

References to & proceedings before TPO & issues connected therewith & dispute resolution procedures

25 January 2014



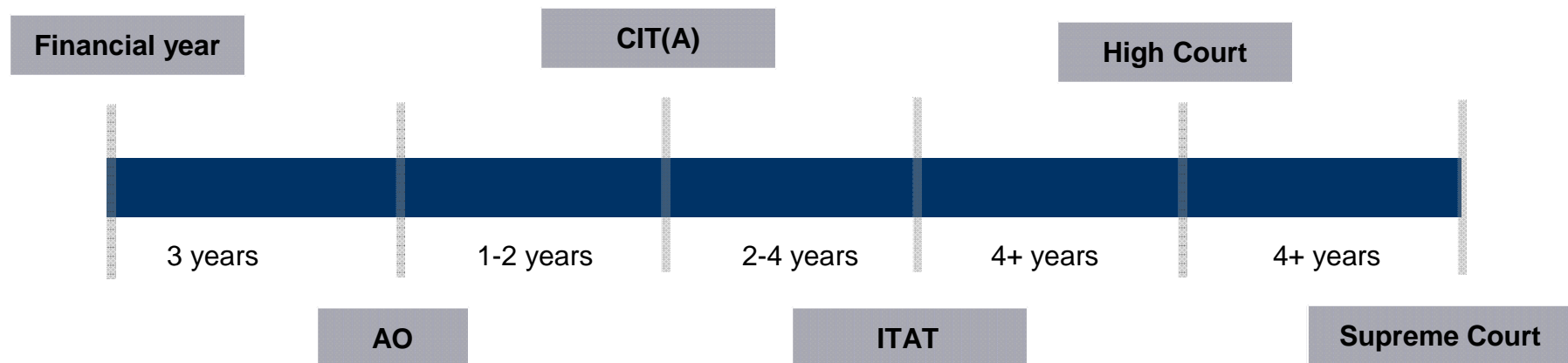
Litigation

Litigation is the basic legal right which guarantees every corporation its decade in court.

- David Porter, US Navy, (1813-1891)



- Literally applicable to the tax dispute redressal system in India
- In fact it used to take more than 15 years to bring finality to a tax matter under erstwhile litigation route



Instruction No 10 of 2013 – Scrutiny Guidelines

CBDT has laid down following procedure and criteria for manual selection of returns/cases for scrutiny during the financial-year 2013-2014 for Transfer pricing matters:

- Cases where value of international transaction as defined u/s 92B of the IT Act exceeds Rs. 15 crores – mandatory to refer the computation of ALP to the TPO
- Cases involving addition in an earlier assessment year on the issue of transfer pricing in excess of Rs. 10 Crores or more which is confirmed in appeal or is pending before an appellate authority.

Either AO can do the transfer pricing assessment or can refer the computation to the TPO

For AO to make a transfer pricing adjustment

- The AO can make a transfer pricing adjustment provided he has material information and documents in his possession based on which an opinion can be framed as to circumstances enumerated in section 92C(3) are satisfied. In all other cases, the value of the international transaction should be accepted without further scrutiny. - **Circular: No. 12/2001, dated 23-8-2001.**

