

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28 Rajeev Kumar v. Union of India, Patna High Court, Order dated September 18, 2016,
29 Supra note 1
30 Notification No. 96/2021 dated 01-09-2021, CBDT (2021)
31 Notification No. 97/2021, dated 01-09-2021, CBDT (2021)
32 Supra note 3, s.245Q
33 Supra note 3, s.245OB
34 Supra note 3, s.245W
“determination” which means the dispute is finally resolved or closure/end of the issues raised. \(^{35}\) The appealable BAR Ruling goes against the definition of advance ruling as it doesn't seem to provide the finality as desired by the legislators.

Further, previously the High Courts were only entertaining appeals under the Act, where substantial questions of law were involved. The right to appeal under the BAR mandates no such conditions which might cause the proliferation of tax litigation before the High court. Thus, a system established to reduce the burden of the courts might end up adding to the proliferating litigation before the higher courts.

Usually, the average time taken by the High court to dispose of a normal tax appeal ranges from four to five years. This appeal under BAR adds to a new class of appeals before High Courts resulting in further delay for disposal of the tax disputes.

This also leads to further complications. Where the ruling is in favour of the taxpayer and the Department has filed an appeal, the Assessing officer may not apply the ruling while making the assessment, the issue being sub judice. In such cases, the taxpayer will pursue the normal appeal remedy to execute the ruling, whereas the Department will pursue the High Court appeal, leading to the duplicity of proceedings on the same issue. A scenario where the High Court overturns the decisions of the AAR will only lead to further complexity.

- **Lack of independence**

  The board comprises two members who are appointed by the CBDT. Such members are officers not below the rank of the Chief Commissioner.\(^ {36}\) This would imply that the advance rulings would now be pronounced by income-tax authorities exercising quasi-judicial powers. Though this might resolve the manpower issue faced in the previous AAR system, it might be a major problem for the taxpayers.

  Earlier under AAR, the members were usually retired, judges or legal experts. Even the revenue members on the bench were retired officers or had to resign from their services on being appointed to the bench. There was also a balance of expertise under AAR Bench as it was a blend of the judiciary (retired Supreme Court/ High Court judge) with legal (Law Member) and commercial/accounting knowledge (Revenue Member). This ensured fair, just, and meritorious orders. With the members of BAR being in-service officers of the department, the Board had become more like a functionary of the department rather than being an independent body. This violates Article 50 of the Indian Constitution, which mandates the separation of judiciary from executive\(^ {37}\).

  The Hon’ble Madras High Court, in Revenue Bar Association v. Union of India \(^ {38}\) has held that a justice delivery system has to be independent and impartial. Especially in the case of tax disputes, it is necessary for the presence of an impartial party in the form of a judicial member to ensure fair decisions. Even the Hon’ble Supreme Court decision of

\(^{35}\) Jawanta Sugar Mills Ltd, Meerut v. Laxmichand 1963 AIR 677, 1963 SCR Supl. (1) 242  
\(^{36}\) Supra note 33  
\(^{37}\) Constitution of India, 1949, Article 50  
\(^{38}\) Revenue Bar Assn. v. Union of India, 2019 SCC Online Mad 8910, decided on 20-09-2019
UOI v. R. Gandhi\(^\text{39}\) has echoed a similar proposition, holding that the independence of members discharging judicial functions in a Tribunal cannot be diluted

- **Possibility of biased ruling**
  
  The AAR follows an adversarial system of hearings. It means that the two opposing parties plead and present their case before an impartial judge or jury. As members of the board are officers of the Income-Tax departments and one of the contesting parties is the department itself, the chances of a biased ruling are much higher, especially in cases of high value and complex cross-border transactions. This not only affects the principles of natural justice but may also lead to a loss of confidence in authority by the taxpayer.

  The failure of the Dispute Resolution Panel is a classic example of how the institutions headed by Tax Administrators in resolving the disputes have not gained trust among the taxpayers. A similar situation arose in relation to AAR constituted under the Central Goods and Services Tax Act, 2017 (CGST Act), which are presided only by Revenue Officers from the Central and State Governments, respectively. As most of the rulings were pronounced in favor of the revenue department, a question as to the independence of the authority was raised by the taxpayer through several writ petitions\(^\text{40}\).

  In the past, tax officials could rarely resolve tax disputes with absolute certainty. Certainty being the pillar for Advance Ruling, the BAR headed by tax officials doesn't look lucrative to the taxpayers.

**CONCLUSION**

The replacing Authority for Advance Ruling with the Board of the Advance ruling seems to be old wine in a new bottle. The new board had not only failed to vanquish the defect of AAR, but it has also led to several other complications which need to be addressed in order for the Board to achieve its purpose.

Prolonged vacancy due to non-availability of eligible persons for the post of chairman was declared to be the prime reason for replacing AAR with BAR. But no reason was provided by the government as to why this issue can't be fixed by simply relaxing the eligibility for appointment of the chairman or extending the retirement age.

An analysis of a successful Advance ruling system around the world reveals that such authority needs an independent judicial body with powers adequate to promptly grant a legally binding order. It is evident that under the new system the independence and power of the Advance ruling body have been extremely diluted.

Independence of the authority is essential to generate confidence among taxpayers. So it is suggested that rather than appointing in-service officers of the IT department, experienced tax lawyers, professionals, tax experts from Private sectors, retired members from the Income Tax Appellate Tribunal (ITAT) can be considered for the post for chairman of advance ruling authority. This would not only ensure the independence of the board but also resolve the delay in disposing of applications. Moreover, the

\(^{39}\) Union of India Vs. R. Gandhi (2010) 11 SCC 1  
\(^{40}\) Chambal Fertilisers and Chemicals Limited v. Union of India (Civil Appeal No. 7091/2019) (Raj HC); Rajendra Kumar Duggar v. Union of India & Ors. (WPA No. 2186 of 2020) (Cal HC); Revenue Bar Assn. v. Union of India, 2019 SCC Online Mad 8910.
quality of the order passed will also be higher.

The delay in Ruling can also be reduced by increasing the number of benches and making sure of the consistency in rulings passed by them. This is essential in order to secure the faith of the applicant and also to prevent bench shopping by the investors. The board must also rationalize the prescribed fees for advance ruling applications considering the costs for appeal before the High court. The existing inequality between resident and non-resident investors in the form of threshold limit41 must either be removed or reduced.

An efficient Advance ruling system is the need of the hour to attract investors, gain public faith in tax administration, and cut back on litigation before the courts. With the above-mentioned changes, the new Board for Advance Ruling might be our hope to achieve tax certainty and protect the investment that is essential for the economic growth of our country.

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41 As per section 245N(b), In the case of resident taxpayer, a threshold of transaction 100 crores or more has been prescribed in order to apply for advance ruling whereas no such threshold has been prescribed in case of non-resident taxpayer.