CHAPTER 24

TRANSFER PRICING

LEARNING OUTCOMES

After studying this chapter, you would be able to -

- **appreciate** the need for incorporation of transfer pricing provisions in the Income-tax Act, 1961;
- **comprehend** the meaning and significance of arm's length principle and the practical difficulties in application of arm's length principle;
- **appreciate** the meaning and significance of the terms "associated enterprise", "international transaction" and "specified domestic transaction";
- **determine** the arm's length price using different methods prescribed under the income-tax law;
- **appreciate** the meaning of safe harbour and rules for safe harbor incorporated in the income-tax law;
- **appreciate** the benefits of entering into advance pricing agreements;
- **identify** the cases where secondary adjustments have to be made;
- **pinpoint** the responsibilities of a person entering into an international transaction to keep and maintain prescribed information and documents;

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- **identify** the circumstances when the Assessing Officer can invoke the power to determine the arm's length price;
- **comprehend and appreciate** the country-by-country reporting requirements and related matters incorporated in the income-tax law in compliance with BEPS Action Plan 13;
- **appreciate** the specific anti-avoidance measures incorporated in the Income-tax Act, 1961 in respect of transactions with persons located in notified jurisdictional areas;
- **appreciate** the provisions incorporated in the Income-tax Act, 1961 restricting interest deduction claimed by an entity in respect of borrowings from an associated enterprise in line with BEPS Action Plan 4.

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24.1 INTRODUCTION

In the present age of globalisation, Multinational Companies (MNCs) have branches/subsidiaries/divisions operating in more than one country. There is a possibility that two or more entities belonging to the same multinational group can fix up their prices for goods and services and allocate profits among the enterprises within the group in such a way that there may be either no profit or negligible profit in the jurisdiction which taxes such profits and substantial profit in the jurisdiction where the tax liability is minimum. This results in base erosion of the high tax jurisdiction by shifting the profits to the low tax jurisdiction, thereby minimizing the taxes. This may adversely affect a country's share of due revenue. The increasing participation of multinational groups in economic activities in India has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same multinational group.

In order to curb such tax avoidance measures, Arm’s Length Principle (ALP) is used internationally to substitute the transfer price adopted by the MNCs to price the intra-group transfer of goods or provision of services. Generally, the arm’s length price refers to the price an unrelated enterprise would be willing to pay in comparable circumstances.

The OECD guidelines define the “Transfer prices” as the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises. Two enterprises are “associated enterprises” if one of the enterprises participates directly or indirectly in the management, control or capital of the other or if both enterprises are under common control. Since international transfer pricing involves more than one tax jurisdiction, any adjustment to the transfer price in one jurisdiction requires a corresponding adjustment in the other jurisdiction. If a corresponding adjustment is not made, double taxation will result.

24.2 MEANING OF “ARM’S LENGTH PRINCIPLE”

The Arm’s Length Price (ALP) of a transaction between two associated enterprises is the price that would be paid if the transaction had taken place between two comparable independent and unrelated parties.

The Arm’s Length Principle, in the context of taxation, is explained in the OECD Model Tax Convention as under:

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"Where conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

The OECD transfer pricing guidelines provides guidance on the application of the arm's length principle in order to arrive at the proper transfer pricing range between associated enterprises. Market forces determine business relations between independent parties. The arm's length principle seeks to adjust the profits between two associated enterprises by comparing the same as if the transaction is carried out between two independent enterprises. It treats each enterprise as a separate independent entity rather than as inseparable parts of a single unified business.

24.3 SIGNIFICANCE OF ARM'S LENGTH PRINCIPLE

There are several reasons as to why the OECD member countries and other countries have adopted the arm's length principle.

Parity between MNCs and independent enterprises – A major reason is that the ALP provides broad parity of tax treatment for MNCs and independent enterprises. Since the ALP puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages and disadvantages that would otherwise distort the relative competitive positions of these entities. The ALP, thus promotes the growth of international trade and investment by removing these tax considerations from economic decisions.

Determines real taxable profits - The transfer price adopted by a multinational has a direct bearing on the proportional profit it derives in each country in which it operates. If inadequate or excessive consideration is paid for the transfer of goods, services or intangible property between the members of an MNC group, the income calculated for each of those members will be inconsistent with their relative economic contributions. An 'arm's length' price is needed to determine real taxable profits earned in each country. The arm's length doctrine permits the taxing authorities to rectify the accounts of the enterprise so as to reflect correctly the income that the establishment would have earned if they were an independent enterprise.

Reduction of artificial price distortion - If the ALP is not followed, an MNC will sell goods/ provide services to a controlled entity in a high tax jurisdiction at a high price (which exceeds the market price) and to an entity in a low-tax jurisdiction or a tax haven at a low price (which is lower

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than the market price). This would result in extreme price distortion of goods and services in the international market.

Accurate measurement of economic contribution – The ALP provides accurate measurement of the fair market value of the economic contribution units of an MNC. The focus of the ALP is to ensure that the proper amount of income is attributed to where it is earned. This result in each unit of the MNC earning a return commensurate with its economic contribution and risk assumed.

24.4 PRACTICAL DIFFICULTIES IN APPLICATION OF ALP

There are, however, certain practical difficulties in applying the ALP, which are described hereunder:

True comparison difficult in certain cases – The commercial and financial conditions governing a transaction between independent enterprises are, by and large, never similar to those existing between associated enterprises. As a result, there cannot be a true comparison. The economies of scale and integration of various business activities of the associated enterprise may not be truly appreciated by arm's length principle. Further, associated enterprises may enter into transactions which independent enterprises may not enter into, like say, licensing of valuable intangible or sharing the benefits of research. The owner of an intangible may be hesitant to enter into licensing arrangements with independent enterprises for fear of the value of the intangible being degraded. In contrast, he may be prepared to offer terms that are less restrictive to associated enterprises because the use of the intangible can be closely monitored. Further, there is no risk to the overall group's profit from a transaction of this kind between members of an MNC group. In such situations, where independent enterprises seldom undertake transactions of the type entered into by associated enterprises, the ALP is difficult to apply because there is little or no direct evidence of what conditions would have been established by independent enterprises.

Availability of data and reliability of available data – There may be difficulty in getting adequate and reliable information and data in order to apply arm's length principle. The information regarding the comparable companies, their profit margins, the pricing charged by them in independent and comparable circumstances may be difficult to obtain. Further, the differences in the accounting of the data could result in difficulty as the reliable adjustments may not be possible to be made.

Absence of comparable market price for "intangible" transactions - The ALP reaches a comparable uncontrolled market price that is reasonably reliable for standard transactions where the price range is narrow and market price is certain. However, the ALP generally fails to achieve

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a comparable market price for transactions involving intangibles because they are unique. The unique nature of these transactions creates a very wide price range.

Administrative burden – Due to the subjectivity in selection of comparables and the methods, the application of arm's length principle results in administrative burden for the tax administration as well as the taxpayers.

Time lag - Although an associated enterprise normally establishes the conditions for a transaction at the time it is undertaken, at some point the enterprise may be required to demonstrate that these are consistent with the arm's length principle. The tax administration may also have to engage in the verification process perhaps some years after the transactions have taken place. It may result in substantial cost being incurred by the tax payer and the tax administration. It is also difficult to appreciate the business realities which prevailed at the time when the transactions were entered into. This may lead to bias against the tax payer.

In spite of the practical difficulties listed above, OECD member countries are of the view that the ALP does provide a sound basis to appreciate the transfer pricing between associated enterprises. It has so far provided acceptable solutions to both taxpayers and the tax administrations. The experience gained so far should be effectively used to remove the practical difficulties and improve the administration.

24.5 THE INDIAN SCENARIO

(1) Transfer pricing in relation to International Transactions

Finance Act, 2001 has introduced Chapter X to the Income-tax Act, 1961 with a view to provide a statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India so as to curb the pricing strategies adopted by the MNCs resulting in base erosion and profit shifting.

These provisions are contained in sections 92 to 92F of the Income-tax Act, 1961. Rules 10A to 10E have been inserted in the Income-tax Rules, 1962. These sections and rules of the Income-tax Act, 1961 and the Income-tax Rules, 1962, respectively, will affect all non-corporate and corporate assessees who have dealings with non-residents for import or export of goods, properties or services.

The following conditions must be satisfied in order to attract the special provisions of Chapter X relating to avoidance of tax:

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(i) There must be an international transaction;

(ii) Such international transaction should be between two or more associated enterprises either or both of whom are non-residents;

(iii) Such international transaction should be in the nature of:

(a) purchase, sale or lease of tangible or intangible property; or

(b) provision of service; or

(c) lending or borrowing money; or

(d) any other transaction having a bearing on the profits, income, losses or assets of such enterprise.

(iv) Further, such transaction can also involve allocation or apportionment of, or any contribution to any cost or expenses incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of the associated enterprises on the basis of mutual agreement or arrangement between such associated enterprises.

(v) Such international transaction must be done at arm's length price and if such international transaction has been done at less than the arm's length price, it shall require determination of income or apportionment of cost or expense on the basis of arm's length price.

(vi) The above adjustment should either result in an increase of income or decrease of loss returned by the assessee. In other words, the adjustment should not have the effect of reducing the income chargeable to tax or increasing the loss.

I. Computation of income from transaction with non-resident [Section 92]:

Section 92 provides that any income arising from an "international transaction" shall be computed having regard to "the arm's length price". For this purpose, the allowance for any expense or interest shall be determined on the basis of arm's length price.

Transactions with associate enterprises should be at ALP

The section further provides that in an international transaction between two or more 'associated enterprises" when there is a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expenses in connection with a benefit, service or facility provided to any one or more of such enterprises, the allocation of cost, expenses etc. shall be determined having regard to arm's length price of such benefit, service or facility.

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The objective of transfer pricing provisions is to protect the tax base of India and to ensure that due to inter-company transactions, there is no reduction in the taxable profits or the taxes paid by the Indian taxpayer.

It is, however, pertinent to note that the transfer pricing provisions would not be applicable if substitution of the ALP has the effect of reducing the income chargeable to tax or increasing the loss.

