DIRECT TAXES LITIGATION MANAGEMENT AND ALTERNATE DISPUTE RESOLUTION

Acknowledgements

This report was prepared by the National Institute of Public Finance and Policy as part of its engagement by the Economic Advisory Council to the Prime Minister to carry of detailed studies on macroeconomic and fiscal issues. The report carries out a comprehensive review and assessment of the direct tax appeals and litigation system. It presents India's current dispute resolution system, focuses on various dispute resolution options, compares it with other countries and concludes with some practical policy options for enhancing tax dispute resolution. Broadly, the report finds that the normal tax assessment and litigation system sets up an adversarial legal relationship between the tax department and the taxpayer. Litigation procedure of the normal assessment-related dispute resolution system in India takes approximately 15 years on average. To reduce tax disputes, India's tax system provides only limited special mechanisms to resolve disputes. Alternative mechanisms are needed to reduce time and cost issues associated with litigation. The report offers certain policy remedies such as: (a) pre-return filing administrative clarifications and guidance, (b) communication of draft orders and mid-assessment objections, (c) post-assessment non-litigation administrative remedies, (d) panel based dedicated dispute resolution team with objective of litigation minimization thorough mediation, arbitration or negotiation, (e) time-bound case disposal and adequate staffing of appellate structures.

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Executive Summary

India's tax system has moved towards a simple and moderate rate structure, with a wider base and better enforcement that enhances equity and strives towards developing an internationally competitive and dynamic economy. The quantum of tax revenue has increased by 50.16% from fiscal years 2014-15 to 2019-20. However, the prevailing system of direct taxes is beset with problems of increasing arrears of collections and pendency of appeals. CIT (Appeals) cases due for disposal has increased from 3.53 lakh in 2015-16 to 5.57 lakhs in 2019-20. The caseload pendency has increased year after year from 73.3% in 2015-16 to 82.2% in 2019-2020. A worrying aspect is that the amount locked in appeal cases with CIT (A) is more than the revenue deficit of the government of India in FY 2019-20. Total cases received collectively by Income Tax Appellate Tribunal (ITAT), High Court and Supreme Court have increased by 76.6% from 2015-16 to 2019-20. With the introduction of Vivad Se Vishwas Scheme (VSVS) in 2020, the number of deadlocked cases may decrease somewhat post 2020. Nevertheless, such ad-hoc dispute reduction schemes are only occasional and do not provide a systemic solution to the issue of burgeoning tax disputes. If the country were able to resolve deadlocked tax cases on time, even taking into account those ruled in favour of the taxpayer, the revenue deficit would not be as high as it is today.

An indicator of India's high tax dispute caseload in comparative terms is the international taxation mutual assessment procedure (MAP) caseload available from OECD. India ranked fifth in caseload at the beginning of 2021, with only the large OECD economies Germany, Italy, France and US having a higher caseload. Other large emerging economies such China, Mexico and Indonesia have much lower MAP caseloads. This is an indicator of high tax disputes and inadequate dispute resolution in relation to the size, international connectedness and complexity of the economy.

The normal tax assessment and litigation system sets up an adversarial legal relationship between the tax department and the taxpayer. Litigation procedure of the normal assessment-related dispute resolution system in India takes approximately 15 years on average. To reduce tax disputes, India's tax system provides only limited special mechanisms to resolve disputes. Alternative mechanisms are needed to reduce time and cost issues associated with litigation. This report presents India's current dispute resolution system, focuses on current dispute resolution options, compares it

with other countries and concludes with some practical policy options for enhancing tax dispute resolution.

Most advanced economies and even some emerging markets have systematic dispute mitigation and alternative dispute resolution measures (IMF 2013). In India alternate dispute resolution methods prevail largely in the civil family dispute realm. Attorneys also participate in arbitration proceedings, negotiation and claim settlement in areas such as personal injury and debt collection cases. It is therefore recommended that India put in place a comprehensive systematic dispute mitigation and alternative dispute resolution structure. This could draw upon existing the methods already available to international taxpayers in India (such as advanced rulings and Dispute Resolution Panel), be based on international good practice, and also build upon alternate dispute resolution methods used in the Indian civil law context. The following are the main recommendations:

1) Pre-return filing administrative clarifications and guidance: Taxpayers may have genuine doubts about particular transactions such as their taxability, time of taxability, head of income, admissibility of deductions, etc. Presently other than Advance Pricing Arrangements (APAs) (applicable only to international transfer pricing), no pre-return filing guidance is available in India. Taxpayers could discuss certain transactions the taxability of which may be doubtful. These could be sent in a "faceless" manner to a panel of experienced senior officials (such as Commissioners of Income Tax) for their opinion that would be binding on the department. This would reduce risks of tax additions during assessment, curb the wide discretionary powers of assessing officers and bring about tax certainty.

2) Communication of draft orders and mid-assessment objections: In the amendment that introduced section 144C of the Income Tax Act in 2009, an assessing officer is obliged to the first issue a draft before making final assessment for certain international tax assesses with transfer pricing cases. It is recommended that this amendment should be modified and expanded to include ordinary taxpayers, so that assessing officers first issue a draft then make the final order. A senior revenue officer could take a role in guiding the assessment decision. In fact, even the existing section 144A of the Income Tax Act empowers the Joint/Additional Commissioner to issue directions to the Assessing Officer. The same provision could be strengthened and

modified to allow disposal of mid-assessment objections of all taxpayers except those facing serious tax evasion allegations such as search and seizure cases (for which Settlement Commission is already available).

3) Post-assessment non-litigation administrative remedies: There should be greater use of administrative remedies in a post-assessment scenario rather than relying excessively on the appellate recourse. Income Tax Act 1961 under section 264 already provides powers to the (Principal) Commissioners to revise orders of subordinate authorities provided the same is not under appeal. This provision could be strengthened though administrative directions by the Central Board of Direct Taxes to reduce tax litigation.

4) Panel based dedicated dispute resolution team with objective of litigation minimization through mediation, arbitration or negotiation: In India most of the cases that are not regarding tax evasion and criminal proceeding, should fall under alternate dispute resolution mechanism. Utilization of Special Dispute Resolution (SDR) mechanism such as arbitration, negotiation and mediation as mentioned in OECD guidelines for domestic resolution to resolve disputes outside the courts should be institutionalized. It is necessary to create a dedicated team comprising departmental officers and external experts from judiciary, accounting and economics professions, whose objective function would be to reduce litigation without fear of vigilance. The performance appraisal of members of these teams should be based on their ability to resolve disputes and minimize litigation, as opposed to the revenue protection performance objectives of the traditional tax department mandate.

5) Time-bound case disposal and adequate staffing of appellate structures: CIT (A) has no time barring limit for taking decision. There should be a time limit of 2 years to dispose a case in appeal before CIT(A) provided the appellant has provided all documents and responded to all queries, and the assessment unit has sent in remand reports on time. There is a shortage of human resources in the litigation forums and vacancies often remain for long time periods. It is therefore recommended to employ eligible candidates for the vacant seats so that delays in adjudication can be avoided.

1. INTRODUCTION

Success of any tax policy is largely dependent on an effective administration that would minimize arrears of assessment, collection, appeal resolution, tax avoidance, tax evasion and improve taxpayers' compliance. A state cannot levy tax without the taxpayer being granted the right to dispute it. It is an integral part of the tax system. The study on dispute resolution in tax matters (Desai, 2013) shows the main reason for increasing tax disputes is due to different interpretations by the taxpayer and tax authorities. Other reasons might be:

i. Existence of multiple appellate levels through which an issue has to pass before attaining certainty
ii. Conflict of opinion from different forums across the country resulting in delay and unresolved cases.
iii. Lack of clarity in law making it susceptible to multiple interpretations.
iv. Understaffed and inadequately trained tax administration leading to challenges in tackling the rapidly changing tax law landscape and issues arising from that.

2. TAX DISPUTE CASE TRENDS IN INDIA

India's tax system has moved towards a simple and moderate rate, with a wider base and better enforcement that enhances equity and ensures an internationally competitive and dynamic economy. The quantum of tax revenue has increased by 50.16% from year 2014-15 to 2019-20. However, the prevailing system of direct taxes is beset with problems of increasing arrears of assessments and collections and pendency of appeals.

Table 1 shows the trend of disposal and pendency of appeal cases before CIT (Appeals) during financial year 2015-16 to 2019-20

Table 1: Disposal of appeal cases by CIT (A)

Financial year	**Appeal cases due for disposal**	**Appeal cases disposed off**	**Appeal cases pending**	**Pendency in percent**	**Amount locked up in Appeal cases**
	(Number in Lakhs)				***(Rs. Crores)***
2015-16	3.53	0.94	2.59	73.3	5,16,250
2016-17	4.08	1.18	2.90	71.1	6,11,227
2017-18	4.25	1.21	3.04	71.7	5,18,647
2018-19	4.62	1.23	3.39	73.4	5,62,806
2019-20	5.57	0.99	4.58	82.2	8,83,331

Source: CBDT

The above table shows that the CIT (A) cases due for disposal increased from 3.53 lakh in 2015-16 to 5.57 lakhs in 2019-20. In year 2019-20 CsIT (A) received 5.57 lakhs requests for disposal and disposed 0.99 lakh cases only. As of April 2020, 4.58 lakhs cases were carried over to the next year. The caseload pendency has increased year after year from 73.3% pendency in 2015-16 to 82.2% pendency in 2019-2020. A worrying aspect is that the amount locked up in appeal cases with CIT (A) is more than the revenue deficit of the government of India in year 2019-20. If the country resolves deadlocked tax cases on time, even taking into account those ruled in favour of the taxpayer, the revenue deficit would not be as high as it is today.

