

Advance Pricing Agreement Guidance with FAQs



Income Tax Department

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Tax Payers Information Series- 43

ADVANCE PRICING AGREEMENT GUIDANCE WITH FAQs



INCOME TAX DEPARTMENT

**Directorate of Income Tax (FR, PP & OL)
6th Floor, Mayap Bhawan, Connaught Circus
New Delhi-110001**

This publication should not be construed as an exhaustive statement of the Law. In case of doubt, reference should always be made to the relevant provisions of the Income Tax Act, 1961, Income Tax Rules, 1962, Wealth Tax Act, 1957 and Wealth Tax Rules, 1957, and, wherever necessary, to Notifications issued from time to time.

डॉ. पूनम किशोर सक्सेना, आई आरएस
Dr. Poonam Kishore Saxena, IRS
अध्यक्षा केन्द्रीय प्रत्यक्ष कर बोर्ड
Chairperson, CBDT
दूरभाष: 23092648
Tel : 23092648



भारत सरकार
GOVERNMENT OF INDIA
वित्त मंत्रालय/राजस्व विभाग
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
केन्द्रीय प्रत्यक्ष कर बोर्ड
CENTRAL BOARD OF DIRECT TAXES
नार्थ ब्लॉक, नई दिल्ली-110001
NORTH BLOCK, NEW DELHI.110001

PREFACE

To bring about certainty and uniformity with regard to determination of arm's length price of the international transaction, the Finance Act, 2012 had inserted sections 92CC and 92CD in the Income Tax Act 1961 introducing the provisions of Advance Pricing Agreement (APA). The Ministry of Finance has notified an "Advance Pricing Agreement Scheme" (Rules 10F to 10T of Income Tax Rules, 1962) vide notification No.36/2012 [F.No.133/5/2012- SO (TPL)] SO (TPL) 2005 (E), dated 30-8-2012. Since APA is a new scheme, to increase the awareness of the taxpayers about the APA scheme and its implementation, this booklet published under the Tax Payers Information Series will prove to be an effective and convenient tool to educate the taxpayers in complying with the provisions of the Scheme.

An APA is an agreement between the Central Board of Direct Taxes and any person, which determines, in advance, the arm's length price or specifies the manner of the determination of arm's length price (or both), in relation to an international transaction. Hence, once APA has been entered into with respect to an international transaction, the arm's length price with respect to that international transaction, for the period specified in the APA, will be determined only in accordance with the APA. The APA process is voluntary and will supplement appeal and other disputes

resolution measures provided under the Double Taxation Avoidance Agreement (DTAA) for resolving transfer pricing disputes. "APA Guidance booklet with FAQs" deals with the procedure to be followed by a taxpayer and the tax authorities before a taxpayer can enter into an APA. This booklet provides guidance on types of APAs, the APA Teams, advantages of an APA, the process from pre-filing to the entering of an APA, applicant disclosure obligation, withdrawal of an APA, renewing an APA etc. The booklet also contains provisions of the Act as inserted by the Finance Act, 2012, the APA Scheme notified vide notification No.36/2012 [F.No.133/5/2012-SO(TPL)]/SO 2005 (E), dated 30-8-2012 along with the relevant Forms and also contains FAQs based on the interaction with the business. It is hoped that this publication will prove to be useful to the readers. Central Board of Direct Taxes would welcome any suggestions to further improve the publication.



(Dr. Poonam Kishore Saxena)
Chairperson, CBDT

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1.0 INTRODUCTION

The Transfer Pricing provisions were introduced in India in 2001 which provided for determination of arm's length price in cases of international transactions between associated enterprises. In order to provide tax certainty and unanimity in approach in international transactions between associated enterprises, the Finance Act, 2012 has inserted sections 92CC and 92CD in the Income Tax Act 1961 (in short 'the Act') introducing the provisions of Advance Pricing Agreement (APA). The APA process is voluntary and will supplement appeal and other Double Taxation Avoidance Agreement (DTAA or in short 'Treaty') mechanism for resolving transfer pricing dispute. The legislation stipulates that Central Board of Direct Taxes (in short 'the Board') can enter into an agreement with any person, with the approval of Central Government, determining the arm's length price (ALP) or specifying the manner for determination of the ALP in relation to an international transaction to be entered into by that person. The Board has prescribed an "Advance Pricing Agreement Scheme" (Rules 10F to 10T of Income Tax Rules, 1962) in this regard vide notification No. 36/2012 dated 30.08.2012. The relevant provisions of the Act and Rules are available in the appendix of this guidance note.

2.0 WHAT IS AN APA?

An APA is an agreement between the Board and the person (taxpayer), which determines, in advance, the ALP or specifies the manner of the determination of ALP (or both), in relation to an international transaction. Hence, once an APA has

been entered into with respect to an international transaction, the ALP with respect to that international transaction, for the period specified in the APA, will be determined only in accordance with the APA. The APA once entered into shall be binding on the person as well as the Commissioner of income tax (and his subordinate income tax authorities) having jurisdiction over such person and such transaction. The term of APA can be a maximum of 5 years. There is no minimum period. However, looking into the time, money and efforts that are expected to be spent before entering into APA, it is likely that the application for APA would normally be for a term which is not less than at least three years. Sections 92CC (6) and 92CC (7) contain circumstances under which the APA will not be binding or can be declared void ab-initio. Rule 10Q and 10R contain circumstances under which the APA could be revised or cancelled.

3.0 TYPES OF APAs

The APA scheme envisages three types of APAs: unilateral, bilateral and multilateral. The choice is on the applicant to choose a particular type of APA at the time of making the application.

Unilateral APA is an agreement between the Board and the applicant and does not involve any agreement with the treaty partner. It, therefore, does not guarantee the ALP or Transfer Pricing Method (TPM), determined under an APA, being accepted by the other country.

In bilateral APA, the applicant is required to make an application with the competent authority of India and simultaneously the applicant or its AE should apply to the competent authority of the other country. The two competent authorities are required to reach an arrangement through Mutual Agreement Procedure (MAP) negotiation. This arrangement is required to be accepted by the applicant before a bilateral APA can be entered into.

In multilateral APA, the applicant is required to make an application with the competent authority of India and simultaneously the applicant or its AE should apply to the competent authority of the other countries which are relevant for such a Agreement. Indian competent authority has to reach an arrangement through MAP with competent authorities of more than one country, before that agreement could be offered to the applicant. The arrangement is required to be accepted by the applicant before a multilateral APA can be entered into.

Request for bilateral or multilateral APA can be accepted by Indian competent authority where:

- (i) a tax treaty exists between India and other country(ies) containing an article on “Mutual Agreement Procedure”;
- (ii) in case of international transactions leading to economic double taxation arising out of TP adjustments, the said tax treaty contains provisions similar to paragraph 2 in the article 9 as provided in OECD model convention on “Associated Enterprises”, and
- (iii) the corresponding APA program exists in the other country.

In unilateral APA, the applicant does not wish to involve competent authority of any other country, and the agreement is only between him and the Board. Since, there is no prior agreement with the competent authority of any other country; there may be a possibility of double taxation in unilateral APA.

4.0 ADVANTAGES OF AN APA

The APA is designed to:

- (a) provide tax certainty with regard to determination of ALP of the international transaction with respect to which the APA has been entered into (also called “covered transaction”);
- (b) reduce the risk of potential double taxation through bilateral or multilateral APA (A taxpayer is thus encouraged to apply for bilateral or multilateral APAs);
- (c) reduce compliance cost by eliminating the risk of transfer pricing audit and resolving long drawn and time consuming litigation;
- (d) reduce the burden of record keeping, as the taxpayer knows in advance the required documentation to be maintained to substantiate the agreed terms and conditions of the agreement.

5.0 APA TEAM

There are two different set-ups for processing of APA and to help the Board to enter into an APA. First set-up comprises of the competent authority of India [which is Joint Secretary (FT&TR-I) in the Ministry of Finance], and his representative (i.e; one Director and two Under Secretaries).

The second set-up is the APA team which is defined in Rule 10F. At present the APA team, constituted by the Board, consists of one Commissioner, 4 Additional Commissioners and 4 Deputy Commissioners. The Board may include more officers in future in this team. The APA team reports to DGIT (International Taxation). DGIT may include experts in economics, statistics, law or any

other field in the team who would be drawn from the Government Departments. Board may constitute more APA teams in future depending on the work load.

Offices with contact details of both set-ups are placed at Annexure A.

6.0 PROCESS INVOLVED

The APA scheme involves the following process:

- (i) Pre-filing consultation;
- (ii) Furnishing of an APA application;
- (iii) Acceptance/rejection of an APA application;
- (iv) Action by the taxpayer, the assessing officer and the transfer pricing officer while the APA is processed or negotiated;
- (v) Amendment to an APA application;
- (vi) Assignment of an APA application to APA team;
- (vii) Examination and analysis of an APA application;
- (viii) Conversion of a unilateral APA into bilateral APA
- (ix) Entering into a unilateral APA;
- (x) Negotiation by the competent authority in bilateral/multilateral APA and entering into an APA
- (xi) Action by the taxpayer and the assessing officer on entering into an APA;
- (xii) Annual compliance report;
- (xiii) Compliance audit of the agreement;
- (xiv) Cancellation and revision of APA.

6.1 PRE-FILING CONSULTATION:

Before a formal APA application can be made, the tax payer is required to request for a pre-filing consultation by making an application to Director General of Income Tax (International Taxation). The application shall be assigned by DGIT(IT) to one of the APA teams (presently there is only one APA team). The APA team shall carry out the pre-filing consultation with the applicant. In case of bilateral/multilateral APA, competent authority or his representative will be associated during pre-filing consultation. The purpose of pre-filing consultation is to enable the applicant and the APA team to assess the possibility of entering into an APA. Issues to be discussed in the pre-filing consultation amongst other things would include.-

- determination of the nature and scope of the agreement,
- identification of transfer pricing issues like the FAR analysis,
- the proposed Transfer Pricing Method (TPM) and determination of ALP,
- determination of the international transactions proposed to be covered
- details of other international transactions not proposed to be covered,
- the broad terms of the agreement which will include manner of adjustment or variation, etc.

The discussion in pre-filing consultation shall not bind any party. If applicant wants to maintain anonymity, the same is also allowed and to that extent the details (which identifies the applicant) in the application form may be omitted. However, in case a taxpayer makes a request for pre-filing on an anonymous basis, the identity

of authorized representative must be disclosed in the request along with sufficient information about the business operation and international transaction in order to make any discussion meaningful. The understanding reached on various issues in the pre-filing consultations would be reduced in writing and a copy of the same will be given to the applicant.

