

TRANSFER PRICING

- Basic Provisions,
Issues & Latest
Developments

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AGENDA

- Introduction to Transfer Pricing
- Transfer Pricing Regulations in India – Sec.92 to 92F
- Analysis of word “Income” as mentioned in Sec.92
- AE & Deemed AE [Interplay between Sec.92A(1) & 92A(2)]
- International Transaction – Sec.92B
- Deemed International Transaction – Pre & post Finance Act 2014.
- Specified Domestic Transaction – Sec.92BA
- Computation of ALP – Sec.92C (Methods and Rules on Range Concept and MYD)
- Reference to TPO – Sec.92CA and Instruction No. 03/2016
- Transfer pricing process – FAR Analysis, Documentation and Form 3CEB

AGENDA

- Economic Analysis / Benchmarking Analysis
- Secondary Adjustment – Sec.92CE
- Alignment of Indian TP regulations with BEPS
 - Sec. 92D & Sec. 286 CbCR (BEPS Action Plan 13)
 - Sec. 94B – Limitation of Interest Deduction(BEPS Action Plan 4)
- APA – Sec.92CC and Sec.92CD
- Revised Safe Harbour Rules – Sec.92CB
- MAP
- Penalties



INTRODUCTION TO TRANSFER PRICING

WHAT IS TRANSFER PRICING?

- Transfer pricing refers to the pricing of cross-border transactions between two related entities.
- When two related entities enter into any cross-border transaction, the price at which they undertake their transaction is called transfer price.
- Due to the special relationship between related companies, transfer price may be different than the price that would have been agreed between two unrelated companies.

WHY TRANSFER PRICING?

- T.P Manipulation can affect the tax liability of an Individual or Group of Persons / Entities.
- Conflicting Govt. Pressures relating to Customs valuations, anti-dumping duties and exchange or price controls.
- Cash Flow requirements of MNE Group.
- **Factors responsible for TP Mis-pricing - UN TP 2017**
 - Rapid advances in technology, transportation and communication
 - Existence of Tax Heavens and Tax Friendly Jurisdiction
 - Dominance of MNCs in World Trade
 - Rise of Service Sector

Rationale for TP regulations

- Differences in tax rates across tax jurisdictions
- Pricing flexibility between associated enterprises
- Every government wants to prevent erosion of their tax base and plug potential tax leakages

Nature of Transfer Pricing

- Transfer pricing is a complex issue which requires knowledge of multiple disciplines
 - Taxation Issue
 - Accounting Issue
 - Economic Issue
 - Legal Issue
 - Statistical Issue
- Over a period of time, it is becoming more and more mathematical and statistical issue.

Evolution of Transfer Pricing

- It is estimated that, 60 % of international trade is carried on between related or Associated Enterprises (AEs)
- To counter the effect of transfer of profits using favourable transfer prices among AEs, many developing and developed countries introduced Transfer Pricing Regulations (TPR)
- The TPR have increased the burden of proof on taxpayers, to demonstrate arm's length price of controlled transaction
- Price between unrelated parties in uncontrolled conditions is known as the “arm's length price”

Evolution of Transfer Pricing

– OECD's View

- *Transfer pricing can deprive governments of their fair share of taxes from global corporations and expose multinationals to possible double taxation. No country - poor, emerging or wealthy - wants its tax base to suffer because of transfer pricing. The arm's length principle can help.*

John Neighbour - OECD Centre for Tax Policy and Administration

Arm's Length Price - ALP

- Sec. 92F(ii) *"arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions;*
- ALP is found in paragraph 1 of article 9 of the OECD MC which reads as under:
"[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."
- The principle laid out above in the UN Model has also been reiterated in the OECD Model Tax Convention and the OECD Guidelines as supplemented and amended.

Source: UN Transfer Pricing Manual 2017



TRANSFER PRICING REGULATIONS IN INDIA

Background of Indian TPR

- Liberalization of trade and foreign exchange policy started in India in the year 1991
- This created huge increase in interest of MNEs in India
- Several Indian companies also steadily emerged as global players by either making offshore acquisitions or by setting up overseas subsidiaries
- The Standing Committee in March 1991 observed that provisions of Income Tax Act, 1961(Act) were inadequate to curb transfer pricing among MNEs

Brief History of Transfer Pricing

- The Expert Group constituted by Central Board Of Direct Taxes (CBDT) recommended complete revision of existing section 92 of the Act
- The Finance Act, 2001 introduced TPR in India by substituting existing Section 92 of the Act and introducing new sections 92A to 92F w.e.f 01.04.2002

Brief History of Transfer Pricing

Finance Minister's speech on the rationale for introducing Transfer Pricing Regulations

"The presence of multinational enterprises in India and their ability to allocate profits in different jurisdictions by controlling prices in intra-group transactions has made the issue of transfer pricing a matter of serious concern. I had set up an Expert Group in November 1999 to examine the issues relating to transfer pricing. Their report has been received, proposing a detailed structure for transfer pricing legislation. Necessary legislative changes are being made in the Finance Bill based on these recommendations."

- Mr Yashwant Sinha

Finance Minister, Government of India

February 28, 2001

Brief History of Transfer Pricing

- The Finance Act, 2012 amended TPR for domestic transactions w.e.f AY 2013-14. The Honourable SC in ***CIT v Glaxo SmithKline Asia (P) Ltd. (236 CTR 113) (2010)*** held
“... in order to reduce litigation occurring in complicated matters, the question of extending Transfer Pricing regulations to domestic transactions require expeditious consideration by the Ministry of Finance and the CBDT may also consider issuing appropriate instructions in that regard”.
- *The birth of domestic TP in India was a product of the legislative arm of the nation heeding the guidance of the highest judicial authority of the land.*

Scheme of TP regulations in India

Relevant Provisions

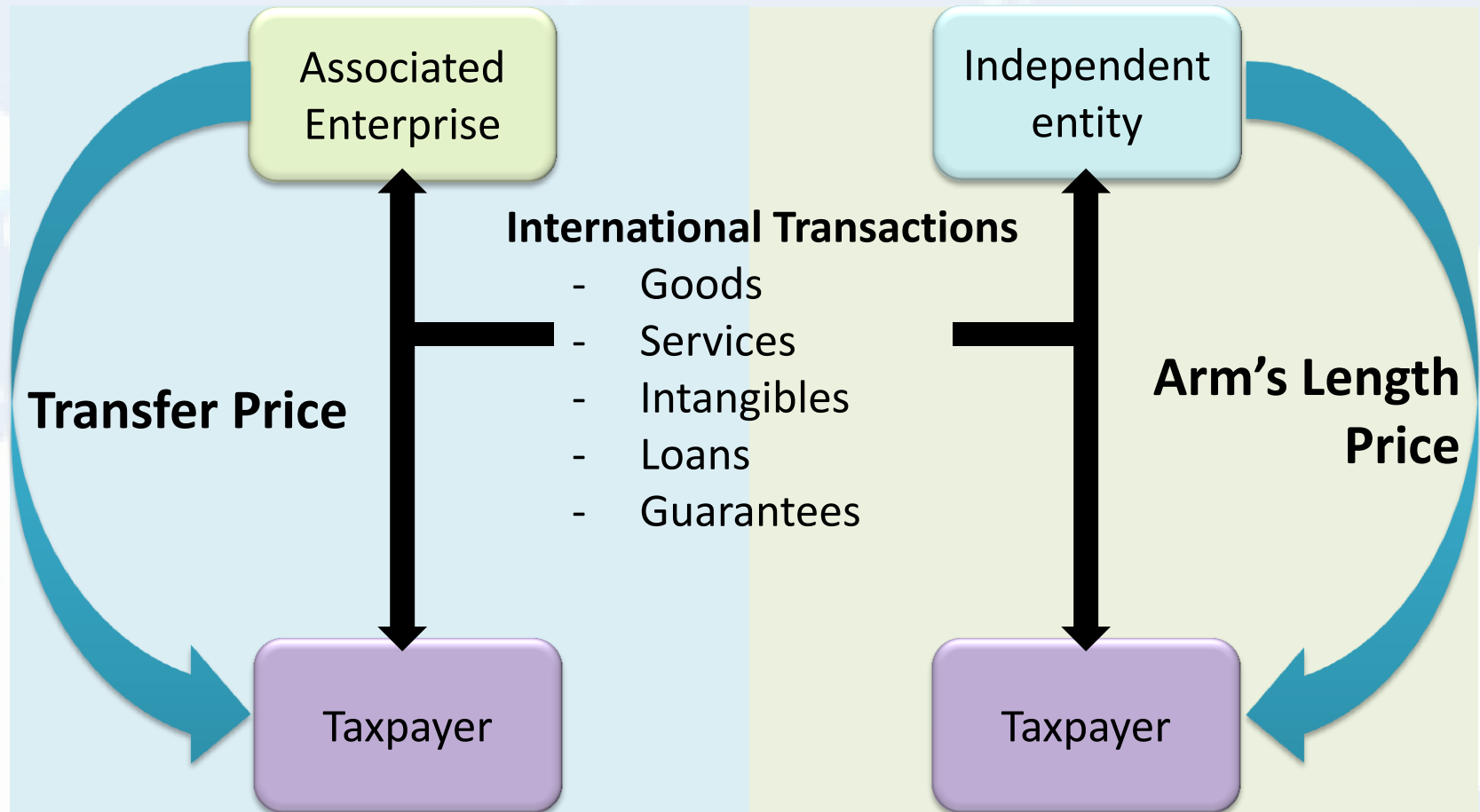
- Computation of Income from Int. Tran having regard to ALP Sec.92
- Associated Enterprises Sec. 92A
- International Transaction Sec. 92B
- Specified Domestic Transactions Sec. 92BA
- Arm's Length Price - Sec. 92C + Rule 10B/ 10C
- Power of AO and TPO - Sec. 92CA
- Safe Harbour Sec. 92CB + Rules 10TA to 10TG
- Advance Pricing Agreements Sec. 92CC and CD+ Rules 10F to 10T
- Secondary Adjustment – Sec. 92CE
- Documentation and Certificate Sec. 92D and Sec. 92E
- Definitions of certain terms relevant to computation of ALP etc. Sec.92F
- Dispute Resolution Panel - Sec. 144C
- Penalties - Sec. 271 (1) (c), 271AA, 271BA, 271G, 271GB
- Furnishing of report in respect of International Group – Sec.286