The Assessing Officer will have wide powers to determine what is an arm's length price for such transactions and make adjustments for computation of income. The keywords in section 92 are

(i) associated enterprises,

(ii) international transactions and

(iii) arm's length price.

These terms are defined in sections 92A, 92B and 92C.

II. Associated Enterprises [Section 92A]: Section 92A(1) defines the associated enterprises generally. Section 92A(2) provides 13 relationships between the enterprises which constitutes deemed associated enterprises.

The term "associated enterprise" in relation to another enterprise is defined in section 92A(1). Associated enterprises are those which are owned or controlled by the same or common entity/ person.

Associated Enterprises [Section 92A(1)]		
	Condition	**Example**
(1)	An enterprise which participates, directly or indirectly, or through one or more intermediaries, in: • management of the other enterprise, or • control of other enterprise, or • capital of other enterprise	*Where A Ltd. directly participates in the management of B Ltd. and B Ltd. directly participates in the management of C Ltd. In such situation, A Ltd. has direct participation in management of B Ltd. but has an indirect participation in management of C Ltd.* A → B → C *In such scenario, both B Ltd. and C Ltd. would be associated enterprises of A Ltd.*
(2)	If one or more persons participates, directly or indirectly, or through one or more intermediaries in:	*Mr. A directly has control in A Ltd. and B Ltd. In such a scenario, both A Ltd. & B Ltd. are associated enterprises since there is a*

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	• management/control/capital of the two different enterprises Then, those two enterprises are AEs.	*common person i.e., Mr. A, who controls both entities A Ltd. & B Ltd.*

Two enterprises are deemed to be associated enterprises if they fall under any one or more of the situations contained in section 92A(2). This section provides 13 such situations during which associated enterprise relationship is deemed to be established. Two enterprises are deemed to be associated enterprise if:

Deemed Associated Enterprises [Section 92A(2)]		
Condition	**Situation**	**Example**
Enterprise ownership	**One enterprise holds 26% or more of the voting power,** directly or indirectly, in the **other enterprise.**	*A Ltd. holds 33% of Voting Power in B Ltd. and B Ltd. holds 80% Voting Power in C Ltd.* A → 33% → B → 80% → C *In above situation, A Ltd. holds 26% or more voting power in B Ltd., directly and in C Ltd. indirectly (i.e. through B Ltd.). Therefore, both B Ltd. & C Ltd. are deemed associated enterprises of A Ltd.*
Substantial voting power in two entities by common person	Any person or enterprise **holds 26% or more of the voting power,** directly or indirectly, in each of **two different enterprises.**	*Mr. A holds 40% of voting power in both X Ltd. and Y Ltd. where neither X Ltd. has any holding in Y Ltd. nor Y Ltd. has any holding in X Ltd.* Mr. A 40% 40% X Ltd. ↔ Y Ltd. *In this situation, since Mr. A directly holds 40% of voting power in both X Ltd. and Y Ltd., X Ltd. & Y Ltd. will be deemed associated enterprises.*
Advancing of substantial sum of money	One enterprise advances loan to the other enterprise of an amount of **51% or more** of the book value of **the total assets of other enterprise**	*Book Value of total assets of Y Ltd. is ₹ 100 crores. X Ltd. advances loan of ₹ 60 crores to Y Ltd.* *In this case, X Ltd. advances loan of ₹ 60 crores to Y Ltd, which is 60% of the book value of total assets of Y Ltd. Hence, X Ltd. & Y Ltd. are deemed associated enterprises.*

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Guaranteeing borrowings	One enterprise guarantees **10% or more** of the **total borrowings** of the **other enterprise**.	*P Inc. has total loan of 1 million dollars from XYZ Bank of America. Out of that, A Ltd., an Indian company, guarantees 20% of total borrowings in case of any default made by P Inc. In such case, since A Ltd. guarantees 20% of total borrowings of P Inc., P Inc. and A Ltd. are deemed associated enterprises.*
Appointment of majority directors of other enterprise	One enterprise appoints **more than half of the board of directors or members** of the governing board, or one or more executive directors or executive members of the governing board of **other enterprise**.	*X Ltd. has 15 directors on its Board. Out of that, Y Ltd. has appointed 8 directors. In such case, X Ltd. and Y Ltd. are deemed associated enterprises.*
Appointment of majority directors of two different enterprises by same person(s)	**More than half of the directors** or members of the governing board, or one or more of the executive directors or members of the governing board of each of the **two** enterprises are appointed **by the same person(s).**	*Mr. A appointed 9 directors out of 15 directors of X Ltd. and appointed 2 executive directors on the board of Y Ltd. In such case, since a common person i.e. Mr. A appointed more than half of the directors in X Ltd. and appointed 2 executive directors in Y Ltd., both X Ltd. and Y Ltd. are deemed associated enterprises.*
Dependence on intangibles w.r.t which other enterprise has exclusive rights	The **manufacture or processing of goods** or articles or business carried out by one enterprise is **wholly dependent (i.e. 100%) on the know-how**, patents, copyrights, trade-marks, licenses, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other entity is the owner or in respect of which the other enterprise has exclusive rights.	
Dependence on raw material supplied by other enterprise	**90% or more of raw materials and consumables** required for the manufacture or processing of goods or articles carried out by one enterprise, **are supplied by the other enterprise**, or by persons specified by the other enterprise, where the prices and other conditions relating to the supply are influenced by such other enterprise.	
Dependence on sale	The **goods or articles manufactured** or processed by one enterprise, **are sold to the other enterprise** or to persons specified by the other enterprise, and the **prices and other conditions** relating thereto are **influenced by such other enterprise.**	

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Control by common individual	Where **one enterprise is controlled by an individual**, the **other enterprise** is also **controlled by such individual** or his relative or jointly by such individual and his relatives.	*Mr. A and Mr. B are relatives. Mr. A has control over X Ltd. and Mr. B has control over Y Ltd. Therefore, both X Ltd. and Y Ltd. will be deemed associated enterprises.*
Control by HUF or member thereof	Where one enterprise is **controlled by a HUF** and the **other enterprise is controlled** by a **member** of such HUF or by **relative of a member** of such HUF or jointly by such member and his relative.	*HUF* *Member of HUF/ Relative of member of such HUF* Control Control *A Ltd.* *B Ltd.* *A Ltd & B Ltd are deemed associated enterprises*
Interest in a firm, AOPs or BOIs	Where one enterprise is a firm, AOPs or BOIs, the **other enterprise** holds **10% or more interest** in **firm/AOPs/BOIs**.	
Mutual interest relationship	There exists **b/w the two enterprises**, any **relationship of mutual interest**, as may be **prescribed**.	

The term "enterprise" is defined in section 92F(iii) to mean a person (including its certain specified Permanent Establishment) who is, or has been, or is proposed to be, engaged in any activity,

- relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, copy rights, trade-marks, licences, franchises or any other business or commercial rights of similar nature or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights, or
- the provision of services of any kind, or in carrying out any work in pursuance of a contract, or in investment, or providing loan or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate,

whether such activity or business is carried on, directly or through one or more of its units or divisions or subsidiaries, or whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or places.

Meaning of PE

"Permanent establishment" includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.

III. Definition of International Transaction [Section 92B]

- As per section 92B, an international transaction means:

  (i) a transaction between two or more associated enterprises, either or both of whom are non-residents; and

  (ii) transaction in the nature of:

  (a) sale/purchase/lease of tangible property; or

  (b) sale/purchase/lease of intangible property; or

  (c) provision of services; or

  (d) lending/borrowing money; or

  (e) any other transaction having a bearing on profits, income, losses or assets of such enterprises; or

  (f) mutual agreement or arrangement between two or more associated enterprise for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

- Where, in respect of a transaction entered into by an enterprise with a person other than an associated enterprise (hereinafter referred to as "other person"),

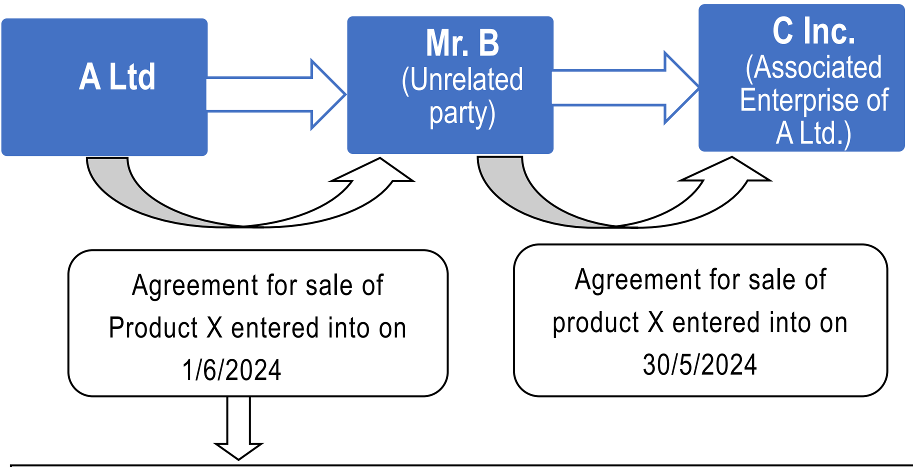
Deemed International Transaction

  - there exists a prior agreement in relation to the relevant transaction between the other person and the associated enterprise **or**,
  - where the terms of the relevant transaction are determined in substance between such other person and the associated enterprise; **and**
  - either the enterprise or the associated enterprise or both of them are non-residents,

then such transaction entered into between the enterprise and the other person shall be **deemed to be an international transaction** entered into between two associated enterprises, **whether or not such other person is a non-resident.**

Example:

If A Ltd., an Indian company, has entered into an agreement for sale of product X to Mr. B, an unrelated party, on 1/6/2024 and Mr. B has entered into an agreement for sale of product X with C Inc., a non-resident entity, which holds 27% of the voting power in A Ltd., on 30/5/2024, then, the transaction between A Ltd. and Mr. B shall be deemed to be an international transaction entered into between two associated enterprises, irrespective of whether or not Mr. B is a non-resident.