Table 2 below gives the position of appeal cases pending with the Income Tax Appellate Tribunals (ITATs), High Courts and Supreme Court during financial year 2015-16 to 2019-20

Table 2: Appeals pending with ITATs, High Courts and Supreme Court

Financial year	ITATs		High Courts		Supreme Court		Total	
	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.
								(Rs in Crores)
2015-16	32,834	1,35,984	32,138	1,61,418	5,399	7,092	70,371	3,04,494
2016-17	37,968	1,43,771	38,481	2,87,818	6,375	8,048	82,806	4,39,637
2017-18	37,353	2,34,999	39,066	1,96,053	6,224	11,773	82,643	4,42,825
2018-19	92,205	NA[@]	38,539	1,36,465	4,425	74,368[#]	1,35,169	2,10,833
2019-20	88,016	NA[@]	31745	3,09,237	4,526	NA[@]	1,24,287	3,09,237

Source: CBDT;

@Amount in respect of appeals filed in ITATs and the Supreme Court by the Department as well as assessees is not available.

Amount in respect of appeals filed in the Supreme Court by the assessees not available.

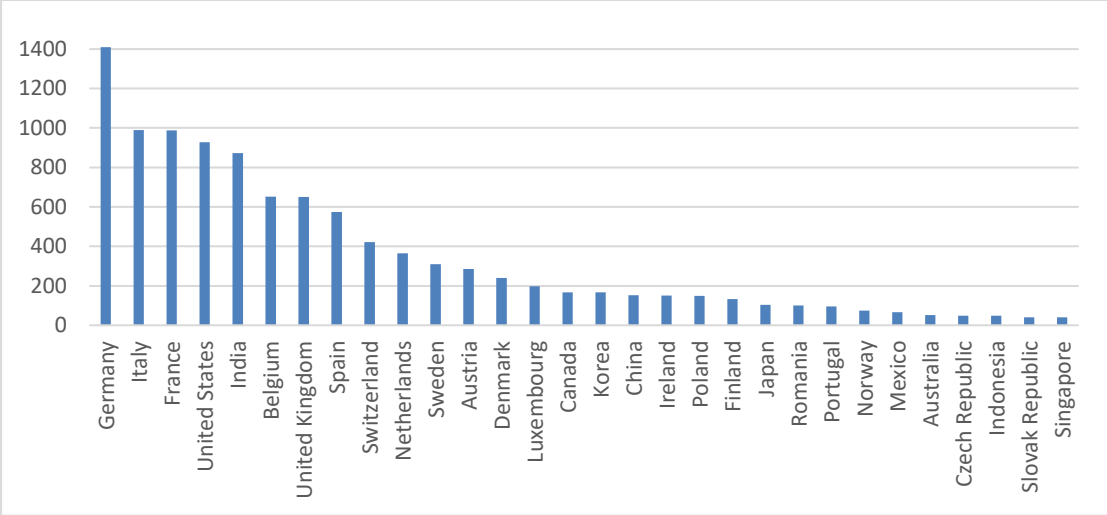
Total cases received collectively by ITAT, High Court and Supreme Court have increased by 76.6% from year 2015-16 to 2019-20. With the introduction of Vivad Se Vishwas Scheme (VSVS) in 2020, the number of deadlock cases may decrease somewhat post 2020 (discussed later in section 4). Nevertheless, such dispute reduction schemes are only occasional and do not provide a systemic solution to the issue of burgeoning tax disputes.

To reduce tax disputes, India's tax system provides only limited special mechanisms to resolve disputes. Alternative mechanisms are designed to time and cost issues associated with litigation. This report presents India's current dispute resolution system, focuses on current Special Dispute Resolution (SDR) options, compares it with

other countries and concludes with some practical policy options for enhancing tax dispute resolution.

An indicator of India's high tax dispute caseload in comparative terms is the international taxation mutual assessment procedure (MAP) caseload available from OECD. India ranked fifth in caseload at beginning of 2021, with only large OECD economies Germany, Italy, France and US having a higher caseload. Other large emerging economies such China, Mexico and Indonesia have much lower MAP caseloads. This is an indicator of high tax disputes and inadequate dispute resolution in relation to the size, international connectedness and complexity of the economy.

Figure 1: Mutual Adjustment Procedure Caseload (Start Inventory 2021)



3. LITIGATION AND DISPUTE RESOLUTION MECHANISM FOR TAX CASES

In India broadly there are two streams for tax disputes:

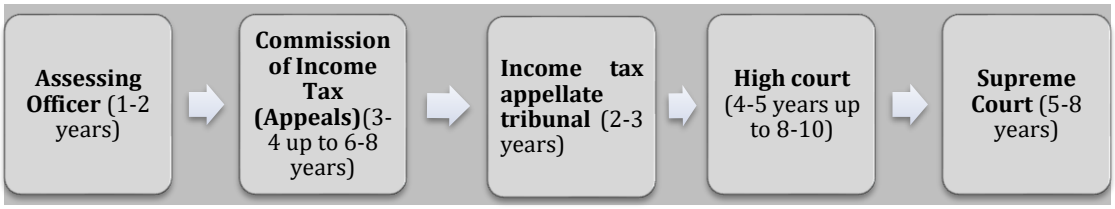
1. Normal litigation mechanism
2. Limited special dispute resolution mechanisms

3.1 Normal litigation method:

The normal direct tax assessment and litigation system sets up an adversarial legal relationship between the tax department and the taxpayer. These are available to the vast majority of taxpayers and cover nearly all types of tax disputes. The flowchart

(Figure 2) shows litigation procedure of the normal assessment-related dispute resolution system in India which takes approximately 15 years on average.

Figure 2: Tax Assessment and Appeals Procedure with Average Time Frames



a) Assessing Officer: Assessing Officer (AO), includes e-Centralized processing Centre and transfer pricing officers. Their main function is to examine the return and documents filed by the taxpayer and frame an assessment by applying the provisions of the law. The AO is both an investigating and fact-finding official and also a quasi-judicial authority. If the AO based on her/his findings believes the amount of income filed by assessee is incorrect, the general principle applied is that she/he provides taxpayers an adequate opportunity of being heard. After taking into account the submissions of the assessee, the AO passes an assessment order determining the income and tax thereon. If the assessee is not satisfied with the order of the AO, then the assessee can appeal to the CIT (Appeals).

b) CIT (Appeals): CIT (A) works as the first appellate authority but also the last stage of further investigation and tax enhancement available within the tax department. This is because the CIT(A) is vested with powers similar to the AO and can not only provide relief to the assessee but also strengthen the case of the tax department. The CIT(A) is typically an officer with significant experience and works according to quasi-judicial principles. The decision of CIT (A) has to be fair, independent and transparent. CsIT (A) on average takes about six months to two years to dispose a case of appeal. The assessee can file an appeal on the e-filing portal w.e.f. 1-4-2020. The Income Tax Act provides for departmental appeal by PCIT (Principal Commissioner of Income Tax) against the appellate orders of CIT (A). Similarly, the assessee can also appeal against such orders.

c) Income Tax Appellate Tribunal (ITAT): ITAT is quasi-judicial forum under the Ministry of Law & Justice. Aggrieved parties can approach the tribunal if not satisfied

with the order of CIT (A). The decision of ITAT is final unless a substantial question arises on law for determination. Starting in 1941 with six Members constituting three benches - one each at Delhi, Kolkata (Calcutta) and Mumbai (Bombay), the number of benches have progressively increased and presently ITAT has 63 benches at 27 different stations covering almost all the cities having a seat of the High Court.

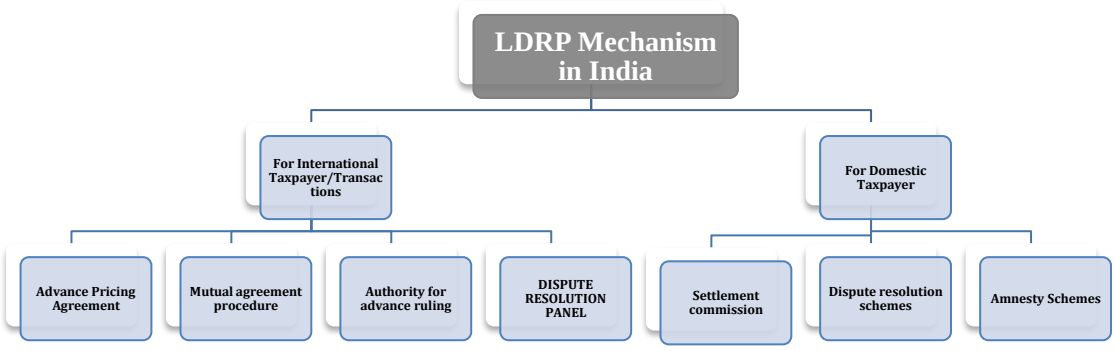
d) High Court: If there is a substantial question on law, the high court resolves those cases. The decision of the high court is final unless reverted by the Supreme Court or by retrospective resolution.

e) Supreme Court: This is the last judicial level and the decision rendered by the Supreme Court is law of the land, unless legislative changes are made.

3.2 Limited Dispute Resolution and Prevention measures

The level of disputes in tax administration has increased exponentially. To reduce the backlog of cases, the government introduced several Limited Special Dispute Resolution and Prevention (LDRP) methods. LDRP measures have become an ad-hoc solutions for resolving disputes against litigation, relieving some burden of taxpayers and assisting in improving the fiscal condition of the country by offering a new approach to handle dispute processes. LDRP measures assist in resolving disputes and avoid time consuming, costly and complex procedures. In India, LDRP mechanisms for international taxpayers are relatively wider than the domestic taxpayers (Figure 3).