Section 92C(3) - Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

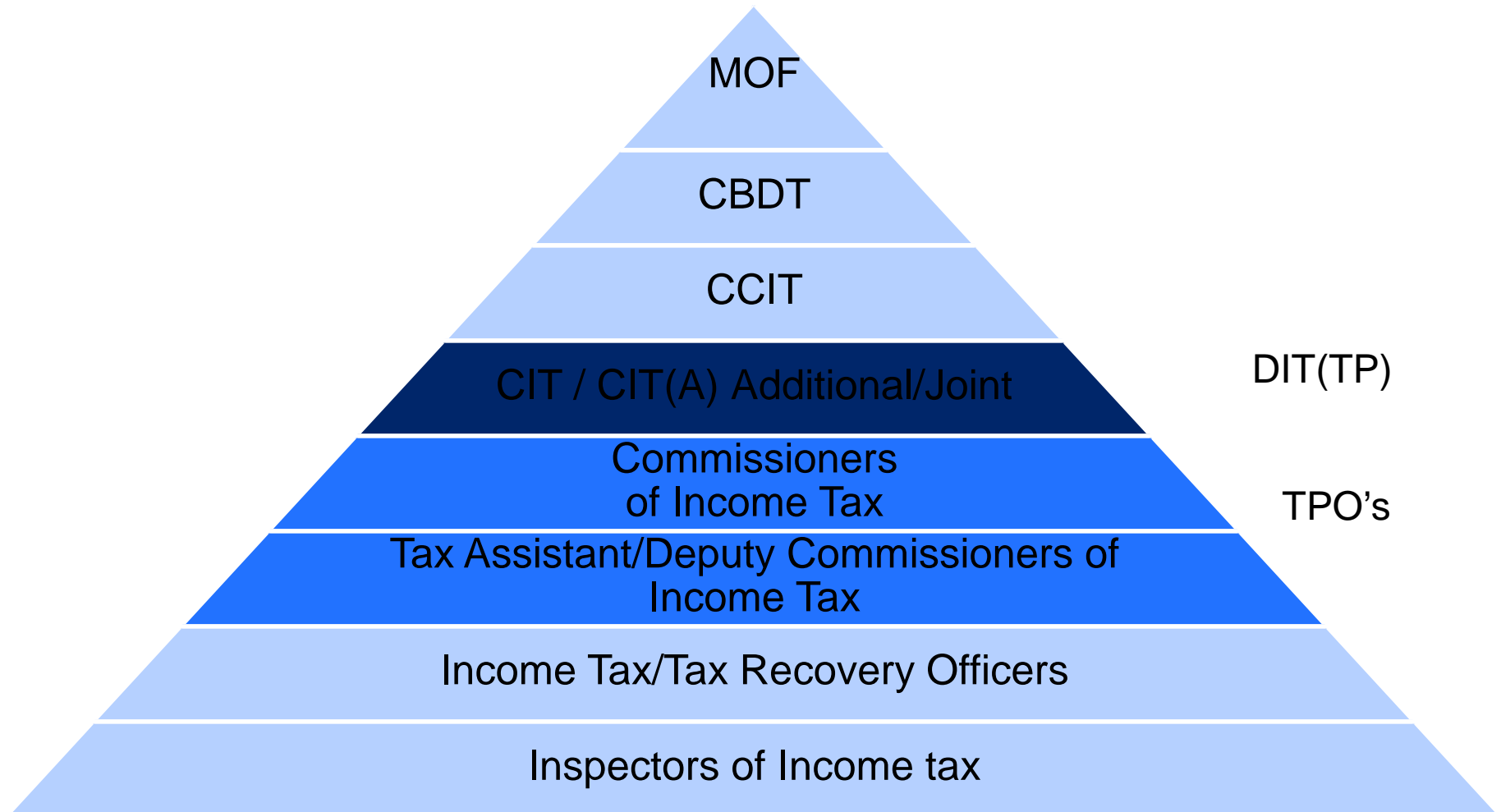
- (a) the price is not determined in accordance with any of the six prescribed methods; or
- (b) information and document substantiating arm's length nature of transaction have not been kept and maintained by the assessee; or
- (c) the information or data used in computation of the ALP is not reliable or correct; or
- (d) the assessee has failed to furnish, within the specified time, any information or document,

the Assessing Officer may proceed to determine the arm's length price in relation to the said transaction in accordance with Sec. 92C(1) and (2), on the basis of such material or information or document available with him:

Reference to Transfer Pricing Officer

- S 92CA (1) – if AO considers it necessary or expedient so to do, he may refer the computation of arm's length price to the TPO with the previous approval of the Commissioner – prima facia view
- S. 92CA (2) TPO to serve notice on the Assessee requiring him to produce evidence in relation to arm's length price computed
- S. 92CA(2A) and (2B) – TPO can *suo motto* take cognizance of the transaction not reported by the Assessee or nor referred by the AO
- S 92CA(3) provides that the TPO after taking into account the material available with him shall, by an order in writing, determine the arm's length price in accordance with s 92C(3).
- S 92CA(3A) Time limit for passing an order - 60 days prior to the date of limitation referred in S. 153.
- S. 92CA(4) Provides that on receipt of the order of the TPO, the AO shall proceed to compute the total income of the assessee in conformity with the ALP as determined by the TPO.
- S. 92CA(5) and (6) refers to rectification for mistake apparent from record in TPO's Order
- S. 92CA(7) exercise of power specified under
 - 131(1) - Power regarding discovery, production of evidence, etc.
 - 133(6) - May require any person to furnish information or
 - 133A - Power of Survey