Transaction between A Ltd. and Mr. B is deemed to be an international transaction between associated enterprises, whether or not Mr. B is a non-resident.

Note – *C Inc. is deemed to be an associated enterprise of A Ltd. since it holds 26% or more of the voting power A Ltd.*

❑ The scope of **"international transaction"** shall include:

	Transactions	Amplification of scope of terms used
(1)	Purchase, sale, transfer, lease or use of tangible property	Tangible property includes - • building, • transportation vehicle, • machinery, equipment, tools, plant, • furniture,

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		• commodity or • any other article, product or thing;
(2)	Purchase, sale, transfer, lease or use of intangible property, including transfer of ownership or the provision of use of certain rights	"Use of certain rights" refer to – • land use, • copyrights, patents, trademarks, licences, franchises, • customer list, marketing channel, brand, commercial secret, • know-how, • industrial property right, • exterior design or practical and new design or • any other business or commercial rights of similar nature.
(3)	Capital financing	• any type of long-term or short-term borrowing, • lending or guarantee, • purchase or sale of marketable securities or • any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business.
(4)	Provision of services	• provision of market research, • market development, • marketing management, • administration, • technical service, • repairs, • design, • consultation, • agency, • scientific research, • legal or accounting service.

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(5)	Business restructuring or reorganization entered into by an enterprise with an associated enterprise	All such transactions are included in the definition of "international transaction", whether or not it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date.

- The expression "**intangible property"** shall include:

	Type of intangible asset in relation to	Examples of each type of intangible asset
(1)	Marketing	• Trademarks • trade names • brand names • logos
(2)	Technology	• Process patents • patent applications • technical documentation such as laboratory notebooks • technical know-how
(3)	Artistic	• literary works and copyrights • musical compositions • copyrights • maps • engravings
(4)	Data processing	• proprietary computer software • software copyrights • automated databases • integrated circuit masks and masters
(5)	Engineering	• industrial design • product patents • trade secrets • engineering drawing and schematics • blueprints • proprietary documentation

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(6)	Customer	• customer lists • customer contracts • customer relationship • open purchase orders
(7)	Contract	• favourable supplier • contracts, • licence agreements • franchise agreements • non-compete agreements
(8)	Human capital	• trained and organised work force • employment agreements • union contracts
(9)	Location	• leasehold interest • mineral exploitation rights • easements • air rights • water rights
(10)	Goodwill	• institutional goodwill • professional practice goodwill • personal goodwill of professional • celebrity goodwill • general business going concern value
(11)	methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, or technical data;	
(12)	any other similar item that derives its value from its intellectual content rather than its physical attributes.	

- **Transaction:** The word "transaction" has been defined in section 92F to include an arrangement, understanding or action in concert

  (i) whether or not such arrangement, understanding or action is formal or in writing; or

  (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings."

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Section 92F(v) provides an inclusive definition of the term "transaction". Based on the reading of the section, it is evident that it is not necessary that for a transaction undertaken between two enterprises there needs to be a formal written agreement between them. It is only relevant whether a transaction has been entered into in substance. The section also negates the requirement as to the legal enforceability of agreement or understanding.

It may be noted that one of the parties to the international transaction should be a non-resident. Therefore, transactions between a resident assessee ("A" Ltd.) and its foreign branches or between its two or more foreign branches will not be considered as international transactions. This is for the reason that when "A" Ltd. is a resident in India, all its foreign branches will be deemed to be resident in India and transactions between Head Office and branches or between branches *inter se* will be considered as transactions between residents. Even otherwise there can be no avoidance of income in the transactions between Indian Head Office and foreign branches.

On the other hand, if an Indian branch of a foreign company ("B" Ltd.) is having a transaction with the Head Office, the same will be covered by the definition of international transaction between associated enterprises. This is because the Indian branch (permanent establishment of "B" Ltd.) will be liable to tax in India in respect of its Indian operations and, therefore, any transaction between the Indian branches of "B" Ltd. with its head office in foreign country or with any of the branches of "B" Ltd. outside India will be considered as an international transaction and it will have to establish that the transaction is at an arm's length price. This will be the position even in respect of transactions between a parent company ("A" Ltd.) and its foreign subsidiary and, therefore, such transactions will have to comply with the provisions of transfer pricing regulations.

IV. Arm's Length Price [Section 92C]: "Arm's length price" is defined in section 92F(ii) to mean price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions. Section 92C deals with the method for determining arm's length price and the factors which are to be considered for applicability or non-applicability of a particular method to a given situation. The factors as well as methods incorporated in this section are not exhaustive and the CBDT may prescribe further factors and methods. It provides that the arm's length price in relation to an international transaction would be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of

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transaction or class of associated persons or functions performed by such persons or such other relevant factors as the CBDT may prescribe, namely -

(a) comparable uncontrolled price method;

(b) resale price method;

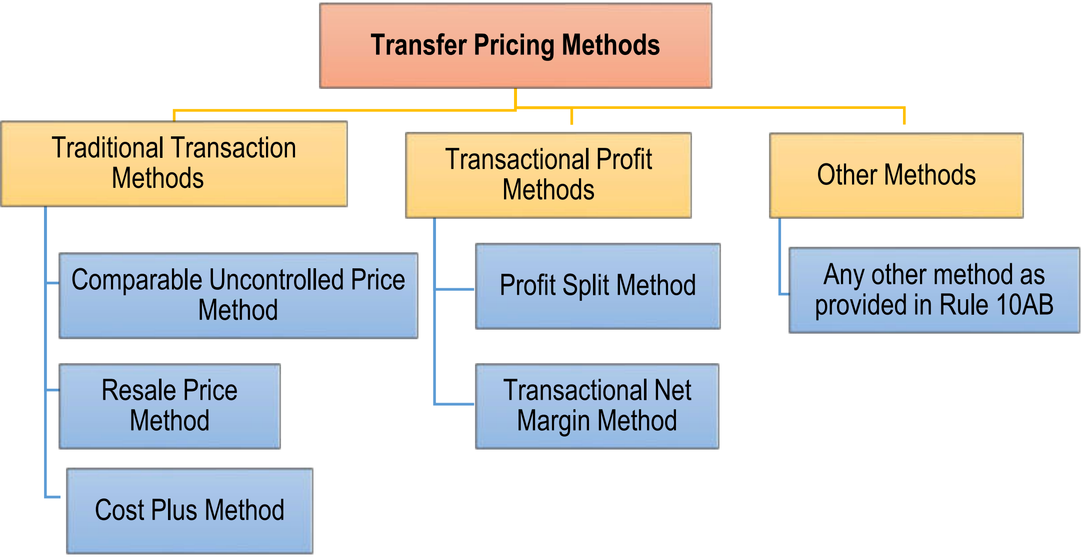
(c) cost plus method;

(d) profit split method;

(e) transactional net margin method;

(f) such other method as may be prescribed by the Board.

Accordingly, the CBDT has prescribed that the other method for determination of arm's length price in relation to an international transaction would be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts [Rule 10AB].



Section 92C(2) provides that the most appropriate method out of the above methods has to be applied for determination of arm's length price, in the prescribed manner.

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Rule 10B(1) prescribed the manner to determine the arm's length price under the five methods as stated in above diagram in respect of any goods, property or services purchased or sold under any international transaction.

(a) Comparable Uncontrolled Price Method

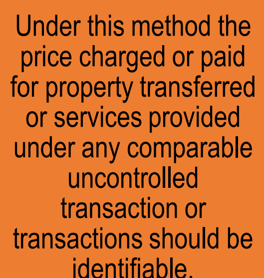
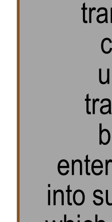
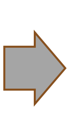

ILLUSTRATION 1

US Ltd., a US company has a subsidiary, IND Ltd. in India. US Ltd. sells computer monitors to IND Ltd. for resale in India. US Ltd. also sells computer monitors to CMI Ltd., another computer reseller. It sells 50,000 computer monitors to IND. Ltd. at ₹ 11,000 per unit. The price fixed for CMI Ltd. is ₹ 10,000 per unit. The warranty in case of sale of monitors by IND Ltd. is handled by IND Ltd. However, for sale of monitors by CMI Ltd., US Ltd. is responsible for the warranty for 3 months. Both US Ltd. and IND Ltd. offer extended warranty at a standard rate of ₹ 1,000 per annum. On these facts, how is the assessment of IND Ltd. going to be affected?

SOLUTION

US Ltd., the foreign company and IND Ltd., the Indian company are associated enterprises since US Ltd. is the holding company of IND Ltd. US Ltd. sells computer monitors to IND Ltd. for resale in India. US Ltd. also sells identical computer monitors to CMI Ltd., which is not an associated enterprise. The price charged by US Ltd. for a similar product transferred in comparable uncontrolled transaction is, therefore, identifiable. Therefore, Comparable Uncontrolled Price (CUP) method for determining arm's length price can be applied.

While applying CUP method, the price in comparable uncontrolled transaction needs to be adjusted to account for difference, if any, between the international transaction (i.e. transaction between US Ltd. and IND Ltd.) and uncontrolled transaction (i.e. transaction between US Ltd. and CMI Ltd.) and the price so adjusted shall be the arm's length price for the international transaction.

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For sale of monitors by CMI Ltd., US Ltd. is responsible for warranty for 3 months. The price charged by US Ltd. to CMI Ltd. includes the charge for warranty for 3 months. Hence arm's length price for computer monitors being sold by US Ltd. to IND Ltd. would be:

Particulars	No.	₹
Sale price charged by US Ltd. to CMI Ltd.		10,000
Less: Cost of warranty included in the price charged to CMI Ltd. (₹ 1,000 x 3 /12)		250
Arm's length price		**9,750**
Actual price paid by IND Ltd. to US Ltd.		11,000
Difference per unit		**1,250**
No. of units supplied by US Ltd. to IND Ltd.	50,000	
Addition required to be made in the computation of total income of IND Ltd. (₹ 1,250 × 50,000)		6,25,00,000

No deduction under Chapter VI-A would be allowable in respect of the enhanced income of ₹ 6.25 crores.