The request for pre-filing consultation is required to be in Form No 3CEC. The form is self-explanatory. However, the following guidance is provided with respect to some of the items:

- Serial no 2 requires global structure of the applicant group. It will be useful if this global structure is presented in the form of flow chart/diagram. This may be omitted, if the request is on anonymous basis. However, in that case this detail must subsequently be submitted with formal APA application in Form 3CED, in case that application is filed.
- Serial no 3 requires names of all the associated enterprises with which international transactions have either been undertaken or proposed to be undertaken. The applicant is required to provide the names of AEs and the nature of international transaction undertaken in last three years or proposed to be undertaken. The name of the associated enterprise may be omitted if the request is on anonymous basis. However, in that case this detail must subsequently be submitted with formal APA application in Form 3CED, in case that application is filed.
- Serial no 6 requires functional and risk profile of the applicant and the associated enterprise. It will be useful if detailed FAR analysis is provided for the applicant and the associated enterprise with respect to the international transaction sought to be covered in the APA application.

- Serial no 17 requires names and designation of the representatives. It would be useful if representative files proper authorization from the applicant (except in case of anonymous application).
- Special attention is invited to note 5 of Form 3CEC which is relevant for bilateral/multilateral APA. The information requested in this note (whether India has DTAA with the other country and whether such country has APA program) must be furnished along with Form 3CEC.

6.2 FURNISHING OF AN APA APPLICATION:

If in pre-filing consultation, the suitability of entering into an APA is determined then after pre-filing consultation, the applicant may choose to file the application for entering into APA in Form No 3CED. Before filing the application, the applicant is also required to pay fee which is to be computed as under:

Amount of international transaction entered into or proposed to be undertaken, in respect of which agreement is proposed during the proposed period of agreement.	Fee
Amount not exceeding Rs. 100 crores	10 lacs
Amount not exceeding Rs. 200 crores	15 lacs
Amount exceeding Rs. 200 crores	20 lacs

It is clarified that the fee is to be computed on the basis of likely value of international transaction for which the APA application is filed. The fee shall be payable by means of electronic transfer directly to the government account as under:

“Indian Government APA A/c”
current A/c number 50140531563 payable at Indian
Bank, Parliament Street, New Delhi,
IFSC Code: IDIB000P582

The proof of payment towards the fee may be enclosed along with the APA application in Form No.3 CED. Fee paid is non-refundable except when the application is not allowed to be proceeded with under Rule 10K.

In case of unilateral APA, the application is required to be furnished in triplicate to the Director General of Income Tax (International Taxation) and in case of bilateral/multilateral APA, the application is required to be furnished in triplicate to the competent authority of India, i.e. Joint Secretary (FT&TR-I) in the Ministry of Finance. In case of bilateral/multilateral APA, the applicant or the AE, as the case may be, must initiate the procedure for entering into APA with the other country as well and furnish evidence to the Competent Authority of India regarding the same.

The application must be filed within the time as provided in Rule 10I(3). If the international transaction is of a continuing nature, from dealings that have already occurred, the application must be filed before the first day of the previous year relevant to the first assessment year which the application seeks to cover. For example, if the APA application seeks to cover five years starting from A. yr 2014-15 to A. Yr 2018-19, the application must be filed before 1st April, 2013. However, if the international transaction is the one which the applicant has not yet undertaken, the application may be filed before undertaking such transaction. For example, if the applicant is going to purchase some raw material from its foreign associate for the first time starting from 1 December 2012 and the application is made before 1 December 2012, the applicant has a choice to include A. Yr 2013-2014 as the first assessment year in the APA application. In that case, the first condition that for A. Yr 2013-2014 the application should be filed before 1st April, 2012 shall not apply.

Since pre-filing consultation is compulsory before filing an APA application, it is advisable for the applicant to initiate pre-filing consultation sufficiently in advance to be able to meet the time requirement of Rule 10I(3) explained above.

The APA application is required to be in Form No 3CED. The form is self-explanatory. However, the following guidance is provided with respect to some of the items:

- Serial no 1(g) requires names and designation of the authorized representatives who would be appearing before the authorities. It would be useful if representative files proper authorization from the applicant.
- Serial no 13 requires multinational structure, organizational arrangement, operation set-up, including major transaction flows. It will be useful if this information is presented in the form of flow chart/ diagram.
- Serial no 17 requires detailed functional analysis of the applicant and all relevant entities with respect to the covered transactions. It would be useful if detailed FAR analysis is provided for the applicant and all relevant entities with respect to the covered transactions.
- After filing the application, a soft copy of the application may also be provided in the first meeting with the competent authority and the APA team.

6.3 ACCEPTANCE/REJECTION OF AN APA APPLICATION:

Preliminary processing of the APA application shall be carried out in accordance with Rule 10K. In case the application is defective

or if any relevant document is not attached (and the defect is not removed within the time allowed), or the application is not in accordance with understanding reached in pre-filing consultation as per Rule 10H, the application may be rejected after providing an opportunity of being heard to the applicant. Fee will be refunded in case the application is rejected. However, the application shall not be rejected in any other circumstance.

Rule 10K (2) provides for rejection of the application, if it is not in accordance with the understanding reached in pre-filing consultation. An example of such an understanding could be that the bilateral/multilateral APA will be possible only when :

- (i) a tax treaty exists between India and other country(ies) containing an article on “Mutual Agreement Procedure”;
- (ii) in case of international transactions leading to economic double taxation arising out of TP adjustments, the said tax treaty contains provisions similar to paragraph 2 in the article 9 as provided in OECD model convention on “Associated Enterprises” and,
- (iii) the corresponding APA program exists in the other country

6.4 ACTION BY THE TAXPAYER, THE ASSESSING OFFICER AND THE TRANSFER PRICING OFFICER WHILE THE APA IS PROCESSED OR NEGOTIATED:

Since processing and negotiation of an APA application takes time, it is possible that assessment process by the assessing officer with respect to the year under APA, or the transfer pricing audit by the transfer pricing officer with respect to the year under APA, might

be required to be initiated or completed. Such proceedings by the assessing officer and the transfer pricing officer shall continue without taking cognizance of the fact that APA process with respect to that year has already been started. It is clarified that merely filing of an APA application will not have any impact on the action that the assessing officers or the transfer pricing officers are required to take under the Act. Further, the taxpayer is required to maintain all the documents and submit all the reports necessary under the Income-tax Act till the lodgment of modified return on finalization of the APA.

6.5 AMENDMENT TO AN APA APPLICATION:

The applicant may request in writing for an amendment to its application at any time before the finalization of the terms of the agreement. This may be allowed by the DGIT (International Taxation) [for unilateral APA] or the competent authority of India and the competent authority of the other country [for bilateral/multilateral APA], if such an amendment does not have the effect of altering the nature of the original application. The applicant is also required to pay the additional fee, if any, due to the amendment. The request for conversion of unilateral APA application to bilateral or multilateral APA application will not be taken to have the effect of altering the nature of the original application.

6.6 ASSIGNMENT OF AN APA APPLICATION TO APA TEAM:

If an application is allowed to be proceeded with under Rule 10K, it shall be dealt with as under:

- In case of a unilateral application, the DGIT (International Taxation) shall assign it to one of the APA teams (there is only one team at this

moment).The APA team shall examine and analyse the APA application and undertake negotiation with the applicant. The APA team shall make an endeavor to arrive at a negotiated settlement with the applicant. In case such a mutual agreement on relevant issues have been arrived at, the mutually agreed draft agreement shall be put up to the DGIT (International Taxation). DGIT shall, on being satisfied, send it to the Board for its consideration.

- In case of a bilateral and multilateral APA, the competent authority of India shall send the application to DGIT (International Taxation) for necessary enquiry, analysis and for preparation of draft report (draft Indian position paper). The DGIT shall assign it to one of the APA teams (at present there is only one team).The APA team shall then carry out detailed enquiry and analysis and prepare a draft Indian position paper in consultation with the Director General of Income Tax (International Taxation), the competent authority of India or its representatives and the applicant. The draft Indian position paper shall be forwarded by the DGIT (International Taxation) to the competent authority of India.

6.7 EXAMINATION AND ANALYSIS OF AN APA APPLICATION:

Since proper functional analysis, determination of transfer pricing methodology, examination of critical assumptions and specifying the manner in which the arm's length price is to be determined are key to the success of the APA programme, power has been given to the APA team and the competent authority to hold meetings, call for additional documents/information, visit applicant's business

premises and make enquiries under Rule 10L(2). The applicant is expected to give full cooperation for this purpose. The APA team is required to do detailed functional analysis and examine the APA application in a reasonable and fair manner taking into consideration all the evidences and information produced by the applicant or collected by it.

6.8 CONVERSION OF A UNILATERAL APA INTO A BILATERAL APA:

A unilateral APA can be converted into a bilateral APA before the mutually agreed draft agreement is forwarded by the DGIT (Intl. Taxation) to the Board. While converting a unilateral APA application to a bilateral APA application, the applicant or its AE needs to make a similar request with the competent authority of the other country. The bilateral request of the applicant shall be forwarded by the DGIT to the competent authority in India. The competent authority of India shall decide whether the bilateral request is allowable based on the existence of appropriate provision on lines of OECD Model Article 9(2) in the tax treaty between India and the other country and also on the existence of an APA program in that other country. If the request is allowed, then the application would be processed as a bilateral APA application.

6.9 ENTERING INTO A UNILATERAL APA:

On receipt of mutually agreed draft agreement, the Board may, with the approval of the Central Government, enter into an APA with the assessee. On behalf of the assessee, the APA shall be signed by the person who is competent to sign its Income-tax Return. Terms of APA will be in accordance with Rule 10M. Once APA has been entered into, DGIT(IT) shall send a copy of the APA to the commissioner of income tax having jurisdiction over

the applicant. It may be noted that once a unilateral APA has been entered into, there will not be any MAP benefit available to the assessee with respect to the covered transactions.