Hierarchy of ITA – Transfer Pricing



Rights of the Assessee

General rights-Principle of natural justice

- To be offered an opportunity of being heard before completion of any proceeding –Tin box Co. vs. CIT (116 Taxman 481) (SC)
- To be supplied copy of documents/ evidences to be used against him -Dhakeswari Cotton Mills Ltd. vs. CIT (26 ITR 775) (SC)
- To rebut the evidences produced against him
- To lead his own evidence both oral and documentary, in his defense
- To receive a proper notice for initiating scrutiny assessment proceedings – should be within the time limits prescribed

Principle of natural justice to apply in case of any proceeding

Personal and professional etiquette

- Give your visiting card and mention the assessee and the relevant assessment year /appeal number to the staff before meeting the officer
- Wait patiently till you are called by the ITA
- Switch off phones/ put it on vibrator mode
- Respectfully introduce yourself, the firm you represent and the assessee before starting any discussions
- Use polite and respectful vocabulary; never be too defensive or too offensive while communicating with the ITA
- Respect even the lower staff of the ITA
- ITA can get nasty at times
- Dress well to feel confident and create a positive impression

**They say 'First impression is the last impression'
Good personal and professional etiquette helps create an rapport with the ITA**

Appearance before TPO

- Have complete knowledge about the client's business
- Never comment on factual details unless confirmed by clients
- Over disclosure may invite new issues/ under disclosure may raise suspicions
- Carefully read and copy the proceeding sheet before signing it.
- Maintain confidentiality
- Update the client on the proceedings before the TPO
- Provide an acknowledged copy of the submission filed before the TPO to the client for his record
- Inform the client about the next date of hearing
- Provide the list of documents that would be required from the client for the next hearing
- Set a calendar invite with a reminder well in advance before the date of the next hearing
- Maintain scanned copies of the submission in respective client folder

Appearance before TPO –Do's

- Check the availability of the ITA before leaving for the hearing –check with the staff
- Background Search of the officer –Domicile, college, common acquaintances, IRS Batch, previous postings
- Obtain the contact details of the Staff
- Submit all the details in the manner asked for in the notice issued –serially numbered, if all details not available, submit those available and ask for appropriate time for balance details
- Invite client to attend the hearing
- If records are not available with officer, offer him our set of records to expedite the proceedings
- Avoid seeking oral adjournments –Always by virtue of a letter in order to keep it on record
- Follow up for orders / rectification orders -Follow up with lower staff as file moves from down to upwards

Appearance before TPO –Don't

- Do not go with the notion that all are inefficient/unreasonable
- Never criticize government but empathize with work load
- Do not bow down to any favors asked by the ITA
- Never quote an officer by name in written/oral communication
- Avoid asking for cell phone number or call on cell phone
- Avoid using our cliché and learn his cliché
- Avoid touching sensitive topics –caste, politics
- Avoid taking updates of the proceedings/ matter over the phone –make a personal visit to tax office

Receipt of TPO's Order

- Confirm the tax working with the staff before the order is finalized –Avoid 154!!
- Verification : Any 154 items
- Analysis of the order and mail to client
- Decide on grounds to be taken
- AO may or may not give an opportunity before confirming the additions made by the TPO

Next Steps:

- Stay/ Penalty / Grounds of appeal:
- Appeal filing
- Check availability of MD for signing appeal memo –Section 140

Decide whether to go for CIT(A) or DRP:



DRP vs CIT(A)