Scheme of TP regulations in India

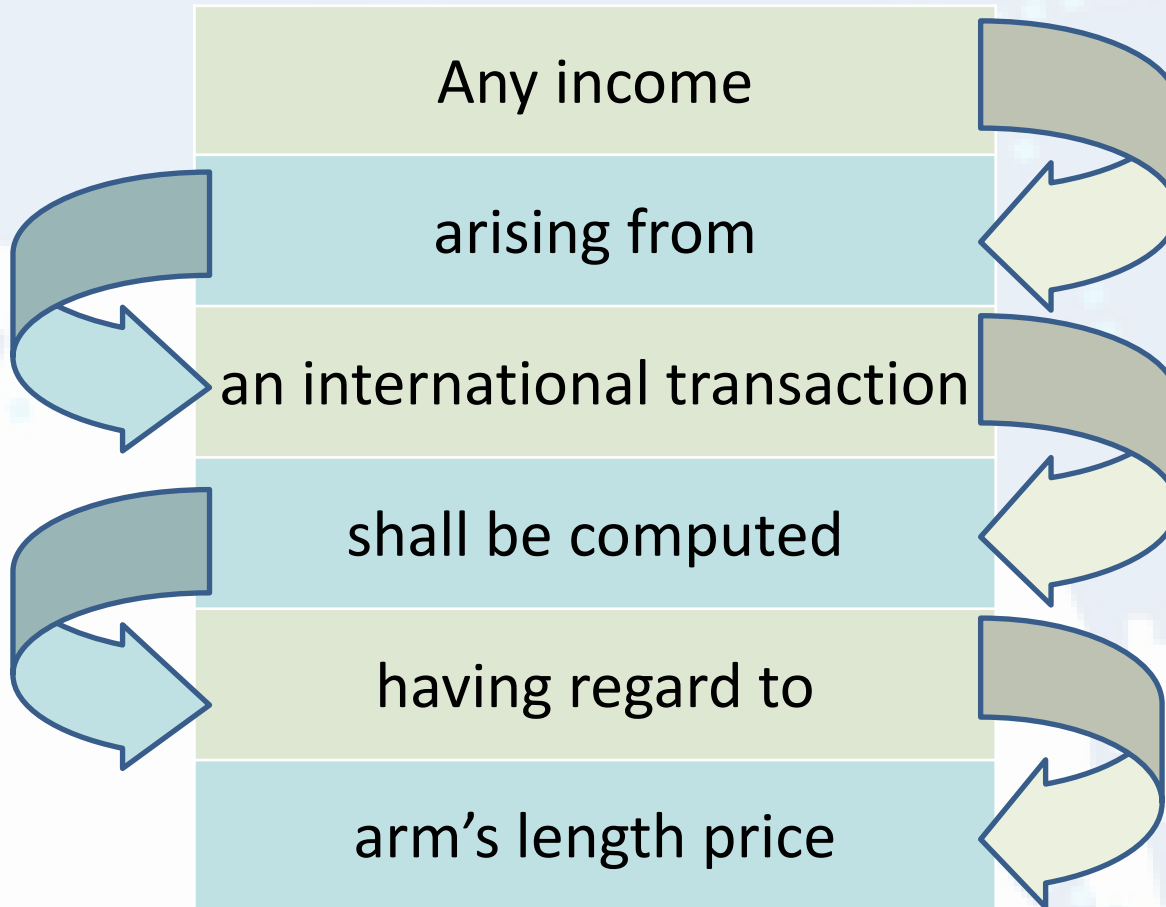
Relevant Provisions

- Rule 10A -** Meaning of expressions used in computation of arm's length price
- Rule 10AB -** method of determination of arm's length price
- Rule 10B -** Determination of arm's length price under section 92C .
- Rule 10C -** Most appropriate method
- Rule 10CA -** Computation of arm's length price in certain cases
- Rule 10D -** Information and documents to be kept and maintained under section 92D .
- Rule 10DA&DB -** Information and documents to be kept and maintained under section 92D . & Furnishing of Report in respect of an International Group.
- Rule 10E -** Report from an accountant to be furnished under section 92E.
- Rule 10F to T -** Advanced Pricing Agreement
- Rule 10TA to TG -** Safe Harbour rules for International transaction
- Rule 10TH to THD -** Safe Harbour rules for SDT

Concept of Transfer Pricing



Section 92



Vodafone India Services (P.) Ltd. V. UOI [2014] 50 taxmann.com 300 (Bombay) (HC)

Factual Matrix

- During FY 2008-09, Vodafone India Services Pvt. Ltd (the assessee), a wholly owned subsidiary of a non-resident company, Vodafone Tele-Services (India) Holdings Limited ('Holding Company'), issued 2,89,224 equity shares of face value of Rs.10 each on a premium of Rs. 8,509 per share to the Holding Company. Vodafone India determined the value of Rs.8,519 per share by applying the methodology prescribed by the Government of India under the erstwhile Capital Issues (Control) Act, 1947.
- The assessee, out of abundant caution, disclosed this transaction (i.e. the issuance of shares) as an “international transaction” in Form 3CEB
- The AO / TPO valued each equity share at INR 53,775 and made an adjustment of INR 45,256 per share (amounting to INR 1308.91 crores), by treating the shortfall in premium as income

Vodafone India Services (P.) Ltd. V. UOI [2014] 50 taxmann.com 300 (Bombay) (HC)

Key Aspects of the Bom. HC Judgement

- i. Existence of 'income' a condition precedent for the applicability of Transfer Pricing Provisions
- ii. Meaning and Scope of the term 'income' in the context of Chapter X
- iii. Amendments providing for inclusion of capital financing and business restructuring in Chapter- X
- iv. Transfer Pricing Provisions - Machinery or Substantive?

Vodafone India Services (P.) Ltd. V. UOI [2014] 50 taxmann.com 300 (Bombay) (HC)

- Chapter X of the Act is a machinery provision to arrive at the ALP of a transaction between AE's
- The substantive charging provisions are found in Sections 4, 5 (Scope of income), 15 (Salaries), 22 (Income from house property), 28 (Profits and gains of business), 45 (Capital gain) and 56 (Income from other Sources) of the Act
- An income arising from an international transaction must satisfy the test of income under the Act and find its home in one of the above heads i.e. charging provisions, as Chapter X is only a machinery provision to compute the chargeable income at ALP

Vodafone India Services (P.) Ltd. V. UOI [2014] 50 taxmann.com 300 (Bombay) (HC)

- Machinery section cannot be read de-hors the charging section, relying on the observations of the Supreme Court in ***CIT v. B. C. Srinivas Shetty 128 ITR 294***
- HC concluded that the issue of shares at a premium by the assessee to its holding company does not give rise to any income from an admitted international transaction
- Thus, there was no occasion to apply Chapter X of the Act. HC quashed all the orders of the Revenue authorities i.e. AO/ TPO/ DRP, as being without jurisdiction, null and void

Vodafone India Services (P.) Ltd. V. UOI [2014] 50 taxmann.com 300 (Bombay) (HC)

- Further, the CBDT vide Instruction No. 02/2015, dated 29 January 2015 has notified that it has accepted the decision of Vodafone IV and has directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved
- CBDT issued Instruction No. 3/ 2016 requiring the AO dispose off the objections raised by the assessee on jurisdictional issue, before making any reference to the TPO
- Issue of shares – Penalty risk – ***BNT Global pvt. Ltd. (Mum) Trib. ITA No. 4111/Mum/2016***

Special bench decision on Base Erosion

Facts:

- The taxpayer advanced an interest free loan to its wholly owned subsidiary in India (the Indian AE)
- Revenue authorities contended AL interest on this loan was required
- Notional interest was brought to tax in the hands of the taxpayer
- Taxpayer's primary argument was that an AL interest charge would lead to erosion of tax base in India, tax payer contended that TP should not apply to the transaction in dispute

Key observations of the Special Bench Ruling:

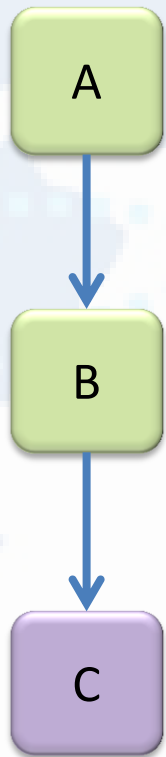
- Interpretation of Section 92(3):
 - refers to the computation of income in the hands of the assessee whose income is being computed under section 92(1) of the Act
 - Does not contemplate taking a holistic view
 - To look at impact on profits / losses for the year under consideration and not subsequent years
 - Mere possibility of a set off of future profits against losses incurred by Indian AE cannot be taken into account nor can time value of money be ignored
- Role of intent of legislature comes into play only when there is ambiguity
- SB rejected the base erosion argument of the taxpayer

(*) *Instrumentarium Corporation Limited [TS-467-ITAT-2016(Kol)-TP]*

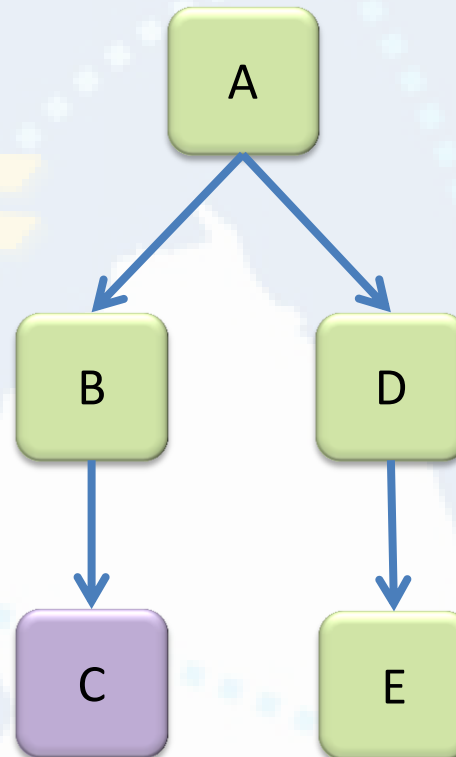
Meaning of Associated enterprise(AE) Sec.92A(1)

- Direct or indirect participation, in management / control / capital of the other enterprise
- (OR)
- Direct or indirect participation of the same person(s), in management / control / capital of both enterprises

Meaning of Associated enterprise(AE) Sec.92A(1)



Both A & B
are AE's of C
B - Direct
A - Indirectly



D & E are also
AE's of C
Ultimate
parent (A)

Deemed AE - Sec.92A(2)

HOLDING

- $\geq 26\%$ **Direct/ Indirect holding** by enterprise

(or)
- By **SAME PERSON** in each enterprise
- **LOAN** $\geq 51\%$ of total assets
- **GUARANTEES** $\geq 10\%$ of debt
- $> 10\%$ **INTEREST** in Firm/ AOP/ BOI

MANAGEMENT

- Appointment $> 50\%$ of **DIRECTORS** / one or more Executive Director by an enterprise

(or)
- Appointment by same person in each enterprise

ACTIVITIES

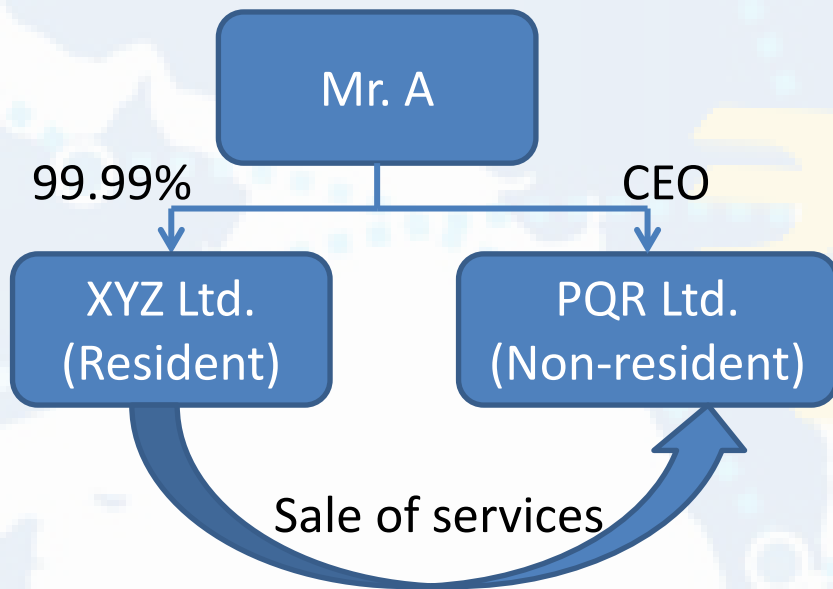
- 100% **DEPENDENCE** on use of Intangibles for manufacture / processing/ business
- Direct/ Indirect Supply Of $\geq 90\%$ **RAW MATERIALS** under influenced prices and conditions
- Sale under **INFLUENCED** prices and conditions