6.10 NEGOTIATION BY THE COMPETENT AUTHORITY IN BILATERAL/MULTILATERAL APA AND ENTERING INTO AN APA:

After receiving the draft Indian position paper the competent authority of India will then carry out negotiation with the other competent authority (ies) in accordance with the provision of Rule 44GA. During this process the competent authority of India will be free to deviate from the draft Indian position paper in order to arrive at negotiated settlement. The competent authority may require the applicant to file additional information and may conduct such enquiry as appropriate. The applicant will not be a part of the negotiation between the two competent authorities but he may be consulted for this purpose by the Indian Competent Authority. On successful completion of negotiations, the competent authority in India shall formalize a MAP arrangement with the competent authority in the other country (ies) and intimate the same to the applicant. The applicant is required to convey acceptance or otherwise of the arrangement within 30 days of such communication. Where the taxpayer accepts the MAP arrangement, the competent authority in India and the applicant shall prepare a mutually agreed draft agreement and the APA agreement shall be entered into by the Board with the assessee after its approval by the Central Government. On behalf of the assessee, the APA shall be signed by the person who is competent to sign its Income-tax Return. Terms of APA will be in accordance with Rule 10M. Once an APA has been entered into, the competent authority of India shall send a copy of it to the Commissioner of Income tax having jurisdiction over the assessee.

In case of failure to reach a MAP arrangement, the applicant shall be informed of the failure to reach an arrangement with the competent authority of the other country(ies). However, the applicant shall have an option to convert the request for bilateral APA to unilateral APA (without payment of additional fee) and inform the competent authority of India in writing. In such cases, the competent authority in India will forward all the information and documents (except the documents provided by the competent authority of the other country subject to confidentiality clause of the concerned DTAA) to the DGIT (International Taxation) who shall in turn examine the request of unilateral APA as per prescribed procedure.

6.11. ACTION BY THE TAXPAYER AND THE ASSESSING OFFICER ON ENTERING INTO AN APA (SECTION 92CD OF THE ACT):

Where in respect of an assessment year covered in the APA, a return of income has been filed prior to the date of entering into an APA, then within three months of entering into APA, the assessee is required to file a modified return in accordance with and limited to the APA. The modified return shall be deemed to be a return under section 139 and all the provisions of the Act shall apply accordingly. If the assessment or reassessment for the year/s covered under APA is pending, the assessing officer is required to complete that assessment or reassessment in accordance with the APA taking into consideration the modified return so furnished. Where the assessment or the reassessment has already been completed the assessing officer shall reassess or recompute the total income of the relevant assessment year having regard to and in accordance with the APA.

It may be kept in mind that a particular assessment year may involve many international transactions and not all international

transactions may be covered international transactions under the APA. The assessment of international transactions which are not covered international transactions under APA will not be affected by entering into of an APA.

In case where a reference to TPO is pending with respect to any covered transaction of APA, the assessing officer shall inform the TPO about the filing of modified return in respect of that transaction. This communication shall be sent immediately after filling of the modified return by the assessee with respect to such covered transaction. On receipt of such communication, the Transfer Pricing Officer shall not proceed further for auditing the covered transaction. Similarly, if the covered transaction is pending before the Dispute Resolution Panel (DRP), the assessing officer shall inform the DRP immediately after filing of modified return by the assessee. On receipt of communication from the assessing officer, the DRP shall not give any direction with respect to the covered transaction. In this regard the attention is invited to Rule 10P(6) which states that the regular audit of the covered transactions shall not be undertaken by the TPO if an agreement has been entered into under Rule 10L except where the agreement has been cancelled under Rule 10R.

The procedures consequent to the filing of the modified return in relation to the covered transaction for the assessment years, included in the term of the APA, would include:

- (i) Withdrawal of any appeal pending before the CIT(Appeal) by the assessee with respect to the covered transaction(s);
- (ii) Withdrawal of appeal filed before the ITAT/ HC/ SC by the department as well as the assessee with respect to the covered transaction(s);
- (iii) Withdrawal of objections filed before the DRP by the assessee with respect to the covered transaction(s) ,

as the assessing officer would not be required to make any adjustment for the covered transaction except in accordance with APA.

6.12 ANNUAL COMPLIANCE REPORT:

The assessee is required to file annual compliance report in quadruplicate in Form 3CEF to DGIT(International Taxation) for each year covered in the agreement. Rule 10O governs the filing of annual compliance report by the assessee. It is required to be filed within 30 days of the due date of filing the income tax return for the assessment relevant to the previous year or within 90 days of entering into an agreement, whichever is later. The filing of Annual Compliance report is in addition to the modified return that is required to be filed.

6.13 COMPLIANCE AUDIT OF THE AGREEMENT:

The compliance audit shall be carried out by the jurisdictional TPO in accordance with Rule 10P. The compliance audit will be carried out only to ensure compliance with the terms of the APA, including satisfaction of the critical assumptions and consistency of the application of the TPM. The TPO has to submit the report to the DGIT in case of unilateral APA and to the competent authority in India in case of bilateral or multilateral APA

6.14 CANCELLATION AND REVISION OF APA:

The cancellation and revision of APA may be carried out in accordance with Rule 10Q and 10R respectively. In case of revised agreement, the procedure as regard to original agreement shall be repeated. That is the taxpayer will be required to file the modified return for the period after the revision of the APA within three months and the assessing officer will reassess or recompute the

total income of the relevant assessment year having regard to and in accordance with the revised agreement. This is illustrated with an example. Let us assume that APA is signed with respect to A. Yrs 2014-2015 to 2018-2019. The Agreement is signed on 31 December 2014 by which time the return of income for A. Yr 2014-2015 has already been filed in accordance with section 139 of the Act. The assessee is required to file the modified return for A. Yr 2014-2015 by 31 March 2015. Subsequently, the APA is revised for A. Yrs 2016-2017 to 2018-2019. The revised APA is signed on 31 December 2016, by which time the return of A. Yr 2016-2017 has already been filed in accordance with the provision of section 139 and in compliance of the terms of the pre-revised APA. Now the assessee is required to file the modified return with respect to the A.Yr 2016-2017, by 31 March 2017, to give effect to the terms of the revised APA.

7. WITHDRAWAL OF AN APA APPLICATION:

The applicant can withdraw APA application by filing a request in form 3CEE at any time before the finalization of the term of the agreement. The fee paid shall not be refunded on withdrawal of application. (i.e before sending of the draft agreement by the DGIT to the Board in case of unilateral APA request and before sending of the MAP arrangement by the competent authority to the Board in case of bilateral or multilateral APA request)

8. APPLICANT DISCLOSURE OBLIGATION

- Any facts, information and statement submitted by an applicant in connection with APA request along with application or during processing of application must be true, correct and accurate. If APA team or competent authority requires additional information for processing and negotiation of agreement, the

applicant is required to provide such information within the time requested.

- While the APA request is pending, the applicant has an obligation to update all the material facts and information filed along with application on a timely basis.
- Failure to provide all the requisite information for process involved in the APA, or on requests by APA team or the competent authority, can cause significant delay and may result in non-finalization of APA.

9. CRITICAL ASSUMPTIONS

- (1) The term “critical assumptions” is defined in Rule 10F(f). It means the factors and assumptions that are so critical and significant that neither party entering into an agreement will continue to be bound by the agreement if any of those factors or assumptions is changed. APA will define critical assumptions in the agreement. These critical assumptions will depend on the facts of each case.
- (2) Decisions about an ALP or the suitability of a particular transfer pricing methodology would be made on the basis of the facts existing at the time. If particular circumstances are held as central to the decision, any changes in them would materially affect the ALP or the suitability of the transfer pricing methodology or the way it would need to be applied. These circumstances would need to be addressed by the taxpayer and be included in the APA request in Form No.3CED as ‘critical assumptions’. Critical assumptions should be noted even where they are not within the applicant’s control.

- (3) The terms and conditions of the APA will specify the critical assumptions. Critical assumptions may include operational, legal, tax, financial, accounting and economic conditions or assumptions.
- (4) The TPO would at time of compliance audit also determine whether critical assumptions as mentioned in the agreement are met.
- (5) In case of breach of critical assumptions the assessee or the TPO should notify, at the earliest, about such a breach to the DGIT (Int. Tax) in case of unilateral APA or to the Competent Authority in case of Bilateral/Multilateral APA along with supporting documents. In these circumstances, the assessee may request for future course of action as to whether the APA has to be revised or cancelled.
- (6) The Board or the DGIT(Int. Tax) or the competent authority may also on its own, having noticed any breach of critical assumptions , seek to revise the APA or cancel the APA after due information and consultation with the taxpayer
- (7) In case of breach of critical assumptions if the APA cannot be revised to the acceptance of all the parties (including the competent authority of other country/ countries) to the APA then the APA would be liable to be cancelled.

10. LEGAL EFFECT OF THE APA

- (1) An APA is binding on the assessee who entered into an APA in relation to the covered transactions and on the Commissioner of Income-tax and other income-tax authorities subordinate to him in respect of that

assessee and that transaction. If the assessee complies with the terms and conditions of the APA, the tax administration will not contest the ALP or the application of the TPM to the covered transactions in the APA in the case of the assessee for the years to which the APA specifically relates.

- (2) The APA shall not be binding on the assessee or the Commissioner, if-
- There is a change in law or facts having bearing on the agreement so entered [section 92CC(6) of the Act];
 - The agreement has been obtained by the assessee by fraud or misrepresentation of facts-the agreement void ab-initio [section 92CC(7) of the Act];
 - There is any change in any of the critical assumptions or there is failure on the part of the assessee to meet conditions subject to which the agreement has been entered into-the agreement can be revised or cancelled[Rule 10M(4)];
 - The agreement is cancelled under Rule 10R.

11. RENEWING AN APA

- (a) A new application has to be filed by the taxpayer after the expiry of the APA term with the DGIT (Intl. Taxation) and the competent authority in India as the case may be.
- (b) The renewal request will follow the same forms and procedures as in initial APA request except that pre-filing consultation is not required.

- (c) The renewal application would be treated as a fresh application and procedure and fee would apply accordingly.
- (d) The renewal request may be filed well in advance before the expiration of the terms of the existing APA.