Figure 3: Limited Dispute Resolution and Prevention Mechanisms in India



3.2.1 LDRPs for International Taxpayers or Transactions

The following are important methods for resolving disputes for international taxpayers:

a) **Authority for Advance Rulings (AAR)**: This scheme was introduced by the Finance Act, 1993. Advance Ruling means written opinion or authoritative decision by an authority empowered to render it with regard to the tax consequences of a transaction or proposed transaction or an assessment in regard thereto. It has been mentioned in section 245N(a) of the Income-tax Act, 1961 as amended from time-to-time. AAR is for both non-residents and residents who are usually entering into a transaction with non-residents. It provides the facility of ascertaining the income tax liability in advance in order to plan their income taxes in advance with certainty and to avoid litigation expenses. They can obtain binding rulings from the authority on income tax issues arising out of the proposed transactions with a prescribed limit of 6 months for issuing binding rulings from the date of application.[1]

The concept of advance rulings to address taxability of proposed transactions in advance, initially gained popularity in India and the mechanism functioned well. Subsequently, the mechanism of advance rulings was extended to resident taxpayers as well in certain specified cases. However, over the years the post of Chairman was vacant due to unavailability of retired judges of the Supreme Court which led to a substantial time-lag in disposal of applications by AAR. In an attempt to stream-line the functioning of AAR, in 2017 the Income Tax Act 1961 (the Act) was amended to provide that the Chairman of AAR could also be a retired Chief Justice of a High Court or a Judge who has been a Judge of a High Court Judge for at least seven years.

Despite this, practically it was experienced that the AAR applications had not been resolved for long durations. The delay was in-effect defeating the very purpose of an advance ruling. As per the Government, the delay was attributed to the suspended functioning of AAR which was due to the inability to fill-in the vacancy for the Chairman/ Vice-Chairman. Therefore, the functioning of AAR was adversely impacted

[1] International Taxation > Advance Ruling (incometaxindia.gov.in)

and resulted in inordinate delay in disposal of applications. In fact, over the last few years, the applications pending with AAR had increased many-folds.

Citing the issues in AAR due to reasons mentioned above and with the intent to revive advance rulings as an effective dispute resolution mechanism, the Government, through Finance Act 2021, has replaced AAR with another body called Board of Advance Rulings (BAR). The key difference between the AAR and BAR is its constitution. The AARs were constituted of judicial members i.e., retired Judges of Supreme Court and High Court but the BARs would be constituted of members of the Income Tax Department i.e., officers who would be at least of the rank of Chief Commissioner and above. Another difference is that the order of the AAR was binding on both parties (taxpayer and the Income Tax Department). However as per the amended provisions of the Act, order of BAR would not be binding and either of the aggrieved parties i.e., the taxpayer or the income tax department would have the liberty to file an appeal against the order of BAR with the High Court. Another aspect that has been introduced in relation to BAR is that the entire process of advance rulings has come under 'faceless' new regime, whereby the interface between the BAR and the applicant during the course of proceedings would be eliminated to the extent technologically feasible.

Although the restructuring of the advance ruling mechanism by replacing AAR with BAR is a positive step by the Government, BAR has been introduced with certain structural changes. Whether changing the fundamentals of the mechanism would achieve the desired result seems questionable, given that the order of BAR would no longer be binding and can be appealed before the High Court. This would in-effect lead to protracted litigation at multiple levels and entail substantial time, cost and uncertainty. The fundamental changes introduced in the new regime in case of BAR, do not align with the objective of providing a certain, litigation free tax environment. On the contrary it may lead to protracted litigation for the taxpayers.

b) **Mutual agreement procedure:** This clause is available in various Double Taxation Avoidance Agreements (DTAAs) agreed by India with other territories allowing competent authorities (official representatives) of the government of contracting countries to interact with the intent to resolve international disputes. These disputes provide solutions for inconsistencies in the interpretation and application of a

DTAA. The main feature of the MAP mechanism is that despite the importance of the procedure to the taxpayer, it is basically a state-to-state procedure and follows a cooperative approach. The taxpayer's role in representing the case is been limited. The MAP has become an attractive way to solve disputes.

c) **Advance Pricing Agreement:** APA is an agreement between a taxpayer and tax authority on an advance transfer pricing methodology for a prescribed period of time over a set of transactions. There is a limit on validation for such tax years specified in the agreement and shall in no case exceed five consecutive tax years. An APA is defined by OECD in its Guidelines as *"an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g., method, comparable and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time."*

d) **Dispute Resolution Panel (DRP):** As India witnessed growth of foreign investment and trade, there was an expansion of intra-company transactions across different countries. Consequently, additional ways to manage tax disputes were needed. The rationale of DRP *"is to further improve the investment climate in the country by facilitating the resolution of tax disputes faced by multinational companies (MNCs) in India within reasonable time frames".* It deals with the objections filed by non-residents related to transfer pricing disputes against the draft assessment order passed by assessing officers. A study found that in 2012, India had the third largest stock of transfer pricing disputes (Tandon, n.d.). Unresolved disputes create uncertainty as MNCs undertake certain similar transactions across years. Transfer pricing disputes are complex not only for the taxpayers but also for the tax administration. In response, an alternative mechanism of DRP was instituted. The eligible assessee could file the case against the findings of the AO before the DRP, which was obliged to pass an order within nine months of the draft order. Section 143 of the Income Tax Act was amended in Finance Act, 2009, to provide for the new mechanism. It provided that the assessing officer was obliged to first issue a draft order before making final assessment to the specified class of assesses. The DRP composed of highly experienced revenue officers would be examine and decide upon an objection raised by the assessee against the draft. Finance Bill, 2009 clarified that assessees could not appeal before ITAT against

the order of DRP but later in 2012, this was amended. In the amendment, the Principal Commissioner could appeal before the ITAT against the order of DRP. DRP, as an alternative dispute resolution mechanism led to reduction in case duration in initial years (Tandon, n.d.). However, the inherent problems with DRPs are lack of independence among panel members and the significant burden of additional information required.

Based on the DRP experience the following measures are suggested to improve its performance.

1. Absence of independent members (from outside the tax department) in the collegium of DRP tends to skew the judgements. The three members of each DRP should comprise members from different professional and educational backgrounds. They could include mixed qualifications with requisite experience in the area of judicial, accountancy, finance, economy and expertise in the arbitration process. At least one member should be from outside the tax department.
2. The members of DRP should have full time assignments, so that they can work in a more focused manner.
3. Reduce the non-essential formalities related to document collection and operating procedure to expedite the process.

3.2.2 Dispute Resolution Options for Domestic Taxpayers

The following are important limited special methods for resolving disputes for domestic taxpayers are:

a) Settlement Commission: The Income Tax Settlement Commission is a statutory body that deals with settlement applications filed by assessees against the cases involving undisclosed income from search and seizure operations. It facilitates speedy and timely resolution of such cases. An assessee can approach it at any stage of the proceeding for assessment pending before an assessing officer with certain conditions. The commission has the power to grant relief from the prosecution for any offence under Income Tax Act, 1961. The order passed by the body is conclusive in nature and no appeal lies to any authority against the order of the body. An assessee

makes an application to the Settlement Commission in such a manner as prescribed, containing true and fair disclosure of the income which has not been disclosed before the Assessing Officer. Assessee has to pay additional tax and interest thereon on or before the date of making the application and the proof of such payment is to be attached with the application.[2]

b) Ad-hoc dispute resolution schemes: Ad-hoc dispute resolution schemes are one-time or relatively irregular attempts to reduce tax disputes. They usually involve the tax administration agreeing to forego some part of taxes or penalties while the taxpayer opts to pay a reduced tax amount in exchange for both parties not pursuing further litigation on the matter.

Direct Tax Dispute Resolution scheme **2016** was in operation from June 1, 2016 to January 31, 2017. It was aimed at reducing the huge backlogs of cases pending before the first appellate authority (CIT(A)). By availing the Direct Tax Dispute Resolution Scheme, a taxpayer could reduce the penalty levied on account of an income tax assessment order or penalty order.

Direct Tax Dispute Resolution Scheme was applicable for tax defined as the amount of tax, interest or penalty determined under the Income-tax or the Wealth-tax Act for which there was an appeal pending before the Commissioner of Income Tax. The pending appeal could be against an assessment order or a penalty order. A declarant under this scheme could pay tax at the applicable rate along with interest due until the assessment date to close the litigation without any penalty. If the disputed tax exceeded Rs.10 lakh, the individual was to pay a minimum of 25% of the penalty levied. Also, if the pending appeal was against a penalty order, then 25% of the minimum penalty could be paid with the tax and interest to complete the assessment. Following the declaration, the appeal that was pending before the Commissioner had to be withdrawn.

For an individual to avail the benefits from the scheme, the declarant had to withdraw any writ petition or an appeal filed against the specified order before the Commissioner or the Tribunal or High Court or Supreme Court, before making the declaration. Also, any person making a declaration under specified tax was required to furnish an

[2] SETTLEMENT COMMISSSION (IT - WT) | Department of Revenue | Ministry of Finance | Government of India (dor.gov.in)

undertaking waiving the right, to seek or pursue any remedy or claim in relation to the specified tax which otherwise was under any protection of investment or otherwise, entered into by India with a country or territory outside India.

If a declarant violated the scheme, it would be considered as if the declaration was never made under this scheme. The consequences under the Income-tax Act or Wealth-tax under which the proceedings against declarant were pending would be revived. Finally, no Appellate Authority, Arbitrator, Conciliator or Mediator could decide on an issue related to the specified tax in the declaration.