CONTROL

- One enterprise controlled **BY AN INDIVIDUAL** and the other by himself or his relative or jointly
- One enterprise controlled **BY HUF** and the other by - a member of HUF his relative or Jointly by member and relative

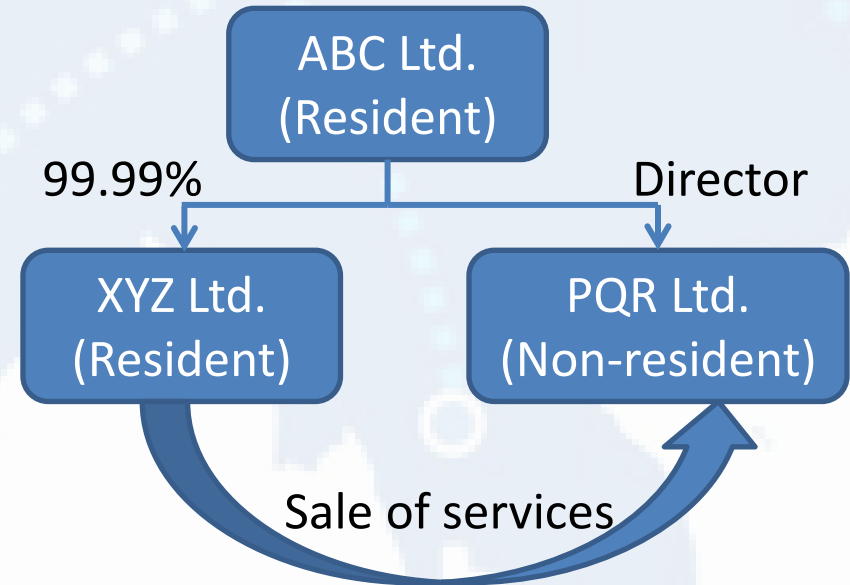
Interplay between Sec.92A(1) & 92A(2)

Scenario 1: Individual having control over two enterprises



- Mr. A holds 99.99% in XYZ Ltd. and acts as the CEO of the Foreign Co., PQR Ltd.;
- XYZ Ltd. received service charges from PQR Ltd.;

Scenario 2: Enterprise having control over two enterprises



- ABC Ltd. holds 99.99% in XYZ Ltd.;
- Mr. M, employee of ABC Ltd. has been appointed as nominee director in PQR Ltd. On behalf of ABC Ltd.;
- XYZ Ltd. received services charges from PQR Ltd.;

Interplay between Sec.92A(1) & 92A(2)

Section 92A(1)

"associated enterprise", in relation to another enterprise, means an enterprise—

(a) which participates, directly or indirectly, or through one or more intermediaries, **in the management or control or capital** of the other enterprise; or

(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

Section 92A(2)

For the purposes of sub-section (1)*, two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,—

.....

(j) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual;

*Inserted vide Finance Act, 2002

Two plausible views:

- 1) Sub-section (1) & (2) of section 92A are independent of each other
- 2) Sub-section (1) & (2) of section 92A operate jointly

Interplay between Sec.92A(1) & 92A(2)

1. Sub-section (1) & (2) of section 92A are independent of each other
 - If conditions under sub-section (1) are fulfilled, two enterprises will be treated as AEs;
 - Sub-sec. (2) is a deeming fiction – expands/enlarges the scope of AE provided under sub-section (1);
 - Sub-sec. (1) does not begin with a subjective clause “subject to sub-section (2)”;
 - Whereas sub-sec. (1) provides basic rule - de facto control on decision making,
 - sub-sec. (2) gives practical illustrations of such control;
 - Case Laws:
 - Kaybee (P.) Ltd. vs. ITO [2015] 171 TTJ 536 (Mum.);
 - Diageo India (P.) Ltd. vs. DCIT [2011] 142 TTJ 287 (Mum.);

Interplay between Sec.92A(1) & 92A(2)

2. Sub-section (1) & (2) operate jointly

- Explanatory Memorandum to Finance Act, 2002

"It is proposed to amend sub-sec.(2) of the said section to clarify that the mere fact of participation of one enterprise in the management or control or capital of the other enterprise or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprise unless the criteria specified in sub-sec. (2) are fulfilled."

- The expression 'participation in management, capital, control' is not defined in the Act:
- Sub-sec. (2) gives meaning to the expression - the practical illustrations thereunder are exhaustive and not illustrative;
- Sub-sec. (2) governs the operation of sub-sec. (1);

Interplay between Sec.92A(1) & 92A(2)

2. Sub-section (1) & (2) operate jointly (cont'd...)

- Once the requirements of sub-sec.(2) are fulfilled, two enterprises will
- be treated as AEs;
 - Such interpretation would render provisions of sub-sec.(1) otiose or superfluous
- Sub-sec. (1) is fulfilled - if an enterprise has de facto control over the other enterprise - BUT if such participation is not covered under sub-sec. (2), two enterprises cannot be treated as AEs
- Case Laws:
 - Page Industries Ltd. vs. DCIT [2016] 159 ITD 680 (Bang Trib.);
 - Orchid Pharma Ltd. vs. DCIT [2017] 182 TTJ 809 (Chennai Trib.);
 - ACIT vs. Veer Gems [2017] 77 taxmann.com 127 (Ahm Trib.) upheld by Gujarat High Court in 338 of 2017 and SLP of Department is dismissed by Supreme Court.

International transaction Sec. 92B

- Between 2 AE's (either or both NR)
- Transaction involves :
 - Purchase/ sale/ lease of tangible/intangible property
 - Provision of services
 - Lending or borrowing money
 - Any other transaction having a bearing on profit/ income/ losses/ assets of the enterprise
 - Includes mutual agreement or arrangement for allocation or apportionment , or any contribution to, any cost or expense incurred
- Scope expanded in Finance Act, 2012 to include - intangibles like marketing intangibles, human capital, Business restructuring, inter-company guarantees, capital funding, etc.

INTERNATIONAL TRANSACTION Sec.92B

TANGIBLE PROPERTY

- ▶ Purchase, Sale, Transfer, Lease/ Use of property/article / product/ thing
- ▶ Includes Building, Vehicle, machinery etc.

INTANGIBLE PROPERTY

- ▶ Purchase, Sale, Transfer, Lease/ Use of IP
- ▶ Includes Transfer of ownership/ use of rights/ other commercial right

CAPITAL FINANCING

- ▶ Long/short term borrowing/ lending
- ▶ Guarantee
- ▶ Purchase/Sale Securities
- ▶ Advances/ receivables, Payments/any debt etc

PROVISION OF SERVICES

- ▶ Market Research/ Development
- ▶ Technical Service
- ▶ Scientific Research
- ▶ Legal/ Accounting Service etc.

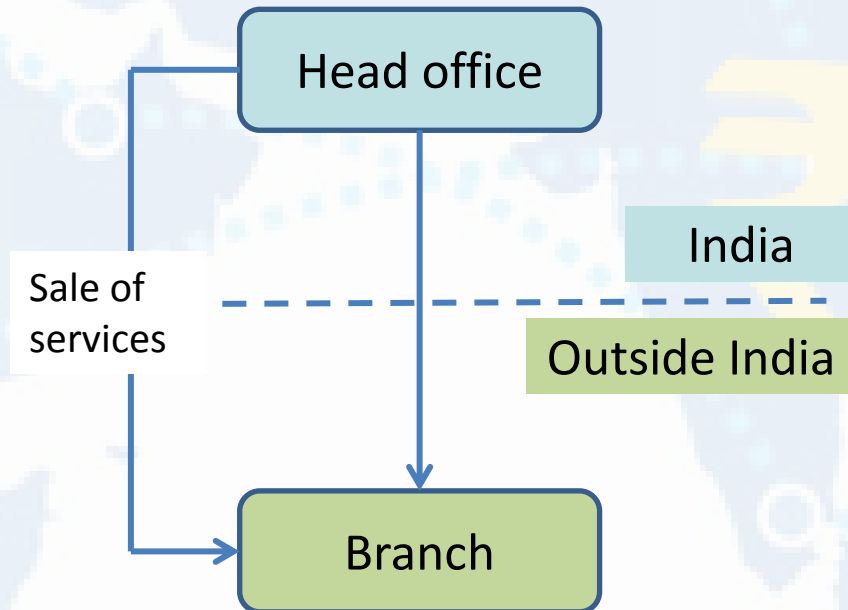
BUSINESS RESTRUCTURING

- ▶ Transaction of Business restructuring/ reorganization with AE irrespective of bearing profit/ income/ loss or assets – at the time of transaction/ future date

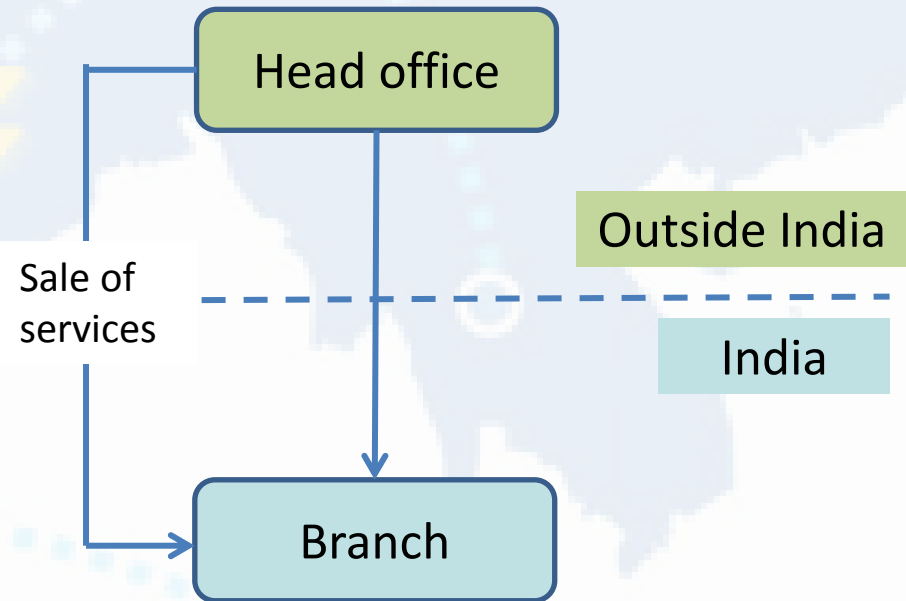
International transaction Sec. 92B

- Head office & branch transactions

Scenario 1: Foreign Branch of an Indian Entity



Scenario 2: Indian Branch of a Foreign Entity



International transaction Sec. 92B

Section 92B(1) – International transaction

- “a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease

Section 92A(1) – Associated Enterprise

- “AE in relation to another enterprise, means an enterprise which participates....in the management or control or capital of the other enterprise.....”

Section 92F(iii) – Enterprise

- “enterprise means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity....”