Annexure A

Addresses of authorities

Office of the DGIT (International Taxation)

3rd Floor, Block E2,
S.P Mukherjee Civic Centre,
Minto Road, New Delhi-110002
Tel:+91-11-23234207

Office of Joint Secretary (FT&TR I)

Room 803 “C” Wing, 8th floor
Hudco Vishala Building
Bhikaji Cama Place
New Delhi-110066
Tel: +91-11-26108402

Offices of APA team

New Delhi

5thFloor,”B” block, SP Mukherjee Civic Centre,
Minto Road, New Delhi-110002
Tel: +91-11-23212513

Mumbai

9th floor, KG Mittal Ayurvedic Hospital,
Near Taraporewala Aquarium,
Charni Road, Mumbai-400004

Bengaluru

5th floor, Unity Building Annexe, Mission Road,
Bengaluru, Karnataka-560027
Tel:+91-80-22221178

Stage	Form	Authority
Pre-filing consultation	Form 3CEC	Authority for filing: DGIT (International Taxation)
Formal APA application	Form 3CED	Authority for filing: DGIT (International Taxation) in case of unilateral Competent Authority of case of India in bilateral/ multilateral
Withdrawal of APA application	Form 3CEE	Authority for filing: DGIT (International Taxation) in case of unilateral Competent Authority of India in case of bilateral/ multilateral
Execution and monitoring of agreement	Form 3CEF	Authority for filing: DGIT (International Taxation) in case of unilateral
Revising an APA	No format	Request either to: DGIT (International Taxation) in case of unilateral Competent Authority of India in case of bilateral/ multilateral
Renewal of APA	Fresh application	Request either to: DGIT (International Taxation) in case of unilateral Competent Authority of India in case of bilateral/ multilateral

Appendix 1: Section 92CC and 92CD of the Income Tax Act 1961

Appendix 2: Notification no. 36/2012 dated 30.08.2012 containing Rules 10F to 10T, 44GA in Income Tax Rules 1962 and Form no. 3CEC, Form no. 3CED, Form no. 3CEE and Form no. 3CEF.

Appendix 1: Section 92CC of the Income Tax Act 1961 on Advance Pricing Agreement

Advance pricing agreement.

92CC. *(1)The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person, determining the arm's length price or specifying the manner in which arm's length price is to be determined, in relation to an international transaction to be entered into by that person.*

- (2) The manner of determination of arm's length price referred to in sub-section (1), may include the methods referred to in sub-section (1) of section 92C or any other method, with such adjustments or variations, as may be necessary or expedient so to do.*
- (3) Notwithstanding anything contained in section 92C or section 92CA, the arm's length price of any international transaction, in respect of which the advance pricing agreement has been entered into, shall be determined in accordance with the advance pricing agreement so entered.*
- (4) The agreement referred to in sub-section (1) shall be valid for such period not exceeding five consecutive previous years as may be specified in the agreement.*
- (5) The advance pricing agreement entered into shall be binding—*
 - (a) on the person in whose case, and in respect of the transaction in relation to which, the agreement has been entered into; and*

- (b) *on the Commissioner, and the income-tax authorities subordinate to him, in respect of the said person and the said transaction.*
- (6) *The agreement referred to in sub-section (1) shall not be binding if there is a change in law or facts having bearing on the agreement so entered.*
- (7) *The Board may, with the approval of the Central Government, by an order, declare an agreement to be void abinitio, if it finds that the agreement has been obtained by the person by fraud or misrepresentation of facts.*
- (8) *Upon declaring the agreement void ab initio,—*
 - (a) *all the provisions of the Act shall apply to the person as if such agreement had never been entered into; and*
 - (b) *notwithstanding anything contained in the Act, for the purpose of computing any period of limitation under this Act, the period beginning with the date of such agreement and ending on the date of order under sub-section (7) shall be excluded:*

Provided *that where immediately after the exclusion of the aforesaid period, the period of limitation, referred to in any provision of this Act, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.*

- (9) *The Board may, for the purposes of this section, prescribe a scheme specifying therein the manner, form, procedure and any other matter generally in respect of the advance pricing agreement.*

- (10) *Where an application is made by a person for entering into an agreement referred to in sub-section (1), the proceeding shall be deemed to be pending in the case of the person for the purposes of the Act.*

Effect to advance pricing agreement.

92CD. *(1) Notwithstanding anything to the contrary contained in section 139, where any person has entered into an agreement and prior to the date of entering into the agreement, any return of income has been furnished under the provisions of section 139 for any assessment year relevant to a previous year to which such agreement applies, such person shall furnish, within a period of three months from the end of the month in which the said agreement was entered into, a modified return in accordance with and limited to the agreement.*

- (2) *Save as otherwise provided in this section, all other provisions of this Act shall apply accordingly as if the modified return is a return furnished under section 139.*
- (3) *If the assessment or reassessment proceedings for an assessment year relevant to a previous year to which the agreement applies have been completed before the expiry of period allowed for furnishing of modified return under sub-section (1), the Assessing Officer shall, in a case where modified return is filed in accordance with the provisions of sub-section (1), proceed to assess or reassess or recompute the total income of the relevant assessment year having regard to and in accordance with the agreement.*
- (4) *Where the assessment or reassessment proceedings for an assessment year relevant to the previous year to which the agreement applies are pending on the date of filing of modified return in accordance with the provisions of*

sub-section (1), the Assessing Officer shall proceed to complete the assessment or reassessment proceedings in accordance with the agreement taking into consideration the modified return so furnished.

(5) Notwithstanding anything contained in section 153 or section 153B or section 144C,—

(a) the order of assessment, reassessment or recomputation of total income under sub-section (3) shall be passed within a period of one year from the end of the financial year in which the modified return under sub-section (1) is furnished;

(b) the period of limitation as provided in section 153 or section 153B or section 144C for completion of pending assessment or reassessment proceedings referred to in sub-section (4) shall be extended by a period of twelve months.

(6) For the purposes of this section,—

(i) “agreement” means an agreement referred to in sub-section (1) of section 92CC;

(ii) the assessment or reassessment proceedings for an assessment year shall be deemed to have been completed where—

(a) an assessment or reassessment order has been passed; or

(b) no notice has been issued under sub-section (2) of section 143 till the expiry of the limitation period provided under the said section.]

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
[CENTRAL BOARD OF DIRECT TAXES]

Notification

New Delhi, the 30th day of August, 2012

INCOME-TAX

S.O.2005(E).- In exercise of the powers conferred by sub-section (9) of section 92CC read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:-

1. (1). These rules may be called the Income-tax (10th Amendment) Rules, 2012.
(2). They shall come into force on the date of their publication in the official Gazette.
2. In the Income-tax Rules, 1962 (hereafter referred to as the principal rules), -
 - (a) after rule 10E, the following rule shall be inserted, namely:-

“Advance Pricing Agreement Scheme

Meaning of expressions used in matters in respect of advance pricing agreement.

10F For the purposes of this rule and rules 10G to 10T,–

- (a) ‘agreement’ means an advance pricing agreement entered into between the Board and the applicant, with the approval of the Central Government, as referred to in sub-section (1) of section 92CC of the Act;
- (b) “application” means an application for advance pricing agreement made under rule 10 I ;
- (c) “bilateral agreement” means an agreement between the Board and the applicant, subsequent to, and based on, any agreement referred to in rule 44 GA between the competent authority in India with the competent authority in the other country regarding the most appropriate transfer pricing method or the arms’ length price;
- (d) “competent authority in India” means an officer authorised by the Central Government for the purpose of discharging the functions as such for matters in respect of any agreement entered into under section 90 or 90A of the Act;
- (e) “covered transaction” means the international transaction or transactions for which agreement has been entered into;
- (f) “critical assumptions” means the factors and assumptions that are so critical and significant that neither party entering into an agreement will continue to be bound by the agreement, if any of the factors or assumptions is changed;

- (g) “most appropriate transfer pricing method” means any of the transfer pricing method, referred to in sub-section (1) of section 92C of the Act, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or function performed by such persons or such other relevant factors prescribed by the Board under rule 10B and 10C;
- (h) “multilateral agreement” means an agreement between the Board and the applicant, subsequent to, and based on, any agreement referred to in rule 44GA between the competent authority in India with the competent authorities in the other countries regarding the most appropriate transfer pricing method or the arms’ length price;
- (i) “tax treaty” means an agreement under section 90, or section 90A, of the Act for the avoidance of double taxation;
- (j) “team” means advance pricing agreement team consisting of income-tax authorities as constituted by the Board and including such number of experts in economics, statistics, law or any other field as may be nominated by the Director General of Income Tax (International Taxation);
- (k) “unilateral agreement” means an agreement between the Board and the applicant which is neither a bilateral nor multilateral agreement.

Persons eligible to apply

10G Any person who –

- (i) has undertaken an international transaction; or

(ii) is contemplating to undertake an international transaction,
shall be eligible to enter into an agreement under these rules.

Pre-filing Consultation

- 10H (1) Every person proposing to enter into an agreement under these rules shall, by an application in writing, make a request for a pre-filing consultation.
- (2) The request for pre-filing consultation shall be made in Form No. 3 CEC to the Director General of Income Tax (International Taxation).
- (3) On receipt of the request in Form No. 3 CEC, the team shall hold pre-filing consultation with the person referred to in rule 10G.
- (4) The competent authority in India or his representative shall be associated in pre-filing consultation involving bilateral or multilateral agreement.
- (5) The pre-filing consultation shall, among other things,-
- (i) determine the scope of the agreement;
 - (ii) identify transfer pricing issues;
 - (iii) determine the suitability of international transaction for the agreement;
 - (iv) discuss broad terms of the agreement.
- (6) The pre-filing consultation shall—
- (i) not bind the Board or the person to enter into an agreement or initiate the agreement process;
 - (ii) not be deemed to mean that the person has applied for entering into an agreement.

Application for advance pricing agreement

- 10 I (1) Any person, who has entered into a pre-filing consultation as referred to in rule 10H may, if desires to enter into an agreement furnish an application in Form No. 3 CED alongwith the requisite fee.
- (2) The application shall be furnished to Director General of Income Tax (International Taxation) in case of unilateral agreement and to the competent authority in India in case of bilateral or multilateral agreement.
- (3) Application in Form No. 3 CED may be filed by the person referred to in rule 10G at any time—
- (i) before the first day of the previous year relevant to the first assessment year for which the application is made, in respect of transactions which are of a continuing nature from dealings that are already occurring; or
- (ii) before undertaking the transaction in respect of remaining transactions.
- (4) Every application in Form No. 3 CED shall be accompanied by the proof of payment of fees as specified in sub-rule (5).
- (5) The fees payable shall be in accordance with following table based on the amount of international transaction entered into or proposed to be undertaken in respect of which the agreement is proposed:

Amount of international transaction entered into or proposed to be undertaken in respect of which agreement is proposed during the proposed period of agreement.	Fee
--	-----

Amount not exceeding Rs. 100 crores	10 lacs
Amount not exceeding Rs. 200 crores	15 lacs
Amount exceeding Rs. 200 crores	20 lacs

Withdrawal of application for agreement

- 10 J (1) The applicant may withdraw the application for agreement at any time before the finalisation of the terms of the agreement.
- (2) The application for withdrawal shall be in Form No. 3CEE.
- (3) The fee paid shall not be refunded on withdrawal of application by the applicant.

