

No. LC/Misc/7(Part-3)/99/

dated: 05 July, 2010

The Secretary
Legislative and Parliamentary Affairs,
The Ministry of Law, Justice and Parliamentary Affairs,
The Government of the People's Republic of Bangladesh
Bangladesh Secretariat, Dhaka.

Subject: Introduction of Alternative Dispute Resolution in the Customs Act, 1969,
The Income Tax Ordinance, 1984 and the Value Added Tax Act, 1991
Your Ref: Memo. No. Law-Opinion-8-9/2010-133 dated 10.02.2010
NBR Ref: Demi Official letter no. 93 dated 27.01.2010 of the Chairman,
the National Board of Revenue

Being directed, I write to you that in pursuance of your above letter, Mr. Nasiruddin Ahmed, Chairman and others of the National Board of Revenue (NBR) visited the Law Commission on 22 February, 2010 and had talks with Mr. Justice Md. Abdur Rashid, Chairman and others of the Law Commission on the above subject. Emphasis was focused on the introduction of Alternative Dispute Resolution (ADR) in the above tax laws for speedy disposal of customs and tax disputes/cases, and also to find out a device to get rid of the backlog and the arrears pending before different appellate forums. It was thought that study of certain tax systems and administration where ADR mechanism is introduced and implemented, in particular, India, Pakistan and South Africa might help formulate necessary ADR mechanism for Bangladesh. Bangladesh Investment Climate Fund (BICF) also expressed to support the idea by providing fund and other necessities for the study.

Accordingly, a delegation comprising four members of NBR, three members of the Law Commission and two members of BICF headed by the Chairman of the Law Commission visited and studied the Indian tax administration from 19 to 21 May and Netherlands tax administration from 22 to 27 June, 2010 (one member of BICF did not join in the latter). Experience gathered in varied, numerous and unique.

The Indian National Board of Revenue was split into two boards, namely, the Central Board of Excise and Custom (CBEC) and the Central Board of Direct Taxes (CBDT) sometimes back, which are independent of each other. Each of the boards is headed by a special secretary of the Government of India belonging to the revenue department. They are highly qualified and experienced tax men.

ADRM was first introduced in India in income tax by inserting chapter XIX-A in the Income Tax Act, 1961 by the Taxation Laws (Amendment) Act, 1975 with effect from 01 April, 1976. And in indirect taxes, the ADR mechanism was introduced in 1999 by insertion of chapter V in the Central Excise Act, 1944 and chapter XIVA in the Customs Act, 1962. Besides, ADRM they have also introduced Online Dispute Resolution Mechanism (ODRM).

By such mechanisms certain opportunities are given to certain group of people to get their disputes settled through the settlement commissions. Two settlement commissions are created, one for direct tax and the other for indirect tax. On fulfillment of certain conditions, the opportunities could be availed by certain people. Decisions of the settlement commissions are made final, conclusive, binding and not subject to any appeal. In the Income Tax before assessment and once in lifetime, one can avail of the opportunity.

Mechanisms appear to be working well. Indians claimed that they are getting good results. It is understood, the methods employed are settlement of disputes by Settlement Commissions, Dispute Resolution Panel (DRP), Advance Rulings and Mutual Agreement Procedure (MAP), which were tailored to meet Indian needs. The delegation was surprised to learn that these four methods of ADRM cover less than one percent of the total cases. So, the mechanisms cannot be termed to be alternative to regular appeal processes rather appear to be additional to the existing procedures.

Settlement Commissions are constituted with one Chairman and two members from the tax men of higher ranks and experience but do not belong to the revenue department (appointed only after retirement or resignation). They are selected and appointed according to the procedure prescribed by rules. Such Commission has their principal office in Delhi and branches in Mumbai, Chennai and Kolkata, each comprising one Vice-Chairman and two members.

Under the Income Tax Act 1961, the Advance Rulings Authority was created in 1992 by insertion of section 245N to 245V in said Act with a chairman and two members. Generally, the chairman is appointed from former judges of the Supreme Court of India and one of the members is also from the judiciary. Any non-resident assessee may obtain an advance ruling on the tax implication in case of any future transaction. The Dispute Resolution Panel is working since 01 October, 1999 to avoid dispute on 'transfer pricing'. Similarly, the Mutual Agreement Procedure is empowered to settle any dispute that may arise with regard to the income earned by an assessee of one country in another country under the agreement to avoid dual taxes.

The boards are made responsible for collection and administration of the national revenue on the basis of regular assessment of income tax and adjudication of the customs and excise duty etc. Final authority vests in the Income Tax Appellate Tribunals and the Customs and Excise Duty Tribunals. A former judge of the Supreme Court or High Court shall be the chairman and one of two members must be appointed from the judiciary in the earlier tribunal while in the latter there is though no such legal requirement but one of the members must be from the judiciary. Such tribunals are intended to be made independent of the Government and the Revenue Department to ensure impartiality, fairness and justice in the tax matters. Result being, few number of cases goes to the High Courts through reference and appeal therefrom to the Supreme Court.

While in the Netherlands revenue collection and tax administration vest in the Dutch Tax and Customs Administration (DTCA), which is headed by a Director-General and five deputy Directors-General. DTCA is a part of the Ministry of Finance. The Minister and the State Secretary head the Ministry of Finance. They are usually appointed every four years following the election of the members of the Lower House of the parliament. Within the Ministry of Finance, the State Secretary is responsible for tax matters including DTCA. The Ministry is divided into four directorates-generals including the Director-General of DTCA. The Director-General for the tax and customs administration directs the Director-General for DTCA and DTCA itself. Director-General is supported by a huge management staff. Netherlands is one of the smaller countries with population of 16.4 million and an area of 41,886 kilometers.

