

# Bimal Jain

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**Dear Professional Colleague,**

## **Indirect Tax Dispute Resolution Scheme, 2016: Clouds of doubt on success quotient**

The Union Budget, 2016, has introduced number of measures for reducing litigation and providing certainty in taxation, considering the same as one of the key thrust areas of tax reform.

In line with said objective, the Hon'ble Finance Minister has announced Dispute Resolution Schemes for Direct and Indirect taxes for bringing down the litigation pending before the Commissioner (Appeals).

Relevant portion of Budget Speech is given as under:

*"162. Litigation is a scourge for a tax friendly regime and creates an environment of distrust in addition to increasing the compliance cost of the tax payers and administrative cost for the Government. There are about 3 lakh tax cases pending with the 1st Appellate Authority with disputed amount being 5.5 lakh crores. In order to reduce this number, I propose a new Dispute Resolution Scheme (DRS)".*

Under Indirect Taxes, the scheme namely, the Indirect Tax Dispute Resolution Scheme, 2016 ("**the IDT DRS Scheme, 2016**"), introduced in the Union Budget, 2016 as the Government's positive intent to reduce litigation in Indirect Taxation, embraces an important question on its success quotient, considering its not-so-lucrative provisions.

## **Gist of the provisions of the IDT DRS Scheme, 2016**

- The enabling provisions of the IDT DRS Scheme, 2016 are formulated in Clauses 209 to 215 under Chapter XI of the Finance Bill, 2016;
- It shall come into force on June 1, 2016;
- It will be applicable for all the disputes pertaining to Customs, Central Excise and Service Tax matter, which are pending before the Commissioner (Appeals) as on March 1, 2016;
- The Declarant, who want to opt for the IDT DRS Scheme, 2016 has to file a declaration to the Designated Authority in the prescribed format between the period commencing from June 1, 2016 to December 31, 2016;
- For the purpose of this Scheme, the Designated Authority means an officer not below the rank of Assistant Commissioner who is authorised to act as Assistant Commissioner by the Commissioner.
- Declaration filed by the Declarant shall be acknowledged by the Designated Authority.

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- To avail the benefit of the Scheme, the Declarant will have to pay **duty/tax liability along with interest and penalty equivalent to 25% as imposed in the Impugned Order** i.e. Order-In-Original within 15 days of the receipt of the acknowledgement from the Designated Authority and intimate the Designated Authority within 7 days of such payment.
- Thereafter, Discharge Order to be passed by Designated Authority within 15 days of receipt of such proof of payment.
- After getting the Discharge Order, the appeals pending before the Commissioner (Appeals) will stand disposed off and further effect of such Order passed under the Scheme will be as under:
  - Complete immunity from all proceedings under the respective Acts, for Excise matter under the Central Excise Act, 1944, for Service tax matter under the Finance Act, 1994 and for Customs matter under the Customs Act, 1962, and Rules made thereunder, in respect of the dispute.
  - The Discharge Order will not be considered to be an Order on merit and will not have any binding effect.
  - It will not be permissible to re-opening and also no refund will be granted of the amount paid under this Scheme;

## **IDT DRS Scheme, 2016 – Not to apply in certain cases**

In terms of Clause 212 of the Finance Bill, 2016, the provisions of the IDT DRS Scheme, 2016 is not applicable, if:

- a) The Impugned Order is in respect of search and seizure proceeding; or
- b) Prosecution for any offence punishable under the Act has been instituted before June 1, 2016; or
- c) The Impugned Order is in respect of narcotic drugs or other prohibited goods; or
- d) The Impugned Order is in respect of any offence punishable under Indian Penal Code, the Narcotic Drugs and Psychotropic Substances Act, 1985 or the Prevention of Corruption Act, 1988; or
- e) Any detention order has been passed under the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974.

## **Illustration to understand the amount of Penalty to be paid under the IDT DRS Scheme, 2016:**

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In order to understand the amount of Penalty to be paid under the IDT DRS Scheme, 2016, let us take an example covering three different scenarios viz. Penalty of 25%/50%/100% of duty amount imposed in the Impugned Order:

Scenario	Amount of duty	Penalty imposed under the Impugned Order	Amount to be paid under the IDT DRS Scheme, 2016
I	Rs. 100/-	25% of duty amount = Rs. 25/-	100 + Applicable interest + Penalty (25% of Rs. 25/-, i.e. Rs. 6.25/-)
II	Rs. 100/-	50% of duty amount = Rs. 50/-	100 + Applicable interest + Penalty (25% of Rs. 50/-, i.e. Rs. 12.50/-)
III	Rs. 100/-	100% of duty amount = Rs. 100/-	100 + Applicable interest + Penalty (25% of Rs. 100/-, i.e. Rs. 25/-)

## **The IDT DRS Scheme, 2016 – Needs redressal for reducing pending litigation**

The drafting of the IDT DRS Scheme, 2016 is not in commensuration with the Hon'ble FM proposal of reducing litigation pending before the Commissioner (Appeals). Still, there are lot of scope in the IDT DRS Scheme, 2016 which may be amended/removed for the success of this Scheme.

Here, we would like to draw your attention towards some of the shortcomings in the IDT DRS Scheme, 2016, which puts a question mark on its success:

➤ **Restricting the scope of the IDT DRS Scheme, 2016 only for the cases pending at Commissioner (Appeals) level, will minimise its impact:**

Foremost, the fact that the IDT DRS Scheme, 2016 will be applicable only for the cases pending before the Commissioner (Appeals) will act as a major setback. As given supra in the relevant extract of the speech of our Hon'ble FM, it is indicated that there are about 3 lakh tax cases pending with the 1<sup>st</sup> Appellate Authority with locked up revenue amount, being Rs. 5.5 lakh crores. However, the quantum of the cases pending at the Appellate Level and before Courts are far higher than those pending at Commissioner (Appeals) levels. Further, only for the cases involving the duty/ tax amount upto Rs. 50 Lakhs, an appeal shall lie before the Commissioner (Appeals). In other cases, appeal shall lie directly to the CESTAT. Thereby, the IDT DRS Scheme, 2016 may not yield desired results in reducing litigation when maximum of the Revenue is locked up at higher levels with statistics revealing only around 20% success rate for the Department.

