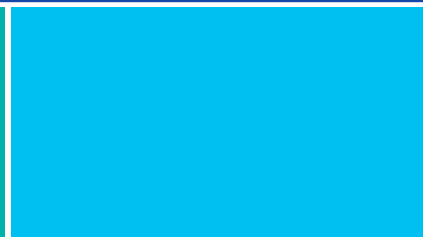
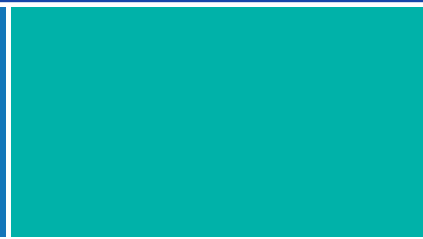




Reference and Proceedings before Valuation Officer, TPO & DRP

April 2019



Glossary

Word	Full Form
ITA	Income-tax Act, 1961
DVO	Department Valuation Officer
AO	Assessing Officer
TPO	Transfer Pricing Officer
ALP	Arm's Length Price
SDV	Stamp Duty Value/Valuation



Reference to Valuation Officer

Reference to Valuation Officer – Situations

S.50C AO may refer valuation of capital asset to a DVO, if assessee claims that FMV < SDV and such valuation is not disputed before the stamp authorities.

S.55A To ascertain FMV of capital asset, AO may refer valuation to DVO if AO is of opinion that it is necessary having regard to nature of asset and other relevant circumstances

S.56(2)(x) AO may refer valuation of immovable property received by taxpayer to DVO, if SDV > actual consideration by INR 50,000 or 5% of the consideration and such SDV is not disputed before the stamp authorities

S.142A For purpose of assessment/ re-assessment, AO may make reference to DVO to estimate value (including FMV), of any asset, property or investment whether or not he is satisfied about correctness or completeness of accounts of assessee

Reference to Valuation Officer – Situations

S.269L

For purpose of initiating proceedings for acquisition of any immovable property by CG under some circumstances (tax evasion or concealment of income), Jt. CIT may require DVO to determine FMV of such immovable property (Chapter XX-A omitted from 30.9.1986)

S.281B

During pendency of assessment proceedings if any property is attached by AO (for protecting revenue's interest) then AO may refer to make reference to DVO to estimate FMV of such property

S.132(9D)

To estimate FMV of property attached during search or seizure proceedings, AO may make a reference to DVO

Reference to Valuation Officer

Section 55A

Basic Provisions – Section 55A

- Provisions introduced by the Taxation Laws (Amendment) Act, 1972 w.e.f. 1.1.1973
- Reference to DVO for determination of fair market value for the purpose of valuation of capital asset

- Applicability [s.55A (a) & (b)]
 - Where the AO is of the opinion that value of asset claimed by assessee basis estimate by registered valuer is at variance with its fair market value or (the provision amended from 1.7.2012) (substituted for “is less than fair market value”)

 - FMV of asset exceeds value of asset claimed by assessee by more than a **fixed percentage/ prescribed amount** of value of the said asset,
 - Amount prescribed – INR 25,000
 - Fixed Percentage – 15%
 - Or
 - If AO was of opinion that given the nature of asset coupled with relevant circumstances, reference to VO was required

- Reference to Wealth Tax Act given
 - Powers of Wealth Tax Officer applicable to DVO also
 - Wealth Tax Act abolished from 1 April 2015

Procedural Aspects – Section 55A

- DVO may serve notice on assessee to furnish accounts, records and other relevant documents for purpose of valuation
- If DVO satisfied that value declared by assessee is correct then order in writing would be passed and copy of the same would be sent to AO and assessee
- On non-satisfaction, DVO to serve notice on assessee intimating proposed value and offer opportunity of being heard
- Upon hearing assessee's contentions and analysing evidence produced before him, DVO would pass order estimating value of asset and sending a copy to AO and assessee
- On receipt of order from DVO, AO would proceed to complete assessment in conformity with order of DVO

Scope – Section 55A

SCOPE OF SECTION 55

View 1

Applicable to Entire Chapter & not just to capital gains

Section uses words “for the purpose of **this Chapter**”

“this Chapter” titled “computation of total income” which includes income from business or profession, income from other sources, **capital gains**, etc.

Capital gains forms a part of “this Chapter”

Above view supported by **Daulatram vs. ITO (1990) 181 ITR 119 (AP)**

View 2

Restricted to capital gains only

Scope of section 55A dealing with “Reference to VO” limited to determination of FMV of a capital asset for purpose of capital gains

Facility of Reference to VO exclusively meant for capital gains

Above view supported by:

Jindal Strips Ltd. vs. ITO (1979) 116 ITR 825 (P&H)

Smt Amiya Bala Paul (2003) 262 ITR 407 (SC)

Which view is correct?