Note: *It is assumed that IND Ltd. has not entered into an advance pricing agreement or opted to be subject to Safe Harbour Rules.*

(b) Resale Price Method

Under this method, the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise should be identifiable.

The following adjustments can be made to such resale price.

- For normal gross profit margin
- For expenses incurred in connection with the purchase of property or obtaining of services.
- For functional and other differences, including differences in accounting practices which could materially affect the gross profit margin in the open market.

The adjusted price as stated above will be considered as the arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise.

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ILLUSTRATION 2

Earth (P) Ltd., Calcutta is engaged in trading of electronic goods. It purchased goods from its associated enterprise Sun Pte. Ltd., Singapore, and also from unrelated party, Oceania Ltd., UK. For the F.Y.2024-25, the gross profit margin was 15% on the sale of goods of Sun Pte Ltd., whereas it was 20% in the case of Oceania Ltd. After-sales warranty of 6 months was provided by Sun Pte Ltd. whereas Oceania Ltd. gave after-sales warranty of 1 year. The cost of warranty may be taken as 2% of the sale price. The Sun Pte. Ltd.'s brand value is internationally known and the benefit of the brand value can be taken as 1% of sale price. During the F.Y.2024-25, it sold goods of Sun Pte Ltd. for ₹ 20 crores and of Oceania Ltd. for ₹ 15 crores. As regards transport cost of the goods purchased, there was no difference between related and unrelated party. Compute the ALP of the transaction between Earth (P) Ltd. and Sun Pte Ltd., Singapore by applying the Resale Price Method, considering the facts of the case.

SOLUTION

As per section 92B, the transactions entered into between Earth (P) Ltd., an Indian company, and Sun Pte. Ltd., Singapore, being associated enterprises, for purchase of electronic goods would be international transaction.

Since Earth (P) Ltd. purchased similar electronic goods from Oceania Ltd., an unrelated entity, and sold the same to unrelated parties, this transaction can be considered as uncontrolled transaction and the gross profit margin of 20% earned on sale of such goods can be considered for the purpose of determining the arm's length price of the transactions between Earth (P) Ltd. and Sun Pte. Ltd. However, functional adjustments need to be given effect to in arriving at the ALP.

Computation of ALP of transaction between Earth (P) Ltd. and Sun Pte. Ltd.

Particulars	Amount (In ₹)
Resale price of goods purchased from Sun Pte. Ltd.	20,00,00,000
Less: Profit margin with reference to uncontrolled transaction between Earth (P) Ltd. and Oceania Ltd. (20% on sale)	4,00,00,000
	16,00,00,000
Add: Adjustment for benefit of brand value of Sun Pte. Ltd. [Sun Pte. Ltd has its brand value internationally. Therefore, adjustment of benefit of brand value has to be carried out to arrive at ALP (1% of sale price)]	20,00,000
Less: Adjustment of cost of warranty [Sun Pte. Ltd. provides warranty for 6 months whereas unrelated party has provided warranty of 12 months. Therefore, adjustment for the cost of such warranty has to be carried out to arrive at arm's length price (2% of sale price x 6/12)]	(20,00,000)
Arm's length price	**16,00,00,000**

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(c) **Cost Plus Method**

Under this method, the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise should be determined.

The amount of a normal gross profit mark-up to such costs arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise in comparable uncontrolled transaction or transactions should be determined.

The computed normal gross profit mark-up can be adjusted to take into account the functional and other differences which could materially affect such profit mark-up in the open market.

Costs referred to in first box should be increased by the adjusted profit mark-up as stated in third box and the price so arrived at will be considered as the arm's length price.

ILLUSTRATION 3

ABC Ltd., Canada holds 35% shares in LMN Ltd., India. LMN Ltd. develops software and does both onsite and offsite consultancy services for the customers. LMN Ltd. during the year billed ABC Ltd. Canada for 120 man-hours at the rate of ₹ 1,800 per man hour. The total cost (direct and indirect) for executing this work amounted to ₹ 2,25,000.

However, LMN Ltd. billed XYZ Ltd., India at the rate of ₹ 2,800 per man hour for the similar level of manpower and earned a Gross Profit of 50% on its cost.

The transactions of LMN Ltd. with ABC Ltd. and XYZ Ltd. are comparable, subject to the following differences:

- *While LMN Ltd. derives technology support from the ABC Ltd., there is no such support from XYZ Ltd. The value of technology support received from ABC Ltd. may be put at 18% of normal gross profits.*
- *As ABC Ltd. gives business in large volumes, LMN Ltd. offered to ABC Ltd., a quantity discount which may be valued at 10% of normal gross profits.*
- *In the case of rendering services to ABC Ltd., LMN Ltd. neither runs any risk nor incurs any marketing costs. On the other hand, in the case of services to XYZ Ltd., LMN Ltd. has to*

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assume all the risk and costs associated with the marketing function which may be estimated at 12% of the normal gross profits.

- *LMN Ltd. offered one month credit to ABC Ltd. The cost of providing such credit may be valued at 2% of the gross profits. No such credit was given to XYZ Ltd.*

Compute the Arm's Length Price along with income to be increased under the Cost Plus Method.

SOLUTION

LMN Ltd, an Indian company and ABC Ltd., a Canadian company, are deemed to associated enterprises as per section 92A(2), since ABC Ltd. holds shares carrying 35% of the voting power (i.e., not less than 26% of voting power) in LMN Ltd. Further, the transaction of developing software and providing consultancy services (both onsite and offsite) fall within the meaning of "international transaction" under section 92B. Hence, transfer pricing provisions would be attracted in this case.

Computation of Arm's Length Price as per Cost Plus Method		
Gross Profit mark-up on cost in case of XYZ Ltd. [an unrelated party]		50%
Less: Adjustments for functional and other differences		
- Value of technology support [ABC Ltd. provides technology support, but XYZ Ltd. does not provide such support. Therefore, value of technology support shall be adjusted] [18% of 50%, being gross profit]	9%	
- Quantity discount to ABC Ltd. [Quantity discount is allowed to ABC Ltd. as it gives business in large volumes, but the same is not provided to XYZ Ltd. Therefore, it shall be adjusted] [10% of 50%, being gross profit]	5%	
- Risk and cost associated with marketing [LMN Ltd. has to bear all the risk and costs associated with the marketing function in case of XYZ Ltd., while there is no such risk in case of services to ABC Ltd. Therefore, market risk and cost shall be adjusted] [12% of 50%, being gross profit]	6%	20%
		30%
Add: Cost of credit to ABC Ltd. [LMN Ltd has provided credit of 1 month to ABC Ltd. but not to the unrelated party. Therefore, adjustment for the cost of such credit has to be carried out to arrive at the ALP] [(2% of 50%, being gross profit]		1%
Arm's length gross profit mark up to cost		**31%**

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Cost incurred by LMN Ltd. for executing ABC Ltd.'s work		2,25,000
Add: Adjusted gross profit (₹ 2,25,000 x 31%)		69,750
Arm's length billed value		**2,94,750**
Less: Actual Billed Income from ABC Ltd. (₹ 1800 x 120 man hours)		2,16,000
Total Income of LMN Ltd to be increased by		**78,750**

(d) Profit Split Method

This is a method which may be applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so inter-related that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction.

Under this method, combined net profit of the associated enterprises arising from the international transactions in which they are engaged is first determined.

The relative contribution of each associated enterprise to the earning of such combined net profit is then evaluated on the basis of the functions performed, assets employed and risks assumed by each enterprise. This evaluation is to be made on the basis of reliable external market data which can indicate how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances.

The combined net profit is then split amongst the enterprises in proportion to their relative contributions. The profit thus apportioned to the assessee is taken into consideration to arrive at an arm's length price in relation to the international transaction.

In certain cases the combined net profit referred to in second box may, in the first instance, be partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction in which it is engaged. This has to be determined with reference to market returns achieved for similar types of transactions by independent enterprises. Thereafter, the residual net profit remaining after such allocation may be split amongst the enterprises as stated in third and fourth box. In such a case the aggregate of net profit allocated in the first instance together with the residual profit apportioned should be considered for arriving at the arm's length price of the international transaction.

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(e) Transactional Net Margin Method

In this method, the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed having regard to costs incurred or sales effected or assets employed or having regard to any other relevant base.

The net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction by applying the same base as computed above. This profit margin is adjusted to take into account the differences which could materially affect the net profit margin in the open market having regard to international transaction and comparable uncontrolled transactions or having regard to the enterprise entering into such transactions.

If the net profit margin realised by the enterprise as in first box is established to be the same as the net profit margin as in second box, then the same is taken into consideration to arrive at an arm's length price in relation to the international transaction.

ILLUSTRATION 4

Andes Inc. having its business in Malaysia has advanced a loan of MD 1,60,000 to Andes Ltd, India. Book value of total assets of Andes Ltd was ₹ 125 lakhs. Andes Ltd provides software backup support to Andes Inc. Andes Ltd has spent 50,000 man hours during the financial year 2024-25 for the services rendered to Andes Inc. The cost for Andes Ltd is MD 75/manhour. Andes Ltd has billed Andes Inc. at MD 90.75/manhour.

Gama Ltd. in India which has a similar business model, provides software backup support to Olive Inc. in Penang, Malaysia. Gama Ltd.'s cost and operating profits are as hereunder:

Particulars	***₹ in lakhs***
Direct costs	*600*
Indirect costs	*200*
Operating profits	*200*

(1) Calculate Arm's Length Price for the transaction between Andes Ltd. and Andes Inc. based on the above data of Gama Ltd. using the Transactional Net Margin Method. Assume 1 MD = ₹ 45.

(2) Explain, if there is any adjustment to be made to the total income of Andes Ltd.

Note: *MD = Malaysia Dollars*

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SOLUTION

Two enterprises are deemed to be associated enterprises where one enterprise advances loan constituting not less than 51% of the book value of the total assets of the other enterprise.