Ineligibility for this scheme arose in:

a) A case where the prosecution has been initiated prior to 29.02.2016.

b) A search or survey case that has been declared under tax arrears.

c) A case that deals with the undisclosed foreign income and assets.

d) A case based on the details received under the Double Taxation Avoidance Agreement under section 90 or 90A of the Income-tax that has been declared under tax arrears.

e) A person who has been notified under the Special Courts Act, 1992.

f) A case that has been covered under Narcotic Drugs and Psychotropic Substances Act, Indian Penal Code, Prevention of Corruption Act or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

Reports indicate that the scheme only achieved moderate success with a mere Rs 1,200 crore being collected.[3]

***Vivad Se Vishwas Scheme (VSVS)* 2020**, used the philosophy of *no dispute but trust* to settle past direct tax related disputes. The government announced the *fast-track redressal mechanism* to dissolve pending cases at various levels of litigation across direct taxes by allowing taxpayers to settle their dispute taxes with the penalties and interest waived. The VSVS Scheme provides a mode to resolve disagreed and pending direct tax cases more speedily and efficiently and hence generating timely revenue for the government and to benefit of reduced litigation for taxpayers. The entities who

[3] https://economictimes.indiatimes.com/news/economy/finance/tax-dispute-scheme-gets-tepid-response-garners-rs-1200-crore/articleshow/57972610.cms

opted for the scheme had to pay a requisite tax following which related litigation against them were closed by the tax department and penal proceedings dropped. The scheme provided for settlement of disputed tax, disputed interests, disputed penalty or disputed fees in relation to an assessment or reassessment order on payment of 100% of the disputed tax and 25% of the disputed penalty or interest or fee. Objective of the VSVS were:

i. To arrive at speedy dissolution of disputed cases on the part of taxpayers and the government.
ii. To initiate revenue mobilization of disputed funds.
iii. Timely collection of locked up revenue.

This scheme was applicable to all the appellants where an appeal was pending before the following appellate authorities as on January 31, 2020:

i. Commissioner of Income Tax (CIT)
ii. Income Tax Appellate Tribunal (ITAT)
iii. High Court (HC)
iv. Supreme Court (SC)
v. Dispute Resolution Panel (DRP) and cases where directions have been issued by the DRP but no final order has been declared.
vi. Vivad se Vishwas Scheme was not available for disputes pending before AAR. However, if the order passed by AAR had determined the total income of an assessment year and writ against such order is pending in HC, the appellant would be eligible to apply for the Vivad se Vishwas Scheme.
vii. Scheme not applicable to those cases that are pending under the Settlement Commission mechanism.

Benefits to the taxpayers:

i. VSVS was useful for the fence sitters who missed the deadlines and unaware of income tax provisions.
ii. Taxpayers whose cases were deadlocked in dispute forums could pay due taxes and get full waiver in interest and penalty.
iii. Clear contingent liability and tax duties that have been reported.

The scheme started on March 17, 2020 and closed on March 31, 2021. However, taxpayers, who have already made declarations within the stipulated deadline of March 31, could make payments without any penalty or interest up to April 30, 2021. However, the last date for making payments under the scheme was extended till August 31, 2021. Taxpayers also had the option to make payments till October 31, 2021 with an additional amount of interest.[4]

Vivad Se Vishwas Scheme settled more than 1.48 lakh cases and recovered 54% of about ₹1 lakh crore amount under litigation. About half of this came from the central PSUs. The scheme has more or less achieved its purpose. It helped settling disputes, which was the focus area, more than the collection of revenue. The VSVS had a wider coverage of disputes that the Direct Taxes Dispute Resolution Scheme, 2016 since the latter was limited to first appeals before CIT(A).

Amnesty Schemes: When tax authorities suspect that the taxpayer is evading taxes, they start proceedings that often increase court cases. These are a significant financial drain for both the parties (Das-Gupta et al., n.d.). A common practice, especially in developing countries, is to offer amnesties for past offences and voluntary disclosures in an effort to evade past tax evasion by encouraging voluntary disclose of the information. On certain occasions the government launches such schemes, primarily with the objective of collecting blocked revenue on undisclosed income**.** Amnesty schemes are *per se* not dispute resolution mechanisms. But they pre-empt tax disputes that may arise due to action against tax evaders. Amnesty schemes provided taxpayers' immunity from penalty and prosecution in exchange for disclosure of income that was evaded tax in the past. The objective of amnesty schemes is to curb tax evasion and to enable taxpayers to disclose their hitherto unreported (black) assets. Amnesty schemes are also one-time solutions for tax evaders. There have been by most accounts over 10 tax amnesty schemes in India since independence with varying degrees of success.[5]

[4] https://economictimes.indiatimes.com/news/economy/finance/government-nets-rs-53684-crore-from-vivad-se-vishwas-scheme-so-far/articleshow/85177091.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[5] Voluntary Disclosure Scheme, 1951, Voluntary Disclosure Scheme, 1965, Second disclosure scheme of 1965, National Defence Gold Bonds, Voluntary Disclosure Scheme 1975, Special Bearer Bonds 1981, The Amnesty Circulars of 1985, Indira Vikas Patra 1986, National Housing Bank Deposit Scheme1991, Foreign Exchange Remittance Scheme and India Development Bonds, Gold Bonds Scheme1993, VDIS-1997 and IDIS 2016.

The most recent three schemes were the Voluntary Disclosure of Income Scheme (VDIS) 1997, The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 and Income Tax Declaration Scheme (IDS) 2016.

Voluntary Disclosure Scheme, 1997, had a compliance period of six months (1st July 1997 to 31st December 1997). Under this scheme a person could make a disclosure in respect of any income chargeable to tax under the Income-tax Act, for any assessment year for which: (*a*) there was failure to furnish a return; (*b*) failure to disclose in a return of income before the date of commencement of the Scheme, *i.e.*, 1st July, 1997; or (*c*) had escaped assessment. The tax payable on the disclosed income in respect of any assessment year was of 35% in the case of companies and firms and 30% in the case of others. Where the voluntary disclosed income is represented by jewellery, the value of the jewellery or bullion so declared had to be substantiated by a registered valuer's certificate. In case the jewellery declared is in respect of an assessment year prior to assessment year, 1987-88, the value for purposes of declaration was taken to be the value as on 1st April, 1987.

The income declared under VDIS was Rs 33,000 crore. However, since the real value of the assets declared was more than the value considered for tax purposes and taxes were paid at less than the normal rate prevailing in earlier periods when India had high tax rates, with zero interest and penalties, the success came at the cost of revenue. It was decided that 77.5 per cent of the proceeds from the VDIS were to accrue to state governments, while the share of the central government was earmarked for financing basic minimum services and building infrastructure.

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 operationalized from 1st July 2015 and till 30th of September with tax to be paid by 31st December 2015 to capture black money stashed overseas. According to this, any undisclosed foreign income and assets held abroad by a person who is ordinarily resident in India, was to declared subject to a tax rate of 30% and of three times the value of tax (90%), taking the total tax to 120%. The Act also has a provision for imprisonment for a maximum term of 10 years. Total disclosures under the

https://taxindiainternational.com/columnDesc.php?qwer43fcxzt=NzU
https://indianexpress.com/article/business/economy/arun-jaitleys-ids-vs-chidambarams-vdis-1997-a-comparative-look-at-tracking-black-money-3059875/

compliance window for foreign assets was 638 totalling foreign assets disclosed were worth Rs 4,147 crore. This was later revised to 644 declarations for black money. The collections were routed to the Consolidated Fund of India to be used for social security purposes. [6]

Income Declaration Scheme, 2016 provided an opportunity to citizen who had not paid full taxes in the past to declare the undisclosed income and pay tax, surcharge and penalty. It was a one-time opportunity to all the citizens who have not declared income correctly in the earlier years to come forward and declared such undeclared income. The declaration was to be made from 1st June, 2016 to 30th September, 2016.All assessees including individuals, HUFs, companies, firms, association of person etc. are eligible to make declaration under this scheme. The amount payable was tax at 30% of undisclosed income, surcharge at 7.5% of undisclosed income and penalty at 7.5% of undisclosed income totalling 45% of such undisclosed income declared.[7] Under this scheme, Rs 65,250 crore were collected from 64,275 declarants.

The academic and policy community opinion on amnesty schemes is mixed. Those adopting a moralistic stance on taxation argue that such schemes undermine the trust of honest taxpayers and punishes them while rewarding tax evaders. On the other hand, the pragmatic argument is that such amnesties capture at least partially lost revenues, brings in much needed capital into the formal economy and are partly justifiable where past tax rates were exorbitant. However, many of the schemes also suffer from design and implementation weaknesses. The Comptroller and Auditor General (CAG) audit of VDIS-1997 observed:

• The scheme had various flaws. It was also weakened by inconsistent circulars, clarifications, and press briefings. This opened the door for widespread misuse.
• The scheme had made those involved in criminal cases, drugs and narcotics and similar offences ineligible. However, several large declarations were discovered from under police investigation for financial scams.
• Jewellery, silver, gold, silver utensils were declared at under-stated values by claiming ownership before 1987.

[6] https://indianexpress.com/article/business/economy/arun-jaitleys-ids-vs-chidambarams-vdis-1997-a-comparative-look-at-tracking-black-money-3059875/
[7] https://incometaxindia.gov.in/Pages/income-declaration-scheme.aspx

• Large real estate properties in metropolitan cities were declared at absurdly low valuations.
• Many declarants having declared huge assets but did not file wealth tax returns in subsequent years.

In any case, neither the limited special dispute resolution schemes nor the amnesties provide an effective long-term solution to the problem of burgeoning and long drawn tax litigations.

4. OECD MODEL GUIDELINES FOR INTERNATIONAL TAXPAYERS

India's international tax litigation and dispute resolution model broadly follow the approach of OECD. It reserves the right to settle the rate of tax through bilateral negotiations, follows arm's length price standard principle and also applies advance pricing adjustment and mutual agreement procedure as dispute resolution methods.

However, India, like Bulgaria, Lithuania, Malaysia, Russia, Serbia and Singapore reserve the right not to include the requirement for the competent authorities to settle by mutual agreement procedure. OECD has developed an arbitration mechanism to tackle the tax dispute issues. There are other mechanisms also to resolve international tax disputes such as advance pricing arrangement and safe harbours.