Situations – Section 55A (illustrative list)

- Determination of FMV of an asset as on 01.04.2001
- Summons u/s 131 to the DVO calling for valuation report
- Value of asset claimed by registered valuer differs from AO
- Nature of asset plus circumstances, reference was inevitable
- Expert assistance required by AO
- Determination of cost of construction

Case Study



- *Assessee sold his property for some consideration*
- *Assessment year is 2009-10*
- *Assessee got his property valued as on 1.4.1981 from government valuer (value on higher side) who valued it at Rs 20 lacs.*
- *AO found some discrepancies in the said report and referred the matter to DVO*
- *Based on report of DVO, the fair market value as on 1.4.1981 worked out to Rs 2,00,000.*
- *Is the action of the AO in referring the matter to DVO was justified ?*



A:

- if value of property reported on higher side as on 1.4.1981 , AO can't refer to DVO
- Supported by
 - **Mrs. Anjali Kabra (2016) 75 taxmann.com 5 (Pune trib)**
 - **CIT v Puja Prints 360 ITR 697 (Bom)**
 - **Nirmal Kumar Ravindra Kumar (2016) 70 taxmann.com 339 (Calcutta)- Adverse.**

Thus, action of AO is not valid

Case Study



- *Assessee sold his property for some consideration*
- *Assessee got his property valued from government valuer (value of higher side), basis which the assessee claimed capital gains*
- *AO was not satisfied by report of government valuer and referred the matter to DVO when AO was not supposed to*
- *Based on report of DVO, revised computation of capital gains and added the same to total income*

Is the action of AO of referring the matter to DVO even when it was not supposed to, valid?



A:

- Without making formal reference to DVO, the report would be considered as void-ab-initio and if the AO uses such report then such proceedings would not hold good
- Further, in such cases, assessee may not have any opportunity of being heard and could lead to misuse of powers afforded by section 55A to the AO

Thus, in light of the above, action of AO is not valid

Case Study



- *Assessee was having a piece of land which was later sold for some consideration on which Assessee claimed capital gains.*
- *The assessee considered the FMV of the asset as per the report of the registered valuer.*
- *The disputed land was merely a piece of land having no special characteristics. However, the AO had a contrary view and referred the case to the VO.*

Is the action of the AO (referring to VO) valid?



A ■ ■

Contention of AO

The AO contended that the aforesaid transaction was covered within sub-clause (b) of section 55A which states that if the AO is of the opinion that having regard to the nature of the asset and other relevant circumstances, it is necessary to refer the valuation to the valuation officer.

Held

If the piece of land was not having any special characteristic or there was nothing special about the nature of the piece of land then the action of AO i.e. reference to VO was not valid.

Anant Mills Ltd. vs. Matain (UJ) (1994) 209 ITR 568 (Guj.)

Case Study



- *Assessee sold land and building to XYZ Ltd. for some consideration*
- *AO noticed that assessee and purchaser company were related parties with common directors and management*
- *Thus, AO took the view that price mentioned in sale deed was not market value and hence, made reference to DVO u/s 55A to ascertain the FMV of property*
- *DVO estimated value of property at higher amount*
- *Based on valuation made by DVO, AO made addition to capital gains declared by assessee*

Is the action of DVO tenable in Law



A:

- AO failed to show that assessee was in receipt of consideration in excess of the same mentioned in sale agreement
- For purpose of computation of capital gains u/s 48, FVOC is neither market value nor necessarily price stated in document for sale but price actually arrived at between the parties to transaction
- In other words, price bargained between the parties is to be considered as sales consideration for the purpose of capital gains
- Hence, the action of AO was held invalid in law in as much as making reference to DVO is concerned

Pr. CIT vs. Quark Media House India (P.) Ltd. (2017) 77 taxmann.com 301 (P&H)

Case Study



- *Assessee declared long-term capital gain on sale of land after relying on valuation report made by approved valuer*
- *AO referred matter to DVO for determining FMV of the said property*
- *DVO assessed Fair Market Value at higher price than declared by assessee*
- *Based upon DVO's report, re-opening notice was issued against assessee*

Was the action of AO valid in law?



A:

- It was observed that DVO did not make any inquiry to find out fair market value
- DVO had mechanically (basis the rate in case of other two properties situated in same town planning scheme) determined fair market value of land
- There was no cogent evidence available with AO to opine that income had escaped assessment
- It is important for the AO to understand the basis on which DVO has made the valuation report since without proper backing, such valuation can fall flat

Munir Ismail Voraji vs. ITO (2017) 82 taxmann.com 92 (Gujarat)

Reference to Valuation Officer

Section 142A

Basic Provisions

- This provision was introduced by Finance (No.2.) Act 2004 w.r.e.f 15.11.72
- To overcome decision of the Supreme court in the case of Smt Amiya Bala Paul.
- This section applicable for limited purpose of assessment or re-assessment [s.142A(1)]
- Estimation of value – value includes FMV [s.142A(1)]
- Nature of asset – not just capital asset, any property, investment or asset covered [s.142A(1)]
 - Broader than reference to DVO under section 55A