In this case, since Andes Inc., a foreign company, has advanced loan to Andes Ltd., an Indian company, and such loan constitutes 57.6% [(₹ 45 x 1,60,000 x 100/1,25,00,000] of the book value of total assets of Andes Ltd., Andes Inc and Andes Ltd. are deemed to be associated enterprises. Since the transaction of provision of software backup support by Andes Ltd. to Andes Inc. is an international transaction between associated enterprises the provisions of transfer pricing would be attracted in this case.

Determination of Operating Margin of transaction of provision of software backup support by Andes Ltd. to Andes Inc

Particulars	₹
Billing per manhour [MD 90.75/hour x ₹45]	4,083.75
Cost per man hour [MD 75/hour x ₹45]	3,375.00
Operating profit per manhour	**708.75**
Operating profits to cost (%) **[708.75 x 100/3375] = 21%**	

Determination of Operating Margin of Comparable Uncontrolled transaction i.e., provision of software backup support. by Gama Ltd. to Olive Inc.

Particulars	₹ in lakhs
Direct Cost	600
Indirect Cost	200
Total cost	**800**
Operating profits	200
Operating profits to cost (%) **[200 x 100/800] = 25%**	

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(1) Computation of Arm's Length Price of provision of software backup support provided by Andes Ltd. to Andes Inc. by applying TNMM

Particulars	₹
Cost for Andes Ltd. (per man hour) [MD 75 x ₹ 45/MD]	3,375.00
Add: Arm's length operating profit margin as % of cost (25% of ₹ 3,375)	843.75
Arm's length price (per manhour) in ₹	**4,218.75**
Arm's length price of total manhours spent by Andes Ltd. for providing software backup support to Andes Inc. [₹ 4,218.75 x 50,000 man hours] = ₹ 21,09,37,500	

(2) Adjustment to be made to the total income of Andes Ltd.

Particulars	₹
Arm's length price of total manhours spent by Andes Ltd. for providing software backup support to Andes Inc.	21,09,37,500
Less: Amount actually billed [90.75 MD x ₹ 45/MD x 50,000 manhours]	20,41,87,500
Arm's length adjustment to be made to the total income of Andes Ltd.	**67,50,000**

(f) Other Method as may be prescribed by the CBDT

The Other method allows the use of 'any method' which takes into account

(i) the price which has been charged or paid or

(ii) would have been charged or paid for the same or similar uncontrolled transactions with or between non-associated enterprises, under similar circumstances.

The various data which may possibly be used for comparability purposes under this method could be third party quotations, valuation reports, tender/Bid documents, documents relating to the negotiations, standard rate cards, commercial & economic business models; etc.

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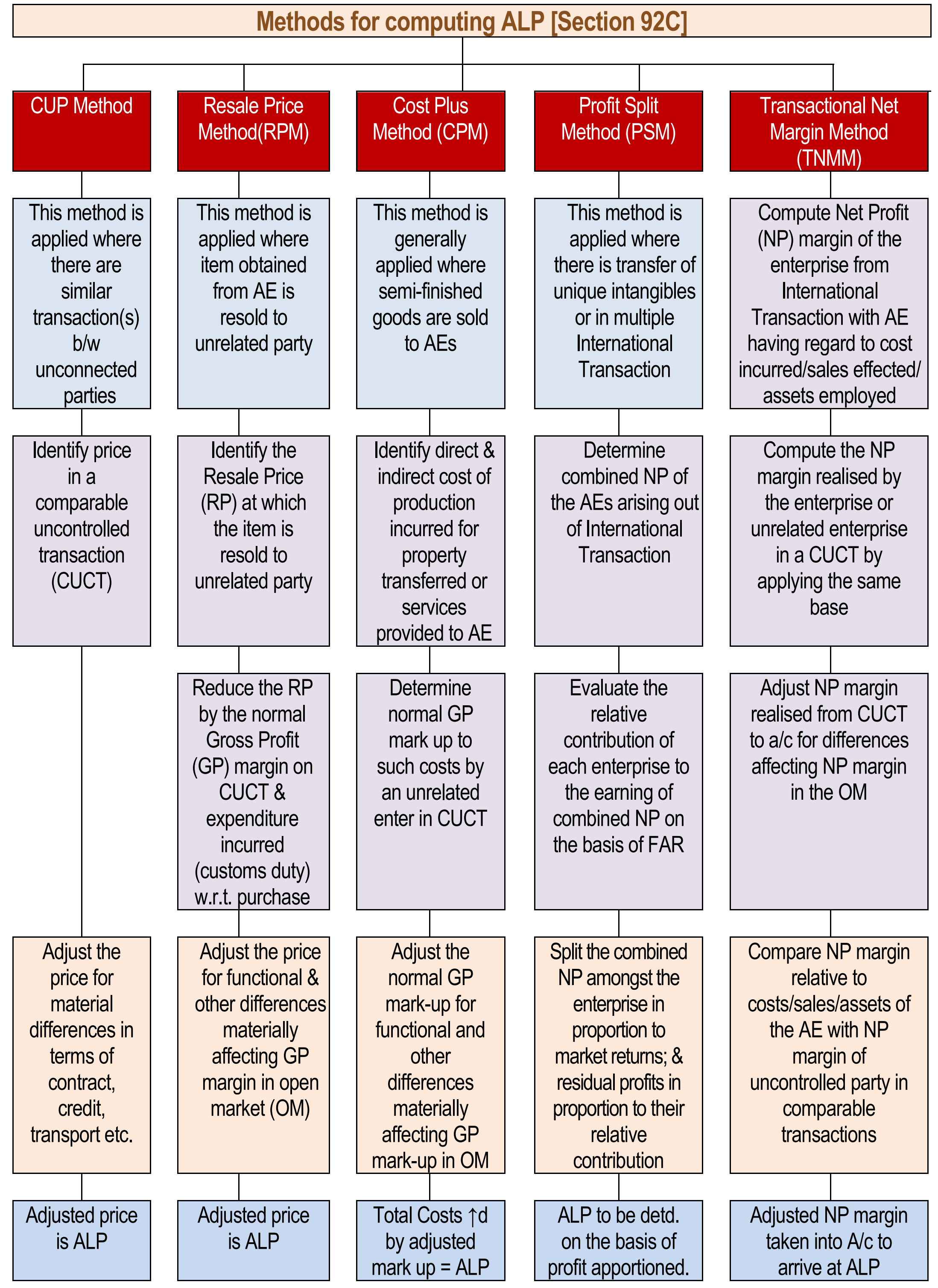

Methods for computing ALP [Section 92C]
CUP Method
This method is applied where there are similar transaction(s) b/w unconnected parties
Identify price in a comparable uncontrolled transaction (CUCT)
Adjust the price for material differences in terms of contract, credit, transport etc.
Adjusted price is ALP
Resale Price Method(RPM)
This method is applied where item obtained from AE is resold to unrelated party
Identify the Resale Price (RP) at which the item is resold to unrelated party
Reduce the RP by the normal Gross Profit (GP) margin on CUCT & expenditure incurred (customs duty) w.r.t. purchase
Adjust the price for functional & other differences materially affecting GP margin in open market (OM)
Adjusted price is ALP
Cost Plus Method (CPM)
This method is generally applied where semi-finished goods are sold to AEs
Identify direct & indirect cost of production incurred for property transferred or services provided to AE
Determine normal GP mark up to such costs by an unrelated enter in CUCT
Adjust the normal GP mark-up for functional and other differences materially affecting GP mark-up in OM
Total Costs ↑d by adjusted mark up = ALP
Profit Split Method (PSM)
This method is applied where there is transfer of unique intangibles or in multiple International Transaction
Determine combined NP of the AEs arising out of International Transaction
Evaluate the relative contribution of each enterprise to the earning of combined NP on the basis of FAR
Split the combined NP amongst the enterprise in proportion to market returns; & residual profits in proportion to their relative contribution
ALP to be detd. on the basis of profit apportioned.
Transactional Net Margin Method (TNMM)
Compute Net Profit (NP) margin of the enterprise from International Transaction with AE having regard to cost incurred/sales effected/ assets employed
Compute the NP margin realised by the enterprise or unrelated enterprise in a CUCT by applying the same base
Adjust NP margin realised from CUCT to a/c for differences affecting NP margin in the OM
Compare NP margin relative to costs/sales/assets of the AE with NP margin of uncontrolled party in comparable transactions
Adjusted NP margin taken into A/c to arrive at ALP

Determination of the most appropriate method: Rule 10C deals with the determination of most appropriate method. Under this Rule, the method which is best suited to the facts and circumstances and which provides the most reliable measure of an arm's length price in relation to the international transaction will be considered to be the most appropriate method.

For the purpose of selecting the most appropriate method, the following factors should be taken into account.

(i) The nature and class of the international transaction;

(ii) The class, or classes of associated enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises;

(iii) The availability, coverage and reliability of data necessary for application of the method;

(iv) The degree of comparability existing between the international transaction and the uncontrolled transaction and between the enterprises entering into such transactions;

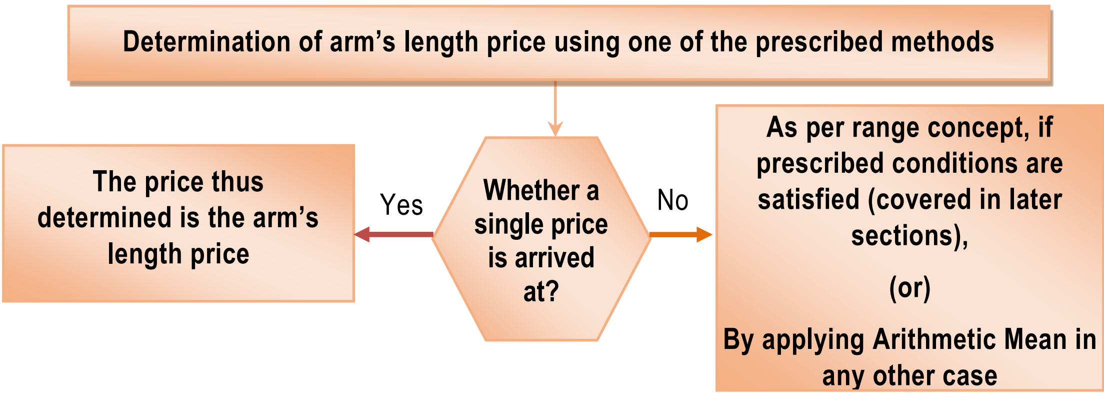
(v) The extent to which reliable and accurate adjustments can be made to account for difference, if any, between the international transaction and the comparable uncontrolled transaction or between the enterprises entering into such transactions;

(vi) The nature, extent and reliability of assumptions required to be made in application of a method.

