



Transfer Pricing Regulations In India



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The materials contained in this publication were assembled in April 2021 and were based on the law enforceable and information available at that time.











Abbreviations

AD Bank-1	Authorized Dealer Bank -1	HO	Head Office
AE	Associated Enterprises	JV	Joint Venture
ALP	Arm's Length Price	LLP	Limited Liability Partnership
AMT	Alternate Minimum tax	LO	Liaison Office
APA	Advance Pricing Agreements	MAT	Minimum Alternate Tax
BEPS	Base Erosion Profit Shifting	MCAA	Multilateral Competent Authority Agreement
BO	Branch Office	MNC	Multi-National Company
BOD	Board of Directors	OECD	Organization for Economic Co-operation and Development
CBDT	Central Board of Direct Taxes	PE	Permanent Establishment
CFS	Consolidated Financial statements	PO	Project Office
DDT	Dividend Distribution Tax	POEM	Place of Effective Management
DTAA	Double Taxation Avoidance Agreement	RBI	Reserve Bank of India
ECB	External Commercial Borrowings	ROC	Registrar of Companies
ED	Executive Director	ROI	Return of Income
FCCB	Foreign Currency Convertible Bond	R&D	Research & Development
FDI	Foreign Direct Investment	SHR	Safe Harbor Rules
FTS	Fee for Technical Services	The Act	Income Tax Act 1961
FY	Financial Year	TP	Transfer Pricing
GAAR	General Anti Avoidance Rules	TRC	Tax Residency Certificate
GDR	Gross Depository Receipt	WOS	Wholly-Owned Subsidiary
GOI	Government of India		



Chapters

 Transfer Pricing Regulations-Associated Enterprises	05	 International Transaction	08
 Domestic Transaction	09	 3-Tier Documentation	10
 TP Calendar	13	 Mechanism For Clarity	14
 Recent Developments	16	 Annexures	18

Click to jump to the respective pages





Transfer Pricing Regulations





With the increase in the size of the global markets, trade practices have seen significant increase in cross border transactions. In present times, MNCs have global presence and operate in more than one country by way of various forms. Resultingly, it is very common for MNCs to transfer goods or services by a company from one tax jurisdiction to a company in another tax jurisdiction.

It is an internationally accepted practice that such 'transfer pricing' (TP) should be governed by the Arm's Length Principle (ALP) and the transfer price should be the price applicable in case of an international transaction. In other words, the transaction between associates should be priced in the same way as a transaction between independent enterprises.

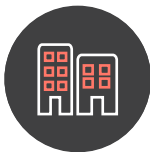
Today in India, transfer pricing is one of the most important matters considered by MNCs as they attempt to fairly distribute their profits amongst the companies within the group.

TP provisions in India are generally in line with the TP guidelines for MNCs and tax administrators issued by the Organization for Economic Co-operation and Development (OECD), though with certain noteworthy differences.





1. Meaning Of Associated Enterprises



According to Indian TP regulations, two enterprises are considered to be 'associated' if there is direct or indirect participation in the management, control or capital of an enterprise or by the same persons in both the enterprises.

Furthermore, TP regulations suggest certain other deeming provisions that trigger an associated enterprise relationship, such as shareholding, giving more than 26% voting power, dependence on source of raw materials or customers, influences on price, depending on borrowings, and authority to appoint BOD or EDs beyond a certain threshold.



2. Meaning Of International Transaction



The TP regulations define an international transaction as a transaction between two or more AEs, where either or both of which are non-residents and have a bearing on the profits, income, losses or assets of such enterprises.

A few examples of international transactions subject to TP are:

- Purchase, sale, lease of tangibles or intangibles;
- Capital financing such as loan, purchase/sale of equity;
- Provision/availing of services;
- Cost apportionments, allocations, contributions;
- Cost reimbursements;
- Transaction of business restructuring or re-organisation;
- Transactions having a bearing on profits, income, losses or assets; and
- Transactions with unrelated parties as a result of prior arrangements with related parties.

Further, a transaction with a non-AE may also be deemed as an international transaction if a prior agreement or arrangement pertaining to such transaction exists between the non-AE and the taxpayer's AE.





3. Specified Domestic Transactions



The Finance Act 2012 brought certain Specified Domestic Transactions ('SDT') under the umbrella of TP regulations in India. The transactions exceeding INR 200 million are covered under such provisions, which includes transactions with units eligible for tax holiday, and newly set up manufacturing companies covered u/s 115BAB.



4. Introduction Of Three-TIER Documentation



The Government, in line with OECD's BEPS Project (Action 13) has introduced a three-tier TP documentation process, keeping in mind India's commitment to implementing OECD/G20's BEPS recommendations.

Taxpayers will now need to prepare a master file, a local file and a CbCR (Country-by-Country Report). The local file will have to be maintained in the same manner as earlier years.

Indian TP regulations require taxpayers to maintain prescribed the TP documentation and information, and electronically furnish an accountant's report to the tax authorities containing the prescribed details about international transactions.

The new regime is effective from FY 2016-17 onwards. In case of Indian subsidiaries with parent companies resident outside India, CbCR will be filed by the parent company or designated entities in their home countries.

Indian tax authorities will have access to CbCR-related information through mutual exchange of information agreements with such countries, failing which their Indian subsidiaries will have to provide the reports.