Procedural Aspects

- VO under section 142A to have all powers as afforded to VO under section 55A as well as under Wealth Tax Act (now abolished) [s.142A(3)]
- Appropriate opportunity of being heard to would be afforded to assessee [s.142A(4)]
 - VO to estimate value of asset, property or investment after taking into account evidence collected or produced by assessee
- VO to estimate value of asset, property or investment to best of his judgment, if assessee does not co-operate or comply with his directions [s.142A(5)]
- VO would send a copy of report of estimate to AO and assessee within a period of six months from end of the month in which reference is made under this section [s.142A(6)]
- AO may, on receipt of report from VO, and after giving assessee opportunity of being heard, may consider the said report in making the assessment or reassessment [s.142A(7)]
 - Is it optional for AO to consider report of estimate by VO in making assessment or re-assessment?

Interplay with Section 142A

- Section 142A inserted to enable reference to DVO for valuation of investments
 - Allows reference on all matters of all valuations required for estimation of value of any investments
 - Overlapping with section 55A with regards to valuation of investments/ capital assets
- Would it be practical to make reference to DVO available to all matters where valuation of capital assets/ investments is necessary to avoid undue litigation and hassle?



- *Assessee filed Return of Income*
- *During assessment, AO was not satisfied with the valuation of investments claimed by assessee*
- *AO referred to DVO by invoking section 142A without rejecting books of accounts*
- *Valuation of investments based on audited Financial Statements which were prepared in accordance with the books of accounts*

Is the action of AO tenable?



A:

- AO is required to show he is not satisfied with the valuation of investments by rejecting books of accounts
- Without rejecting the books of accounts, the AO cannot make reference to DVO

Saragam Cinema vs. CIT [2011] 197 Taxman 203 (SC)

Case Study



- *Assessee purchased property for which he took loan from bank*
- *AO issued notice to assessee to call for some information with respect to the above loan*
- *Assessee filed his submissions, however, AO had some doubt about unexplained investments with respect to the above*
- *AO made a reference to DVO to value the property based on his doubt*

Is the action of AO tenable in law?



A:

- Reference to DVO u/s 142A can be invoked for investigation and not for making phishing or vague inquiries
- The AO should have cogent evidence to support his doubt that there were unexplained investments
- Where AO had no cogent material available to satisfy himself about requirement of section 69, reference to DVO u/s 142A cannot be made

Anand Banwarilal Adhukia vs. Dy. CIT (2016) 75 taxmann.com 301 (Gujarat)

Section 50C – Key Issues

- Whether AO is bound to refer matter to DVO where assessee claims that stamp valuation is not correct
 - Where assessee applies to AO to refer matter to DVO, the word “may” appearing in section 50C(2) would be construed as “shall”
 - AO would be obligated to refer the matter to DVO

[N. Meenakshi vs. ACIT [2010] 326 ITR 229, S. Muthuraja vs. CIT [2013] 2018 taxman 73 (Madras)]

- Whether valuation can be challenged before AO although it was challenged before stamp valuation authorities which was rejected
 - Remedies u/s 50C are alternative
 - Assessee can challenge the valuation provided it wasn't challenged before stamp valuation authorities

[Jitendra Mohan Saxena 117 TTJ 974 (Lucknow Tribunal), Mohd. Shoib vs. Dy. CIT [2010] 127 TTJ 459 (Lucknow)]

- Whether AO bound to adopt value determined by DVO although the same is less than stamp duty valuation
 - **CWT vs. Dr. H Rahman [1991] 189 ITR 307** – reading of section 50C shows that wealth tax officer has no option but to complete assessment in conformity with valuation of DVO
 - Hence, AO is bound to accept value determined by DVO even if it is less than stamp duty valuation

[Dr. Indra Swaroop Bhatnagar [2012] 349 ITR 2010]

Section 50C – Key Issues

- Whether valuation report of DVO can be challenged
 - View 1 – Can be challenged
 - DVO's report is not sacrosanct and only an estimation
 - It is only a matter of opinion and differs from valuer to valuer
 - It is only statistical hypothesis that exposes to errors
 - Hence, valuation report of DVO can be challenged by assessee
[ITO vs. Santosh Kumar Dalmia [1994] 208 ITR 337 (Cal), Bholanath Majumdar vs. ITO [1996] 221 ITR 608 (Gauhati), Waaf Alal Aulad vs. Addl. CIT [2010] 37 SOT 58 (Delhi)]
 - View 2 – Cannot be challenged
 - DVO is required to apply his own mind, source relevant information from other sources such as market rates, documents based on comparable transactions
 - DVO cannot simply follow data which does not reflect the current market value
 - Section 50C is an on-going exercise which has to be carried for each transaction and not doing so would defeat the purpose
 - Valuation done by government approved valuer cannot be brushed aside since he is a qualified person
[Ravi Kant vs. ITO (2007) 110 TTJ 297 (Delhi), CIT vs. Raman Kumar Suri [2013] 212 taxman 411 (Bombay)]

