PRIMARY AND SECONDARY ADJUSTMENTS IN TRANSFER PRICING

SECTION 92CE: SECONDARY ADJUSTMENT IN CERTAIN CASES AND RULE 10CB: COMPUTATION OF INTEREST INCOME PURSUANT TO SECONDARY ADJUSTMENTS

1. **EXCESS MONEY MEANS:**
   Arm's length price determined in primary adjustment **minus** Price at which international transaction has actually been undertaken

2. **Section 92CE shall not apply i.e. No secondary adjustment to be made in the following cases:**
   (i) **Where Primary Adjustment is made for AY 2016-17 or any earlier AY.**
   (ii) **Where Primary Adjustment made is ₹1 crore or less.**
   (iii) **Where Primary Adjustment is made on basis of Advance Pricing Agreement entered before 01.04.2017.**

3. **Computation of Interest where excess money is not repatriated to India within 90 days:**

	Case	Rate
(i)	Where the international transaction is denominated in Indian rupee	At the one-year marginal cost of fund lending rate of SBI as on 1st April of the relevant previous year + 3.25%
(ii)	Where the international transaction is denominated in foreign currency	At six-month London Inter-Bank Offered Rate (LIBOR) as on 30th September of the relevant previous year + 3.00%

<table>
<tr><th>4. WHERE PRIMARY ADJUSTMENT TO TRANSFER PRICE:</th><th>EXCESS MONEY TO BE REPATRIATED TO INDIA ON OR BEFORE 90 DAYS FROM/ INTEREST TO BE CHARGEABLE FROM:</th></tr>
<tr><td>Has been made suo moto by the assessee in his return of income</td><td rowspan="3">Due date of Filing of Return of Income under section 139(1)</td></tr>
<tr><td>Is determined by an Advance Pricing Agreement entered into by the assessee under section 92CC on or after 01.04.2017 but on or before the due date of filing of return (See Note 1)</td></tr>
<tr><td>Is made as per the safe harbour rules opted by assessee under section 92CB.</td></tr>
<tr><td>Made by the Assessing Officer has been accepted by assessee</td><td>Date of order of Assessing Officer</td></tr>
<tr><td>Made by the Assessing Officer has been subjected to appeal to an appellate authority.</td><td>Date of Final Order of Appellate Authority</td></tr>
<tr><td>Is arising as a result of resolution of arm's length price by way of the Mutual Agreement Procedure under DTAA entered into under section 90/90A</td><td>Date of giving effect by the Assessing Officer to the resolution arrived at under Mutual Agreement Procedure</td></tr>
</table>

Note 1: Where Advance Pricing Agreement is entered into after the due date of filing of return, then excess money shall be repatriated into India within 90 days or interest shall be computed from the end of the month in which APA is entered into.

Note 2: The cushion of 90 days from the due dates prescribed above for the purposes of repatriation of money shall not be available for the purposes of computing interest on such excess money.

♦ AMENDMENTS MADE BY FINANCE ACT, 2019 ♦

Prior to amendment by Finance Act, 2019, the Associate Enterprise with whom the international transaction was carried out, was to repatriate the excess money to India within 90 days from the due date/ order of Assessing officer/ final order of appellate authority.

After the amendments by Finance Act, 2019, the following THREE OPTIONS are available.

OPTION I: The **Associate Enterprise** with whom the international transaction was carried out, can repatriate the excess money to India within 90 days from prescribed date.

OPTION II: The excess money can be repatriated to India within 90 days from prescribed date, **by any of the associated enterprises of the assessee which is a non-resident**. In other words, the excess money can be repatriated by a Non-Resident Associate Enterprise of the assessee, with whom international transaction which resulted in primary adjustment, was not carried out.

OPTION III: Where the excess money has not been repatriated by any associated enterprises as per option I and option II, the assessee can pay additional income tax @ 18% on such excess money. This shall further be increased by surcharge of 12% (18% tax plus 12% surcharge plus 4% cess)

Treatment of Tax paid by the assessee

1. This tax shall be treated as final payment of tax in respect of excess money not repatriated and credit for such tax cannot be claimed by the assessee or any associated enterprise.
2. Assessee cannot claim the tax so paid as revenue expenditure.
3. Assessee shall not be required to make secondary adjustment. Assessee shall not pay interest from the date of payment of tax.

♦ ANALYSIS OF AMENDMENT RELATING TO APA ♦

Prior to amendment by Finance Act, 2019, the secondary adjustment was to be made in Assessment Year 2017-18 or future assessment years on the basis of any Advance Pricing Agreement (APA) in force in the assessment year. Therefore adjustment was to be made even if APA was entered into before 01.04.2017.

Finance Act, 2019 provides that secondary adjustment shall be made on basis of APA only if APA has been entered on or after 01.04.2017.