Dispute Resolution Panel – Background

- Introduced by the Finance (No.2) Act, 2009 w.e.f. 1 April 2009
- An alternative dispute resolution mechanism available for Eligible Assessee:
 - ▶ Foreign company - Transfer pricing adjustment not necessary.
 - ▶ Any other person – If variation in pursuance to order issued by transfer pricing officer.
- Objections to be filed against entire order – both corporate tax issues and transfer pricing issues
- Additional evidence not submitted to the AO to be filed through a separate application stating the reasons for filing such additional evidence
- Once the application is made by the taxpayer, the Panel is required to complete their review and issue directions within 9 months of the date of Draft Order
- Directions of the Panel are binding on the AO
- However, the taxpayer may appeal directly to ITAT
- No tax demand till the Panel issues its directions and AO passes the Final Order

DRP – Powers and Duties

DRP has powers as are vested in a 'Court' under Code of Civil Procedure, 1908

DRP issues directions to confirm, reduce or enhance proposed variation

To issue directions within nine months from end of month in which draft order is forwarded to taxpayer.

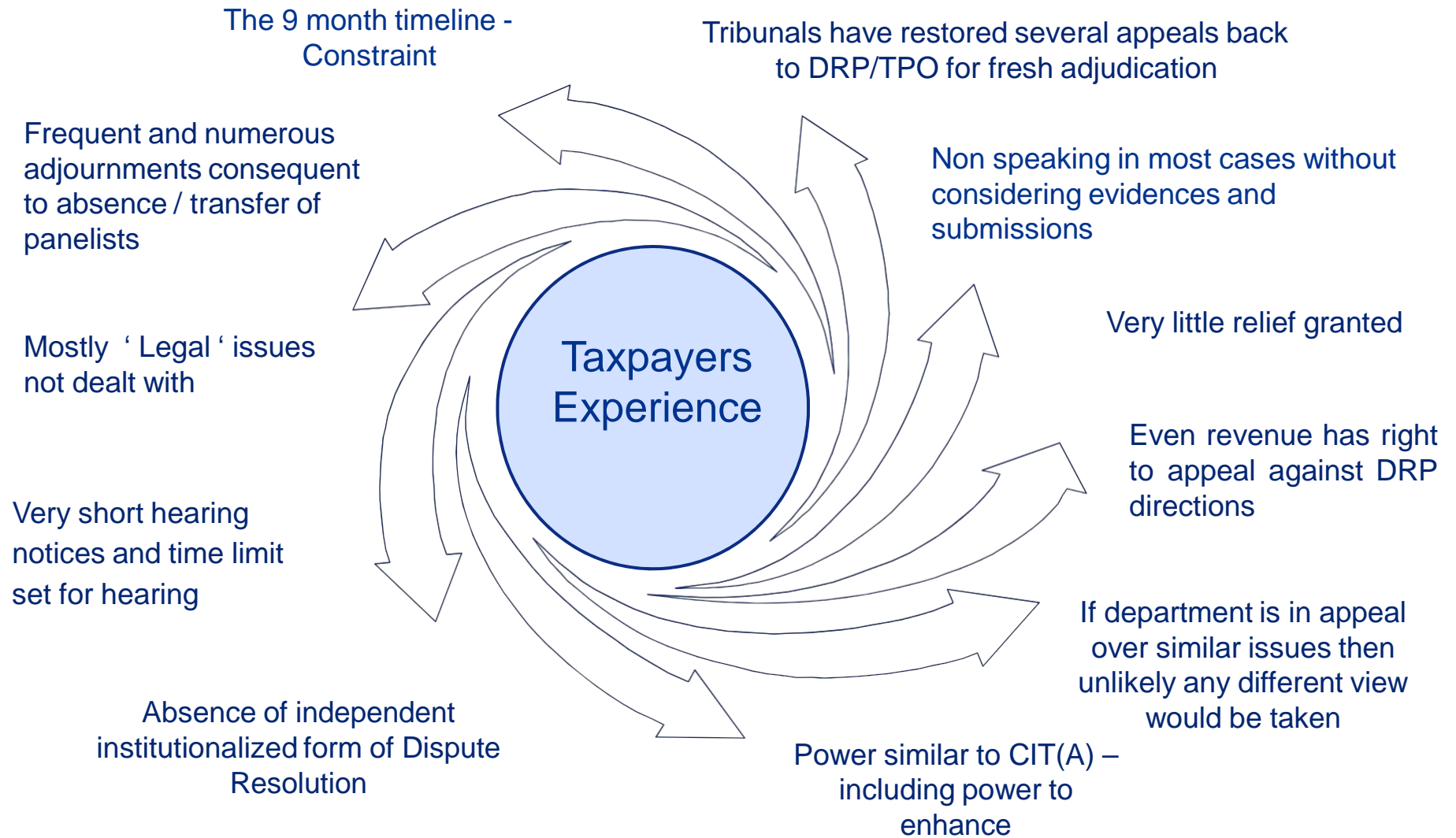
DRP cannot set aside proposed variation – Must give final directions to AO on the issue