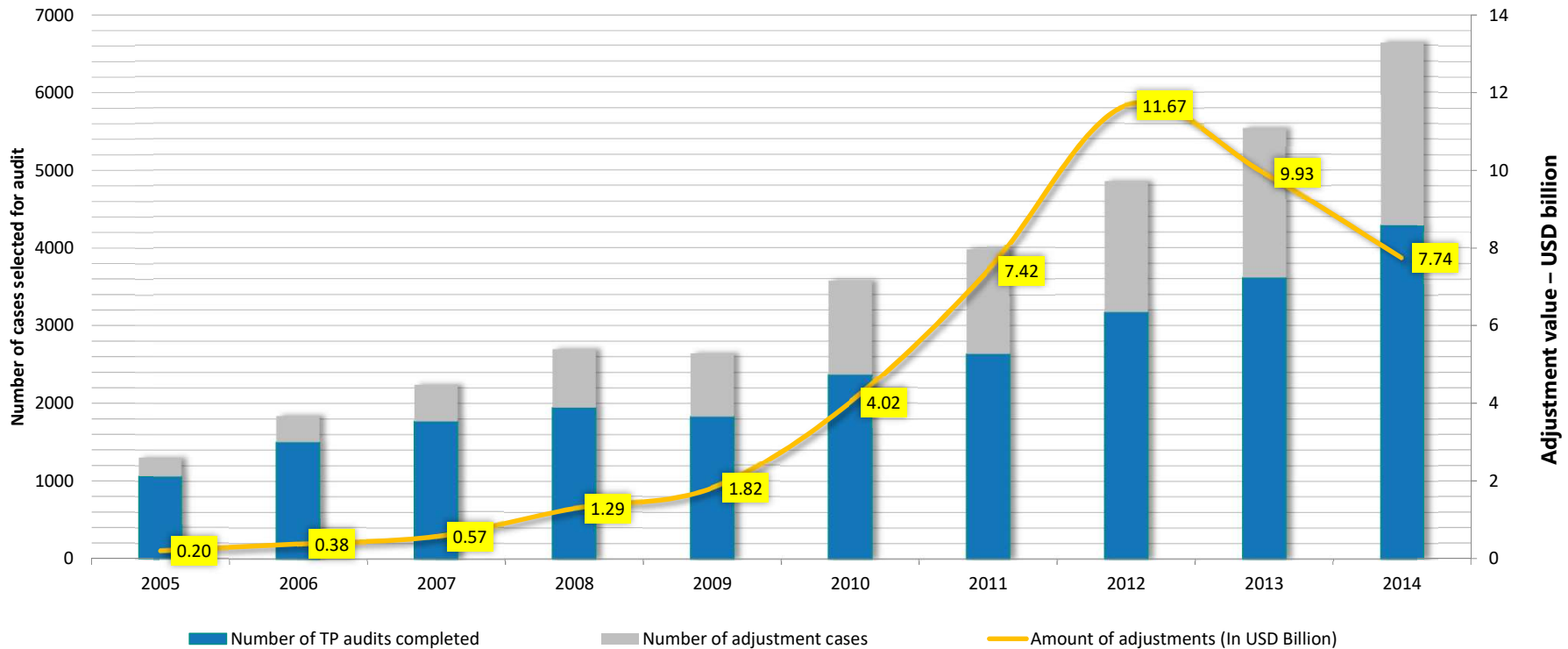


Reference to & Proceedings before Transfer Pricing Officer

Audit Adjustment Trends

Transfer Pricing Disputes Growth

Source: CBDT Annual Report 2014-15

