

TAX FLASH NEWS

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Revisionary proceedings initiated by the CIT against the final assessment order passed by the tax officer pursuant to DRP's direction is invalid

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Barclays Bank PLC¹ (the taxpayer) quashed the revisionary proceedings initiated by the Commissioner of Income Tax (CIT) on Assessing Officer's (AO) final order passed pursuant to Dispute Resolution Panel's (DRP) direction. The Tribunal observed that an order passed pursuant to DRP's direction under Section 144C of the Income-tax Act, 1961 (the Act) is excluded from such revisionary proceedings. Once the AO passes an order in accordance with the directions issued by the DRP, the same cannot be revised by the CIT under Section 263.

Facts of the case

The taxpayer is a financial services group, based in the U.K., engaged in banking and investment management. During the assessment year 2013-14, the taxpayer was operating out of its Indian branches. The taxpayer filed return of income and claimed loss.

With respect to international transactions, the Transfer Pricing Officer (TPO) made various adjustments. Based on the order passed by the TPO, the AO passed an assessment order making upward adjustments.

The taxpayer had made objection before the DRP. The DRP issued directions to the AO under Section 144C(5) whereby it rejected all objections raised on the issue of TP adjustments. Consequently, the AO passed an order considering DRP's directions.

The CIT rejected the submissions of the DRP and observed that there was no enquiry by the AO on the issues raised by the CIT. The AO merely on the basis of the submissions made by the taxpayer had passed the assessment order without examining the nature and details of each transactions and the basis of various

various deductions claimed in the return. The CIT held that an order passed by the AO becomes erroneous and prejudicial to the interests of the revenue under Section 263. Accordingly, notice was issued to the taxpayer. Aggrieved, the taxpayer filed an appeal before the Tribunal.

Issue before the Tribunal

When the assessment order has been passed pursuant to the direction of the DRP, the appeal from the said assessment order does not lie with the CIT(A) but lies directly to the Tribunal as per provision of Section 253(d). The issue to be addressed in the present case is whether, the CIT has erred in initiating proceedings under Section 263, when the original assessment order has been passed under Section 143(3) read with Section 144C(13), on the basis of the directions of the DRP.

Tribunal decision

The assessment order was passed after the transfer pricing adjustment were made by the TPO. The taxpayer had made objection before the DRP and pursuant to DRP direction, the assessment was framed as per Section 144C(13). As against the above, the CIT has observed that in this case the TPO has not proposed any adjustment. This is contrary to the facts of the case. The CIT has exercised his jurisdiction under Section 263 without properly appreciating the assessment order passed. The CIT also seems to be ignoring the fact that the taxpayer had chosen to file objection before the DRP.

On reference to the provision of Section 263, it indicates that the Principal Chief Commissioner or Chief commissioner may revise order passed by the AO, if the same is erroneous in so far as prejudicial to

¹ Barclays Bank PLC v. CIT (ITA No. 827/Mum/2021) – Taxsutra.com

the interest of the revenue. The Explanation 1(a) to Section 263 provides that the order passed by the AO can be a subject matter of Section 263 revision. It clarifies that the order of the AO in certain cases passed on the direction of certain superior officers can also be subject matter of Section 263. The above Explanation does not include the order passed under the direction of the DRP under Section 144C(13).

On reference to the Memorandum to the Finance Bill, 2009², it can be observed that consequential amendments have been made to various provisions of the Act as a result of insertion of Section 144C. Such consequential amendments have been made to Section 131, Section 246A and Section 253. However, no amendment is made in Section 263 as a consequence of insertion of Section 144C to deem such orders being capable of being revised. Therefore, the Memorandum, CBDT Circular, etc. support the taxpayer's stand that once the AO passes an order in accordance with the directions issued by DRP the same cannot be revised by the CIT under Section 263.

It was nobody's case that the AO had not followed the direction of the DRP. Therefore, the final assessment order cannot be said to be erroneous. In fact, if the AO had made any addition in the final assessment order which were not as per the direction of the DRP, the said assessment order would be held to be invalid and contrary to law. Therefore, there was no question of the CIT holding that the final assessment order is erroneous so as to fall within the ambit of Section 263.

Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly. If the AO could not have directly made any change in the final assessment order after the direction of the DRP, then the CIT also cannot indirectly make any change so as to circumvent the provision of Section 144C(13). The Tribunal relied on the decision of the Supreme Court in the case of Supertech Limited³. Further, the scheme of the Act itself does not provide any interference in the direction of the DRP as the law containing Section 144C(13) directs that the AO shall pass an order in conformity with the directions of the DRP without providing any further opportunity of being heard to the taxpayer.