India has signed the Multilateral Competent Authority Agreement (MCAA) to facilitate automatic exchange of CbCR. By doing so, it has agreed to bilaterally and automatically exchange CbCR with countries that are signatories of the MCAA.





4. Introduction Of Three-TIER Documentation

Master File:

- *Intends to provide an overview of the MNC's business*
- *Applicable in India from FY 2016-17 onwards*
- *Due date – 30th November*
- *Documentation in line with Action Plan 13, with few key additional requirements*
- *Threshold – The consolidated group revenue exceeding INR 5 billion during the financial year and*
 - *International transactions exceeding INR 500 million during the financial year OR*
 - *Purchase, sale, transfer, lease or use of intangible property exceeds INR 100 millions during the financial year*

Local File:

- *Refers to international transactions of the taxpayer*
- *Due date – 31st October*
- *Documentation requirement same as earlier years*
- *Threshold for maintaining documentation – International transaction exceeding INR 10 million during the financial year; no minimum threshold for specified domestic transactions.*
- *Threshold for reporting a transaction – No minimum threshold for international transactions; INR 200 million threshold for specified domestic transactions.*





4. Introduction Of Three-TIER Documentation

CbCR:

- *Seeks information related to the global allocation of MNC's income and taxes paid in addition to the location of economic activity within MNC group*
- *Applicable in India from FY 2016-17 onwards*
- *Due Date – 31st December**
- *Details required in line with Action Plan 13 report.*
- *Threshold – Consolidated group revenue exceeding INR 64,000 millions (Euros 750 million approx)*

** due date may change depending upon parent entity's financial year.*





5. Transfer Pricing Calendar

FORM NAME	PARTICULARS	DUE DATE
Form 3CEB	<i>Local File</i>	31 st October
Form 3CEAA	<i>Master File</i>	30 th November
Form 3CEAB	<i>Intimation by designated entity for filing of Master file</i>	31 st October
Form 3CEAC	<i>Intimation of CbCR being filed by parent entity or alternate reporting entity</i>	31 st October
Form 3CEAD	<i>CbCR</i>	31 st December*

* due date may change depending upon parent entity's financial year.



6. Mechanism For Providing Clarity For TP Issues In India



6.1 SAFE HARBOR RULES

In order to reduce the number of TP audits and prolonged disputes, the Finance Act (No. 2) 2009 provided that the determination of ALP with respect to international transactions shall be subject to Safe Harbor Rules (SHR). The CBDT is empowered to draft and issue SHR. Safe harbor indicates circumstances under which tax authorities accept a transfer price declared by a taxpayer. Safe harbor rules have been notified by the CBDT for various types of eligible transactions.

6.2 ADVANCE PRICING AGREEMENTS (APA)

The Finance Act 2012 introduced an enabling provision which empowers the CBDT to enter into an APA with a taxpayer to determine ALP or to specify the manner in which an ALP is to be determined, in relation to an international transaction. APA is an effective tool in place in several countries with established transfer pricing regimes, to provide certainty and avoid potential disputes in a cooperative manner.



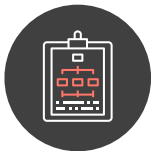


Some of the salient features of the provisions are as follows:

- ***APAs are applicable for a maximum prospective period of 5 consecutive years, with a provision for roll-back of up to 4 years;***
- ***Types of APA – Unilateral, Bilateral and Multilateral;***
- ***APA team includes revenue officials, experts in economics, statistics, law, etc.;***
- ***Filing fees – approx. INR 1 million to INR 2 million, depending upon inter-company transactions;***
- ***Provides for simplified annual compliance report during APA term for covered transactions;***
- ***Provides for annual compliance audit by transfer pricing officer;***
- ***An APA is binding on income tax authorities and the taxpayer.***



7. Recent Developments



7.1 THIN CAPITALISATION RULES

In line with recommendations from OECD's BEPS project, the Finance Act 2017 has introduced the Thin Capitalisation Rules. These provisions do not allow deduction for payment of interest under certain circumstances.

As a basic rule, there will be a 30%* EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) cap on claims for payment of interest to overseas-related parties. Excess interest disallowed in a year will be eligible for carry-forward up to 8 consecutive years.

7.2 SECONDARY ADJUSTMENT

The Indian Finance Act 2017 introduced a secondary adjustment mechanism vide Section 92CE of the IT Act. The primary adjustment results in addition to income or reduction in expense and creates an additional tax liability for taxpayers.

The secondary adjustment will be applicable for the following primary adjustments:

- Suo-moto adjustment offered by taxpayers;
- Adjustment made by Tax Officer (TO) and accepted by taxpayer;
- Adjustment determined by an Advance Pricing Agreement (APA);
- Adjustment made according to India's Safe Harbor Rules;
- Adjustment arising due to a Mutual Agreement Procedure (MAP) resolution.





As per the existing provisions, the primary adjustment, if not repatriated to India within 90 days, shall be deemed to be an advance made by the taxpayer to such AE.

Accordingly, the provision adopted the scheme of imputing interest on the amount of primary adjustment imposed upon the taxpayer till the said adjustment amount is repatriated in India.

Further, an amendment was made vide Finance Act, 2019 which provided an alternative to the taxpayers to pay a “one-time” and final income tax at the rate of 18% plus surcharge of 12% and cess thereon, on the amount of primary adjustment. No repatriation will be required in the given case. The same is applicable w.e.f. 1st September 2019.





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