Preliminary processing of application

- 10 K (1) Every application filed in Form No. 3CED shall be complete in all respects and accompanied by requisite documents.
- (2) If any defect is noticed in the application in Form No. 3CED or if any relevant document is not attached thereto or the application is not in accordance with understanding reached in pre-filing consultation referred to in rule 10H, the Director General of Income-tax (International Taxation) (for unilateral agreement) and competent authority in India (for bilateral or multilateral agreement) shall serve a deficiency letter on the applicant before the expiry of one month from the date of receipt of the application.
- (3) The applicant shall remove the deficiency or modify the application within a period of fifteen days from

the date of service of the deficiency letter or within such further period which, on an application made in this behalf, may be extended, so however, that the total period of removal of deficiency or modification does not exceed thirty days.

- (4) The Director General of Income Tax (International Taxation) or the competent authority in India, as the case may be, on being satisfied, may pass an order providing that application shall not be allowed to be proceeded with if the application is defective and defect is not removed by applicant in accordance with sub-rule (3).
- (5) No order under sub-rule (4) shall be passed without providing an opportunity of being heard to the applicant and if an application is not allowed to be proceeded with, the fee paid by the applicant shall be refunded.

Procedure

- 10L (1) If the application referred to in rule 10K has been allowed to be proceeded with, the team or the competent authority in India or his representative shall process the same in consultation and discussion with the applicant in accordance with provisions of this rule.
- (2) For the purpose of sub-rule (1), it shall be competent for the team or the competent authority in India or its representative to— (i) hold meetings with the applicant on such time and date as it deem fit;
- (ii) call for additional document or information or material from the applicant;

- (iii) visit the applicant's business premises; or
 - (iv) make such inquiries as it deems fit in the circumstances of the case.
- (3) For the purpose of sub-rule (1), the applicant may, if he considers it necessary, provide further document and information for consideration of the team or the competent authority in India or his representative.
- (4) For bilateral or multilateral agreement, the competent authority shall forward the application to Director General of Income Tax (International Taxation) who shall assign it to one of the teams.
- (5) The team, to whom the application has been assigned under sub-rule (4), shall carry out the enquiry and prepare a draft report which shall be forwarded by the Director General of Income Tax (International Taxation) to the competent authority in India.
- (6) If the Applicant makes a request for bilateral or multilateral agreement in its application, the competent authority in India shall in addition to the procedure provided in this rule invoke the procedure provided in the rule 44 GA.
- (7) The Director General of Income Tax (International Taxation) (for unilateral agreement) or the competent authority in India (for bilateral or multilateral agreement) and the applicant shall prepare a proposed mutually agreed draft agreement enumerating the result of the process referred to in sub-rule (1) including the effect of the arrangement referred to in sub-rule (5) of rule 44GA which has been accepted by the applicant in accordance with sub-rule (8) of the said rule.

- (8) The agreement shall be entered into by the Board with the applicant after its approval by the Central Government.
- (9) Once an agreement has been entered into the Director General of Income Tax (International Taxation) or the competent authority in India, as the case may be, shall cause a copy of the agreement to be sent to the Commissioner of Income Tax having jurisdiction over the assessee.

Terms of the agreement

- 10 M (1) An agreement may among other things, include –
- (i) the international transactions covered by the agreement;
 - (ii) the agreed transfer pricing methodology, if any;
 - (iii) determination of arm's length price, if any;
 - (iv) definition of any relevant term to be used in items (ii) or (iii);
 - (v) critical assumptions;
 - (vi) the conditions if any other than provided in the Act or these rules.
- (2) The agreement shall not be binding on the Board or the assessee if there is a change in any of critical assumptions or failure to meet conditions subject to which the agreement has been entered into.
- (3) The binding effect of agreement shall cease only if any party has given due notice of the concerned other party or parties.

- (4) In case there is a change in any of the critical assumptions or failure to meet the conditions subject to which the agreement has been entered into, the agreement can be revised or cancelled, as the case may be.
- (5) The assessee which has entered into an agreement shall give a notice in writing of such change in any of the critical assumptions or failure to meet conditions to the Director General of Income Tax (International Taxation) as soon as it is practicable to do so.
- (6) The Board shall give a notice in writing of such change in critical assumptions or failure to meet conditions to the assessee, as soon as it comes to the knowledge of the Board.
- (7) The revision or the cancellation of the agreement shall be in accordance with rules 10Q and 10R respectively.

Amendments to Application

- 10 N
- (1) An applicant may request in writing for an amendment to an application at any stage, before the finalisation of the terms of the agreement.
 - (2) The Director General of Income Tax (International Taxation) (for unilateral agreement) or the competent authority in India (for bilateral or multilateral agreement) may, allow the amendment to the application, if such an amendment does not have effect of altering the nature of the application as originally filed.
 - (3) The amendment shall be given effect only if it is accompanied by the additional fee, if any, necessitated

by such amendment in accordance with fee as provided in rule 10 I.

Furnishing of Annual Compliance Report

- 10 O (1) The assessee shall furnish an annual compliance report to Director General of Income Tax (international Taxation) for each year covered in the agreement.
- (2) The annual compliance report shall be in Form 3CEF.
- (3) The annual compliance report shall be furnished in quadruplicate, for each of the years covered in the agreement, within thirty days of the due date of filing the income tax return for that year, or within ninety days of entering into an agreement, whichever is later.
- (4) The Director General of Income Tax (International Taxation) shall send one copy of annual compliance report to the competent authority in India, one copy to the Commissioner of Income Tax who has the jurisdiction over the income-tax assessment of the assessee and one copy to the Transfer Pricing Officer having the jurisdiction over the assessee.

Compliance Audit of the agreement

- 10 P (1) The Transfer Pricing Officer having the jurisdiction over the assessee shall carry out the compliance audit of the agreement for each of the year covered in the agreement.
- (2) For the purposes of sub-rule(1), the Transfer Pricing Officer may require –

- (i) the assessee to substantiate compliance with the terms of the agreement, including satisfaction of the critical assumptions, correctness of the supporting data or information and consistency of the application of the transfer pricing method;
 - (ii) the assessee to submit any information, or document, to establish that the terms of the agreement has been complied with.
- (3) The Transfer Pricing Officer shall submit the compliance audit report, for each year covered in the agreement, to the Director General of Income Tax (International Taxation) in case of unilateral agreement and to the competent authority in India, in case of bilateral or multilateral agreement, mentioning therein his findings as regards compliance by the assessee with terms of the agreement.
- (4) The Director General of Income Tax (International Taxation) shall forward the report to the Board in a case where there is finding of failure on part of assessee to comply with terms of agreement and cancellation of the agreement is required.
- (5) The compliance audit report shall be furnished by the Transfer Pricing Officer within six months from the end of the month in which the Annual Compliance Report referred to in rule 10 O is received by the Transfer Pricing Officer.
- (6) The regular audit of the covered transactions shall not be undertaken by the Transfer Pricing Officer if an agreement has been entered into under rule 10L except where the agreement has been cancelled under rule 10R.

Revision of an agreement

- 10 Q (1) An agreement, subsequent to it having been entered into, may be revised by the Board, if:-
- (a) there is a change in critical assumptions or failure to meet a condition subject to which the agreement has been entered into;
 - (b) there is a change in law that modifies any matter covered by the agreement but is not of the nature which renders the agreement to be non binding ; or
 - (c) there is a request from competent authority in the other country requesting revision of agreement, in case of bilateral or multilateral agreement.
- (2) An agreement may be revised by the Board either *suo-moto* or on request of the assessee or the competent authority in India or the Director General of Income Tax (International Taxation).
- (3) Except when the agreement is proposed to be revised on the request of the assessee, the agreement shall not be revised unless an opportunity of being heard has been provided to the assessee and the assessee is in agreement with the proposed revision.
- (4) In case the assessee is not in agreement with the proposed revision the agreement may be cancelled in accordance with rule-10R.
- (5) In case the Board is not in agreement with the request of the assessee for revision of the agreement, the Board shall reject the request in writing giving reason for such rejection.

- (6) For the purpose of arriving at the agreement for the proposed revision, the procedure provided in rule 10 L may be followed so far as they apply.
- (7) The revised agreement shall include the date till which the original agreement is to apply and the date from which the revised agreement is to apply.

Cancellation of an agreement

- 10 R (1) An agreement shall be cancelled by the Board for any of the following reasons:
- (i) the compliance audit referred to in rule 10P has resulted in the finding of failure on the part of the assessee to comply with the terms of the agreement;
 - (ii) the assessee has failed to file the annual compliance report in time;
 - (iii) the annual compliance report furnished by the assessee contains material errors; or
 - (iv) the agreement is to be cancelled under sub-rule (4) of rule 10Q.
- (2) The Board shall give an opportunity of being heard to the assessee, before proceeding to cancel an application.
- (3) The competent authority in India shall communicate with the competent authority in the other country or countries and provide reason for the proposed cancellation of the agreement in case of bilateral or multilateral agreement.

- (4) The order of cancellation of the agreement shall be in writing and shall provide reasons for cancellation and for non acceptance of assessee's submission, if any.
- (5) The order of cancellation shall also specify the effective date of cancellation of the agreement, where applicable.
- (6) The order under the Act, declaring the agreement as *void ab initio*, on account of fraud or misrepresentation of facts, shall be in writing and shall provide reason for such declaration and for non acceptance of assessee's submission, if any.
- (7) The order of cancellation shall be intimated to the Assessing Officer and the Transfer Pricing Officer, having jurisdiction over the assessee.

Renewing an agreement

10 S Request for renewal of an agreement may be made as a new application for agreement, using the same procedure as outlined in these rules except pre filing consultation as referred to in rule 10H.

Miscellaneous

- 10 T
- (1) Mere filing of a application for an agreement under these rules shall not prevent the operation of Chapter X of the Act for determination of arms' length price under that Chapter till the agreement is entered into.
 - (2) The negotiation between the competent authority in India and the competent authority in the other country or countries, in case of bilateral or multilateral

agreement, shall be carried out in accordance with the provisions of the tax treaty between India and the other country or countries.”.

- (b) after rule 44G of the principal rules, the following rule shall be inserted, namely.-

“Procedure to deal with requests for bilateral or multilateral advance pricing agreements.