Illustration:
ABC Ltd. is having an associated enterprise in UK, namely, JCB Plc. During the financial year 2021-22, ABC Ltd. exported goods at a price of ₹ 100 crores to JCB Plc. The Arm's length price of the transaction is ₹ 110 crores. Transaction was designated in Indian Rupees. Discuss the applicability of Section 92CE and options available to ABC Ltd. therein in following cases:

<u>Arm's Length Price of Exports determined</u>

(i) By assessee himself and adjustment to Transfer Price Made by assessee suo-moto in return
(ii) As per Safe Harbour Rules
(iii) Under Advance Pricing Agreement entered into on or after 01.04.2017 but before 30.11.2022
(iv) Under Advance Pricing Agreement entered on 01.02.2023.
(v) By giving effect to the resolution arrived at under Mutual Agreement Procedure by the Assessing Officer. Order passed on 25.05.2023.
(vi) By assessment order by Assessing Officer and accepted by assessee (order of Assessing Officer dated 31.03.2023)

(vii) By assessment order by Assessing officer to be ₹ 115 crores and on appeal to CIT(Appeals)/ITAT reduced to ₹ 110 crore (order of CIT(Appeals)/ITAT dated 30.06.2023)

Solution:

PREVIOUS YEAR 31.03.2022

PRIMARY ADJUSTMENT = ₹ 110 crores

EXCESS MONEY = ₹ 110 crores - ₹ 100 crores

= ₹ 10 crores

OPTION I:

SECONDARY ADJUSTMENT:

Assessee should pass following adjustment entry in the books of account:

Foreign Associated Enterprise Dr.	₹ 10 crores	
To Profit & Loss Account		₹ 10 crores

REPATRIATION TO INDIA WITHIN 90 DAY: BY JCB Plc U.K. OR ANY NON-RESIDENT ASSOCIATED ENTERPRISE OF ASSESSEE

If JCB Plc U.K. / any non-resident associated enterprises of the assessee repatriates ₹ 10 crores to India:

- **In (i)/(ii)/(iii) above** → on or before 90 days from the due date of filing of ROI i.e. 30.11.2022 i.e. by 28.02.2023, then no further adjustments are required.
- **In (iv)** → on or before 90 days from the end of the month in which APA was entered into i.e., 28.02.2023 i.e., by 29.05.2023, then no further adjustments are required.
- **In (v)** → on or before 90 days from the date of order of Assessing Officer of giving effect to the resolution arrived at under MAP i.e., 25.05.2023 i.e., by 23.08.2023, then no further adjustments are required.
- **In (vi)** → on or before 90 days from the date of assessment order i.e. 31.03.2023 i.e. by 29.06.2023, then no further adjustments are required.
- **In (vii)** → on or before 90 days from the date of Appellate order i.e. 30.06.2023 i.e. by 28.09.2023, then no further adjustments are required.

IF MONEY IS NOT REPATRIATED WITHIN 90 DAYS:

Suppose, in above cases (i)/(ii)/(iii) money is not repatriated to India by non-resident associated enterprises by 28.02.2023, then in previous year 31.03.2023, assessee shall compute interest.

For example, one-year marginal cost of fund lending rate of SBI on 01.04.2021 is 8%. Then, interest shall be computed @ 11.25% since international transaction was designated in Indian Rupees. In cases (i), (ii), (iii), the following entry shall be passed by assessee.

Foreign Associated Enterprise	Dr.	₹ **37,60,274**	
To Interest Income			₹ **37,60,274**

[Being interest @ 11.25% on ₹ 10 crores from **30.11.2022** to 31.03.2023]

₹ 10 crores × 11.25% × **122/365** = ₹ **37,60,274**

OPTION 2:

NO SECONDARY ADJUSTMENT IF ASSESSEE DECIDES TO PAY ADDITIONAL TAX

As per amendment by Finance Act, 2019, no secondary adjustment is required to be made in books of account of the assessee, if he pays from his own pocket additional income tax within 90 days from prescribed date, i.e., in above example by 28.02.2023 as under:

Additional tax @ 18% on ₹ 10 crores	₹ 1,80,00,000
Add: 12% surcharge thereon	₹ 21,60,000
	₹ 2,01,60,000
Add: 4% cess	₹ 8,06,400
	₹ 2,09,66,400

The above tax cannot be

(i) claimed as expenditure
(ii) claimed as credit by assessee or anyone else.

If assessee pays the additional tax on 15.03.2023, then

Excess amount	₹ 10,00,00,000
Add: Interest from **30.11.2022** to 14.03.2023 (**105 days**)	₹ **32,36,301**
	₹ **10,32,36,301**
Additional Tax thereon @ 20.9664	₹ **2,16,44,935**