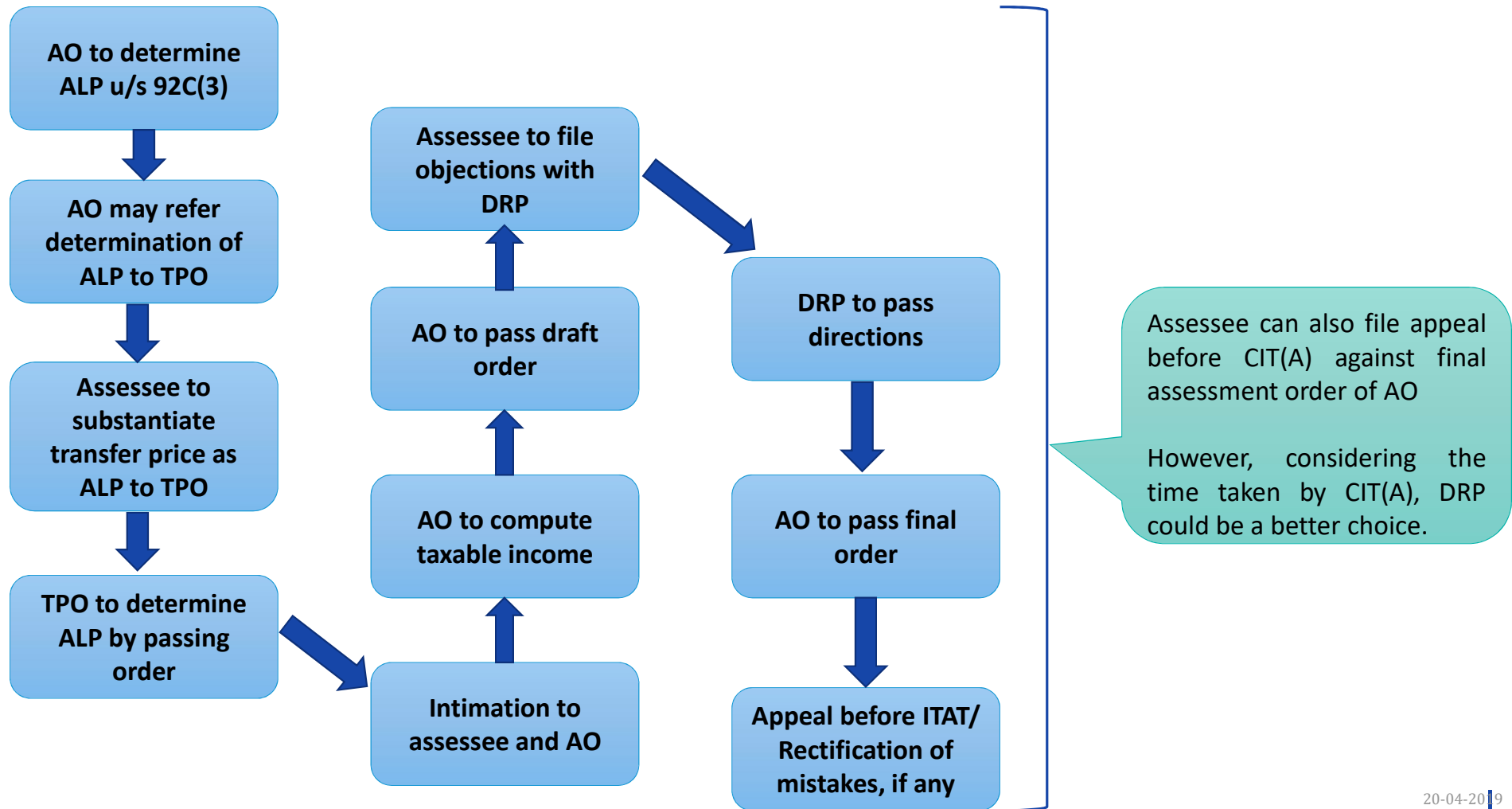


However, the high success rate for taxpayers at the Tribunal and HC level of 69% and 86% respectively, is an affirmation of the independence and fairness of the Indian judicial system