- 44GA(1)** Where a person has made request for a bilateral or multilateral advance pricing agreement in an application filed in Form No. 3 CED in accordance with rule 10 I, the request shall be dealt with subject to provisions of this rule.
- (2) The process for bilateral or multilateral advance pricing agreement shall not be initiated unless the associated enterprise situated outside India has initiated process of advance pricing agreement with the competent authority in the other country.
- (3) The competent authority in India shall, on intimation of request of the applicant for a bilateral or multilateral agreement, consult and ascertain willingness of the competent authority in other country or countries, as the case may be, for initiation of negotiation for this purpose.
- (4) In case of willingness of the competent authority in other country or countries, as the case may be, the competent authority in India shall enter into negotiation in this behalf and endeavour to reach a set of terms which are acceptable to the competent authority in India and the competent authority in the other country or countries, as the case may be.

- (5) In case of an agreement after consultation, the competent authority in India shall formalise a mutual agreement procedure arrangement with the competent authority in other country or countries, as the case may be, and intimate the same to the applicant.
 - (6) In case of failure to reach agreement on such terms as are mutually acceptable to parties mentioned in sub-rule 4, the applicant shall be informed of the failure to reach an agreement with the competent authority in other country or countries.
 - (7) The applicant shall not be entitled to be part of discussion between competent authority in India and the competent authority in the other country or countries, as the case may be; however the applicant can communicate or meet the competent authority in India for the purpose of entering into an advance pricing agreement.
 - (8) The applicant shall convey acceptance or otherwise of the agreement within thirty days of it being communicated.
 - (9) The applicant, in case the agreement is not acceptable may at its option continue with process of entering into an advance pricing agreement without benefit of mutual agreement process or withdraw application in accordance with rule 10J.”.
- (c) In Appendix-II of the principal rules, after Form No. 3 CEB, the following Forms shall be inserted, namely:-

**“Form No. 3CEC
(See sub-rule (2) of rule 10 H)
Application for a pre-filing meeting**

To,

The Director General of Income Tax (International Taxation)
New Delhi.

Sir/Madam,

I propose to apply for an Advance Pricing Agreement. In this regard I give below the necessary particulars for a pre-filing meeting:

1. Particulars of the applicant:
 - a. Full name of the applicant:
 - b. Permanent account number:
 - c. Address of the applicant:
 - d. Location(s) of the business enterprises in India:
 - e. Details of applicant authorized representative:
 - f. Address for communication:
 - g. Email id and the contact numbers of the person with whom correspondence is required to be made:
2. The global structure of the applicant's group and the industry in which it operates:

3. Names of all the associated enterprises (AE's) with which international transactions have been either undertaken or proposed to be undertaken:
4. Name of country(s) in which (AE's) is located:
5. Business model and overview of the applicant's business operations in prior 3 years:
6. Functional and Risk Profile of the applicant and associated enterprises:
7.
 - a. Details of all the international transactions proposed to be covered in the APA:
 - b. Value of such international transactions covered under Transfer Pricing audit in prior 3 years:
8. Details of all other international transactions not proposed to be covered in the APA:
9. Type of APA proposed:
 - a. Are you proposing a unilateral APA? Yes/ No
 - b. If yes the reasons for the same:
 - c. Are you proposing a Bilateral or Multilateral APA? Yes/ No
 - d. If yes, provide the names of the country (ies) in which the associated enterprises are located:
10. Number of years for which APA is proposed to be applied:
11. Proposed transfer pricing methodology to be used with supporting documentation:
12. Identification of third party comparable:

13. Details of arm's length price or profit level indicator:
14. Details of critical assumptions, that the applicant considers, may affect the business or the transfer pricing methodology:
15. The history of the Competent Authority issues, requests, and settlements:
16. History of transfer pricing audits, assessments and present status of appeals:
17. Names and designation of the representatives who would be appearing before the authorities for pre-filing discussions:

Any other relevant information:

I declare that to the best of my knowledge and belief, the information furnished in the application is correct and truly stated.

Yours faithfully,

Place:

Date:

Applicant

Notes:

1. The application must be filed in triplicate.
2. If the space provided for answering any item in the application is found insufficient, separate enclosures may be used for the purpose. These enclosures should be signed by the person authorised to sign the application.
3. In case the pre-filing meeting is requested on an anonymous basis, no names of the applicant or associated enterprises are to be given.

4. With regard to details of all the international transactions proposed to be covered in the APA, please furnish agreements with associated enterprises, if any, relating to the international transactions along with the reasons for covering these transactions in APA.
5. In case the applicant is applying for a Bilateral or Multilateral APA, the applicant must state whether India has an existing comprehensive DTAA with such country (ies). It may also be verified whether such country (ies) has APA program in place?
6. In case the pre-filing request is on anonymous basis, details of the representatives of the applicant who would be appearing before the authorities for pre-filing discussions must be furnished.

Form No. 3 CED
(See sub-rule (1) of rule 10 I)
Application for an Advance Pricing
Agreement

To,
The Competent Authority of India
or
Director General of Income Tax (International Taxation)
New Delhi
Sir/Madam,

This is to state that(Name of the Applicant).....wishes to negotiate an APA with the Central Board of Direct Taxes. I am submitting herewith the necessary particulars hereunder:

I. General

1. Particulars of the applicant:
 - a. Full name of the applicant:
 - b. Permanent Account Number:
 - c. Address of the applicant:
 - d. Address for communication:
 - e. Location(s) of the business enterprises in India:

- f. Email id and the contact numbers of the person with whom correspondence is required to be made:

- g. Names and designation of the authorised representatives who would be appearing before the authorities for negotiations of the APA:

2. Whether pre-filing discussions were sought by the applicant? If yes, please furnish:

- a. Date of application for pre-filing meeting:
- b. Date of pre-filing meeting(s) with the APA Team:

3. Name(s) of the Associated Enterprises with whom the APA is requested for:

4. Name of the country(ies) in which the associated enterprises mentioned in (3) above are located:

5. a. Are you applying for a Unilateral, Bilateral or Multilateral APA: Unilateral/Bilateral/Multilateral

- b. 4If you are applying for a Bilateral or Multilateral
APA, have the Associated Yes/ No
Enterprises applied for APA with the Competent
Authority in the country of its residence?:

- c. If yes, enclose evidence of furnishing such application with the other Competent Authority:**

- d. If no, by what date the application is proposed to be furnished to the other Competent Authority:

- e. If the application is for Unilateral APA and it involves international transactions with an entity located in a jurisdiction with which India has an agreement under section 90 or 90A of the Act for

avoidance of double taxation, kindly provide explanation for why the request is not for bilateral or multilateral APA.

6. Particulars of Fee paid by the applicant: Amount in Rs.
Challan No:
Dated:
7. Period of APA proposed along with the date from which APA is sought to be applicable:
8. Details of the international transactions proposed to be covered in the APA (Description of the property or services to which the proposed APA relates):
9. Proposed Transfer Pricing Method(s):
10. Proposed terms and conditions, and critical assumptions, for the APA:
11. History and background of the applicant and the associated enterprise:
12. General description of business and products/services:
13. Multinational structure, organizational arrangement, operational set-up, including major transaction flows:
14. Identify all other transaction flows of the multinational enterprise (volumes, directions and amounts) that may have an impact on the pricing of the covered transactions:
15. Functional currency for each entity and the currency which is used for the proposed transactions to be covered under the APA:
16. Accounting and costing system, policies, procedures, and practices, including any significant financial and tax accounting differences that may affect the TPMs:

II. Functional analysis

17. Detailed functional analysis of the applicant and all relevant entities with respect to the covered transactions:
18. Business strategies – current and future Budget statements, projections and business plans for future period covered by proposed APA, general business and industry trends, future direction/business: strategy including R&D, production, and marketing:
19. Financial and operating information, including corporate annual reports: (Please enclose copies)
 - a. Financial statements on a consolidated and unconsolidated basis for the prior five years, or the most recent business cycle as appropriate (Also provide interim statements for the most recent period prior to the date of the submission):
 - b. Income tax returns and related supporting schedules for the prior three years including Form 3CEB:
 - c. Operating data (gross and net) segmented by product line, division, unit, and geographic region for the prior five years, or the most recent business cycle as appropriate:
20. Relevant marketing and financial studies: (Please enclose copies)
21. Copies of all relevant intercompany agreements (pricing, cost sharing, licensing, distributorship etc.): (Please enclose copies)

III. Industry and market analyses

22. Detailed industry analysis:
 - a. Comprehensive description of industry as well as generally accepted industrial and commercial practices:
 - b. Identification and general profile of competitors, including respective market shares:
 - c. Industry and general business statistics, financial ratios, and analyses/studies:
 - d. Critical success factors:
23. Detailed analysis of the markets for all countries involved:

IV. Transfer pricing background

24. Discussion of relevant legal considerations and requirements as per:
 - a. Indian law
 - b. Foreign law
 - c. Income tax treaty between India and the foreign country
25. Discussion of transfer pricing methodologies, policies, and practices used by the applicant and associated enterprises for the covered transactions during the past three years, or business cycle as appropriate:
26. Discussion of relevant rulings, APAs/BAPAs/MAPAs, and other similar arrangements entered into with foreign tax administrations, for transfer pricing

or other valuation bases, or other taxation matters entered into by the applicant (or its associated enterprises) and Indian or foreign tax administrations:

27. Discussion of relevant Indian income tax audit, appeals, judicial and competent authority history:
28. Discussion of relevant foreign income tax audit, appeals, judicial and competent authority history:
29. Discussion of un-assessed taxation years (Indian and foreign) and related outstanding tax, legal, and other pertinent issues:

V. Transfer Pricing Methodology analysis:

30. Provide all information, including detailed analyses and explanations needed to establish the appropriateness of a proposed TPM, in accordance with transfer pricing regulations as contained in the Indian Income Tax law:
31. Discussion and analysis of each transfer pricing method, applied or rejected, for each covered transaction. In particular provide details on accepted or rejected internal comparables. (Indicate assumptions, strategies, and policies that may have influenced the acceptance or rejection of each TPM):
32. Summary of selected TPMs and secondary TPMs, if used as a sanity check:

VI. Impact of proposed TPMs

33. Application of the proposed TPMs to the covered transactions for the three prior years' operations or the most recent business cycle, and discuss results:

34. Application of the proposed TPMs to the time period applicant wants the APA to cover and discuss results:
35. Discussion and quantification of the variance, if any, from the methodology applied in section IV:

I declare that to the best of my knowledge and belief, the information furnished in the application is correct and truly stated.

Yours faithfully,

Place:

Date:

Applicant

Notes:

1. Bilateral or multilateral APA application shall be filed with the Competent Authority i.e. the Joint Secretary FT&TR-I, New Delhi in triplicate.
2. Unilateral APA application shall be filed with the Director General of Income Tax (International Taxation), New Delhi in triplicate.
3. If the space provided for answering any item in the application is found insufficient, separate enclosures may be used for the purpose. These enclosures should be signed by the person authorised to sign the application.
4. The fee shall be computed in accordance with the sub-rule (5) of Rule 10 I.
5. The application shall accompany with all the relevant documents.

