

Conflict Between Sec. 144C (4) & (13) and the Third Proviso to Sec. 153 (1)

On the point of deadline to complete TP Assessments under Sec. 144C our analysis is summarised below.

1. Third Proviso to Sec. 153 (1): Deadline to make TP Assessments in cases referred to the TPO

The AO has to complete assessment, in cases referred to TPO, within the expiry of 3 years from the end of the relevant Assessment Year. For example, for AY 2011-12 the last date to make assessment was 31st March 2015.

2. Sec. 92CA (3A): Deadline for the TPO to pass TP Order

The TPO has to complete the TP Order u/s 92CA (3) at any time before 60 days prior to the date on which the period of limitation referred to in section 153 expires. So, for AY 2011-12 the TPO had to pass TP Order by 31st January 2015.

3. Non Obstante Clauses of Sub-sections (4) and (13) of Sec. 144C override the deadline under Sec. 153

By virtue of *sub-sections (4) and (13) of Sec. 144C* the AO may make final TP Assessment (in cases where Draft Assessment Order is served) at any time *notwithstanding the provisions of Sec. 153*.

If the Assessee does not file objections before the DRP, the AO can pass final Assessment Order within 1 month from the end of month in which the period of 30 days (from the date of receipt of Draft Order by the Assessee) expires. And if the Assessee does file objections before the DRP, the AO can pass final Assessment Order within 1 month from the end of month in which the AO receives the DRP's directions u/s 144C (5).

In both situations the AO is not bound or constrained by the deadline under the Third Proviso to Sec. 153, due to the overriding provisions of Sec. 144C (4) and (13).

Of course, there is no time limit whatsoever for the AO to serve the Draft Assessment Order. So, the AO can serve the Draft Order even after say 10 or 15 years from the end of the relevant year.

4. Issues

4.1 No time limit is imposed on AO to complete TP Assessments in cases referred to the TPO

Sec 144C imposes no time limit on the AO to either serve the Draft Order or to make Final Assessment Order. In fact, Sec. 144C (4) and (13) explicitly, clearly and unambiguously set the AO free from the deadlines imposed u/s 153. The practical implications of this can be disastrous. The AO can pass the Final Assessment (in cases referred to TPO) at any time - 5 years, 10 years, or 20 years, after the relevant year. This sort of provision creates insurmountable difficulties for the TP Taxpayers.

4.2 Discrimination between TP Taxpayers whose cases are referred to the TPO and other Taxpayers

The provisions of Sec. 144C (4) and (13) discriminate between TP Taxpayers whose cases are referred to the TPO and other Taxpayers (TP Taxpayers whose cases are not referred to the TPO + Non-TP Taxpayers). In the former cases the Taxpayers may end up waiting endlessly for Assessment, whereas in the latter cases the Taxpayers will get Assessment Orders within 2 years of the end of Assessment Year. Such discrimination could make Sec. 144C legally invalid or unconstitutional.

4.3 The Third Proviso to Sec. 153 (1) is rendered redundant

Another issue is that by overriding Sec. 153, Sec. 144C (4) and (13) make the Third Proviso to Sec. 153 (1) redundant, a dead letter of law. It is well established legal principle that no legal provision of the Statute should be rendered redundant - effect should be given to each and every provision of the Statute. But that is not happening here.

Sec. 144C cannot be read and applied in isolation without taking note of Sec. 153.

4.4 The AO gets 1 year extra to complete Assessment in TP cases referred to the TPO

Because the AO gets 3 years – 1 year extra – to complete Assessment in TP cases referred to the TPO, no further extension of time limit (beyond what is prescribed in Sec. 153) should be granted to the AO for completing the Assessment.

Besides, the TPO too need not wait till the very end to complete the TP Order, so that the DRP procedure can be completed well within the Sec. 153 time limit.

4.5 Which provision should prevail? Third Proviso to Sec. 153 (1) or Sub-sections (4) and (13) of Sec. 144C?

The Revenue may argue that Sec. 144C is a special provision enacted for TP cases referred to the TPO (and for Foreign Companies). Being a special provision it should prevail over Sec. 153. But the Taxpayers can argue that Sec. 153 is also a very important special provision laying down statutory time limits for completion of assessments. If no time limit is imposed upon the AO, to complete assessment, sound Tax Administration practice is violated– the Taxpayers could be left in lurch and be shocked with assessments after a long...long time. That is wholly undesirable.

4.6 Case of Mahindra & Mahindra

Here it is worthwhile to make a mention of the Judgement of Bombay High Court in Mahindra & Mahindra [*DIT(IT) v. Mahindra & Mahindra Limited [TS-404-HC-2014(BOM)]*] where the High Court held that a limitation period is applicable to section 201(1)/(1A) proceedings even though no statutory time limit is prescribed.

5. Conclusion

We strongly feel there is room to argue that Sec. 144C procedure should be completed well within the time limit laid down in the Third Proviso to Sec. 153 (1). Accordingly, the AO must complete assessment under Sec. 144C within such time limit. This argument might win the day for Taxpayers in the Tribunal and the Courts.

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