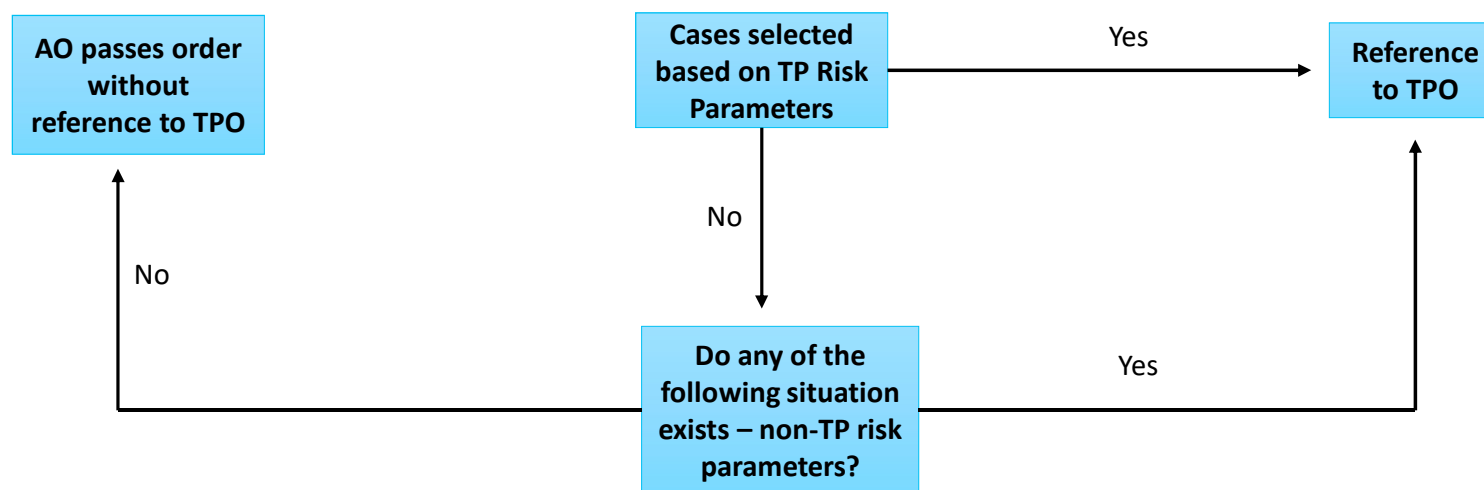
Basic Provisions – section 92CA

Section	Provisions
92CA(1)	If AO considers it necessary or expedient to do so, may refer computation of ALP to TPO with prior approval of CIT
92CA(2)	TPO to serve notice on assessee requiring him to produce evidence in relation to computation of ALP
92CA(2A) & (2B)	TPO can suo-motto take cognizance of transaction neither reported by assessee nor referred by AO
92CA(3)	Post considering material before him, by an order in writing, TPO to determine ALP under ITA
92CA(3A)	Time limit for passing order – 60 days prior to date of limitation u/s. 153
92CA(4)	On receipt of order of TPO, AO to compute total income of assessee in line with ALP as determined by TPO
92CA(5) & (6)	Rectification of mistake apparent from record in TPO's order
92CA(7)	<p>Exercise power u/s.:</p> <ul style="list-style-type: none"> ▪ 131(1) – power regarding discovery, production of evidence, etc ▪ 133(6) – may require anyone to furnish information ▪ 133A – Power of survey

Audit Process – Bird’s Eye View



Reference to TPO – CBDT Instruction No. 03/2016



AO must record his satisfaction that there is an income or a potential of an income arising

Non-TP Risk Parameters

- AO came to know that assessee had entered into international transaction/s but assessee had either not filed Form 3CEB or not disclosed the same in the said Form 3CEB
- TP adjustment of INR 100 million or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal
- Assessee has declared international transactions or specified domestic transactions in Form 3CEB but made qualifying remark that the same is not international transaction or specified domestic transaction or do not have any impact on income of assessee

AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise

CBDT Instruction No. 03/2016 dated 10 March 2016 – Operational Guidance

- TPO empowered to examine any other international transactions (not referred by AO) that come before him during proceedings

- TPO's order should contain following details (minimum)
 - Comparable data used for purpose of computation of ALP
 - Application of most appropriate method
 - Justification for arriving at certain ALP

- Determination of ALP not to be carried out by AO, if reference not made to TPO



Reference to & Proceedings Before Dispute Resolution Panel

Background

- In India, MNCs face tax issues on
 - Income Characterization (business income/ royalties/ fees for technical services)
 - Permanent Establishment issues
 - Transfer Pricing
- Resultant litigation entails high degree of uncertainty into business operations of MNCs in India
- Finance Minister, Mr. Pranab Mukherjee – speech while presenting Budget for 2009-10
 - To improve the investment climate in the country, easy and quick disposal of tax disputes faced by foreign companies required
 - To achieve this objective, alternative dispute resolution mechanism to be set-up for resolution of transfer pricing disputes
- DRP (Section 144C) introduced vide Finance Act 2009 to hasten resolution of transfer pricing disputes

Constitution of DRP

- DRP Rules revised w.e.f. 1 January 2015- Income Dispute Resolution Panel Rules 2009.
- Established 3 Headquarters – Mumbai, Delhi and Bangalore
- Jurisdiction of each headquarter

Headquarters	Panels	Jurisdiction (illustrative list)
Mumbai	3	Maharashtra, Gujarat, Madhya Pradesh, Chhattisgarh, etc
Delhi	2	Delhi, Rajasthan, Himachal Pradesh, Jammu & Kashmir, Uttar Pradesh, West Bengal, Bihar, Odisha, North-east states, etc
Bangalore	2	Karnataka, Tamil Nadu, Andhra Pradesh, Telangana, Kerala, Goa, etc

- Rules prescribed for transferring cases from one jurisdiction to another
- Self sustained (own infrastructure and staff)

Basic Provisions

Section	Particulars
144C(1)	AO shall forward the draft order to the eligible assessee in case AO proposes to make any variation in income or loss returned being prejudicial to interest of assessee
144C(2)	“eligible assessee” accepts draft order or files objections against the draft order (transfer pricing + non-transfer pricing matters) within 30 days from receipt of draft order
144C(3)	AO shall complete assessment once assessee intimates AO of accepting draft order or no objections are received as mentioned u/s 144C(2)
144C(4)	AO shall pass final assessment order (irrespective of section 153 or 153B) within 1 month where acceptance is received or period of filing objections expires
144C(5)	DRP to issue directions for guidance of AO to enable him to complete assessment once objections are received u/s 144C(2)
144C(6)	On receipt of objections, DRP analyses the following records/ documents [s.144C(6)] <ul style="list-style-type: none"> ▪ Draft Order ▪ Objections filed by assessee ▪ Evidence furnished by assessee ▪ Report of AO, TPO, VO or any other authority ▪ Records relating to Draft Order ▪ Evidence or information collected by DRP ▪ Any enquiry made by DRP