International transaction Sec. 92B

Relationship between HO and Branch

Branch is not distinct from HO

- Elder Exim vs. DCIT [2017] (ITA No. 5385/Mum/2014) (Mum.);
- Sumitomo Mitsui Banking Corpn. vs. DDIT (IT) [2012] (19 taxmann.com 364) (Mum.) (SB);
- Semantic Space Technologies Ltd vs. DCIT [2012] (ITA No.824/Hyd/2010) (Hyd Trib.);
- Aithent Technologies (P.) Ltd. vs. DCIT [2016] (74 taxmann.com 214) (Delhi Trib.);

Distinct Entities

- Definition of 'enterprise' [section 92F(iii)] – 'person' includes a 'PE of a person'
CAN BRANCH AND HO BE CONSIDERED AS DISTINCT ENTITIES???
- Dresdner Bank AG vs. ACIT [2006] (108 ITD 375) (Mum.) – Branch hypothetically treated as independent entity to compute profits attributable to the Branch

International transaction Sec. 92B

If HO and Branch are considered as distinct entities

Branch derives its residential status from its HO

Foreign Branch of Indian Company

- Status of Foreign Branch = Resident as HO is resident in India;
- Transaction between two residents;
- Not an international transaction (section 92B) as none of the parties are non-residents;
- Global income of Indian Company (HO) is taxable in India – Hence, tax neutral;
- Aithent Technologies (P.) Ltd. (supra) – TP provisions not applicable

Indian Branch of Foreign company

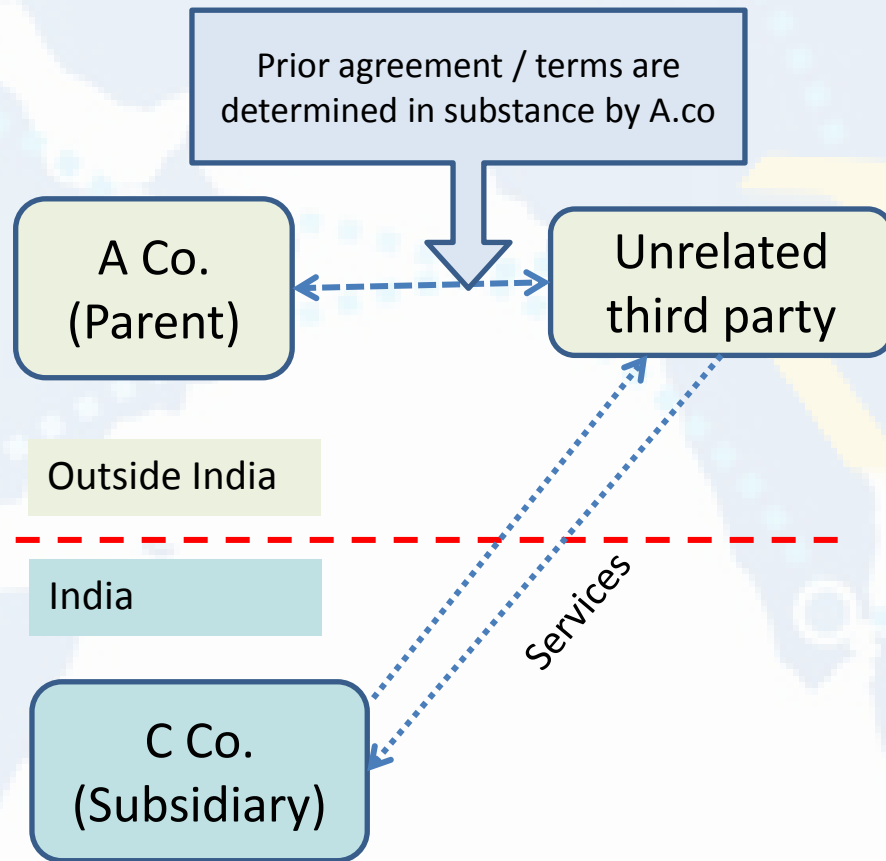
- Status of Indian Branch = Non-Resident as HO is non-resident;
- Transaction between two non-residents;
- Qualifies as an international transaction (section 92B) as both the parties are non-residents;
- Dresdner Bank AG (supra) – TP provisions apply to transactions between Foreign Company and Indian Branch

International transaction Sec. 92B

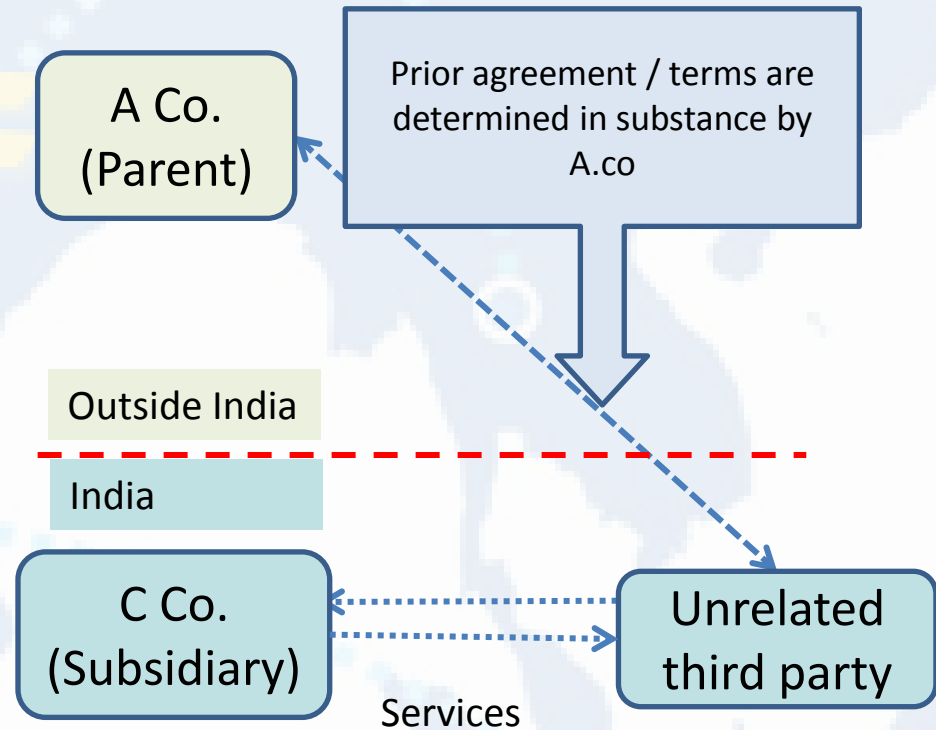
- Article 7(2) of UN TP Manual:
 - *“where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment”*
- DTAA recognises PE as a distinct entity, for the purpose of attribution of profits;
- Interplay between Indian TP Regulations and Article 7(2);

Deemed international transaction Sec.92B(2)

Scenario 1: Prior to amendment



Scenario 2: After Amendment in Fin Act. 2014



Deemed international transaction Sec.92B(2)

Synopsis:

- 1) Transaction between enterprise and unrelated third party
- 2) But, there exists a agreement between AE and the third party (or) terms of such transaction are determined by AE and the third party
- 3) Either Enterprise or AE or both are Non-Residents
- 4) Third party can be Non-resident or Resident
- 5) Clarified by Finance Act 2014, that deemed international transactions would also cover cases where both the contracting parties are residents

Deemed international transaction Sec.92B(2)

- Circular No.14/2001 clearly explained that one of the parties must be a non-resident in an International transaction.
- Transaction between two residents would not shift any profit outside India – Morgan Stanley's case
- First ruling against the revenue:
 - *Genisys Integrating Systems [2012] 20 taxmann.com 715 (Bang.)*
 - *Kodak India Pvt Ltd vs. ACIT [2013] 37 taxmann.com 233 (Mumbai - Trib.)*
 - *Tellabs India Private Ltd. [2013] 35 taxmann.com 341 (Bang-Trib) – not a deemed international transaction, as conditions u/s 92B(2) not satisfied.*

Now by an amendment through Finance Act 2014 even transaction between two residents also may become international transaction.

Transfer of goods or services u/s 80-IA(8)

Any transaction with person covered u/s 80-IA(10)

Payments to persons u/s 40A(2)(b) – **omitted** *w.e.f. 01/04/2017*

Specified Domestic Transactions (Sec.92BA)

Any transaction under chapter VI-A or Sec. 10AA, to which Sec. 80-IA(8) or (10) apply.

Aggregate value of transactions exceeds Rs.20Cr.

Computation of ALP

- Methods:
 - Comparable Uncontrolled Price - CUP
 - Resale Price Method - RPM
 - Cost Plus Method - CPM
 - Profit Split Method - PSM
 - Transactional Net Margin Method - TNMM
 - Other method

RANGE CONCEPT

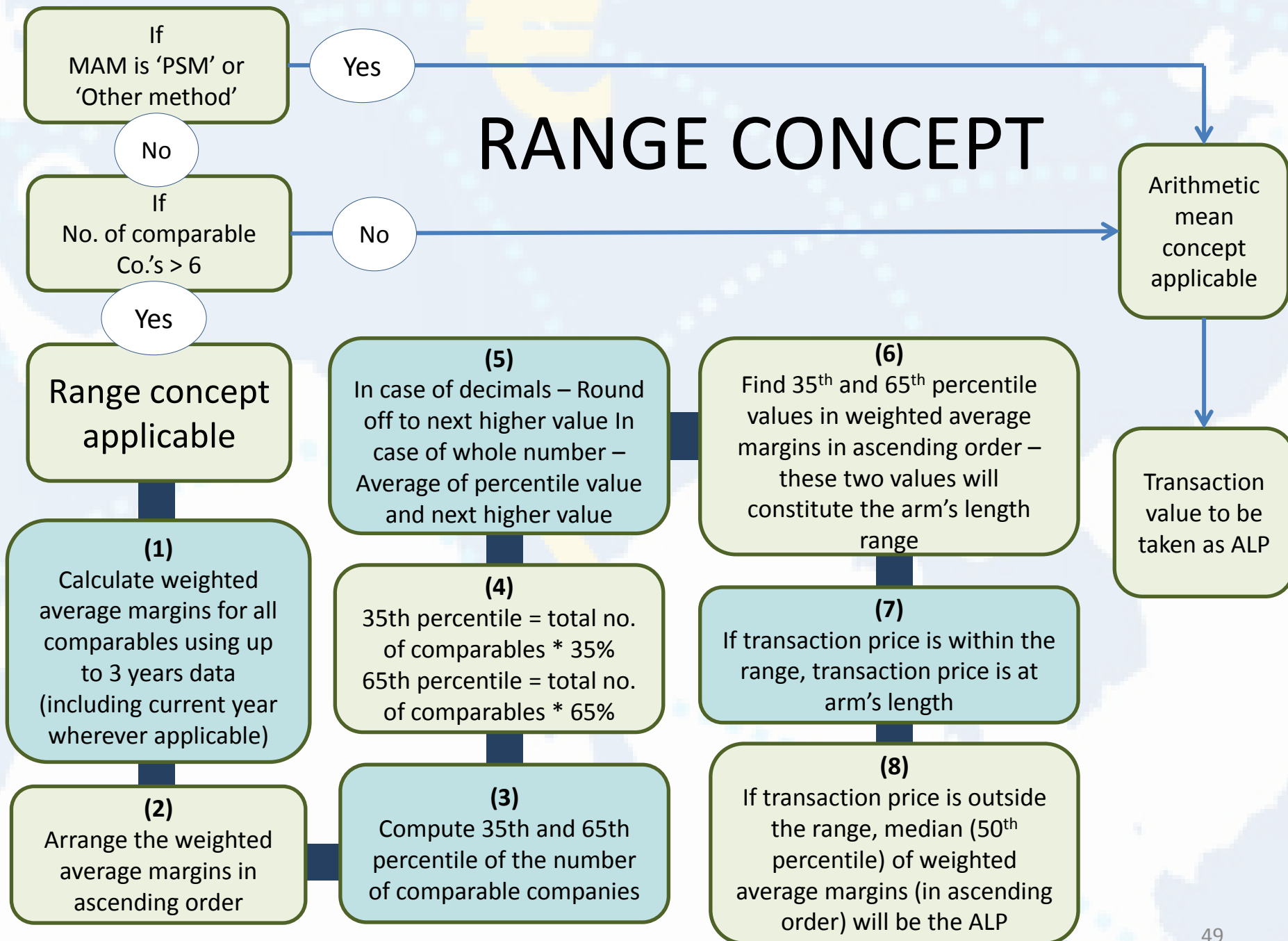
- 'CBDT' issued a notification on 19th Oct 2015, wherein a revised range concept was introduced for the purpose of arm's length analysis and usage of multiple year data.
- the notification permits the use of multiple year data while carrying out transfer pricing analysis.
- The notification is applicable for international/ SDT transactions w.e.f 1st Apr. 2014, i.e. from FY 2014-15
- Range concept would be used for all methods (depending on the facts) except for Profit Split Method ('PSM') and Other Method. For PSM and Other Method, only arithmetic mean concept would have to be used.
- Range concept will be applicable only if 6 or more comparable companies are available. If not, arithmetic mean concept will continue to be used
- The arm's length range will constitute of the values falling between the 35th and 65th percentile of the weighted average margins of comparable companies
- If the transaction price falls outside the arm's length range, the median value of the comparable prices shall be considered as ALP
- Use of multiple year data can be split into 2 categories; first, at the time of compliance and second, at the time of transfer pricing assessment