DRP may not condone delay -No provisions in sec144C / DRP rules to condone delay in filling of objections

Reference to DRP vs CIT(A) - A Comparative

Key	DRP	CIT(A)
Constitution	Collegium of three officers of the CIT rank	Only one CIT
Application Process	If the taxpayer chooses this route, he is required to lodge objections within 1 month from receipt of Draft Order	Should file Appeal within 30 days from the receipt of Final AO Order
Time limit	Only 9 months from the date of Draft Order to examine the case, hold hearings and pass directions	No time limit
Demand	No demand till disposal of the matter	Significant portion of demand is required to be paid unless stayed
Pros	Fast track route to the ITAT	Detailed hearings may be granted to the Assessee to represent their case
Form	Form 35A – specific format to be followed for submission	Form 35
Further Appeal	Both taxpayer as well as AO can appeal to ITAT	

DRP – TAXPAYERS EXPERIENCES



DRP vs. CIT(A) – Way Forward



Following factors should be considered depending upon the facts and circumstances of each case, while deciding the way forwards:

- No compelling reasons for a fast track ITAT hearing
- Covered matter – ITAT / Higher authorities' orders are in favor
- Factual vs Legal issues
- Directions of DRP are non-speaking
- If CIT(A) has ruled in favor of taxpayers on similar issues in preceding years
- If no favorable order exists, possibility that the CIT(A) could exercise flexibility / independence in approach

General guidelines on appearance before Appellate Authorities

Appearance before CIT(A)