Basic Provisions

Section	Particulars
144C(7)	DRP can make further inquiry or have income-tax authority to make further inquiry before issuing any directions
144C(8)	DRP may confirm, reduce or enhance variations proposed in Draft Order but cannot set-aside the proposed variations
144C(9) & (11)	Decision of DRP to be reached via majority after giving reasonable opportunity to AO and assessee
144C(10)	Every decision of DRP is binding on AO
144C(12)	DRP is required to complete hearing and give final directions within a period of 9 months from end of the month in which draft order is forwarded to eligible assessee
144C(13)	After Direction from DRP, AO to pass final order within 1 month from end of month in which such directions received – no further opportunity of being heard offered to assessee
144C(14)	Provisions not to apply to assessment/ re-assessment order passed with prior approval of Pr. CIT u/s 144BA
144C(15)	<p>(a) Dispute Resolution Panel means collegium of 3 Commissioners of Income-tax before whom the AO and Assessee would present their case</p> <p>(b) Eligible Assessee means any person in whose case the proposed variation arises as a consequence of the order of the TPO and any foreign company.</p>

Powers and Duties

DRP issues directions to confirm, reduce or enhance proposed variation

DRP can call for additional information if it deems fit

DRP cannot condone delay – no enabling provisions in Section 144C or respective rules

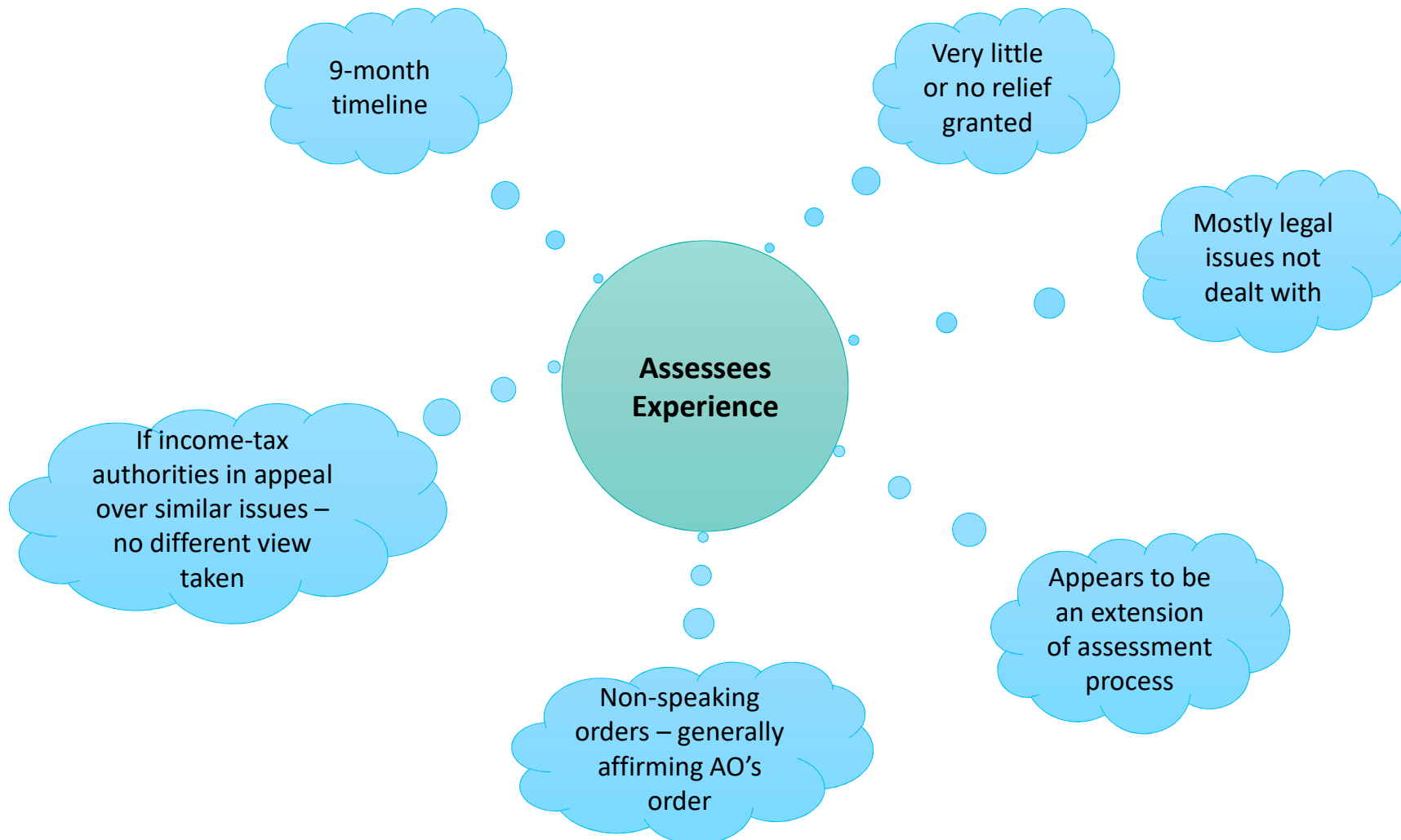
DRP cannot set aside case back to AO for further inquiries and then passing a fresh order