Multiple year data / Range

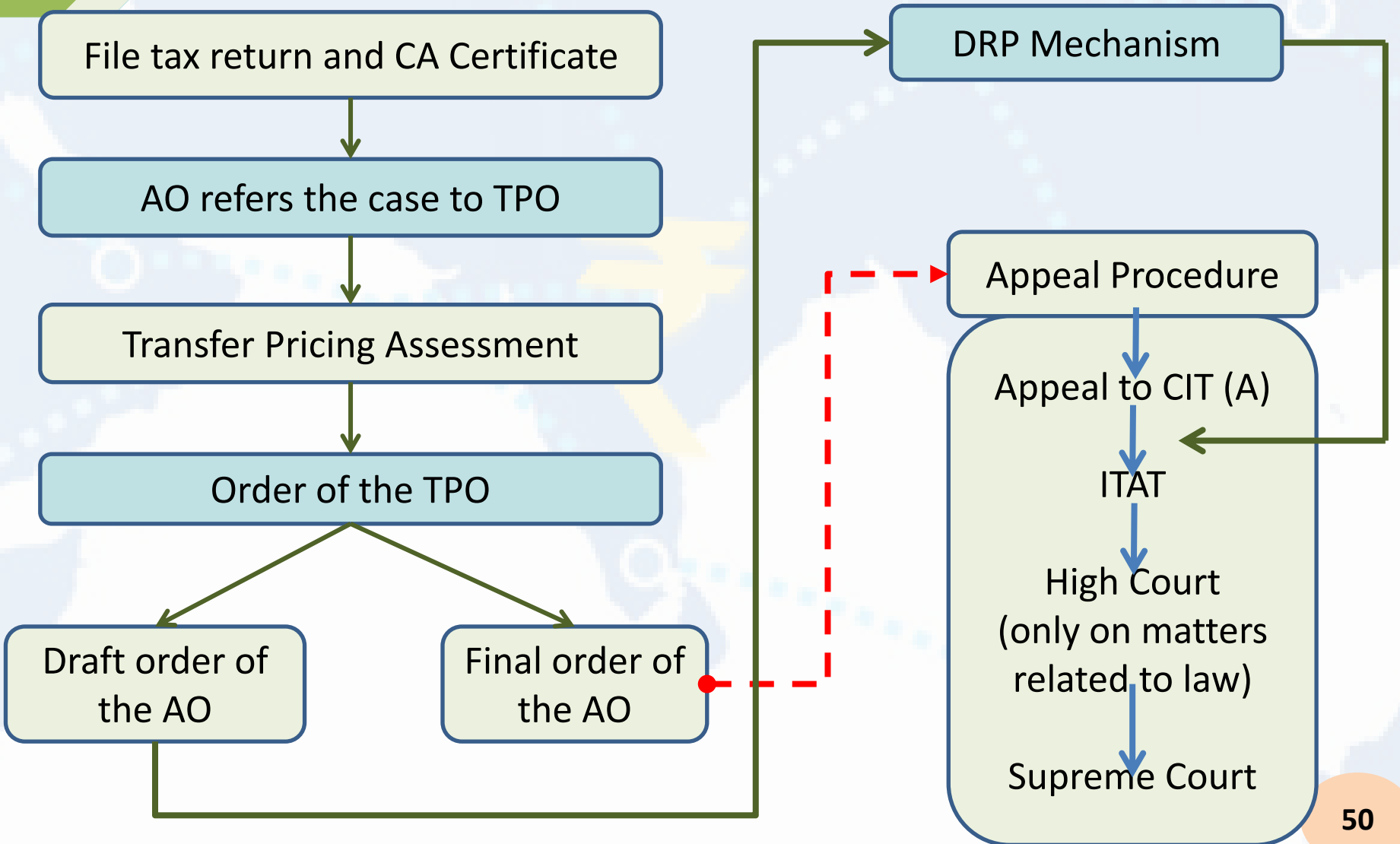
Applicability:

Methods	Multiple year Data	Range
Comparable Uncontrolled Price Method (CUP)	✗	✓
Cost Plus Method (CPM)	✓	✓
Resale Price Method (RPM)	✓	✓
Profit Split Method (PSM)	✗	✗
Transactional Net Margin Method (TNMM)	✓	✓
Other Method	✗	✗

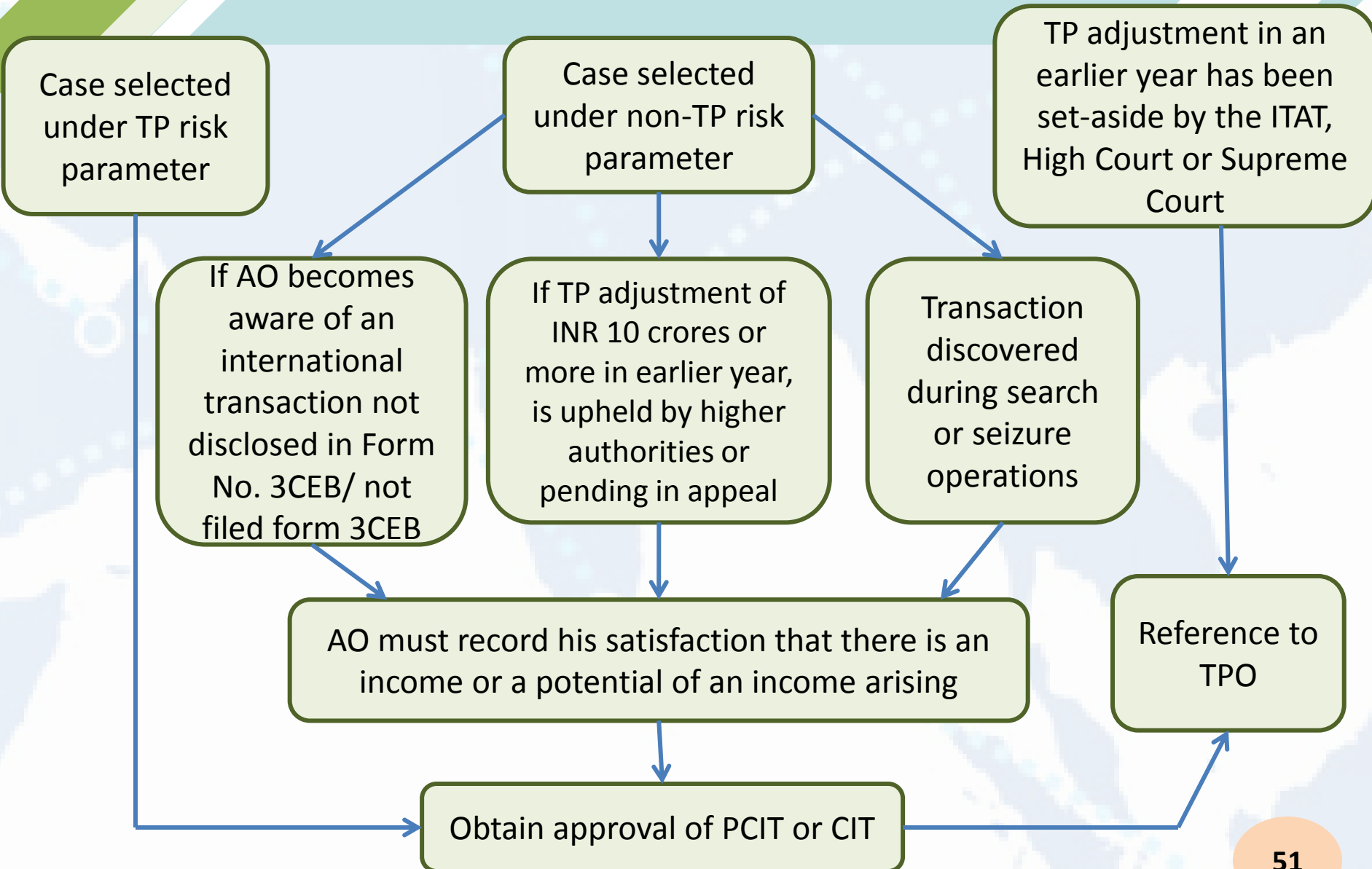
RANGE CONCEPT



Transfer Pricing Process



Reference to TPO



Reference to TPO

T P risk parameters as per OECD	Brief description
Significant transactions with related parties in low tax jurisdictions	Where the transactions take place with the entities located in low taxed jurisdictions, there is a risk that mispricing will incorrectly attribute excess profits to the low taxed jurisdiction.
Transfers of intangibles of related parties	Transactions of this nature raise difficult valuation questions, especially where the intangibles are unique and consequently there is a lack of comparables.
Business restructurings	The business structures and transaction flows adopted in connection with restructuring an MNE's business need careful consideration. There are two aspects of such transactions to be considered. The first is the restructuring transaction itself. The transfers of assets, including intangibles, in connection with such transactions can give rise to difficult valuation and other transfer pricing issues. Often these transactions involve efforts to move valuable assets into more tax favoured environments.
Intra-Group services	Parent companies or regional headquarters offices often provide administrative or other general services for members of the MNE group. Even when such services are charged at cost or at cost plus a small mark-up, questions may arise as to whether the level of the overhead charge is appropriate to the size of the subsidiary given the nature of benefits received.

Reference to TPO

T P risk parameters as per OECD	Brief description
Specific types of payments	Payments of interest, insurance premiums and royalties to related parties because the underlying rights are highly mobile and consequently there is a risk that the payments do not reflect the true value being added by the related party.
Loss making	Year on year loss making where there is no attempt made to change business operations or financing. Sustained losses may be evidence that the reported results do not reflect the true value of the business.
Poor results	Similarly results that are not consistent with industry norms or with the functions carried on by the enterprise in the country concerned may be evidence that related party transactions have not been correctly priced.
Effective tax rate	Significant variations between the effective tax rate reported at group level and the nominal rates to which it is subject can be the result of transfer pricing that allocates too much profit to low tax jurisdictions.
Poor/Nonexistent documentation	Evidence that transfer prices and the methods used to compute them are inadequately recorded casts doubt on the reliability of the prices themselves.
Excessive debt	Debt that appears to be in excess of the amount that an entity could borrow if it were a free standing entity, or interest rates that appear to be in excess of market rates



**TRANSFER PRICING PROCESS:
FAR ANALYSIS,
DOCUMENTATION &
FORM 3CEB**

FAR Analysis – What?