When the Act itself provide, that order has to be passed by the AO without providing any opportunity to the taxpayer pursuant to the direction of the DRP, the direction given in the order under Section 263 by the CIT to the AO to call for the details of allowability of various deductions claimed by the taxpayer, in light of the observations discussed by him is quiet contrary to the sanguine provisions of law.

Constitution of the DRP

The DRP constitutes a collegium comprising of three Principal Commissioners or Commissioners of Income-tax, the directions given by them is binding upon by the AO. The Bombay High Court in the case of Vodafone India Services Pvt. Ltd.⁴ while expounding upon the proceedings at DRP observed that the proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the taxpayer. This exposition duly elaborates upon the provisions of the Act contained under Section 144C.

It has been observed that the members of the DRP are three in numbers and are individually equivalent in rank to the CIT, who is initiating revision proceedings under Section 263 against the order passed by the AO pursuant to their direction. Now as far as equivalence of single CIT to a 'collegium of 3 CIT' is concerned, it is settled law that bench comprising single persons is not higher/superior to a collegiums of three persons. Hence, it is abundantly clear that the DRP stands at a higher pedestal than the CIT passing an order alone.

The decisions referred by the tax department were not applicable on the facts of the case. Submission of tax department was at variance with the exposition by the Bombay High Court in Vodafone India Services Pvt. Ltd. The tax department in his submission had emphasised that proceeding before DRP is akin to appeal before the tax department. This is quiet contrary to the Bombay High Court's decision.

The decisions relied on by the tax department in the case of Devas Multimedia Pvt. Ltd⁵ rejected by the tax department. In the present case, the Tribunal is under the jurisdiction of the Bombay High Court.

Hence, the Tribunal did not have any authority whatsoever to deviate from the exposition of the jurisdictional High Court that the proceedings at DRP is not an appeal proceeding, but a correcting mechanism. Furthermore, the ratio from the Bombay High Court in the case of Virendra Kumar Jamb⁶ also support this view.

Thus, the Tribunal set aside the orders of the CIT and held that the CIT cannot legally assume jurisdiction under Section 263 on an order passed by the AO pursuant to the direction of the DRP. The CIT has passed this order without properly appreciating the assessment order⁷.

² Explaining the rationale for insertion of Section 144C (read with CBDT Circular No. 5 of 2010, dated 3 June 2010)

³ Supertech Limited v. Emerald Court Owner Resident Welfare Association and Ors. (MANU/SC/08643/2021)

⁴ Vodafone India Services Pvt. Ltd. v. Union of India & Others [2013] SCC Bom 1534

⁵ Devas Multimedia (P.) Ltd. v. Pr. CIT [2019] 419 ITR 391 (Kar)

⁶ Virendra Kumnar Jhamb v. N.K. Vohra [2009] 176 Taxman 11 (Bom)

⁷ Since, the Tribunal quashed assessment order on jurisdiction itself, it has not dealt with the merits of the case.

Our comments

Whether the CIT can initiate revision proceedings under Section 263, when the final assessment order has been passed pursuant to DRP's direction? This issue has been a subject matter of debate before the courts.

The Karnataka High Court in the case of Devas Multimedia (P.) Ltd⁸ held that under Section 263 there is no bar for the Commissioner to invoke revision proceedings to examine the final assessment order passed by the AO pursuant to the DRP's direction.

It is important to note that the Bombay High Court in the case of Vodafone India Services Pvt. Ltd.⁹ observed that the proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the taxpayer. On the basis of this decision, the Tribunal in the instant case observed that DRP stands at a higher position than the single CIT.

Further it is also important to note that the Bombay High court in the case of Virendra Kumar Jhamb v. N. K. Vohra¹⁰ held that assessment orders which were solely based on the directives of the earlier CITs, could not be revised by the subsequent CIT under Section 263.

The Mumbai Tribunal in the present case has considered all these decisions and followed the jurisdictional High Court's decisions to quash the revisionary proceedings initiated by the CIT on AO's final order passed pursuant to DRP's direction. The Tribunal observed that an order passed pursuant to DRP direction under Section 144C is excluded from revisionary proceedings under Section 263.



⁸ Devas Multimedia (P.) Ltd. v. Pr. CIT [2019] 419 ITR 391 (Kar)

⁹ Vodafone India Services Pvt. Ltd. v. Union of India & Others [2013] SCC Bom 1534

¹⁰ Virendra Kumnar Jhamb v. N.K. Vohra [2009] 176 Taxman 11 (Bom)

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