The *MAP agreement (Mutual agreement procedure)* under Article 25 is basically regarding the application of double tax conventions that could arise because of transfer pricing. Tax treaty arbitration was introduced in 2008 in the updated OECD Model convention. It added a new mechanism that allows taxpayers to request arbitration regarding unresolved cases that have not reached a mutual agreement within two years. OECD members took a favourable view of the introduction of *"Supplementary dispute resolution (SDR)"* in addition to arbitration including mediation and the referral of factual disputes to third party experts.

As per the report of OECD, mutual agreement procedure committee in general recommended that:

i. The operation of MAP and all the formality should be kept minimum and unnecessary documentation and workload should be avoided.
ii. Agreement should be settled on a win-win situation not as per the reference of any balance results of other cases.
iii. Competent authorities should, where appropriate, formulate and publicize domestic rules, guidelines and procedures concerning use of the mutual agreement procedure.

5. GUIDELINES FOR DOMESTIC TAXPAYERS

OECD guidelines for the domestic taxpayers are not clearly mentioned. However, guidelines for international taxpayers should apply to domestic taxpayers as well. So, India should take benefit to adopt and adapt those OECD guidelines for the domestic taxpayers with certain modifications. A study by Ault, n.d. also highlighted the need of an SDR mechanism, not as it is often formulated "Alternative Dispute Resolution", but as an extension of existing mechanism which moves in the direction of arbitration. SDR mechanisms mentioned below can be applied to domestic taxpayers.

Forms of SDR

i. *Mediation*: Mediation method is used to resolve disputes through a facilitator or mediator. When the agreement is not concluded through the negotiation, the intervention and facilitation mediator give a means to break the impasse. It provides a third-party channel of communication between parties and encourages them to work back on negotiation. Mediators can actively participate in negotiation and help to resolve disputes between parties outside the courts. The decision of mediator is non-binding on parties.

ii. *Arbitration:* Implementing arbitration under income tax has been prevailing in many developed countries. OECD countries are actively promoting arbitration. Arbitrators should have an understanding of the economic and social situation and have an intellectual independent opinion. The main problem arises in the international disputes arbitration as arbitrators are inclined more towards the

developed countries as they could see them as a future client and try to resolve issues in their favour.

iii. *Advisory Opinions:* It is the most flexible alternative dispute resolution method. The opinion of the advisory committee is casted by simple majority voting within time limits. The opinion should be delivered to the competent authority to make the final decision. However, competent authority decisions can deviate with the reason behind the noncompliance but if they do not take decision within prescribed time limits, they have to abide by the opinion of the committee.

Effect of SDR decision: There have been a variety of methods to be followed, from advisory (weakest form) to the binding (strongest form).

Proponents of ADR argue that informal dispute-resolution mechanisms are more efficient than formal ones and saves both time and money (Cai 2019). The amicable and flexible methods to resolve disputes are:

i. *Negotiation:* The negotiation between the taxpayer and competent authority would reduce the cost of cases. This method is prevalent in many countries has not been implemented in the India's taxation system yet. India should employ a legal negotiation system before filing cases in the judicial courts.
ii. *Conciliation:* Conciliation provides non-binding opinion from a conciliation commission. The qualification of the conciliation commission should be equal to the judicial member and arbitral tribunal. India may consider having a conciliation officer to resolve tax disputes.

7. ADR MECHANISM IN OTHER COUNTRIES

Approaches to alternate dispute resolution in countries can be seen as a continuum. On one hand, countries such as Russia, Argentina and Brazil with large endowments of natural resources are normally willing to resolve tax disputes through the means of litigation. On the other end of the spectrum, countries like Japan and UK with less endowment of natural goods, most likely prefer negotiation as the standard method of

resolving tax disputes. Dispute resolution mechanisms of some countries are summarized below.

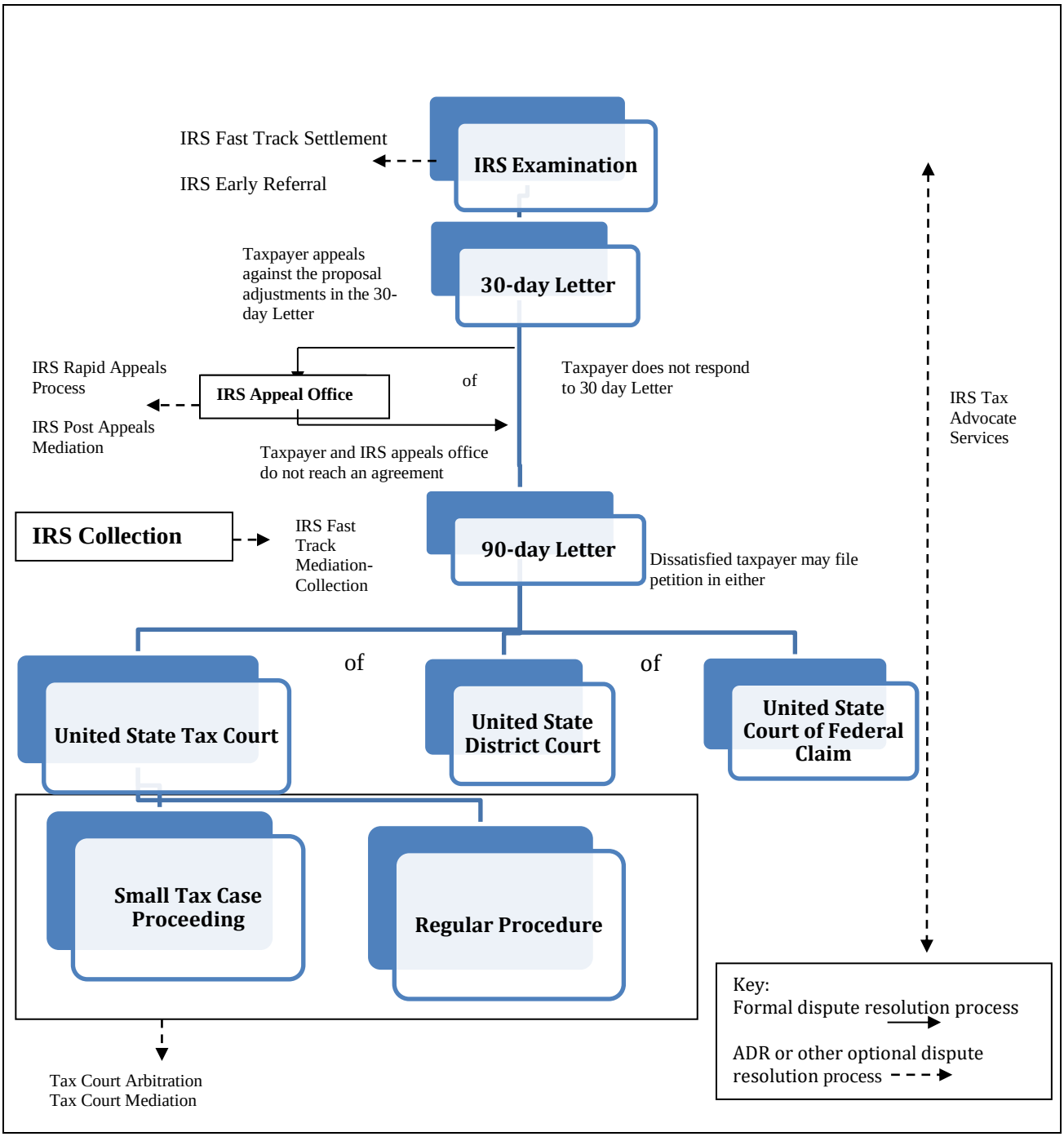
7.1 US Approach

The United State ADR practices by revenue authorities aligns with the concept of dispute system design (DSD), defined as a deliberate effort to identify and improve the way an assessee addresses conflict by decisively and strategically arranging its dispute resolution processes. IRS (Internal Revenue Service) has incorporated various ADR programmes within their dispute resolution systems. In 1990, "Administrative Dispute Resolution Act of 1990" was passed which mandated all the government agencies to implement ADR into their administrative dispute process. In 1998, the Internal Revenue Service Restructuring and Reform Act of 1998, enacted new section, directed IRS to implement new section procedures to allow broader use of appeal program and introduce a procedure that allows mediation and arbitration in ADR processes. Pursuant to these mandates the IRS created five main post filing programs: Fast Track Settlement (FTS); Fast Track Mediation (FTM); Early Referral; Post Appeals Mediation (PAM); and Arbitration (figure 4).

Tax disputes in the US generally arise through the IRS's examination (or audit) process. When the taxpayer disagrees with any IRS findings, the assessee may request a meeting or telephone conference with the IRS examiner or the examiner's supervisor. If no mutual agreement is reached then the given resolution procedures are followed:

1. 30 days (preliminary notice of deficiency): If in the discussion no agreement is reached, then 30-days preliminary letter is issued by the IRS notifying the taxpayer to appeal to the IRS office in 30 days.
2. After makes an appeal, the IRS officers will consider the issues of the case and schedule a conference between the parties so that they can attempt to settle it before.
3. If the parties do not agree on the issues after the conference, or if the taxpayer does not respond to the 30-days letter, then 90-days letter (Notice of Deficiency) is issued by the IRS.
4. The taxpayer has 90 days (150 days for taxpayers outside the US) from the date of the 90-days letter to file a petition with the US Tax Court, the US District Court or the US Court of Federal Claims.

Figure 4: Unites States' Tax Dispute Resolution Procedures



In addition, as shown in figure 4, the IRS Appeals Office offers a number of ADR programs for certain types of taxpayers to resolve tax disputes during the examination, appeals and collection stages of the dispute resolution process. These programs are Fast Track Settlement (FTS) (available at the examination stage); Fast Track Mediation – Collection (FTMC) (available at the collection stage); and Post-Appeals Mediation and

the Rapid Appeals Process (RAP) (available at the Appeals stage).[8] These ADR processes are designed to help taxpayers resolve disputes at the earliest possible stage generally through utilising mediation services provided by IRS Appeals employees[5].