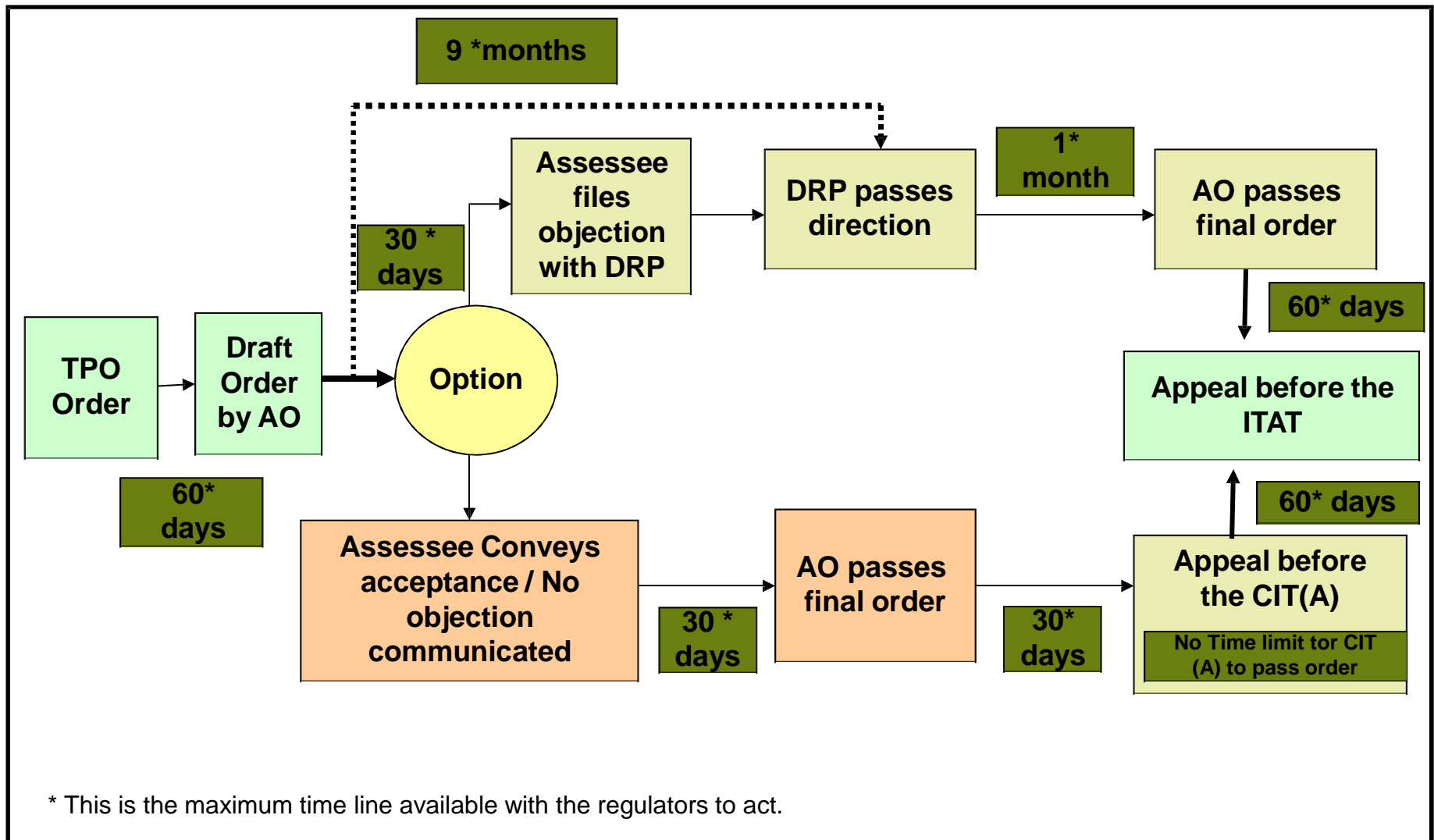
- Avoid arguing before unreasonable CIT(A)
- Use good relationships for seeking adjournment
- Personal rapport with PS/ staff for not putting up the matter/ long adjournment
- Check for negative dates before seeking a date and give preference to income tax hearings over business meetings

Appearance before DRP

- DRP –collegium comprising of three CIT constituted by CBDT
- Follow all the guidelines as is required to be followed before CIT(A)
- Present an executive summary and an effective presentation to highlight the important facts of the case –
No second opportunity

Follow-up subsequent to hearing

Transfer Pricing – Scrutiny and Appellate Proceedings



General checklist before all ITA's

Particulars	Remarks
Letter of Authority	<p>Letter of Authority is a prerequisite for representing a client before any ITA</p> <ul style="list-style-type: none">• Should be on relevant stamp paper (Rs. 100/-for Maharashtra)• Should clearly state the names of qualified individuals authorized to appear <p>In case of an international client : Letter of Authority to be apostilled from foreign country</p>
Stationery	<p>Keep the required stationery including highlighters, clips, staplers, etc. for last minute requirements</p>
Proceeding sheet	<p>Carry an updated proceeding sheet to review the matters discussed and documents submitted in the course of assessment proceedings</p>
Additional papers	<p>Carry the required working papers including the Income –tax Act, Income-tax Rules and other relevant statutes</p>