Form No. 3 CEE
(See sub-rule (2) of rule 10 J)
Application for withdrawal of APA request

To,
The Competent Authority of India,
or
The Director General of Income Tax (International Taxation),
New Delhi.

Sir/Madam,

This is to state that(Name of the Taxpayer)
had filed an application for Unilateral/Bilateral/Multilateral APA
on ...dd/mm/yyyy. For the reasons stated below, the application is
hereby withdrawn:

.....
.....
.....
.....

I declare that to the best of my knowledge and belief, the
information furnished with regard to the withdrawal of the
application is correct and truly stated and I fully understand that
the fee paid by me under Rule 10 I of Income-tax Rules shall not
be refunded.

Yours faithfully,

Place:

Date:

Applicant

Notes:

- 1. The Withdrawal Application must be filed in triplicate.**
- 2. The Withdrawal Application shall be filed before the authority, before whom the application for APA was made.**
- 3. If the space provided for answering any item in the application is found insufficient, separate enclosures may be used for the purpose. These enclosures should be signed by the person authorised to sign the application.**

Form No. 3 CEF
(See sub-rule 2 of rule 10 O)
Annual Compliance Report on Advance
Pricing Agreement

To,
The Director General of Income Tax (International Taxation)
New Delhi

Sir/Madam,

I am submitting herewith Annual Compliance Report for the period beginning from dd/mm/yyyy to dd/mm/yyyy for Advance Pricing Agreement entered into between(Name of the taxpayer)and the Central Board of Direct Taxes, vide APA Reference No.dated. In this regard I give below the necessary information:

1. Particulars of the taxpayer:
 - a. Full name of the Taxpayer:
 - b. Permanent Account Number:
 - c. Address of the Taxpayer:
 - d. Address for communication:
 - e. Email id and the contact numbers of the person for correspondence:

2. Type of APA entered into:
 - a. Have you entered into a unilateral APA or Bilateral APA or Multilateral APA? Unilateral/Bilateral/Multilateral
 - b. If you have entered into a Bilateral APA or Multilateral APA, provide the names of the country (ies) with which the APA has been entered into.
3. Name(s) of the associated enterprise(s) with which international transactions have been undertaken during the year.
4. Details of Covered Transactions:
 - a. Nature of Covered Transaction:
 - b. Amount of Covered Transaction:
 - c. Country(ies) involved:
 - d. Agreed transfer pricing method:
 - e. Agreed profit level indicator:
 - f. Actual result achieved:
 - g. Adjustment required:
 - h. How the adjustment if any is reflected in the income tax return:
5. Are there any changes in the **business model** of the taxpayer in the current financial year as compared to:
 - a. Immediately preceding year:
 - b. Year immediately preceding to the first year to which APA is applicable:

6. Are there any changes in the **Functional and Risk Profile** of the taxpayer and the associated enterprises in the current financial year as compared to:
 - a. Immediately preceding year:
 - b. Year immediately preceding to the first year to which APA is applicable:
7. **Transfer pricing methodology:**
 - a. Agreed upon in the APA:
 - b. Followed during the year to justify the arm's length price of the international transactions covered by APA:
 - c. Variations between (a) and (b) above, if any:
 - d. Reasons for variations:
8. **Critical assumptions:**
 - a. Agreed upon in the APA:
 - b. Whether the critical assumptions have been met during the year or there has been a change in critical assumptions:
 - c. Reasons for not meeting the critical assumptions or change in critical assumptions:
9. Are there any changes in the organisational structure of the taxpayer group by way of amalgamation, acquisition, merger, demerger or sale of business or by any other methods? If yes, please furnish complete details thereof and show its impact on the critical assumptions agreed upon in the APA:

10. Specify all other terms and conditions agreed upon in the APA and show whether they have been complied with. In case of non compliance, furnish the reasons thereof:

I declare that I have examined the information contained in this APA Annual Compliance Report, including the accompanying documents, and to the best of my knowledge and belief, the facts presented within this report and accompanying documents are true, comprehensive and accurate.

Yours faithfully,

Place:

Date:

(Name of the Taxpayer)

Notes:

1. The Annual Compliance Report shall be filed in quadruplicate.
2. The Annual Compliance Report shall be filed for every year covered in the APA Separate report shall be filed for each year.
3. The information relating to “Covered Transaction” in item No. 4 above is required to be furnished for each covered transaction separately.
4. Please attach all documents as agreed upon in the APA to justify the transfer pricing methodology and computation of arm’s length price.”.

[Notification No. _36/2012/ F.No.133 /5/2012–SO (TPL)]

(ASHISH KUMAR)
Director (Tax Policy and Legislation)

Note. - The principal rules were published vide Notification No. S.O.969 (E), dated the 26th March, 1962 and last amended by Income-tax (9th Amendment) Rules, 2012 vide Notification S.O. No. 1979(E) dated _28-08-2012.

FAQs on India APA scheme

Experts in APA team

1. The APA rules provide that APA team would also include experts in economics, statistics, law or any other field as may be nominated by the DGIT (IT). Would such experts be included in each and every APA or would the need be analysed on a case to case basis? Further would such experts be from Government only or could they also be independent professional/industry experts of repute?

Answer: The Director General of Income Tax (International Taxation) has been given power to nominate experts. These experts would be taken from other Government Department and their services would be case specific and need based.

Pre-filing consultation

2. Whether application for pre-filing consultation needs to be filed in Delhi or the APA offices in Mumbai Bengaluru are also authorized to accept the applications?

Answer: The office of the DGIT(IT) is in Delhi and all the applications for pre-filing will have to be filed in Delhi. However, places of undertaking pre-filing consultations can be either Delhi, Mumbai or Bengaluru as per administrative convenience.

3. Is pre-filing consultation mandatory? Would there be any fee for the pre-filing consultations?

Answer: The pre-filing consultation is mandatory in each case before an APA application can be filed. There is no fee for pre-filing consultation.

4. Would there be a written communication to the taxpayer after the pre-filing consultation, containing details of the understanding reached in the pre-filing consultation?

Answer: The understanding reached at the end of the pre-filing consultation would be reduced in writing and also communicated to the taxpayer. This will form the basis of the formal application, as and when the taxpayer decides to enter into a formal APA. The copy of such written understanding may preferably be attached with the formal application.

5. Whether the pre-filing understanding would be limited to four items mentioned in rule 10H(5)?

Answer: The purpose of pre-filing consultation is to reach an understanding between the applicant and tax administration which will be useful for conclusion of an APA agreement. The items provided in rule 10H(5) are only indicative, the understanding could be on other relevant issues. This understanding could also be on the extent and nature of information that needs to be provided in the formal application.

6. How does a taxpayer achieve anonymity, given the significant level of information (including information on past audits, etc) required to be filed as part of the pre filing consultation?

Answer: In case of anonymous pre-filing consultation, the details that identify the applicant may be omitted. However,

the applicant or its representative is encouraged to provide a thorough explanation of the proposed international transaction in order to have a fair understanding of the APA requirement. In addition, the details not filed at the time of pre-filing would have to be filed at the time of formal APA application, in case the applicant decides to go for it.

7. Does the APA Authority have discretion to decline a pre filing meeting / APA application?

Answer: A request for pre-filing consultation cannot be refused. If a request of pre-filing is made, the meeting with taxpayer would be there for purpose of reaching an understanding. The APA application can be declined only on the grounds mentioned in the Rules; like removal of defects in the application or application not being in accordance with the understanding reached at the time of pre-filing meeting.

8. As the pre-filing discussions do not bind the APA team, can the APA team review/ revisit its initial conclusion on approach (assuming there is no change in facts or difference in understanding of facts)?

Answer: Pre-filing is designed to reach a preliminary understanding and it does not bind either the taxpayer/ applicant or the tax administration. The detailed analysis is undertaken only after filing of APA application. The agreement will be reached based on detailed analysis carried out after filing of APA application.

9. The pre-filing application (Form No. 3CEC) requires the applicant to explain reasons for proposing a unilateral APA instead of bi-lateral or multi-lateral. Is this a tacit manner to discourage unilateral APA requests? What could be some potential responses to this question?

Answer: The decision to opt for a unilateral APA or a bilateral APA is to be taken by the applicant. It is a fact that bilateral APA goes a step further than unilateral APA in ensuring tax certainty on both sides and avoiding the risk of double taxation. However, there is no particular preference for the tax administration. The applicant may prefer unilateral for the reason that there is no APA mechanism in the other DTAA country or for the reason that he wants only tax certainty with India or for any other reason.

10. If a taxpayer has more than one international transaction but desires to have an APA for only one of the transactions, can the APA Authority insist that all the transactions should be covered. Can the APA Authority insist that the sale of goods transaction should also be included in the APA as it would need to evaluate whether the pricing of goods already includes value of IP for which royalty is charged?

Answer: There cannot be any compulsion that taxpayer should enter into an APA in respect of all international transactions undertaken by him. However, if one international transaction is intrinsically linked with another international transaction in a manner that one cannot be benchmarked independently, the tax administration can inform the applicant that both the international transactions need to be covered in the application.

11. The APA rules are silent on the time line for the various steps in the APA process. Is there any target/ planned timeline for completion of various steps of APA Process e.g. scheduling of pre-filing meeting, filing of application after pre-filing, conclusion of unilateral and bilateral APA etc.? Would these matters be allowed to be discussed at the pre-filing consultation?

Answer: There is no fixed time line. However, the applicant and tax administration can discuss this during pre-filing consultations.

APA Application

12. The prescribed form for application for APA (Form No. 3 CED) contains an exhaustive list of information required to be filed by the taxpayer. Would all such information be necessary or need for such information can be discussed during pre-filing meeting?

Answer: The information as listed in the application form are required to be provided. However, in how much detail this information needs to be provided can be discussed during pre-filing consultation.

13. What would be the impact of concluded or pending MAPs/domestic litigation on APA negotiations?

Answer: The past history of a case is one of the several factors which are looked at and discussed in the process of negotiating an APA. It is not, therefore, mandatory that the same position as taken in past shall guide or decide the APA process. If the applicant believes that the facts of his case are different to what have been understood earlier by tax authorities or adjudicating authorities, he may file relevant evidence/information in support of his submission. The APA authorities would look at this evidences/information with open mind.

