

## CIT (A) or DRP ? - An Inevitable Muddle

Apr 29, 2016



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### Introduction

Tax litigation is a scourge for a tax friendly regime and creates an environment of distrust in addition to increasing the compliance cost of the taxpayers and administrative cost for the Government. It is one of the road blocks in the growth of the economy as this affects the investment climate in the country.

The Government acknowledged that the existing litigation process was time consuming and needed restructuring. Therefore, with objective of speedy disposal of disputes, Dispute Resolution Panel (DRP) mechanism was introduced by Finance Act, 2009 as an alternative to first appellate authority i.e. Commissioner of Income Tax (Appeals) {CIT (A)}.

### Revised litigation process post introduction of DRP

Post introduction of DRP, the taxpayer, being a foreign company or facing TP adjustment (eligible taxpayer), has an option to opt for either CIT (A) route or the DRP mechanism.

If DRP is opted: the assessing officer (AO) has to pass the draft assessment order. Within 30 days of receipt of the draft order, the eligible taxpayer may file objections before DRP. DRP issues directions to AO within 9 months from the end of the month in which the draft order is forwarded to the taxpayer. Subsequently, final order is issued by the AO within 1 month.

If CIT (A) is opted: An appeal is to be filed within 30 days of receipt of final assessment order. No time limit is prescribed for disposal of the appeal. However, CIT(A) may dispose of the appeal within 1 year from the end of the financial year in which appeal was filed.

An appeal against the final assessment order (pursuant to DRP directions)/CIT(A)'s order may be filed before the Income Tax Appellate Tribunal (ITAT) within 60 days of the date of communication of the impugned order. ITAT is the final fact finding authority and further appeal before the High Court (HC) and subsequent appeal before the Supreme Court (SC) against HC can only be filed on a question of law.

With the introduction of the alternative DRP mechanism, the taxpayer is at a crossroads in relation to the future course of action i.e. either to opt for the DRP route or go for the conventional CIT(A) path. The decision is dependent on various factors. Some are discussed below:

- **Time limit for disposal of appeal**

The Income Tax Act, 1961 ( the Act ) mandates the DRP to pass its directions within 9 months from the end of the month in which AO's draft order is received. On the other hand, no time limit is laid down in case of CIT(A). However, based on the practical experience an appeal is generally disposed of within 2-4 years.

- **Abeyance of demand**

Under the CIT(A) route, there is no provision of automatic stay of demand and taxpayer is required pay the demand before appeal. The taxpayer may file a stay application with the AO seeking a stay of demand. Central Board of Direct Taxes (CBDT) via its instruction<sup>[1]</sup> clarified that the quantum of stay would depend on the discretion of the AO.

With the objective of streamlining the process of grant of stay and standardising the quantum of demand, the aforesaid instruction was recently revised<sup>[2]</sup>. The said instruction provides that where the demand is disputed before CIT(A), the AO shall grant the stay till the disposal of the appeal by CIT(A) on payment of 15% of disputed demand unless the AO is of the view that :

(a) *the payment of lump sum amount higher than 15% is warranted:* for e.g. if an addition on the same issue has been confirmed by the ITAT in taxpayer s own case or jurisdictional HC s or SC s decision is in the favour of revenue or addition is based upon evidence collected in a search or survey operation, etc.)

**Or**

(b) *the payment of lump sum amount less than 15% is warranted:* for e.g. if an addition on the same issue has been deleted by the ITAT or judgment has been passed by the jurisdictional HC or SC is in the favour of the taxpayer etc.

The said instruction does not provide the exhaustive list of cases which would fall in exceptions to the mandated limit of stay of demand.

If the AO grants a stay of 15% of disputed demand, the aggrieved taxpayer may approach the jurisdictional administrative Principal CIT/CIT for review of AO s decision.

In a scenario where the AO proposes to vary the quantum of payment of demand such variation would be required to be supported by detailed reasoning. Furthermore, where the taxpayer applies for payment of demand less than 15%, the burden of convincing the AO would vest on the taxpayer. However, AO s thorough knowledge of the appeal s subject matter before expressing views on the quantum of stay to be granted may reduce the taxpayer s burden. For example if the appeal involves transfer pricing matter, AO s opinion of increasing/decreasing the demand to be paid would be based solely on TP principles and judicial precedents. Accordingly, the revised instruction restricts the discretionary power of the AO to some extent.

Further, the appellate powers of the CIT(A) also include the power to grant stay in relation to the appeal pending before it. However, this is not a substitute to the powers of the AO. CIT(A) is not bound by the aforesaid instruction and therefore, the quantum of stay would be dependent on CIT(A) s judgement.

Under the DRP route, the demand becomes payable once final order is issued by the AO in pursuance of DRP s direction and hence typically the demand automatically is not triggered for a period of 10 months.

In case the taxpayer appeals before the ITAT against the final assessment order, the ITAT has the power to grant stay of demand. It is advisable that while applying for a stay before the ITAT, the taxpayer should file a copy of the stay application before AO so as to avoid any coercive action by the AO. Also, stay granted matters are heard on a priority by ITAT. Accordingly, by opting for the DRP route the

duration of the entire litigation process is reduced substantially. However, the quantum of stay would be at the discretion of the ITAT.

Alternatively, post issuance of final order under DRP route, the taxpayer has the option to apply for stay of demand before the AO. However, in such a scenario, the taxpayer will not be able to get the benefit of the aforementioned instruction as the same is applicable only where the matter is pending before the CIT(A).

- **Issues not raised before lower level**

The taxpayer can raise any matter before the DRP irrespective of the fact that such an issue was not raised before the AO. In plethora of judgments it has been upheld that though the powers of CIT(A) is co-terminus to the power of the AO, still it has no jurisdiction over the matters, which were not raised or processed before the AO.

- **Effective resolution of the dispute**

The DRP route is shorter however; in certain cases, the directions issued by it do not support underlying objective of providing relief at initial stage. This could be due to the excessive burden of work on the limited number of DRP members. Following depicts the amendments made in the DRP mechanism over the period of time:

On the contrary, based on the practical experience, it has been observed that right of the taxpayer of being heard is appropriately implemented by the CIT (A). This might be because there is no as such mandatory time limit prescribed for CIT(A) to pass its order.

## **Conclusion**

In a nutshell, a taxpayer looking for a fast track route of appealing before the ITAT may opt for the DRP route. The CIT(A) route, though a time consuming process, may provide a better opportunity of being heard. Also, the taxpayer might get the benefit of the revised instruction on stay matter. Needless to say, one needs to properly weigh all factors before selecting a particular litigation path, i.e., CIT(A) or DRP as the same will be very fact specific.

In the current year, the Government has taken step for reducing litigation by taking away the power of the AO to appeal against the directions of the DRP. This would provide assurance to the taxpayer in relation to the relief (if any) granted by the DRP. Furthermore, the revised instruction in relation to stay of demand may acts as an added advantage for the taxpayer s to opt for CIT(A) route. However, the manner of implementation of this instruction by the AO would have significant impact on taxpayer s decision.

*(The article was co authored by Vaishali Mane, Chartererd Accountant)*

*Note:- Views expressed are personal and readers may seek specific professional advice based on their facts.*

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[1] Instruction No.1914 - Recovery and Granting of stay of demand

[2] Partial modification to instruction No.1914 to provide for guidelines for stay of demand at the first appeal stage