IRS Appeal officers tend to be more experienced and skilled. They act more reasonably as litigations are considered a hazard. If no settlement is agreed at appeals, the taxpayer and appeals can agree to appoint trained appeal officers (from different teams) to act as a *neutral mediator* at the IRS expense; however, taxpayers can appoint their own mediator at their own expense, subject to Appeal team manager's approval. The decision of the mediator is non-binding.

The main strengths of the US dispute resolution mechanisms lie in the structural aspects of design, including providing multiple options for dispute resolution, multiple entry points to the system.

7.2 EU Approach

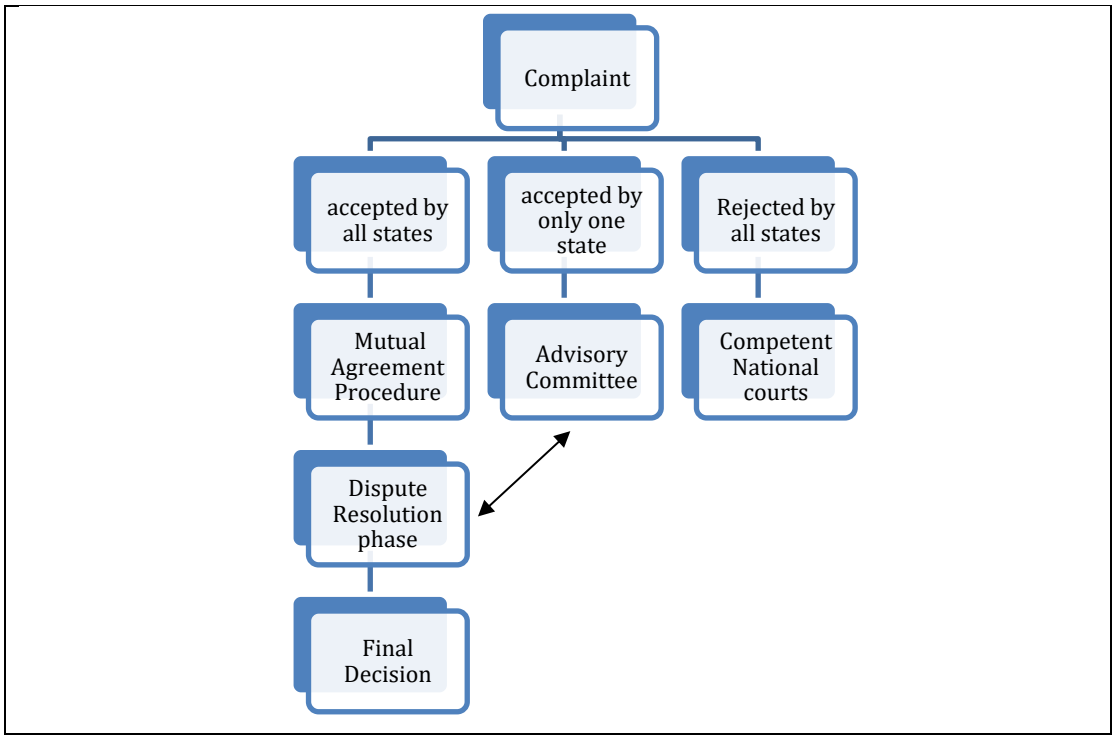
European Union is an international organization consisting of European countries, formed in 1993. Any tax disputes between Member States can apply the procedure of "Council Directive on Tax Dispute Resolution Mechanisms in the European Union".[9] The procedure adopted contains four-steps:

1. Complaint: Complaint phase is quite technical. If the complaint is accepted by the competent authorities of all concerned states, then phase 2 is initiated. If only one state accepts then the complaint is submitted to the advisory committee, which can decide on the admissibility. However, if the all concerned states dismissed the complaint, then

[8] 1. See Internal Revenue Service, Rev. Proc. 2003-40, 2003-25 IRB 1044 ('Rev. Proc. 2003-40'); IRM 8.26.1; IRM 8.26.2; IRM 8.26.7. 51
2. See Internal Revenue Service, Rev. Proc. 2016-57, 2016-49 IRB 786 ('Rev. Proc. 2016-57'); IRM 8.26.3. 52
3. See Internal Revenue Service, Rev. Proc. 2014-63, 2014-53 IRB 1014 ('Rev. Proc. 2014-63']; IRM 8.26.5; IRM 8.26.9. 53
4. See IRM 8.26.11. 54
5. See Internal Revenue Service, 'Appeals Mediation Programs -Alternative Dispute Resolution (ADR)',https://www.irs.gov/compliance/appeals/appeals-mediation-programs.
[9] "Council Directive on Tax Dispute Resolution Mechanisms in the European Union" (Doc. 9420/17 FISC 111 Ecofin 429

the taxpayer, as a last resort, can file a complaint before the competent national courts in order to reach a reversal of the decision of competent authorities.

Figure 5: European Union Tax Dispute Resolution Procedures



2. Mutual Agreement Procedure: The member states endeavour to resolve dispute within two years, can be extended up to one year with justification.

3. Dispute resolution: Failure to resolve the dispute by MAP (as well as cases where the complaint is only accepted by one state), will resolve through dispute resolution phase. The dispute will then be solved by an 'Advisory Commission' (consisting of a chair, representatives of the states concerned, as well as independent persons). The competent authorities may, however, also agree to set up an 'Alternative Dispute Resolution Commission', which can apply other types of dispute resolution, such as 'last best offer' arbitration.

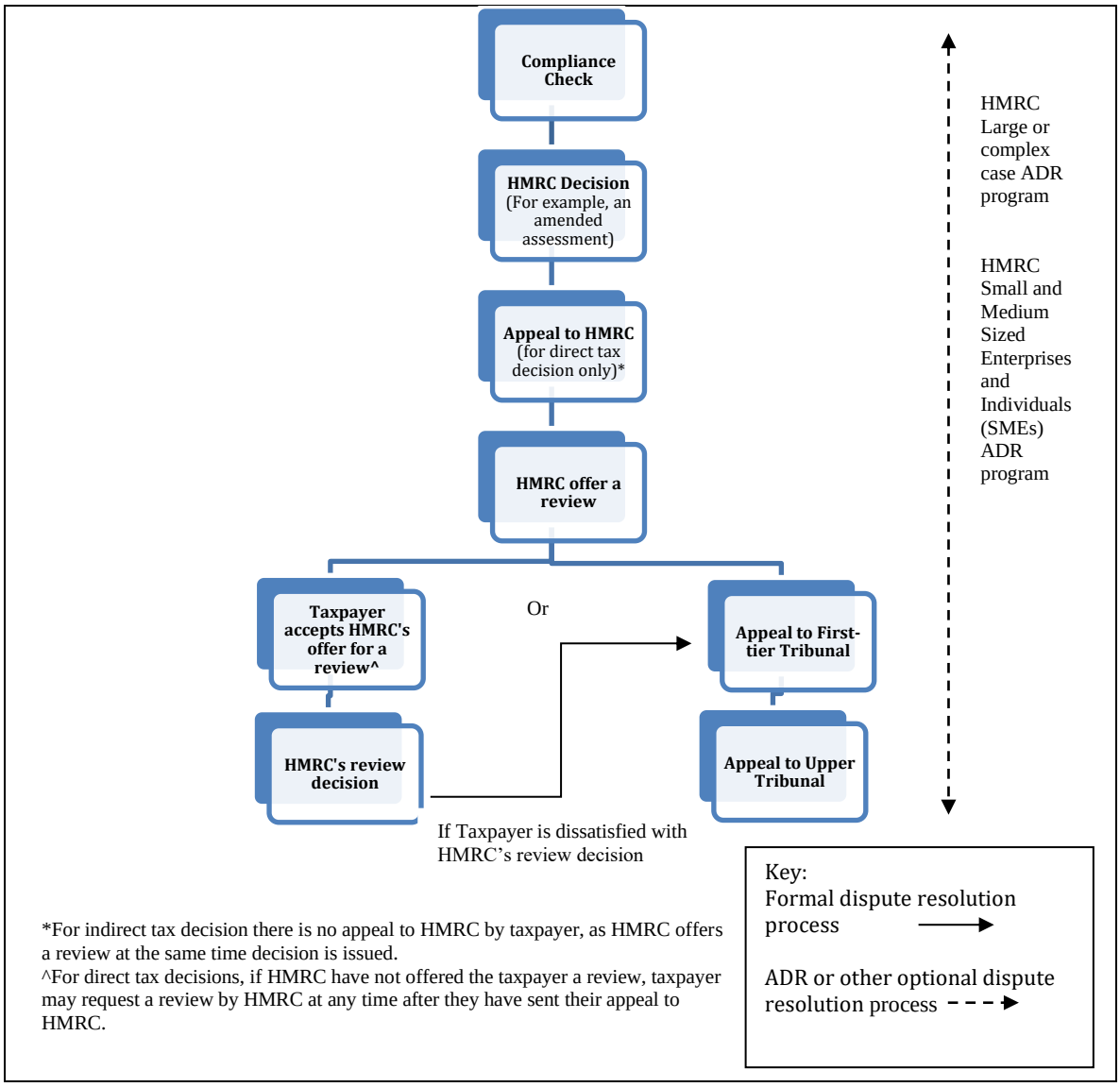
4. Final Decision: After the Advisory Commission has issued an opinion, the last phase is initiated. The competent authorities must agree within six months on how to resolve the dispute. This implies that they may deviate from the decision of the Advisory

Commission. However, if they fail to reach an agreement as to how to resolve the dispute, the states shall be bound by the decision of the Advisory Commission.
In addition, there are specific forms of agreements applicable in the individual tax systems that apply both in the stage of prevention and after legal remedies. One is *Substantive law*, which aims to relax tax burden in various forms such as instalments, write-offs and suspension. The other one is *Voluntary disclosure*, which avoids disputes where tax authority acts appropriate after disclosure or tax return has been filed.