- FAR Analysis is an exercise to determine and document significant economic activities performed by the enterprise and its associated enterprise('AEs') in an International Transaction
- Allocation of significant economic activities between those entities involved in the transaction, so each entity can be appropriately characterised
- **Price charged** in any transaction should reflect the functions performed (taking into account the risks assumed and assets used)

FAR Analysis - Components

- **Functions performed**
 - **Activities** carried out by each of the parties to the transaction
 - Focus should be on identification of **critical functions** which add value to the international transactions
 - Principal functions performed by the entities in a controlled transaction are **compared** with the functions performed in uncontrolled transactions

FAR Analysis - Components

- **Assets employed**

- **Type** of assets and their **nature** needs to be understood
- Helps in determination of their **contribution** to the business process / economic activity
- Facilitates understanding of respective **roles** played by the entities participating in the International transaction
- Knowledge of assets owned and employed by the entities facilitates determination of the returns to be earned by them

FAR Analysis - Components

- **Risks Assumed**

- Probable **variability** of future outcomes or returns
- As the risk increases, the vulnerability to earn profit **increases** as well
- The potential risks are **company and industry specific**
- Focus should be on **important risks**
- Important to **distinguish** between which entity bears risks as per legal terms and which one bears as per the conduct of the transaction

FAR Analysis- Why?

- **Rule 10B(2)** of the Income Tax Rules, 1962 asserts on **Importance of FAR Analysis:**
- Comparability of an international transaction with an uncontrolled transaction shall be judged with reference to *(among others)*:
 - i. Functions performed, taking into account assets employed and risks assumed, by both the parties to the transactions
 - ii. Contractual terms *(whether or not such terms are formal or in writing)* which lays down explicitly or implicitly how the responsibilities, risks and benefits are divided between parties to the transactions

FAR Analysis – Why?

- Para1.36(Chapter1)of OECD TP Guidelines, 2017 lists **functional analysis as one of the five factors for comparability analysis**
- *“The functions performed by each of the parties to the transaction, taking into account assets used and risks assumed, including how those functions relate to the wider generation of value by the MNE group to which the parties belong, the circumstances surrounding the transaction, and industry practices”*

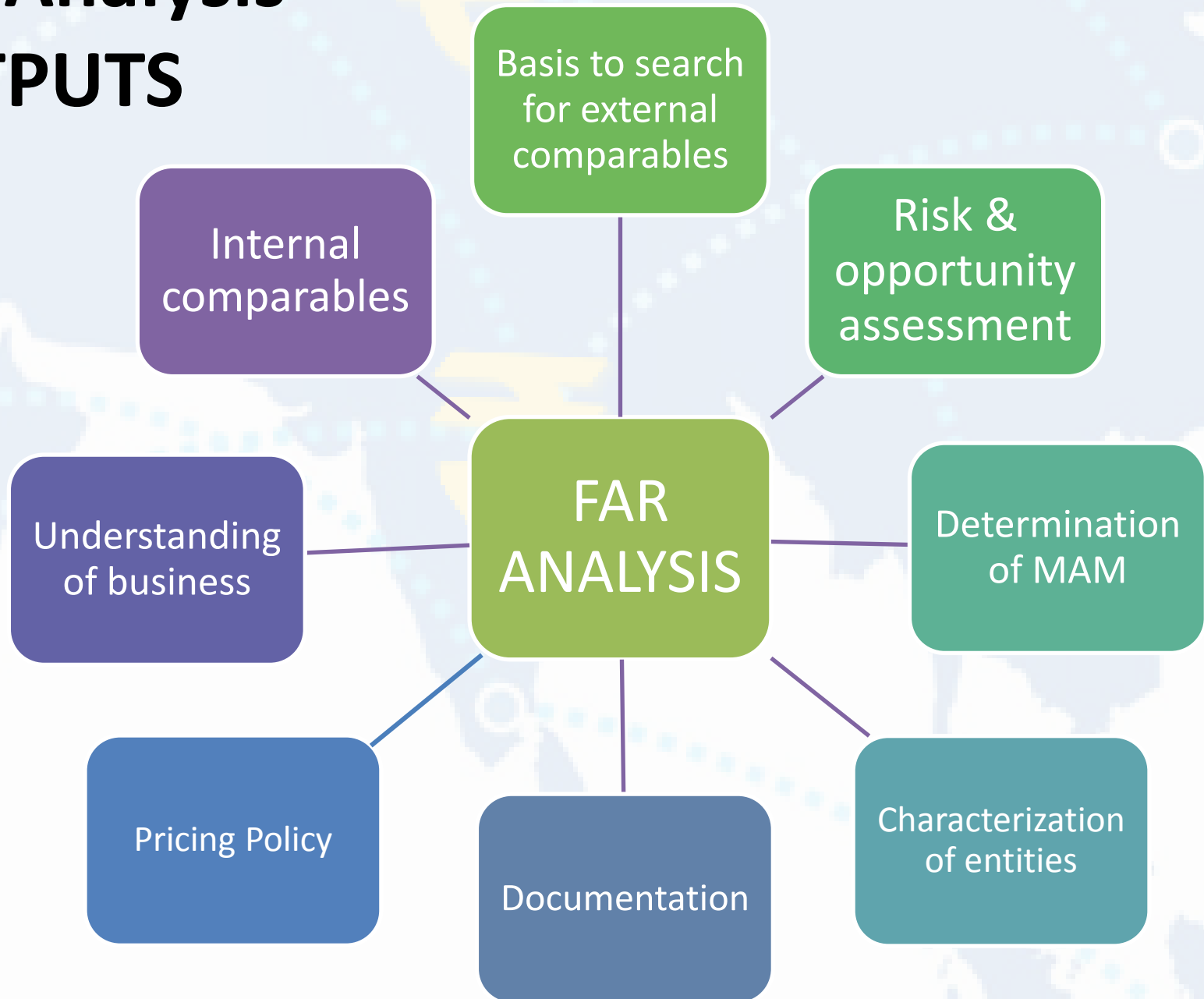
FAR Analysis

- Importance -
 - To **identify an appropriate reward** that each of the related parties should earn with respect to inter company transactions under review
 - To **determine the economic characterization** of the entities in the transaction and to **select a tested party**
 - To **determine the most appropriate method** for benchmarking the transaction
 - To **identify any uncontrolled transaction** involving one of the controlled parties

FAR Analysis - INPUTS



FAR Analysis - OUTPUTS



Documentation [Rule 10D]

Entity related

- Ownership structure
- Profile of the MNC group
- Description of business & the industry
- Published F.S. of AE
- Correspondence with AE

Price related

- Nature & Terms (incl. prices)
- FAR analysis
- Economic and market analysis incl. forecasts and budgets

Analysis related

- Record of uncontrolled transactions
- Methods considered for ALP
- Comparability analysis
- Workings of ALP
- the assumptions, policies and price negotiations –ALP
- details of the adjustments, made
- any other information relevant for ALP

Supporting documents

- Official publications/ reports/ database – from govt. of AE
- Market research reports by reputed institutions
- Price publications incl. stock market quotations
- Contracts with AE or unrelated parties w.r.t similar transactions
- Documents normally issued

Must be maintained for a period of 8 years from end of AY

Report u/s 92E – Form 3CEB

- Opinion on ***maintenance of proper records*** w.r.t International and SDTs
- whether as per the transfer pricing documentation the prices of international transactions are at ***arm's length***
- certifies ***the value of the international transactions*** as per the books of account and as per the transfer pricing documentation are “true and correct”
- Annexure –
 - Part A – Particulars of the assessee, incl. aggregate value of transactions
 - Part B & C – List of AE's , Specific details of international transactions & SDT incl. ALP & methods used.



Economic Analysis / Benchmarking Analysis

Economic analysis

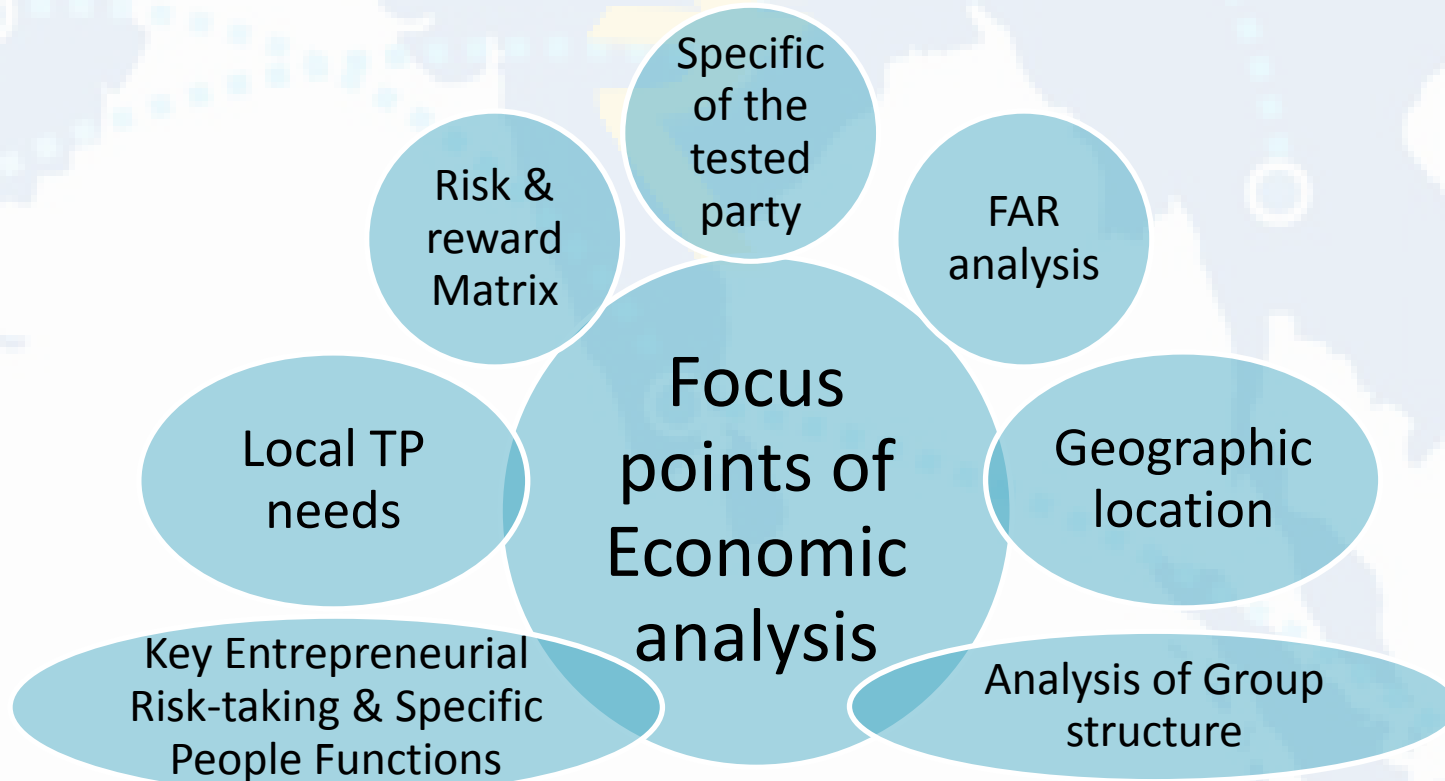
(1)
Selection of
Tested Party

(2)
Selection of
"MAM"

(3)
Selection of
database

(4)
Selection of
comparable
companies

(5)
Arm's
Length
result



Secondary Adjustment -92CE

- Introduced by Fin. Act 2017 w.e.f 1st Apr. 2018.
Sec. 92CE(3)(v) "secondary adjustment" means an adjustment in the books of account of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.