Manner of computation of Arm's length price (Applicable for international transactions and specified domestic transactions undertaken on or after 1.4.2014) [Third proviso to section 92C(2)]

In case of an international transaction or specified domestic transaction[1] undertaken on or after 1.4.2014, where more than one price is determined by the most appropriate method, the ALP would be computed in the prescribed manner specified in Rule 10CA.

Computation of arm's length price in certain cases [Rule 10CA]



[1] discussed later in this Chapter

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Rule 10CA(1) provides that where in respect of an international transaction or a specified domestic transaction, the application of the most appropriate method referred to in section 92C(1) results in determination of more than one price, then, the arm's length price in respect of such international transaction or specified domestic transaction has to be computed on the basis of the dataset constructed by placing such prices in an ascending order as provided in Rule 10CA(2).

Application of multiple year data for construction of dataset

Multiple year data allowed only in cases where determination of ALP is done using TNMM, RPM or CPM

Data to be used for analyzing the comparability of an uncontrolled transaction with an international transaction

The data to be used for analyzing the comparability of an uncontrolled transaction with an international transaction should relate to the financial year (current year) in which the international transaction has been entered into.

In case the most appropriate method for determination of ALP of a transaction entered into on or after 1.4.2014 is the **resale price method** or **cost plus method** or **the transactional net margin method**, then, the data to be used for analyzing the comparability of an uncontrolled transaction with an international transaction shall be –

(a) the data relating to the current year; or

(b) the data relating to the financial year immediately preceding the current year, if the data relating to the current year is not available at the time of furnishing the return of income by the assessee, for the assessment year relevant to the current year.

However, where the data relating to the **current year is subsequently available** at the time of determination of arm's length price of an international transaction **during the course of any assessment proceeding** for the assessment year relevant to the current year, then, **such data shall be used** for such determination **irrespective of the fact that the data was not available** at the time of furnishing the return of income of the relevant assessment year.

For the data relating to the current year, where the comparable uncontrolled transaction has been identified and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred

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to in sub-rule (1)], has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction then,-

(i) the most appropriate method used to determine the price of the comparable uncontrolled transaction undertaken in the aforesaid period and the price in respect of such uncontrolled transactions has to be determined; and

(ii) the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the current year and in the aforesaid period preceding it has to be included in the dataset instead of the price referred to in sub-rule (1).

Further, where the comparable uncontrolled transaction has been identified **on the basis of the data relating to the financial year immediately preceding the current year** and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], has in the financial year immediately preceding the said financial year undertaken the same or similar comparable uncontrolled transaction then, -

(i) the price in respect of such uncontrolled transaction shall be determined by applying the most appropriate method in a similar manner as it was applied to determine the price of the comparable uncontrolled transaction undertaken in the financial year immediately preceding the current year; and

(ii) the weighted average of the prices, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken in the aforesaid period of two years shall be included in the dataset instead of the price referred to in sub-rule (1).

Also, in such cases, where the use of data relating to the current year for determination of ALP subsequently at the time of assessment establishes that,-

(i) the enterprise has not undertaken same or similar uncontrolled transaction during the current year; or

(ii) the uncontrolled transaction undertaken by an enterprise in the current year is not a comparable uncontrolled transaction,

then, irrespective of the fact that such an enterprise had undertaken comparable uncontrolled transaction in the financial year immediately preceding the current year or the financial year immediately preceding such financial year, the price of comparable uncontrolled transaction or the

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weighted average of the prices of the uncontrolled transactions, as the case may be, undertaken by such enterprise shall **not** be included in the dataset.

Rule 10CA(3) provides that where an enterprise has undertaken comparable uncontrolled transactions in more than one financial year, then for the purposes of constructed the dataset, the weighted average of the prices of such transactions would be computed in the following manner, namely:-

	Method used to determine the prices	**Manner of computation of weighted average of the prices**
(i)	The resale price method	By assigning weights to the quantum of sales which has been considered for arriving at the respective prices
(ii)	The cost plus method	By assigning weights to the quantum of costs which has been considered for arriving at the respective prices
(iii)	The transactional net margin method	By assigning weights to the quantum of costs incurred or sales effected or assets employed or to be employed, or as the case may be, any other base which has been considered for arriving at the respective prices.

Range Concept: Rule 10CA(4) provides that where the most appropriate method applied is –

(i) a method other than the profit split method or a method prescribed by the CBDT under section 92C(1)(d)/(f); and

(ii) the dataset constructed in accordance with sub-rule (2) consists of six or more entries,

an arm's length range beginning from the thirty-fifth percentile of the dataset and ending on the sixty-fifth percentile of the dataset would be constructed.

If the price at which the international transaction or the specified domestic transaction has actually been undertaken is within the said range, then, the price at which such international transaction or the specified domestic transaction has actually been undertaken would be deemed to be the arm's length price [Rule 10CA(5)].

If the price at which the international transaction or the specified domestic transaction has actually been undertaken is outside the said arm's length range, the arm's length price shall be taken to be the median of the dataset [Rule 10CA(6)].

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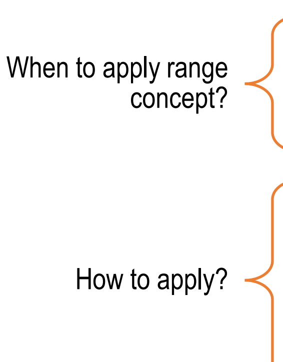

- Most appropriate method selected is Comparable uncontrolled price method, resale price method, cost plus method or transactional net margin method and
- The dataset constructed has six or more entries.

- Arrange the values in the dataset in the ascending order.
- Where the actual transaction price falls within 35th and 65th percentile of the dataset, the value of transaction will be accepted to be arm's length price.
- Where the transfer price does not fall within the above range, then median of dataset shall be taken as the Arm's Length price.

Range concept not applicable:

In a case where the provisions of Rule 10CA(4) are not applicable [i.e. most appropriate method is profit split method or any other method or the dataset has less than 6 entries], the arm's length price shall be the arithmetical mean of all the values included in the dataset. However, if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding 3% of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price [Rule 10CA(7)].

Meaning of certain terms [Rule 10CA(8)]

	Term	Meaning
(a)	the thirty-fifth percentile of a dataset (having values arranged in an ascending order)	The lowest value in the dataset such that at least 35% of the values included in the dataset are equal to or less than such value. However, if the number of values that are equal to or less than the aforesaid value is a whole number, then, the thirty-fifth percentile shall be the arithmetic mean of such value and the value immediately succeeding it in the dataset.
(b)	the sixth-fifth percentile of a dataset (having values arranged in an ascending order)	The lowest value in the dataset such that at least 65% of the values included in the dataset are equal to or less than such value. However, if the number of values that are equal to or less than the aforesaid value is a whole number, then, the sixty-fifth percentile shall be the arithmetic mean of such value and the value immediately succeeding it in the dataset.
(c)	the median of the dataset (having values	The lowest value in the dataset such that at least 50% of the values included in the dataset are equal to or less than such value.

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	arranged in an ascending order)	However, if the number of values that are equal to or less than the aforesaid value is a whole number, then, the median shall be the arithmetic mean of such value and the value immediately succeeding it in the dataset.

Comparability Analysis

The comparability of the international transaction with an uncontrolled transaction is to be judged with reference to the following factors:

(i) The specific characteristics of the property transferred or services provided in either transaction;

(ii) The functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

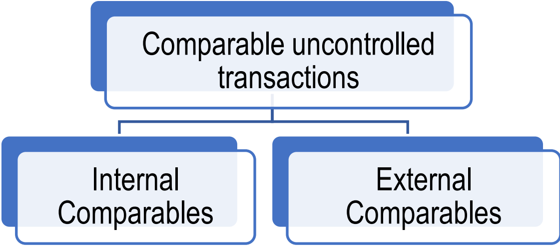
(iii) The contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(iv) Conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

As per Rule 10B(3), an uncontrolled transaction should be considered comparable to the international controlled transaction only if there are no material differences (in terms of functions, assets and risks) between the transactions being compared or the enterprises entering into such transactions which would materially affect the prices or costs charged or paid in, or the profit arising from, such transactions in the open market.

It, further, provides that in a case there are any such material differences, reasonably accurate adjustments should be made to eliminate such material differences in order to compare the controlled and the uncontrolled transactions.

Comparable uncontrolled transactions could be of two types - Internal or external.



(a) Internal comparables: These are the comparable transactions between one of the parties to the controlled transaction, (taxpayer or the AE) and an independent third party. These

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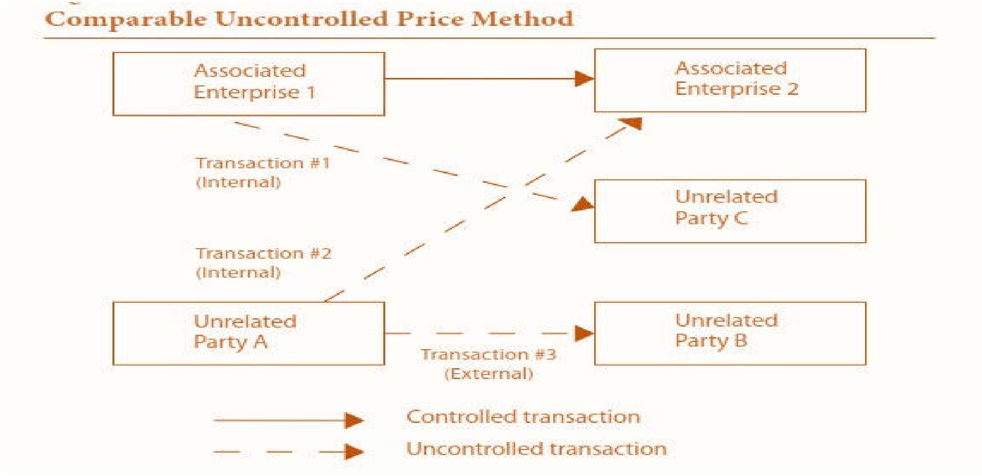
comparables are considered a good measure of comparability as it is likely that the Functions, Assets, Risks analysis (FAR analysis) of the comparable transaction would be similar to that of the controlled transaction due to the involvement of a common entity to the said two transactions. Even though internal comparables may offer a higher degree of comparability, there is a need of rigorous scrutiny like in external comparables and suitable adjustments should be made, wherever necessary.