7.3 UK Approach

Resolving a tax dispute with HMRC (Higher Majesty's Revenue and Customs) tax authority through normal appeals is a time-consuming and resource-intensive process for taxpayers. Businesses can quickly settle their decisions through negotiation and litigation. HMRC's Litigation and Settlement Strategy (LSS) is the framework within which HMRC resolves tax disputes in accordance with civil law processes and procedures. It applies irrespective of whether the dispute is resolved by agreement with the customer or through litigation. A potentially cost-effective and quick way of resolving a dispute is a statutory review, carried out impartially by an officer who works in HMRC's Solicitors Office and Legal Services directorate. If the customer disagrees with the outcome of a statutory review, they can appeal to an independent tribunal (as shown in Figure 6)
Aggrieved taxpayer can appeal after receiving decision letter of an assessment. The deadline is usually 30 days from the date of the letter. Then the case worker who made the decision will look at the case again and consider the appeal. If the concerned authority does not change their decision after this, taxpayer will be offered a review. This is where the decision is looked at by someone at HMRC who was not involved in the original decision. The review is voluntary in nature but usually quicker than appeals to the tax tribunal. The taxpayer has 30 days from the date of the review offer to accept the offer of a review. If the taxpayer is still not satisfied, appeal can be made to the Lower Tribunal and then Upper Tribunal.

Figure 6: United Kingdom Tax Dispute Resolution Procedures



The Collaborative Dispute Resolution (CDR) programme and HMRC's processes such as the High-Risk Corporate Programme (HRCP) have been successful in resolving significant portfolios of tax issues for large businesses. Alternative Dispute Resolution (ADR), in the form of mediation, is now embedded within many parts of HMRC and Tribunals as a way of narrowing and potentially resolving disputes before the need for litigation. HMRC operates a formal ADR program for the most complex and notable disputes called the High-Risk Corporate Programme (HRCP); these programmes are geared towards corporations of large amount of tax at stake, inherent risks and a historically poor compliance record that has the potential to improve. An *independent* HMRC officer facilitates ADR process (as shown in figure 6) where aggrieved parties can appeal to an independent officer for '*internal review and negotiation'*; if the matter

does not resolve at administrative level, and if decision is not accepted through negotiation with HMRC, then taxpayers may apply for the independent tax tribunal (Tax Chamber of the First Tier Tribunal, then Chancery Chamber of Upper Tribunal) as mentioned above.

7.4 Japanese Approach

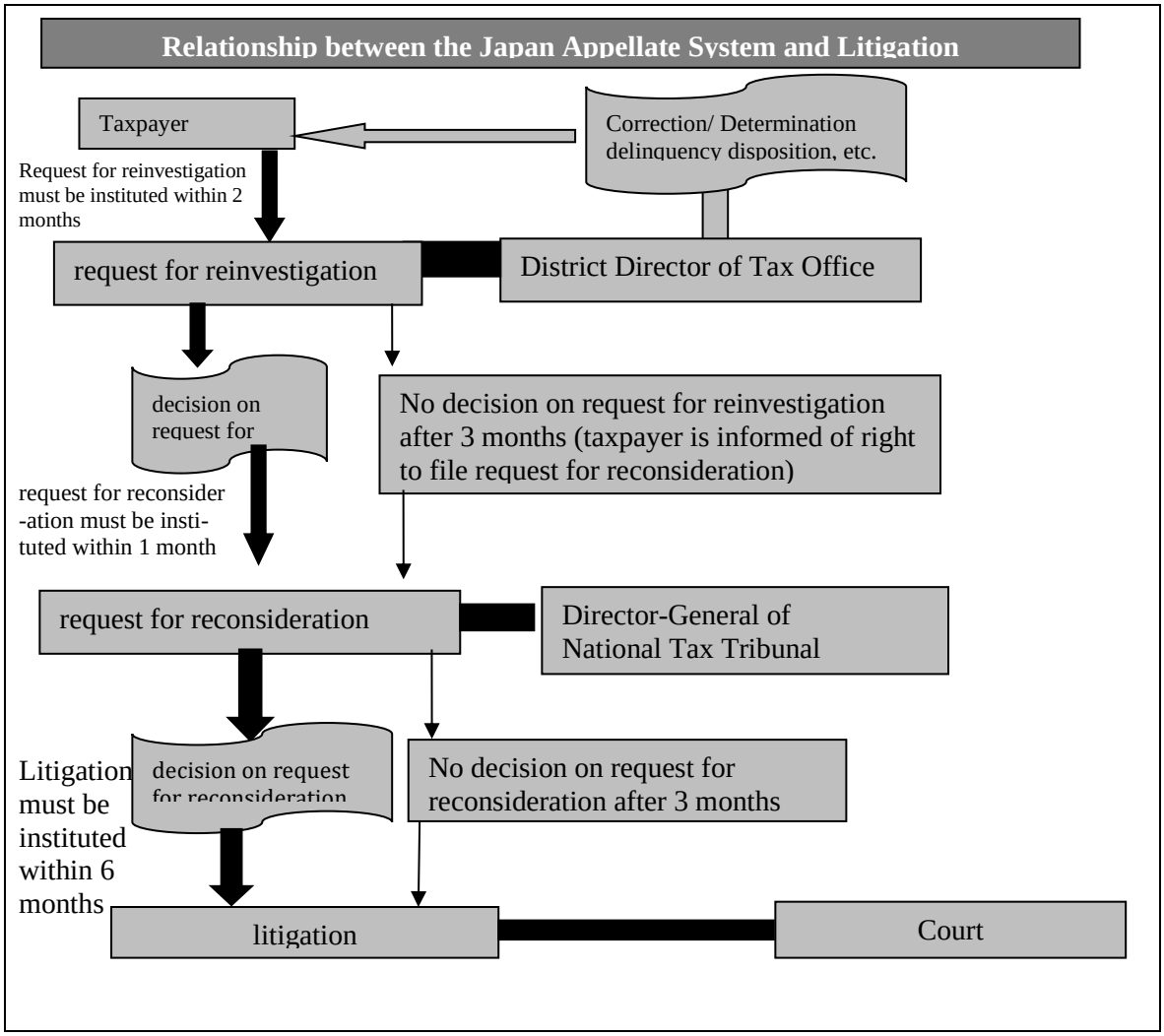
There has been myth in Japan that taxpayers' litigations have a slim chance of winning. However, some studies confirm the end of the myth based on court cases, tax laws changes and anecdotal evidence (Nakayama 2007). The dispute resolution mechanism of Japan is different from that of other developed countries. The dispute resolution mechanism of Japan consists of administrative review and litigation. The procedure of the tax litigation filing in Japan is as follows: (see figure 7)

1. Taxpayer files a request for reinvestigation within two months if he is not satisfied with the assessment of tax office.
2. If he still does not accept the decision on his request of the reinvestigation, he can file a request for reconsideration with National Tax Tribunal (NTT) within one month after the decision delivered to him.
3. If the taxpayer does not accept the NTT's decision, he can go to court within six months after the date he gets the decision.

The procedures for requests for reinvestigation and reconsideration are administrative reviews. The plaintiff in a tax case must undergo the administrative review process (describe in figure 7) as a *sine qua non* for litigation. The rationale behind this is to resolve as many of the disputes as possible before going to the courts, so the courts would not face too many deadlocked cases. The advantage of the administrative review system is to provide a simpler, less expensive and timely remedy than litigation. As per research, there is no domestic alternative dispute resolution. However, if the taxpayer is not satisfied with the assessment decision of tax officer, he can file request for reinvestigation with the district director of tax within 2 months. If he does not accept the assessment of reinvestigation, he can go for reconsideration with the NTT within one month. The NTT is an independent body with officers having specialized knowledge and vast experience. If taxpayer still does not accept the decision of the NTT, he can file a case in court within 6 months.

Figure 7: The Japan domestic remedies excerpted from NTA Report 2006

(*Resolution of Tax Disputes in Japan (1)*, n.d.)