Secondary Adjustment -92CE

- *Sec. 92CE(3)(iv) "primary adjustment" to a transfer price, means the determination of transfer price in accordance with the arm's length principle resulting in an increase in the total income or reduction in the loss, as the case may be, of the assessee;*

Secondary Adjustment -92CE

- When Primary adjustment is :
 - Made suo motu by the assessee in ROI
 - Made by AO accepted by the assessee.
 - Determined by APA u/s 92CC
 - Made as per Safe harbour rules u/s 92CB
 - as a result of resolution of an assessment by way of the mutual agreement procedure('MAP') under an agreement entered into u/s 90/90A for avoidance of double taxation,

the assessee shall make a secondary adjustment

Secondary Adjustment -92CE

- **Proviso to section 92CE(1) states:**
- **Provided that nothing contained in this section shall apply, if,—**
- (i) *the amount of primary adjustment made in any previous year does not exceed one crore rupees; and*
- (ii) *the primary adjustment is made in respect of an assessment year commencing on or before the 1st day of April, 2016.*

Secondary Adjustment -92CE

- Secondary adjustments introduced where primary adjustments result in increase in total income or reduction in loss.
- Excess money available with its AE as a result of primary adjustment, if not repatriated to India within the prescribed time, to be treated as an interest bearing advance.
- *"excess money" means the difference between the arm's length price determined in primary adjustment and the price at which the international transaction has actually been undertaken;*

Secondary Adjustment -92CE

- **Rule 10CB** - Computation of interest income pursuant to secondary adjustments
- Excess money to be repatriated to India within 90 days from the following:
 - Due date of filing of the return of income (ROI) – in case of a *suo moto* adjustment and Safe Harbour
 - Date of filing of the ROI (or modified return) – in case of an APA
 - Date of ROI – in case of MAP
 - Date of Tax officer's order or Appellate authority's order – in case of acceptance by the taxpayer

Secondary Adjustment -92CE

- Interest rate (for excess money which is not repatriated within the time limit) shall be computed as follows:
 - For an international transaction dominated in INR
 - one year MCLR of SBI as on 1st April of the relevant previous year plus 325 basis points
 - For an international transaction dominated in foreign currency - six month LIBOR as on 30th September of the relevant previous year plus 300 basis points



**Alignment of Indian
TP regulations with
BEPS**

Indian Regulations

aligning with BEPS Action Plan 13

Master File - A global consistent overview

- Group organizational structure
- Description of global value chain
- Intangibles
- Financing activities
- Global Transfer pricing policies

Local File - Specific to country analysis

- Description of Intercompany transactions
- Comparability analysis
- Selection and Application of TP Method(s)
- Financial information

CbCR - key data points for each group entity

- Main business activity
- Capital & Assets
- Revenue (AE & Non-AE), Profits, Taxes
- Number of Employees
- Tax jurisdiction

Master File and CbCR

- *Master File & Local File to be filed with each tax jurisdiction*
- *CbCR to be filed with tax jurisdiction of ultimate parent*
- *CbCR mandatory if consolidated turnover > EUR 750 mn (approx. INR 5,632 Cr.)*
- *CbCR to be used only for risk assessment; not for concluding audits*

Recent Amendments

- New compliance by Finance act, 2016 In response to BEPS action plan 13
- New Sec. (Sec. 286) inserted - for CBCR
- Sec. 92D amended to include Master File
- *Rule 10DA - Master File*
- *Rule 10DB - CBCR*

Master File – Rule 10DA

- Applicability [10DA(1)]:
 - Group revenue exceeds Rs. 500/- Cr **AND**
 - Aggregate value of international transaction > Rs.50Cr.
 - OR
 - Aggregate value of International transactions in IPR > Rs. 10Cr.
- File form 3CEAA (part A & part B) – on or before due date u/s 139(1), (31st March 2018 for FY 16-17)

Master File – Rule 10DA

Form 3CEAA

Part A

Part B

Applicability

Every person, who is part of an international group

Who satisfies the applicability conditions of Rule 10DA(1)

Content & Details

Basic details - Name of the group, number of CEs in India, their names, addresses and PAN etc.

- Business Description & Overall strategy
- Entities developing IPs, IPs owned, agreements, TP policies & transfers w.r.t such IPs
- Financing arrangements of international group & the TP policy
- Fin. Statements, APA's & other tax rulings

CBCR– Sec.286 r.w. Rule 10DB

- Applicability:
 - Group revenue > Rs.5,500/- Cr for FY 2015-16.
- Parent Co. in India ? – Yes. Form 3CEAD by 31st March, 2018
- No – Form 3CEAC – 31st Jan, 2018
- Else: subject to conditions in 286(4) Resident Co. Files – Form 3CEAD
- If more than one Resident Co. – designate one – Form 3CEAE

Master file & CbCR - Summary

Particulars	Purpose	Form No.	Applicable to
Master File related forms	Filing of the Master File	3CEAA	<ul style="list-style-type: none">• Part A – Every constituent entity of an IG (no threshold)• Part B – Every constituent entity of an IG meeting the threshold discussed above
	Intimation of designated Indian constituent entity of an IG	3CEAB	<ul style="list-style-type: none">• IGs having multiple constituent entities resident in India

Master file & CbCR - Summary

Particulars	Purpose	Form No.	Applicable to
CbC reporting related forms	CbC report notification	3CEAC	<ul style="list-style-type: none"> • Every Indian constituent entity of a foreign IG
	Filing of CbC Report	3CEAD	<ul style="list-style-type: none"> • Indian- headquartered IG • Indian constituent entity of a foreign IG designated as Alternate Parent entity • Indian constituent entity of a foreign IG required to submit CbC report in India under the specified circumstances
	Intimation of designated Indian constituent entity of foreign IG for filing CbC report in India under specified circumstances	3CEAE	<ul style="list-style-type: none"> • Foreign IG having multiple constituent entities resident in India

Thin Capitalisation

- **What is thin capitalisation?**

- Thin Capitalisation means having highly disproportionate debt capital in comparison to equity capital
- Companies tend to borrow in high-tax jurisdictions to avail higher tax deductions

- **Why debt over equity?**

- No stamp duty required for infusion of debt capital, unlike equity capital
- In most countries, dividends are subjected to economic double taxation, whereas interest is not; on the contrary interest is tax-effective
- Easy and tax effective repatriation of borrowed funds as compared to capital infusion
- Debt is more flexible; it can be converted into equity, when required
- Debt can be borrowed in foreign currency to avoid currency fluctuation risk

Thin Capitalisation – Impact analysis

Particulars	Zero Debt	Debt-Equity Ratio of 1:1	Zero Equity
Debt	0	500	1,000
Equity	1,000	500	0
Total Capital	1,000	1,000	1,000
PBIT	200	200	200
Less: Interest (Assumed @10%)	0	-50	-100
PBT	200	150	100
Less: Tax @ 30% (approx) (A)	-60	-45	-30
PAT	140	105	70
Less: DDT @ 20% (approx) (B)	-28	-21	-14
Net profit distributed to equity shareholders	112	84	56
Amount distributed for capital	112	134	156
Total tax paid (A + B)	88	66	44
Effective rate of tax (Total tax to PBIT)	44%	33%	22%

Limitation on interest deduction (Sec. 94B)

Applicability :

- Introduced vide Finance Act 2017; Applicable from AY 2018-19
- 'Anti-abuse' provisions in line with BEPS Action Plan 4

Conditions triggering Section 94B

Condition 1 : Borrower is an *Indian Company or PE of a foreign company*

Condition 2 : Incurs any expenditure by way of *interest or of similar nature exceeding INR 1 crore which is deductible in computing income chargeable under the head "Profits and gains of business or profession"*

Condition 3 : In respect of any debt issued by a *non-resident*:

- being an AE; or
- a third party lender (non-AE) but where the *AE provides implicit or explicit guarantee to such lender or deposits a corresponding and matching amount of funds with the lender*

Not applicable to borrowers engaged in banking or insurance business

Limitation on interest deduction (Sec. 94B)

Amount of disallowance ('excess interest')

Lower of:-

- *Total interest paid or payable in excess of 30% of EBITDA; and*
- Interest paid or payable to Aes

Carry forward/set off

- Interest disallowed can be carried forward and set-off up to eight assessment years

Illustration - Sec. 94B

S No.	Particulars	Rs. In Crs
A	Interest expenditure on Loan taken from Non-resident AE	200
B	Interest expenditure on Loan taken from third party	100
C	Total Interest (A+B)	300
D	EBITDA (Earnings before Interest, Taxes, Depreciation and Amortisation)	500
E	30% of EBITDA = 30% of 500	150
F	Interest to be disallowed	
	Excess interest paid (300-150) or [(C) – (E)]	150
	Interest paid to Non-resident AE	200
	whichever is lower (amount to be disallowed)	150

Limitation on interest deduction (Sec. 94B)

- What is a debt?
 - Debt means:
 - any loan, financial instrument, finance lease, financial derivative, or an arrangement that gives rise to
 - interest, discounts or other finance charges that are deductible as business expenditures
- a. Whether LCs will be considered as debt?
- b. Whether compulsorily convertible debentures which are hybrid instruments should be considered as debt?
- c. Whether premium on option contracts (financial derivative) would be considered as 'other finance charges'?

Limitation on interest deduction (Sec. 94B)

- What is the mode of computation of EBITDA?
- What is implicit and explicit guarantee?
- Whether borrowing of real funds and availing of guarantee for borrowing could be classified in the same basket?
- Whether interest is to be understood, net of interest income?

Limitation on interest deduction (Sec. 94B)

An Illustration

- A Ltd. has borrowing of INR 100 crore from its overseas AE i.e. B Ltd. @ 14% p.a.
- Interest paid / payable to AE is INR 14 crore
- EBITDA of A Ltd. for year ended 31.03.2017 is 30 crores
- *Impact u/s 94B:*
- Disallowance u/s 94B = Total deductible interest exceeding the 30% of EBITDA i.e. 5 crores [$14 - (30\% * 30) = 5$]
- *TP proceedings:*
- Arm's length interest rate determined by TPO @ 11% and hence, made a transfer pricing adjustment of 3 crores [$(14\% - 11\%) * 100$ crores]

What would be the amount of interest allowed to be carried forward u/s 94B(4), INR 2 crores or INR 5 crores)



Advanced pricing agreement

Advanced pricing agreement (APA)

- agreement between a tax payer and tax authority determining the ***transfer pricing methodology*** for pricing the tax payer's international transactions for future years.
- applied for a certain period of time based on the fulfillment of certain terms and conditions (called critical assumptions).
- Types:
 - Unilateral – tax payer and tax authority
 - Bilateral – tax payer, foreign AE, and respective tax authorities

Advanced pricing agreement (APA)

- **Why APA – Reason**
- **APA mechanism introduced in 2012 and Roll-back in 2014**
- **Salient Features –**
 - **To provide assurance of certainty and unanimity in transfer pricing approach**
 - **Valid upto five subsequent years and four previous years**
 - **Binding on tax authorities as well as taxpayers unless there is a change in the law or facts of the case**
 - **Pre-consultation process (anonymous application option)**

Advanced pricing agreement (APA)

Statistics as per CBDT Press Release dated 7th February 2018:

	Unilateral	Bilateral
No. of applications made in 5 years	More than 800 applications (about 85% are Unilateral)	
No of agreements signed	178	18

Advanced pricing agreement (APA)

- **Important points to be considered:**
 - Each year Annual Compliance Report in Form No. 3CEF needs to be filed before DGIT (IT)
 - The APA can be cancelled/revised if critical assumptions are violated or conditions are not met
 - If the Compliance Audit results in a finding that the assessee has failed to comply with the terms of the agreement, the agreement can be cancelled
 - Non filing of Compliance Report or the report contains material errors, it may result in cancellation of the agreement