(b) **External comparables:** These are the comparable transactions between two independent parties, neither of which is a party to the controlled transaction. Generally, the level of comparability offered in the external comparables is not as precise as internal comparables; however, this rule is not absolute. For instance, it may so happen that an entity offers a certain variation of its product exclusively to its AE and a slightly different variation to unrelated parties. In such a situation, preference should be given to external comparables involving the identical product and identical contractual terms than accepting the internal comparable.



In the above example, Transaction between AE1 and AE2 are subject to transfer pricing. AE1 and AE2 are parties to a controlled transaction. Transaction #1 and #2 are internal uncontrolled transactions since it is entered by AEs with unrelated parties.

Transaction #3 is external uncontrolled transactions since it is entered between unrelated parties.

Process for identification and selection of external comparables:

Wherever internal comparables are available, preference should be given to internal comparables in the process of determination of ALP. However, in the absence of the same, recourse has to be taken to search for external comparables. The transfer pricing legislation in India does not

prescribe a particular process for selection of such comparables. However, various decisions of the judicial authorities have provided guidance on how to carry out such process based on the data available in public domain. The major steps involved in the search process are discussed hereunder:

Step 1: Selection of database

A database is a domain where information (financial and non-financial) about companies is maintained in an organised manner so as to facilitate easy search for data and also for the application of the relevant filters. Some of the commonly used databases in India are as under:

(a) **Capitaline Plus/ Capitaline TP:** It contains digital database of over 35,000 companies. It includes information of public, private, co-operative and joint sector companies, listed or otherwise.

(b) **Prowess:** Prowess is a database of the financial performance of Indian companies. Audited Annual Reports of companies and information submitted to the MCA; and in the case of listed companies, company filings with stock exchanges and prices of securities listed on the major stock exchanges are the sources of the database. The database contains information on all listed companies and a larger set of unlisted companies.

(c) **ACE TP Database:** ACE TP database contains information, both financial and non-financial of companies and sectors. It also contains information regarding equity and commodity and derivative markets.

There are other available Indian and foreign databases also like Prowess Pro, Amadeus, Royalty Stat, Compustat Global, Osiris, ktmine, Oriana, Bloomberg etc. which can be referred.

Step 2: Application of quantitative filters

The application of the quantitative filters help in filtering the companies available in the database based on the similarity of the quantitative information between the tested party and the potential comparables. Some of the commonly used quantitative filters are:

(a) **Availability of financial data:** The companies whose financial information for the relevant period (financial year of the controlled transaction or the preceding two years as the case may be) are not available in the public domain should not be considered in the comparability analysis.

(b) **Industry of the tested party:** The appropriate industry head should be selected. For instance, if the tested party operates in the seed segment, it should be ensured that various

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industry heads which could include comparable companies should be chosen, i.e. seeds, agriculture etc. Therefore, while applying this filter, the parameters should be fairly broad.

(c) **Turnover filter:** This is perhaps the most commonly used quantitative filter in the search process. This is for the reason that companies which are operating in the same range of turnover would have similar share in the market and thus are more likely to have somewhat similar margins. On the other hand, companies with extremely high or low turnover would not provide an effective base for comparison since their margins would not only reflect the efficiency of their business but also the scale of the operations. The range of the filter is very subjective and varies with the facts of each case.

(d) **Net worth filter:** Net worth of a company can be used to determine the creditworthiness of the company. Negative net worth would indicate that the debts of the company have surpassed its assets. Therefore, a company with consistent negative net worth should be rejected in the comparability analysis since its margins would be adversely affected and it would ordinarily be difficult to quantify and adjust the effect of its negative worth on the margins. Companies with negative net worth are usually rejected in this filter.

(e) **Export filter:** The parameter of 'geographic location of market' has lead to adoption of 'export turnover filter' whereby Transfer Pricing Officers ('TPOs') insist that if the taxpayer is an exporter then the comparables should also have export earnings of a certain degree. The export activity levels, by itself, cannot be a valid filter unless it is established that the market to which the exports are made are materially different from the domestic market.

(f) **Employee expense filter:** The employee expense ratio helps to analyse the level of activities and intensity of employee dependence.

(g) **Related party transactions:** As already discussed, a transaction between two related parties cannot be taken as a comparable uncontrolled transaction for the purpose of benchmarking a controlled transaction. This filter finds its application on the same principle, i.e., if a potential comparable has substantial related party transactions, it can be inferred that its margins are contaminated with transactions which are not entirely governed by the market forces and thus such a company should be rejected in the search process.

(h) **Consistently loss making companies:** The companies which are incurring losses on a consistent basis cannot be considered as good comparables as their profitability is adversely impacted by factors which are not specific to the industry but to the entity. However, loss in just one year would not be indicative of any extra ordinary factors

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surrounding the company and therefore such a company should not be rejected on that count alone.

Step 3: Application of qualitative filters

The entities remaining after the application of the quantitative filters are further narrowed down by applying the qualitative filters. Some of the commonly used qualitative filters are as under:

(a) **Product filter:** Although the industry filter excludes the companies not operating in the same industry but at the same time there are entities producing a variety of products in the same industry and therefore in order to reach a precise measure of comparability, the list of companies should be further shortlisted to exclude the companies not dealing in the same/similar products as that of the tested party. For instance, for a tested party trading in seeds, the industry filter to be applied could be agri-trading. However, this filter might result in companies engaged in various types of agricultural products such as fertilizers, pesticides etc. In order to remedy this, product criteria would be applied to only select the companies engaged in trading of seeds in the agriculture industry.

(b) **Functional filter:** The chosen companies must be further analyzed to select only those companies which are functionally similar to the tested party. The functions could be in the form of manufacturing of goods, rendering of services, trading in goods etc. Thus, the filter to be applied depends on the functions performed by the tested party to find transactions which are functionally similar.

(c) **Ownership (Government or private):** Generally, entities in the private sector exist for generating profits. Government owned entities on the other hand, function to serve the society and are not necessarily driven by the profit motive. Accordingly, such companies should be included/ excluded based on their comparability analysis like the other private companies.

V. Reference to Transfer Pricing Officer [Section 92CA]: This section provides for a procedure for reference to a Transfer Pricing Officer (TPO) of any issue relating to computation of arm's length price in an international transaction. The procedure is as under -

(1) The option to make reference to TPO is given to the Assessing Officer. Where the assessee has entered into an international transaction in any previous year and if

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Assessing Officer considers it necessary or expedient to do so, he may refer the computation of the arm's length price in relation to the said international transaction to the TPO. This option is not, however, available to the assessee.

(2) The Assessing Officer has to take the approval of the Principal Commissioner of Income-tax (PCIT)/Commissioner of Income-tax (CIT) before making such a reference.

(3) Any Joint/Deputy/Assistant Commissioner of Income-tax, authorised by CBDT, can be appointed as TPO.

(4) When such reference is made, TPO would serve a notice to the assessee requiring him to produce on a date specified in the notice, any evidence on which the assessee relied in support of the computation of arm's length price made by him in relation to the international transaction.

(5) The TPO can also determine the ALP of other international transactions identified subsequently in the course of proceedings before him as if such transaction is an international transaction referred to the TPO by the Assessing Officer under section 92CA(1) [Sub-section (2A)].

(6) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the TPO during the course of proceeding before him, the transfer pricing provisions shall apply as if such transaction is an international transaction referred to the TPO by the Assessing Officer under section 92CA(1) [Sub-section (2B)].

(7) The TPO has to pass an order determining the arm's length price after considering the evidence, documents, etc. produced by the assessee and after considering the material gathered by him. He has to send a copy of his order to Assessing Officer as well as the assessee.

(8) The order of the Transfer Pricing Officer determining the arm's length price of an international transaction is binding on the Assessing Officer and the Assessing Officer shall proceed to compute the total income in conformity with the arm's length price determined by the Transfer Pricing Officer [Sub-section (4)].

(9) In order to provide sufficient time to the Assessing Officer to complete the assessment in a case where reference is made to the Transfer Pricing Officer, section 92CA(3A) provides for determination of arm's length price of international transactions by the Transfer Pricing Officer at least 60 days before the expiry of the time limit under section 153 or section 153B for making an order of assessment by the Assessing Officer.

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(10) In many cases, it becomes necessary to seek information from foreign jurisdictions for the purpose of determining the arm's length price by the TPO. At times, proceedings before the TPO may also be stayed by a court order.

Taking into consideration such cases, it has been provided that where assessment proceedings are stayed by any court or where a reference for exchange of information has been made by the competent authority under an agreement referred to in section 90 or 90A, the time available to the Transfer Pricing Officer for making an order after excluding the time for which assessment proceedings were stayed or the time taken for receipt of information, as the case may be, is less than 60 days, then, such remaining period shall be extended to 60 days.

(11) The TPO has power to rectify his order under section 154 if any mistake apparent from the record is noticed. If such rectification is made, the Assessing Officer has to rectify the assessment order to bring it in conformity with the same.

(12) The TPO can exercise all or any of the powers specified in clause (a) to (d) of section 131(1) or section 133(6) or section 133A for determination of arm's length price once the above reference is made to him.