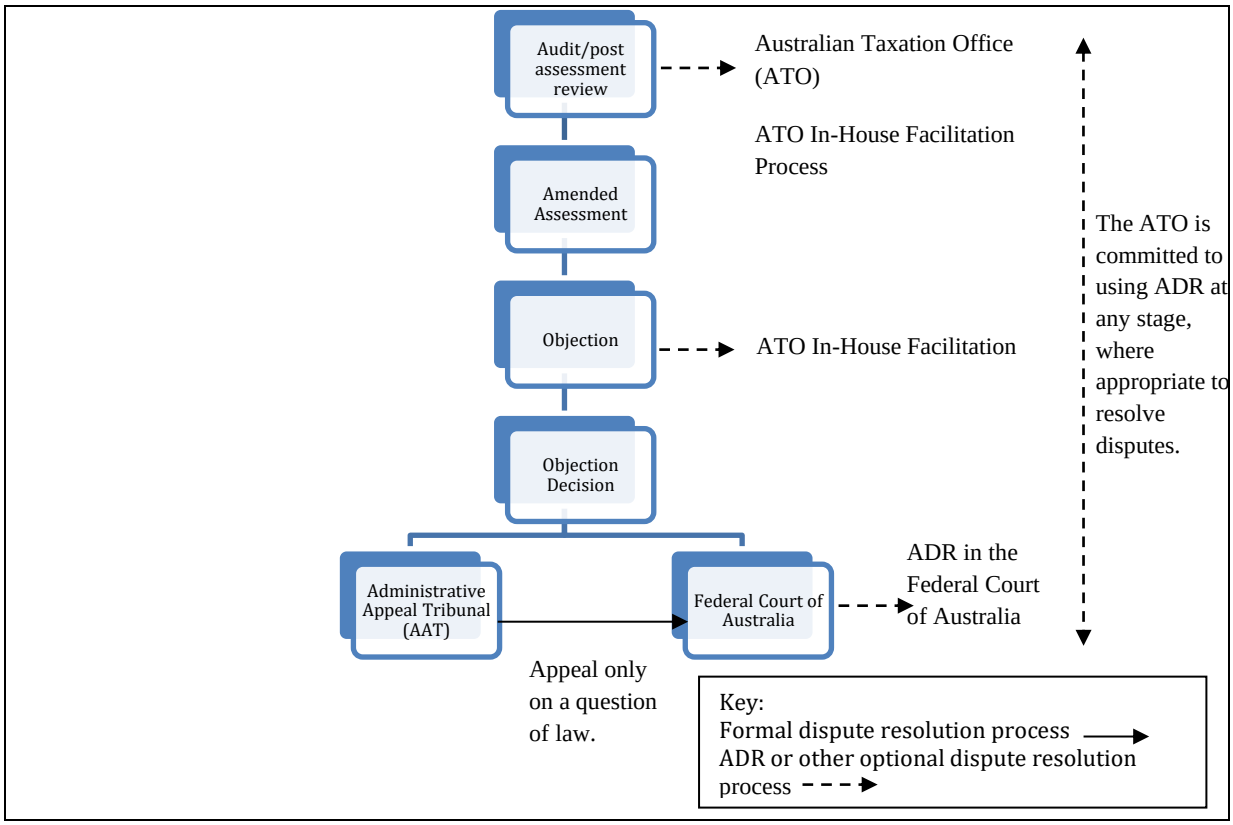


7.5 Australian Approach

The value of ADR was recognized in Australian legal circles in 1980s. Initially, it was used to just describe the procedure to resolve disputes by mediation. However, its meaning has been changed over a period of time. Now, the ADR processes are facilitative (meditation), advisory (neutral evaluation or case appraisal) and determinative (arbitration). ADR processes are generally available to parties during the dispute resolution procedures (as described in figure 8). The Australian Tax Office (ATO) officers have a specifically developed ADR program, in-house facilitation for less complex disputes, where an impartial ATO facilitator meets with taxpayer and the ATO case officers to identify the issues in dispute, develop options, consider

alternatives, and attempt to reach a resolution. It is an early dispute resolution process that aims to promote less backlog of cases.

Figure 8: The Australian Tax Dispute Resolution Procedures



After receiving a position paper from tax authority during the latter stages of an audit, large public or privately owned groups with a turnover of more than $250 million can seek an independent review of the statement of audit position prior to ATO making a final decision. An independent review process provides an opportunity to an "independent officer" outside of an audit area to review the technical merits of an audit case prior to the finalization of the ATO position (Jone, 2015).

When a written notice of objection is submitted by the taxpayer, it is considered by a review officer, from 'Objections and Review' area, independent of 'Audit' area and the original decision-maker. In this phase, review officer will engage in discussing issues, gathering all relevant information, examining, researching and forming view on the dispute. If taxpayer is still dissatisfied with an objection decision, he generally has the right to have the decision reviewed by the (Administrative Appeal Tribunal (AAT) or appeal the decision to the Federal Court). Application must be lodged directly with

either the AAT or the Federal Court, and the law gives strict timeframes in which to do this. Participation in ADR processes does not vary these strict timeframes.

The full range of ADR processes in Australia are used more frequently in tax cases than in any of the Tribunal's other non-tax jurisdictions. While yearly statistics show some variation, over time around 80% of tax applications have been finalized without the need for a hearing and decision.

7.6 Malaysian Approach

In Malaysia, taxpayers are allowed to file an income tax appeal after they receive a notice of assessment and they are not satisfied with the income tax assessment. The appeal must be made within 30 days from the date of the notice and write the appeal to the Inland Revenue Board of Malaysia (IRBM) branch which issued assessment.

Tax appeal will be forwarded to the Special Commissioner of Income Tax, an independent tribunal which consists of panel members to handle tax appeals.

Appeal Settlement:

A dispute may be resolved either by agreement between the taxpayer and the IRBM, or by a decision of the Special Commissioners of Income Tax / the High Court / the Court of Appeal.

In Malaysia, there is a mandatory alternate dispute resolution mechanism i.e., the Dispute Resolution Proceeding (DRP) that is a common resolution platform between the parties under the Malaysia Income Tax Act. The proceeding allows for a 12 months review period after the notice of appeal is filled. If the matter is not resolved, then it is forwarded for the litigation procedure. The second alternative dispute resolution mechanism is an appeal to the DGOC (Director General of Customs) to review a decision. Unlike DRP, an appeal to the DGOC is not mandatory. During the review session, parties can communicate through mails, letters and meetings to come at a common ground, which may come into settlement decision. However, there is no arbitration or mediation for tax disputes and no ADR mechanisms for the international transfer pricing; only DRP is applicable. In 2018, the government of Malaysia

introduced Self Voluntary Disclosure Programme (SVDP) to encourage taxpayers for disclosing underreported income, giving assurances that the declaration under the SVDP would not expose any subsequent investigations. The taxpayers can also mitigate tax controversies by providing economic reasons and commercial reasons for the treatment in a certain manner.

8. GENERAL RECOMMENDATIONS

The Indian tax system has repeatedly dealt with burgeoning tax disputes and tax delinquency using ad-hoc dispute resolution measures (such as VSVS) or sporadic amnesty schemes (such as VDIS). In India there is no proper resolution mechanism for domestic or ordinary taxpayers and government come up with schemes that is only just one time solution in 5-10 years. There is need to have proper continuous mechanism for resolving disputes of an ordinary taxpayer. On the other hand, most advanced economies and even some emerging markets have systematic dispute mitigation and alternative dispute resolution measures (IMF 2013). In India alternate dispute resolution methods prevail largely in the civil family dispute realm. Attorneys also participate in arbitration proceedings, negotiation and claim settlement in areas such as personal injury and debt collection cases. Therefore, it is recommended that India put in place a comprehensive systematic dispute mitigation and alternative dispute resolution structure. This could draw upon existing the methods already available to international taxpayers in India (such as advanced rulings and DRP), be based on international good practice and also build upon alternate dispute resolution methods used in the Indian civil context. The following are the main recommendations:

1) **Pre-return filing administrative clarifications and guidance:** Taxpayers may have genuine doubts about particular transactions such as their taxability, time of taxability, head of income, admissibility of deductions, etc. Presently other than APAs (applicable only to international transfer pricing), no pre-return filing guidance is available in India. A positive step has been the recent inclusion of pre-return filing information available with the tax department. This allows the taxpayer to clarify the nature of the flagged transactions that may constitute taxable income and thereby mitigate tax risks. This could be taken a step further whereby taxpayers could discuss certain transactions the

taxability of which may be doubtful. These could be sent in a "faceless" manner to a panel of experienced senior officials (such as CsIT(A)) for their opinion that would be binding on the department. This would reduce risks of tax additions during assessment, curb the wide discretionary powers of assessing officers and bring about tax certainty.

2) **Communication of draft orders and mid-assessment objections:** In the new amendment that introduced section 144C of the Income Tax Act in 2009, an assessing officer is obliged to the first issue of draft before making final assessment for certain international tax assesses with transfer pricing cases. This allows objections to be filed before the DRP or the assessing officer. It is recommended that this amendment should be modified and expanded to include ordinary taxpayers, so assessing officers first issue draft then make final draft. A senior revenue officer could take a role in guiding the assessment decision. In fact, even the existing section 144A of the Income Tax Act, empowers the Joint/Additional Commissioner to issue directions to the Assessing Officer for any reasons that he thinks are necessary. The directions to the Assessing Officer are binding in nature and the assessee has a recourse to agitate in appeal if the Assessing Officer does not follow the directions. However, this is rarely used effectively in practice. This may partly be due to fears that it may increase vigilance risks for the officer concerned. In a "faceless: scenario this risk is already mitigated considerably. The same provision could be strengthened and modified to allow disposal of mid-assessment objections of all taxpayers other than those facing serious tax evasion allegations such as such and seizure cases (for which Settlement Commission is already available).

3) **Post-assessment non-litigation administrative remedies:** There should be greater use do administrative remedies in a post-assessment scenario rather than relying excessively on the appellate recourse. Income Tax Act 1961 under section 264 already provides powers to the (Principal) Commissioners to revise orders of subordinate authorities provided the same is not under appeal. However, as with section 144A its use in practice is limited. Again, this may partly be due to fears that it may increase vigilance risks for the officer concerned. In a 'faceless' scenario this risk is already substantially mitigated.

4) **Panel based dedicated dispute resolution team with objective of litigation minimization thorough mediation, arbitration or negotiation**: In India most of the cases that are not regarding tax evasion and criminal proceeding, should fall under alternate dispute resolution mechanism. Utilization of SDR mechanism such as arbitration, negotiation and mediation as mentioned in OECD guidelines for domestic resolution to resolve disputes outside the courts should be institutionalized. This would greatly complement the "faceless" assessment and appeals schemes (Verma and Vidyarthi, 2020). It is necessary to create a dedicated team comprising departmental officers and external experts from judiciary, accounting and economics professions whose objective function would be to reduce litigation without fear of vigilance. The performance appraisal of members of these teams should be based on their ability to resolve disputes and minimize litigation, as opposed to the revenue protection performance objectives of the traditional tax department mandate.

5) **Time-bound case disposal and adequate staffing of appellate structures:** CIT (A) has no time barred limit for taking decision as discussed. There should be time limit of 2 years to dispose a case in appeal before CIT(A) provided appellant has provided all documents and responded to all queries and assessing officer has sent in the remand reports on time. There is a shortage of human resources in the litigation forums as only 60 members of ITAT are actually doing their job as per RTI report. It is therefore recommended to employ eligible candidates for the vacant seats so that delay in cases can be avoided.

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