Taxes in the Netherlands are varied and numerous. The system is also very complex but systematic. DTCA handles all taxes core of which is personal taxes, corporate taxes, turnover tax (VAT) and wage tax besides customs duty. In 2007, total revenue collected was euro 199,889 million at a cost of euro 2,797 million that is 1.4% of the revenue collected. Last year total revenue collected was about euro 254 billion.

Few data of the same year would make the tasks of DTCA clearer. Tax declarations processed was 48,617,000 and provisional assessments made 11,037,000. Telephone information requests received 13,860,000. Appeals and objections handled were 1,704,000. The court cases figure 6,100 only. Besides, DCTA is also responsible for allocation and monitoring allowances or "benefits" to households. Allowances include childcare benefits, rent benefits and health care benefits.

In the hierarchy of the tax administration, a tax inspector is empowered to make an assessment. After his assessment, an objection may be filed. Another tax inspector disposes of such objections. Against such disposal, one may file an appeal before a regular Court of Justice,

then, further to the District Court and the High Court therefrom. Such courts are parts of the national judiciary and manned by judicial officers. In case of customs dispute, there may be further appeal to the European Court of Appeal.

Out of about 10,800 disputes received last year, few hundred are challenged in appeal before the District Court and High Court. In High Court much time may be needed for disposal of a case, even 20 years. But total number of pending cases in the courts involves only less than one percent of the total revenue, which could be ignored by the department. And admitted amount is always paid pending appeal. Returns submitted by the companies comprise of 2000 large size, 11,000 medium size and 1 million small size.

In the tax administration presence of two institutions, one of advisers who are made responsible for the tax administration and the tax policy and legislation and another of ombudsman is found to be effective. More than two hundreds advisers are attached to all tiers of the tax administration. Their main job is to advise the department in the matters of policy making, administration and field operation.

Institution of Ombudsman is as old as is the tax administration department. Jurisdiction of the Ombudsman is clearly defined in law. It is an independent body but not a Court and accountable only to the parliament. It could only recommend for correction or amends in case of mistakes or flaws in the disposals of cases or decisions. It mainly scrutinizes the exercise of jurisdiction by the tax authorities.

DTCA maintains high standard in the tax administration. It has through the horizontal monitoring and a kind of partnership built up on the basis of trust with the tax payers and meticulously following the policy of **'stimulate compliance and prevent non-compliance'** practically resolves all differences and disputes before the assessment or adjudication. Consequently, out of millions of returns 10,800 disputes arose after assessment last year.

In tax matters, there is no mechanism alternative to what is provided by law or rules or regulations. In civil jurisdiction, some legal provisions have been made for resolution of civil disputes on the basis of agreement between the parties. It is understood that on the request of our National Board of Revenue a PowerPoint presentation was made on Resolution (Alternative) of Disputes. In fact, they don't have any law or practice of ADR in the tax administration. If the department and a taxpayer, generally a large tax paying company do have an agreement for settlement of any disputes by ADR say mediation, the Court may insist for resolution of the dispute by mediation. Of course, there is no legal basis for mediation. There are hardly one hundred

trained and certified mediators in the department and in private. When such service was sought for they may take up the mediation. But in the customs, no ADR mechanism is possible according to them since the customs demand is a public debt which could not be negotiated.

Lesson learnt from the above study is that there is no alternative to making the system efficient, in particular, the appeal process and friendly to the taxpayers on the basis of mutual trust and confidence not as an enforcer but as a service provider like any other service providers in the nation.

It may be noted that Netherlands belong to the civil law system while India like us belongs to the common law system and tradition of jurisprudence. Besides, Bangladesh and India share the same and similar laws and the system in the administration of tax for pretty long time. May be for this reason, two drafts, one for Income Tax and the other for the customs were sent on behalf of NBR for consideration of the Law Commission.

Besides, the experience gathered from the study of the tax administrations of India and the Netherlands, the Law Commission examined the tax administration and the tax laws of other countries including Pakistan. It is now of the view that some measures legislative, administrative and awareness building may be taken to make the system strong, effective and tax payers friendly.

No mechanism or procedure outside the regular tax system could achieve any miracle for the huge arrears. Consequence of the introduction of any ADR mechanism in the tax laws would always be prospective. It may encourage disposal of the backlog of about 50,000 cases pending before the appeal forums but to a very limited extent. Similarly, no legislative amendment of the tax laws could expedite the disposal of the arrears pending before the Supreme Court of Bangladesh, which function under the Constitution. There is therefore no alternative to the effective steps to be taken by the lawyers of NBR in such pending cases.

Secondly, the tax structure of Bangladesh is neither complex nor big. There is huge scope for improvement in the tax administration to reach the tax payers to ensure compliance and prevent non-compliance. Share of direct tax has to be increased from 25/26 percent of the national revenue. Information Communication Technology (ICT) may widely be used to help the taxpayers to pay their taxes online. Information centres may be organized at all offices of the tax authorities to cater all sorts of information to the tax payers. A bridge has to be built with the tax payers and a confidence to be restored in them. Appeal process must be fair, effective and just. Tax Appellate Tribunal must be made impartial and neutral by participation of such people who cease to belong to the tax administration. Participation of members of the judiciary must be restored. With such

steps taken, when the tax administration would become overall effective and earn confidence of the tax payers, ADR mechanism that is to be introduced would bring expected result.

Lastly, two final drafts for the proposed amendments to the Customs Act, 1969 and the Income Tax Ordinance, 1984 are already sent to the Chairman of National Board of Revenue.

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