14. In case of new transactions having no historic transfer pricing issues, would the tax payer be still required to file audit history for transactions not proposed to be covered under the APA application?

Answer: It will be useful to have the full details of audit history so that APA authorities are aware of it. Though APA authorities are not bound by past history, it is necessary that they are aware of it and if the applicant is willing to file information in relation to past history, they are in a better frame of mind to understand and analyse this information.

Amendments to the APA Application

15. Amendment to the APA application can be made before finalization of terms of agreement and it should not alter the nature of application. What is the stage at which terms of the agreement would be treated as finalized? What are the probable amendments that would not have effect of altering the nature of the application?

Answer: The APA process is a consultative process designed to reach an agreement. Since taxpayer is involved in every stage of APA process, the stage of finalization of terms of agreement for APA would be within knowledge of the taxpayer. The APA application can be amended in case of unilateral APA before the draft agreement is sent by DGIT(Intl. Taxation) to the Board and in case of Bilateral Multilateral APA before the MAP arrangement is sent by Competent Authority to the Board.

The request for conversion of unilateral APA application to bilateral or multilateral APA application will not be taken to have the effect of altering the nature of the original application.

Filing fee

16. The filing fee is based on value of international transaction during the period of APA. How does one deal with a situation where the actual value at the end of the period is more (or less) than what was envisaged at the time of application (e.g. applicant makes a bona fide assumption that value of transaction over proposed APA period would be less than INR 100Cr. However, given the business growth, in the last year of the APA period the applicant realizes that the value could be over INR 100 Cr)? Can this also lead to a conclusion by the APA Authorities that taxpayer has failed to meet the critical assumptions forming basis of APA negotiation process?

Answer: The mere fact that the value of international transaction happens to be more than what was earlier projected would have no effect on the quantum of the fee which has already been paid.

17. How would the fee payable for an APA application be calculated if the transaction to be covered is part of a number of inter-linked transactions (and the analysis is undertaken on an aggregated basis i.e. TNMM)?

Answer: If one international transaction is part of many other inter linked international transactions, and it cannot be separately benchmarked, all the international transactions need to be covered in the APA and the fee needs to be calculated accordingly.

Critical Assumptions

18. The APA rules provide for critical assumptions as part of the APA. What are the probable critical assumptions that can be made for an APA?

Answer: The critical assumptions would depend on the facts of each case. As the applicant and the APA authorities discuss any case and project future price, they need to make some assumptions. Some of the assumptions would be critical for arriving at a particular settlement. These assumptions are critical assumptions.

Bilateral/ Multilateral APAs

19. Can a taxpayer file request for a bilateral APA with a country where the treaty entered into by India does not contain specific provision for corresponding adjustment for TP disputes [i.e., Article 9(2) of OECD Model Convention]?

Answer: The practice followed by India in MAP proceedings is that without corresponding model article 9(2), the cases of economic double taxation are not admitted under MAP. The similar position will also apply to APA. Hence, if India's DTAA/DTAC with a country does not contain model Article 9(2), India would not be able to admit cases of economic double taxation under bilateral APA. These cases would still be eligible to apply for unilateral APA.

Conversion of unilateral into bilateral/multilateral APA and vice-versa

20. Is it possible to convert a concluded/ in-process Unilateral APA into a Bilateral APA/ Multilateral APA?

Answer; A unilateral APA can be converted into bilateral APA before finalization of the terms of the agreement and not thereafter. Therefore, a concluded unilateral APA cannot be converted into a bilateral APA

21. Practically, how would a Multilateral APA work and what would be the process given that there could be three or more participating countries? What happens if negotiations with one of the participating country fail and the negotiations with other participating country/ies yield a result? Would APA in such a situation be converted to Unilateral or Bilateral instead of Multilateral? Is partial withdrawal allowed?

Answer: The multilateral APA, in general, takes time as it involves more than two competent authority negotiations. The negotiation could be separate or may be simultaneously. It depends on convenience of countries involved. If negotiations with one or all countries fail, there will always be an option for the taxpayer to either opt for unilateral APA or even a multilateral APA not involving the country with which agreement could not be reached.

22. Can an entity request for a unilateral APA for some international transactions and bilateral APA for other international transactions and if so whether separate APA processes are required to be undertaken or separate APA applications need to be filed?

Answer: Since the APA is transaction specific, there may be no bar in making separate request and in undertaking separate processes. However, even by filing one application, the taxpayer can indicate its preference of having only unilateral APA for certain transactions and bilateral APA for rest of the international transactions. Such an application would, however, be required to be filed with the Competent Authority of India i.e JS (FT&TR-I) in respect of all the international transactions proposed to be covered in the APA.

APA for transactions with Permanent Establishment

23. The APA rules provide for covering international transactions. Can the taxpayers consider APA for profit attribution to permanent establishments?

Answer: Yes, it is possible. If applicant admits having PE, he can file APA request for profit attribution to PE.

Firewalls against Confidential information

24. The taxpayer may file a lot of confidential information (factual/analysis) during the APA application/negotiation. What are the safeguards to ensure that such information filed by the taxpayer would not be shared with the on field audit officers or used against the taxpayer in regular audits?

Answer: Internationally, most countries allow sharing of APA information with on-field audit officers. The confidentiality provision of the Income-tax Act also allows such sharing within the income tax department.

Documentation requirements

25. As per the APA rules, mere filing of an application for an agreement under these rules does not prevent the operation of Chapter X of the Act for determination of ALP under that Chapter till the agreement is entered into. Would regular documentation/ Form 3CEB compliances be required during APA negotiation phase, which in case of bilateral APAs may even take 2-3 years?

Answer: Yes, the regular provisions of the Income-tax Act will continue to have application, till APA is concluded and modified return is filed. It is always advisable to start the process earlier so that the APA is concluded early.

26. Does the taxpayer need to maintain prescribed transfer pricing documentation (Rule 10D) after entering into an APA? If not, would the provisions relating to levy of penalty for non-maintenance of such documentation be modified accordingly?

Answer: After entering into an APA, the taxpayer is required to maintain documents in order to satisfy the terms of the APA. Hence, there will be less compliance burden after entering into an APA.

Remedy against cancellation of APA

27. If an APA is cancelled by the Board, would there be any mechanism to appeal against the cancellation of the APA or would the taxpayer have only recourse to constitutional remedies?

Answer: APA is an agreement entered into by two parties one of which is CBDT. The rules, therefore, provide for certain specific circumstances in which CBDT can, after due notice to taxpayer cancel the agreement. No appeal against decision of CBDT to cancel the agreement has been provided in Income-tax Act. However, there is no bar against right of a taxpayer to take recourse to constitutional remedies.

No roll back provision

28. There are no roll back provisions in the APA rules. Would the Transfer Pricing Officers be encouraged by the DGIT(IT) to undertake audits of prior periods consistent with the APA outcome?

Answer: Under the provisions of the Income-tax Act, the DGIT (International Taxation) has no such powers to issue directions of this nature.

Miscellaneous

29. Section 92CC provides that the manner of determination of ALP in an APA may include the methods referred to in section 92C(1) or any other method. But the reference to 'any other method' is missing in the APA rule 10F(g). Would it mean that apart from the 6 methods referred to in section 92C(1) read with rule 10AB, 'any other method' would not be allowed under the APA Scheme?

Answer: The sixth method already allows use of any method leading to arm's length price.

30. The Indian TP regulations require use of arithmetic mean and do not allow inter-quartile range. Can the taxpayers consider use of median and the concept of inter-quartile range in a bilateral APA? This is important as almost all other countries adopt a median/inter-quartile range and not arithmetic mean. Where the APA determines the ALP (as against methodology), would the ALP be a specific price or a range?

Answer: The Indian tax laws specifically mandates use of arithmetic mean. However, even with this requirement

India has been able to resolve a number of cases under MAP with competent authorities of countries where the law mandates use of inter-quartile range. The issue will be handled similarly in bilateral APAs.

31. Would an APA have to follow the Indian transfer pricing regulations on all parameters or can apply OECD principles e.g. use of multiple year data?

Answer: The APA in India would be guided by Indian TP regulations.

32. Would the benefit of the arm's length range (i.e. variation of upto 3 percent) be given in an APA?

Answer: The APA would determine the arm's length methodology or arm's length price. The arm's length price would be determined according to the APA. Therefore, once ALP is determined in accordance with agreement, there is no provision for allowance of variation of 3 percent.

33. During the time that the APA discussions are underway (say for 2-3 years), could there be any impact on ongoing TP audits of the applicant?

Answer: No there will not be any impact until the APA is finalized and modified return is filed by the taxpayer.

34. The APA rules require annual compliance audit by TPO. Would annual compliance audit be as broad based as the regular TP audits? Would the TPO fix hearings for the same?

Answer: No the annual compliance audit is a focused audit with view of ascertaining compliance with terms of APA and would not be as wide ranging or broad based as a regular TP assessment. The rules also clearly state that

compliance audit is not a regular TP audit. The purpose of compliance audit is only to ensure that the terms of the APA have been complied with.

35. When would an APA come into force for an existing transaction or a new proposed transaction?

Answer: The APA comes into force from the day it is entered into. However, it has effect in respect of transactions entered into or undertaken during the period for which the APA has been entered into.

36. If facts and circumstances change or are likely to undergo change, can the taxpayer file for revision of the APA under new facts? Or would it have to cancel the APA and file for a fresh APA, i.e. would the process be a complete withdrawal of APA and then fresh application for APA?

Answer: If APA has already been entered into and if any of the critical assumption is violated for change of facts, the APA would have to be revised or cancelled. If APA has still not been entered into, the changed facts would be considered before arriving at an agreement.

37. Regarding the visit of the APA team to the premises of the applicant, would the APA team provide the details of date of their visit to the applicant in advance?

Answer: Yes, the visit by APA authorities would be in consultation with taxpayer and on a pre-agreed date and time with sufficient notice to the taxpayer. The purpose of visit by APA team is only to understand the business model of the taxpayer and to ascertain the functional profile.

38. The renewal procedure for an APA is the same as a fresh APA application excluding the pre-filing

consultation. Would it imply that the renewals shall be easier and faster if facts are similar?

Answer: Yes, if facts are same, the renewal process is likely to take less time and efforts.

39. Will retrospective amendments in law having a bearing on the concluded APA annul the APA?

Answer: Only that retrospective law which governs APA can have an impact on APA already concluded.

40. Some countries like US, Canada have Model APA templates which ensure consistency in the language and scope of various APAs. Would India also have its own Model APA template?

Answer: This will be considered at an appropriate time.



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