DRP can make or have the income-tax authorities make inquiries on the matter

DRP can entertain additional evidences which were not earlier produced before AO

Direction by DRP binding upon AO but can be contested before ITAT. However, AO can not file the appeal

Taxpayers – Experience with DRP



DRP vs CIT(A)

Key	DRP	CIT(A)
Constitution	Collegium of 3 CITs	1 CIT only
Application Process	File objections within 1 month from receipt of draft order	File appeal within 30 days from receipt of AO's order
Time limit for disposal	9 months from the date of draft order	No time limit as such- preferable to dispose off within 1 year from the end of the financial year in which appeal is filed.
Demand	No demand until disposal of matter	20% of demand is required to be paid unless stayed
Pros & Cons	Fast track route to ITAT Eligible Assesseees (variation due to transfer pricing adjustment and any foreign company)	Detailed hearings may be granted Any assessee (domestic or international) aggrieved by the order of AO can appeal
Additional Evidence	DRP required to record reasons only (Generally accepted)	Difficulty in accepting additional evidences Conditions to be satisfied

Other Issues

- DRP provisions u/s 144C(1) applies only if the AO proposes to make any variation in the income or loss returned. Thus, this section is not applicable in respect of other variations such as variation in rate of tax, status of assessee, etc.

- DRP provisions covers within its ambit re-assessments also
 - Section 2(8) – unless to the contrary, assessment includes re-assessment
 - Objective of DRP – to expedite resolution of disputes on a fast track basis. Hence, re-assessments would also be covered under DRP
 - DRP provisions are quasi appeal provisions and hence, should be interpreted in a liberal manner (in favour of taxpayer) in case of appeal matters

- Agent of the Foreign company (representative assessee) also regarded as eligible assessee
 - Memorandum explaining provisions of the Finance Bill 2009 – one argument that object of provisions equally apply in respect of assessment of representative assessee
 - **CIT vs. Eli Lilly & Co. (India) Pvt. Ltd. [2009] 312 ITR 225 (SC)** – sections pertaining to representative assessee are machinery sections and the charge being crystallized by sections 4 and 5, the same should not be construed to deprive a foreign company of a fast track assessment

Other Issues

- The time limit of 9 months for disposal of directions by DRP should be reckoned from the date of actual service of draft assessment order by AO [**Rain Cements Ltd. vs. Dy. CIT (2016) 75 taxmann.com 113 (AP & Telangana)**]

- Pursuant to order of TPO, AO passed final order u/s 143(3) instead of passing draft assessment order u/s 144C, there being violation of procedure prescribed under Act, impugned order was required to be set aside along with corrigendum issued by AO modifying final order of assessment to be read as a draft assessment order, could not cure defect existing in original order [**Vijay Television (P.) Ltd. v. Dispute Resolution Panel [2014] 46 taxmann.com 100 (Mad.)**]

- Where assessee is not a foreign company and TPO did not propose any variation to return filed by petitioner, section 144C cannot be applied as the assessee falls out of the scope of eligible assessee [**Honda Cars India Ltd. vs. Dy. CIT (2016) 67 taxmann.com 29 (Delhi)**]

- Eligible assesseees other than foreign companies – DRP to provide directions for all variations or only tp variations
 - View 1 - Precondition for jurisdiction of DRP is a transfer pricing adjustment, hence, DRP will have to give directions on all variations proposed including non-transfer pricing adjustments.
 - View 2 - DRP may confine itself to transfer pricing adjustments and the entire assessment order including the other variations will have to be agitated for the first time before the Tribunal

Case Study



- *Assessee filed return of income. It wanted to make an additional claim in the assessment proceedings*
- *AO – additional claim via revised return only*
- *CIT(A) – may accept additional claim in the appellate proceedings without filing revised return of income*

Would DRP allow such additional claim?

Case Studies!!



A:

DRP would not allow such claim since DRP is only an extension of assessment proceeding and does not form part of appellate proceedings.

It is pertinent to note that additional claim differs from additional evidence.



Thank You