Checklist

Particulars	Dispute Resolution Panel ('DRP')	Commissioner of Income-tax (Appeals) [CIT(A)]	Income-tax Appellate Tribunal ('ITAT')
Section	Sec. 144C	Sec. 246 to 251	Sec. 252 to 255
Appealable Orders	Draft AO Order u/s. 144C(1)	Mentioned u/s.246A	Mentioned u/s. 253.
Time Limit	Within 30 Days from the date of Receipt of draft Order.	Within 30 Days from the date of Receipt of Notice of Demand.	Within 60 Days from the date of Service of CIT(A)'s order.
To be filed with	The Secretariat of the Dispute Resolution Panel	CIT(A) as mentioned in the Notice of Demand.	Registrar of the Appellate Tribunal.
Fees	No fees prescribed for filing DRP	Rs.250/- where the Assessed Income is Rs.1 lakh or less; more than Rs.1 lakh but less than Rs.2 lakh-Rs.500/- and more than Rs.2 lakh-Rs.1000/- as per Note # 8 of Form 35.	Rs.500/- where the Income assessed is Rs.1 lakh or less, Rs.1,500/- where the income assessed is more than Rs.1 lakh but less than Rs.2 lakh and 1% of assessed income, subject fee maximum of Rs.10,000/- where the income assessed income is more than 2 lakhs. as per Note # 2 of Form 36 or Form 36B, whichever is applicable.

Checklist

Dispute Resolution Panel ('DRP')	Commissioner of Income-tax (Appeals) [CIT(A)]	Income-tax Appellate Tribunal ('ITAT')
Covering letter to <u>DRP</u> and <u>AO</u> in duplicate <u>with correct address</u>	Covering letter to <u>CIT(A)</u> and <u>AO</u> in duplicate <u>with correct address</u>	Covering letter to Registrar in <u>triplicate</u>
Form 35A to be <u>signed by Company's MD</u> [Rule 4(1)]	Form 35 to be <u>signed by Company's MD</u> [Rule 45]	Appeals against the order of CIT(A) - Form 36 to be <u>signed by Company's MD</u> [Rule 47(1)] Appeals against the order of AO after DRP direction i.e. u/s 143(3)/ 144C(6) - Form 36B to be <u>signed by Company's MD</u> [Rule 14]
6 copies break-up: 3 copies to DRP; 1 copy to AO; 1 copy for client; and 1 copy for CA.	4 copies break-up: 2 copies to CIT(A); 1 copy for client; and 1 copy for CA.	5 copies break-up: 3 copies to ITAT incl. DR; 1 copy for client; and 1 copy for CA.
Grounds of objection – Annexure and Exhibits with only <u>company seal</u>	Grounds of Appeal and Statement of Facts with <u>company seal and MD's initials</u>	Grounds of Appeal with <u>company seal and MD's signature</u>

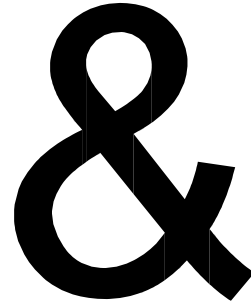
Checklist

Dispute Resolution Panel ('DRP')	Commissioner of Income-tax (Appeals) [CIT(A)]	Income-tax Appellate Tribunal ('ITAT')
Draft AO order and TPO order to be <u>certified True copy</u> with <u>Name of CA</u> and <u>Membership number</u>	Final AO order and TPO order to be <u>certified True copy</u> with <u>Name of CA</u> and <u>Membership number</u>	Certified True copy with <u>Name of CA</u> and <u>Membership number</u> on: Final AO order; Grounds of Objection filed before DRP, if applicable; Copies of DRP's direction, if applicable; CIT(A) order, if applicable; and Grounds of Appeal and Statement of Facts filed before CIT(A), if applicable.
<ul style="list-style-type: none"> • Index to paper book to give brief background of the relevance of the documents contained therein • Certificate that the details/ documents filed in the paper book have already been filed before the lower authorities • Each page of the paper book to be numbered (running numbers across volumes of paper book) and certified as a true copy 		
Attach all relevant TPO and AO submissions along with relevant TPO / AO notices as part of paper book with each page being numbered – Avoid back to back print and thereby numbering.	<u>Other documents:</u> <u>Original</u> notice of demand; Court fee stamp of Rs. 5/- to be affixed on Form no. 35 and also on the copy of the assessment order; and Copy of challan evidencing payment of appeal fees (as given in Point 8)	Copy of challan evidencing payment of appeal fees (as given in Point 8)

Q&A



Questions



Answers



Thank You



Presenter

Hiral Dedhia

Manager – Transfer Pricing

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