**SAFE
ZONE**

**SAFE HARBOUR
RULES**

Safe Harbour Rules

- Safe Harbour(SH) Provisions were Introduced by Finance Act, 2009, however, CBDT released SH rules in September 2013
- In June 2017, CBDT revised the SH rules w.e.f. 1 April 2017, decreasing the SH margins and the included low value adding intra group services as one of the eligible international transactions
- Revised SH margins shall be applicable from the AY 2017-18 for three consecutive years
- Eligible assessee has the right to exercise the option under either sub-rule (2) or sub-rule (2A) of Rule 10TD, whichever is beneficial

Safe Harbour Rules

Eligible International Transaction (EIT)	Safe Harbour Rules		
	Old [Rule 10TD (2)]	Revised [Rule 10TD (2A)]	
Provision of software development services (other than contract R&D) and ITES	20 % or more (EIT ≤ INR 500 crores)	17 % or more of OP/OC (EIT ≤ INR 100 crores)	
	22 % or more (EIT > INR 500 crores)	18 % or more of OP/OC (EIT > INR 100 crores but < 200 crores)	
Provision of knowledge process outsourcing services	25 % or more (No Threshold)	(EIT ≤ 200 crores)	
		Employee Cost to Operating Cost	OP to OC%
		< 40 %	18 % or more
		≥40 % and < 60 %	21 % or more
		≥60 %	24 % or more

Safe Harbour rules

Eligible International Transaction (EIT)	Safe Harbour Rules	
	Old [Rule 10TD (2)]	Revised [Rule 10TD (2A)]
Provision of contract R&D services wholly or partly relating to software development and generic Pharmaceutical drugs	30 % or more (software development)	24 % or more (EIT ≤ INR 200 crores)
	29 % or more (generic pharmaceutical drugs)	
Manufacture and export of core and non-core auto components	12 % or more (core auto components)	
	8.5 % or more (non-core auto components)	
Providing corporate guarantee (other than comfort letter, performance guarantee, etc.)	2% p.a. or more (EIT ≤ INR 100 crores)	1 % p.a. or more (No Threshold)
	1.75% p.a. or more (EIT > INR 100 crores)	

Safe Harbour rules

Eligible international transaction	Safe Harbour Rules	
	Old [Rule 10TD (2)]	Revised [Rule 10TD (2A)]
Interest on advancing of intra-group loans	SBI base rate + 150 bp (INR Loan ≤ 50 crores)	1 year SBI MCLR + basis points as shown below in (A) (INR Loan)
	SBI base rate + 300 bp (INR Loan > 50 crores)	6 month LIBOR + basis points as shown below in (B) (foreign currency Loan)

Safe Harbour rules

CRISIL credit rating of associated enterprise (AE)	(A)	(B)
	Basis points	Basis points
AAA to A or equivalent	175	150
BBB-, BBB or BBB+ or equivalent	325	300
BB to B or equivalent	475	450
C to D or equivalent	625	600
Credit rating not available and total loan in INR provided to all AEs do not exceed INR 100 crores as on 31 March of the relevant previous year	425	NA
Credit rating not available and total loan provided to all AEs do not exceed equivalent to INR 100 crores as on 31 March of the relevant previous year	NA	400

Safe Harbour rules

Eligible International Transaction (EIT)	Safe Harbour Rules	
	Old [Rule 10TD (2)]	Revised [Rule 10TD (2A)]
Receipt of low value adding intra group Services (This concept was introduced in the BEPS Action Plan 13, wherein it has been stated that these services are activities which are not the principal business activities of the group entity providing such services)	Absent	Value of EIT including a markup on cost upto 5% ≤ INR10 crores*
* The following shall be required to be certified by an accountant: 1.Method of cost pooling 2.Exclusion of shareholder costs duplicate cost from the cost pool 3.Reasonableness of the allocation key used by overseas AE for allocation of cost to the Assessee		

Safe Harbour rules

- Procedural Aspects

- Eligible taxpayers must furnish a self-attested form i.e. Form No. 3CEFA, containing various details of the eligible transactions on or before the due date for filing the income tax return
- The Assessing Officer may make a reference to the Transfer Pricing Officer to verify the validity of option exercised by the taxpayer
- Various other procedural aspects have been provided by the relevant Rules

Safe Harbour rules

- Circumstances under which tax authorities to accept transfer price declared by the taxpayer for certain transactions like ITeS, Software, KPO, Guarantees etc.
- Provisions applicable from FY2012-13 and applicable only to international transactions (does not cover SDTs) for a period of 5 years unless opted out by furnishing a declaration to that effect
- Safe harbour rules not applicable if the transactions relates to AE located in any country or territory with no tax or low tax rates

Safe Harbour rules

- Need to maintain transfer pricing documentation report and e-file Accountant's Report in Form 3CEB
- Need to furnish Form 3CEFA (as a self-declaration) stating that taxpayer opts for safe-harbour before due date for filing of return for relevant assessment year
- Owing to higher rates prescribed under safe harbour, there were discussions/representations and revised safe harbour rules were notified.



MUTUAL AGREEMENT PROCEDURE

Mutual Agreement Procedure (MAP)

What is MAP?

- MAP is an alternative available to taxpayers to resolve disputes giving rise to double taxation, whether juridical or economic in nature.
- An agreement for avoidance of double taxation between countries would give authorisation for assistance of Competent Authorities (CAs) in the respective jurisdiction under MAP. In the context of the Organisation for Economic Co-operation and Development's (OECD) Model Convention for the Avoidance of Double Taxation, Article 25 provides for the assistance of CAs under MAP.

Mutual Agreement Procedure (MAP)

Benefits of MAP

- The main benefit of pursuing MAP is the elimination of double taxation (either juridical or economic).
- The MAP resolution, once accepted, eliminates protracted litigation.
- For certain jurisdictions, India has also entered into agreements wherein there is no immediate collection of the disputed demand.

Mutual Agreement Procedure (MAP)

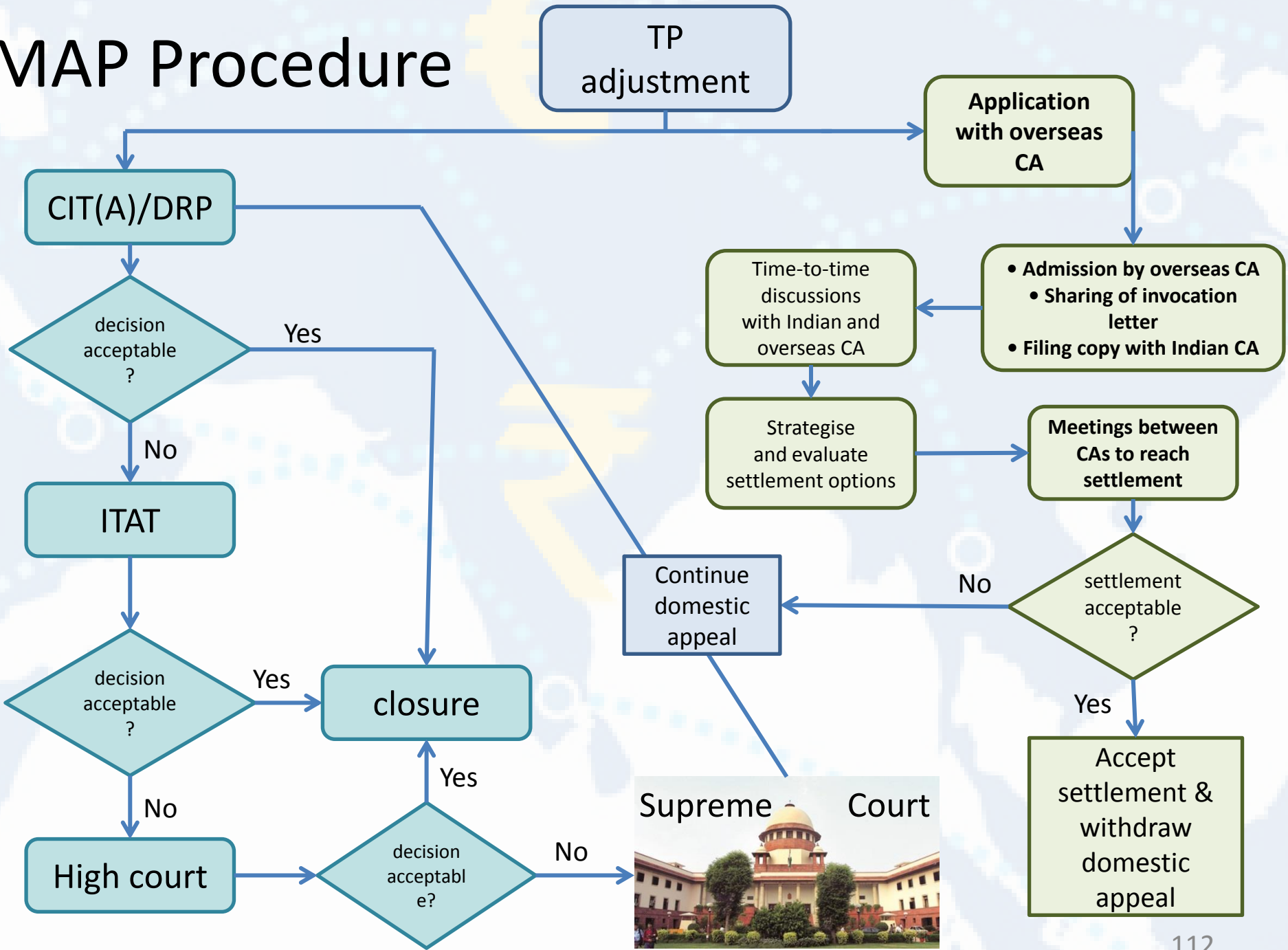
Issues that can be resolved under MAP

- Generally, the issues giving rise to double taxation (either juridical or economic) are submitted by taxpayers for resolution under MAP. Some of the instances giving rise to double taxation are:
 - Adjustment arising from transfer pricing assessment
 - Issues relating to the existence of permanent establishments
 - Characterisation or classification of income
 - Attribution of profits to permanent establishments
 - Withholding tax is levied beyond the allowance limit within an applicable tax convention
 - When a taxpayer is considered to be a resident of two treaty countries

Mutual Agreement Procedure (MAP)

- Who can apply? - The taxpayer of the country having to bear the incidence of double taxation can apply for the assistance of CAs under MAP to resolve the issue of such double taxation.
- It may be noted that under the Multilateral Instrument (MLI) to which India is a signatory, India has selected the option where cases can be presented by taxpayers but only in the countries of their residence.

MAP Procedure





PENALTIES

Penalties

Section	Penalty	Quantum of penalty
271(1)(c)	Penalty for concealing particulars of income or furnishing inaccurate particulars of income	100% to 300% of tax sought to be evaded on account of transfer pricing adjustments made
271AA(1)	Penalty for: <ul style="list-style-type: none">• failure to maintain documentation prescribed under Section 92D of the Act,• failure to report a transaction, or• maintaining or furnishing incorrect information/ document	2% of the value of international transaction or specified domestic transaction
271AA(2)	Penalty for failure to keep and maintain Master File	INR 500,000
271BA	Penalty for failure to furnish Accountant's Report in Form 3CEB	INR 100,000

Penalties

Section	Penalty	Quantum of penalty
271G	Penalty for failure to furnish documentation prescribed under Section 92D of the Act	2% of the value of international transaction or specified domestic transaction
271GB	For failure to furnish CbCR u/s286(2)	a.INR 5,000 per day upto one month; or b.INR 15,000 per day beyond one month Failure continues after penalty order INR 50,000 per day
271GB	For non-furnishing information asked for u/s286(6)	INR 5,000 per day; Failure continues after penalty order INR 50,000 per day
271GB	Inaccurate report/ information	INR 500,000

THANK YOU!

CA NEMICHAND SIRVI H

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