➤ **Reduced penalty of 25% not likely to attract assesses when similar provisions are already available under Indirect Tax Laws:**

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It is to be noted that benefit of reduced penalty of 15%/ 25% is already available under the Indirect Tax provisions in fraud cases (i.e. any duty/tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of duty/tax) at the level of Show Cause Notice/ Order-In-Original respectively, if duty/ tax liability is paid along with interest and specified reduced penalty within 30 days of the receipt of Show Cause Notice/Order-In-Original.

For instance, under Service Tax, in fraud cases, where the penalty imposed under Section 78 of the Finance Act, 1994, benefit of reduced penalty of 25% is available if Service tax is paid along with interest & reduced penalty @ 25% of tax amount within a period of 30 days from date of receipt of the Order-In-Original. Similar provisions are also contained under the Central Excise and Customs.

Therefore, proposal of providing reduced penalty of 25% at the level of the Commissioner (Appeals) will not be able to attract the assessee because if case is capable of being litigated on merits, the assessee will fight till the last resort.

➤ **The present Scheme is less beneficial as compared to previous 'Service Tax Amnesty Scheme':**

The IDT DRS Scheme, 2016 encompasses payment of interest as well as 25% penalty, which may not attract assessee to come forward for resolution of cases. In previous 'Service Tax Amnesty Scheme', there was complete waiver of Interest and penalty also, which could attract reasonable number of assessee. However, the IDT DRS Scheme, 2016 has not provided for any type of such waiver benefit either for interest or for penalty, thus not being lucrative.

➤ **IDT DRS Scheme, 2016 viz-a-viz DT DRS Scheme, 2016 - No penalty for specified monetary limit:**

Under the similar Scheme provided in the Income Tax Act, there is a proposal to waive penalty in all cases where disputed tax amount is below Rs. 10 lakhs, which is not available in the IDT DRS Scheme, 2016. There should not have been any disparity between the Schemes and similar provisions should have been there for waiver of penalty upto specified monetary limit under the IDT DRS Scheme, 2016, to make it little attractive.

➤ **Cum-duty/tax benefit not available:**

When the appeal is disposed off on merits allowing the statutory claim of Cum-duty/tax benefit, the duty/tax amount gets reduced along with penalties imposed under various

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Sections like Section 76 and 78 of the Finance Act, 1994 for Service tax, Section 11AC of the Central Excise Act, 1944 and various Rules made thereunder, etc.

However, the IDT DRS Scheme, 2016 will compel the Assessee to pay the whole amount of disputed duty/tax along with interest and 25% penalty.

## **In the Nutshell**

The IDT DRS Scheme, 2016 has been introduced for the purpose of reducing the pending litigation before the Commissioner (Appeals) and providing a platform for dispute resolution. However, perusal of the provisions contained therein, would reveal that such Scheme may not be fruitful for mass assesseees. Further there are bouquet of issues which lack clarification with regards to the IDT DRS Scheme, 2016, such as:

- Whether adjustment possible for the amount paid during the course of investigation or as mandatory pre-deposit @ 7.5% at Commissioner (Appeals) level, in terms of Section 35F of the Central Excise Act, 1944 – Applicable to Service tax vide Section 83 of the Finance Act, 1994 and to Customs vide Section 129E of the Customs Act, 1962;
- What will happen to the proceedings initiated simultaneously against Co-Appellants – Whether there would be closure of proceedings against co-Noticees as well once the proceedings against the main Noticee have been closed;
- Whether 25% of the penalty imposed in the Impugned Order would mean sum total of the penalties, which may be imposed under different Sections simultaneously;
- IDT DRS Scheme, 2016 excludes from its purview the cases where the Impugned Order is in respect of search and seizure proceeding. But does that mean a complete bar for those cases also where search and seizure might be a part of the total case along with other matter of disputed tax liability etc.

Therefore, we are hoping that the Government will look into the vital issues on various matter related to the IDT DRS Scheme, 2016 and modify this Scheme accordingly, by incorporating the provisions, which may invite litigants to come forward to adopt the Scheme and thereby, results in decreasing pending litigation.

Nonetheless, the main mantra which could actually help in bringing down the quantum of litigation in the Country, would be to re-vamp the Adjudication process being practiced by the Department. Its high time to take stringent actions against the erring officials issuing frivolous show cause notices despite of settled legal jurisprudence, time and again. Revenue & the Assesseees – both are partner for the Nation towards development of the economy and the same should be kept in mind.

**“Reactions on Union Budget 2016” by Bimal Jain**

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The Union Budget, 2016, proposing flurry of changes in Indirect Taxes, has been a talk of the town since the day of its presentation i.e. February 29, 2016. Numbers of measures have been introduced, few of which are welcome changes for the Trade & Economy, but few of them are not in line with 'Make in India' and 'Ease of Doing Business' initiatives. Here, is a video on **"Reactions on Union Budget 2016" by Bimal Jain**, discussing both sides of the Union Budget, 2016. You may watch the video presentation by clicking the following link:

<https://www.youtube.com/watch?v=lm1B71zMWK4>



To view our previous video on Union Budget 2016, summarising all the important changes in the arena of Indirect Tax - Service Tax & Excise, please click on the link below:

<https://www.youtube.com/watch?v=n8EZYIeZbzU>

Thanks & Best Regards,

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