(13) The Central Government may make a scheme, by way of notification for the purposes of determination of the arm's length price, so as to impart greater efficiency, transparency and accountability by –

(a) eliminating the interface between the Transfer Pricing Officer and the assessee or any other person to the extent technologically feasible;

(b) optimising utilisation of the resources through economies of scale and functional specialisation;

(c) introducing a team-based determination of arm's length price with dynamic jurisdiction [Sub-section (8)].

(14) The Central Government may, for the purpose of giving effect to the scheme made, direct that any of the provisions of this Act would not apply or would apply with such exceptions, modifications and adaptations as may be specified.

However, no direction shall be issued after ***31st March, 2025***.

(15) Every notification so issued shall, as soon as may be after the notification is issued, be laid before each House of Parliament [Sub-section (10)].

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VI. Safe Harbour Rules for determination of arm's length price in case of international transactions [Section 92CB]

Section 92CB provides that determination of

- income referred to in section 9(1)(i); or
- arm's length price under section 92C or Section 92CA

shall be subject to Safe Harbour rules. Section 92CB(2) empowers the CBDT to prescribe safe harbour rules[2].

Safe Harbour means circumstances in which the income-tax authorities shall accept the transfer price or income, deemed to accrue or arise under section 9(1)(i), as the case may be, declared by the assessee.

VII. Introduction of Advance Pricing Agreements [Sections 92CC & 92CD]

(1) An Advance Pricing Agreement (APA) is an agreement between a taxpayer and a taxing authority on an appropriate transfer pricing methodology for a set of transactions over a fixed period of time in future. They offer better assurance on transfer pricing methods and provide certainty and unanimity of approach.

Advance Pricing Agreements

(2) Keeping in mind the benefits offered by the APAs, sections 92CC and section 92CD have been introduced in the transfer pricing regime to provide a framework for formulation of APAs between the tax payer and the income-tax authorities.

(3) Section 92CC enables the CBDT (with the approval of the Central Government), to enter into an APA with any person determining the –

- arm's length price or specifying the manner in which the arm's length price is to be determined, in relation to an international transaction to be entered into by that person;
- income referred to in section 9(1)(i), or specifying the manner in which said income is to be determined, as is reasonably attributable to the operations carried out in India by or on behalf of that person, being a non-resident.

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[2] The Safe Harbour Rules relevant for A.Y. 2025-26 are yet to be notified by the CBDT as on the date of release of the Study Material. These rules, when notified, will form part of the webhosted Statutory Update.

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(A) Purpose of APA: The APA shall relate to an international transaction to be entered into by such person. The APA shall be entered into for the purpose of determination of the

(a) arm's length price or specifying the manner in which arm's length price shall be determined, in relation to such international transaction.

(b) income referred to in section 9(1)(i), or specifying the manner in which said income is to be determined, as is reasonably attributable to the operations carried out in India by or on behalf of that person, being a non-resident.

(B) Manner of determination of Arm's Length Price in APA: The manner of determination of arm's length price or the income referred above may include methods referred to in section 92C(1) or any other method provided by rules made under the Act with necessary adjustments or variations.

(C) Provisions of APA to apply notwithstanding anything contained in sections 92C or 92CA: In case an APA has been entered, the arm's length price in relation to that transaction or the income referred to in section 9(1)(i) shall be determined in accordance with that APA notwithstanding any contrary provisions contained in section 92C or section 92CA i.e., the provisions of the APA shall override the provisions of section 92C or section 92CA, which are normally applicable for determination of arm's length price.

(D) Validity of APA: The APA shall be valid for such period as specified in the agreement, which shall in no case exceed five consecutive previous years.

(E) Binding nature of APA: The APA so entered into shall be binding on:

(a) the person in whose case, and in respect of the transaction in relation to which, the APA has been entered into; and

(b) the Principal Commissioner or Commissioner and the income-tax authorities subordinate to him, in respect of the said person and the said transaction.

(F) Not binding of APA: The APA shall not be binding if there is any change in law or facts having bearing on such APA.

(G) Conditions to declare APA as *void ab initio*: In case the Board finds that the APA so entered into has been obtained by the person by way of fraud or misrepresentation of facts, the Board is empowered to pass an order declaring any such APA to be *void ab initio*, with the approval of Central Government.

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(H) Consequences of declaration of an APA as *void ab initio*: As a result of declaration of an APA as *void ab initio*:

(a) all the provisions of the Act shall apply to such person as if such APA had never been entered into.

(b) The period beginning with the date of such APA and ending on the date of order declaring the APA as *void ab initio*, shall be excluded for the purpose of computation of any period of limitation under this Act (for example period of limitation specified in the section 153, 153B etc). This is irrespective of anything contained in any other provision of the Act.

(c) In case the period of limitation after exclusion of the above mentioned period is less than 60 days, such remaining period of limitation shall be extended to 60 days.

(I) If an application is made by a person for entering into an APA, then, the proceeding, in respect of such person for the purpose of the Act, shall be deemed to be pending.

(J) Prescribed scheme for APA: The Board is empowered to prescribe a scheme specifying the manner, form, procedure and any other matter generally in respect of the APA[3].

Prescribed Advance Pricing Agreement Scheme for the purpose of section 92CC [Rule 10F to 10T]: In exercise of the powers conferred in section 92CC(9) read with section 295 of the Income-tax Act, 1961, the CBDT has prescribed rules specifying an Advance Pricing Agreement (APA) Scheme. Some of the important provisions of the scheme are briefed hereunder –

(1) Persons eligible to apply [Rule 10G]: Any person who has undertaken an international transaction or is contemplating to undertake an international transaction, shall be eligible to enter into an agreement under these rules.

[3] *Rules prescribing the scheme to enter into an APA for the purpose of determining income referred to in section 9(1)(i), or the manner in which said income is to be determined, as is reasonably attributable to the operations carried out in India by or on behalf of that person, being a non-resident are yet to be notified by the CBDT as on the date of release of the Study Material. These rules, when notified, will form part of the webhosted Statutory Update.*

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(2) Pre-filing Consultation [Rule 10H]:

(a) Any person proposing to enter into an agreement under these rules may, by an application in writing, make a request for a pre-filing consultation in the prescribed form to the Director General of Income-tax (International Taxation).

(b) 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.

(c) 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.

(3) Application for advance pricing agreement [Rule 10-I]

(a) Any person who is eligible to enter into agreement may, if he desires to enter into an agreement furnish an application in the prescribed form along with proof of payment of requisite fee as specified, 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.

(b) The application may be filed 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.

ILLUSTRATION 5

XYZ (P) Ltd. has been supplying goods to its Associate Enterprise (AE) in foreign country. It has applied for Advance Pricing Agreement ('APA') in respect of the transactions with its AE. Application for APA was filed on 15th March, 2024 and the

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APA was signed on 2nd June, 2024. Discuss from which previous year APA would be applicable.

SOLUTION

XYZ (P) Ltd. has filed APA application in respect of transactions with its AE which are of a continuing nature from dealings that are already occurring. Since the application was filed on 15th March, 2024 i.e., before 1.4.2024, APA would be applicable from P.Y. 2024-25.

(4) Applicable Fee: The application has to be accompanied by proof of payment of fees as given below:

Amount of international taxation entered into or proposed to be undertaken in respect of which agreement is proposed during the proposed period of agreement	Fee
Amount ≤ ₹ 100 crores	₹ 10 lakhs
Amount > ₹ 100 crores but not exceeding ≤ ₹ 200 crores	₹ 15 lakhs
Amount > ₹ 200 crores	₹ 20 lakhs

(5) Withdrawal of application for agreement [Rule 10J]

The applicant may withdraw the application for agreement at any time before the finalisation of the terms of the agreement. However, application fees paid shall not be refunded on withdrawal of application by the applicant.

(6) Approval of Central Government: The agreement shall be entered into by the Board with the applicant after its approval by the Central Government.

(7) Terms of the agreement [Rule 10M]

(a) 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 item (ii) or (iii);

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(v) critical assumptions i.e., 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;

(vi) rollback provision referred to in Rule 10MA;

(vii) the conditions, if any, other than provided in the Act or these rules.

(b) 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.

(c) The binding effect of agreement shall cease only if any party has given due notice of the concerned other party or parties.

(d) 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.

(8) Furnishing of Annual Compliance Report [Rule 10-O]: The assessee shall furnish an annual compliance report in quadruplicate in the prescribed form to Director General of Income-tax (International Taxation) for each year covered in the agreement, within 30 days of the due date of filing income-tax return for that year, or within 90 days of entering into an agreement, whichever is later.

(9) Compliance Audit of the agreement [Rule 10P]:

(a) 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. For this purpose, 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.

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(b) 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 is received by the Transfer Pricing Officer.

(10) Revision of an agreement [Rule 10Q]:

(a) An agreement, after being entered, 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), if –

(i) there is a change in critical assumptions or failure to meet a condition subject to which the agreement has been entered into;

(ii) 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

(iii) there is a request from competent authority in the other country requesting revision of agreement, in case of bilateral or multilateral agreement.

(b) 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.

(c) 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.

(11) Cancellation of an agreement [Rule 10R]:

(a) An agreement shall be cancelled by the Board for any of the following reasons:

(i) the compliance audit 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 assessee is not in agreement with the revision proposed in the agreement or the agreement is to be cancelled under rule 10RA(7);.

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(b) The Board shall give an opportunity of being heard to the assessee, before proceeding to cancel an application.

(c) 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.

(d) The order of cancellation shall also specify the effective date of cancellation of the agreement, where applicable.

(e) 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.

(12) Mere filing of an 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. [Rule 10T(1)].

(13) 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. [Rule 10T(2)].

(K) Provision for Roll back in APA Scheme [Section 92CC(9A)]

(a) In order to reduce current pending as well as future litigation, section 92CC(9A) provides roll back mechanism in the APA scheme

(b) Accordingly, the APA may, subject to such prescribed conditions, procedure and manner, provide for determining the

- ALP or for specifying the manner in which ALP is to be determined in relation to an international transaction entered into by the person
- income referred to in section 9(1)(i), or specifying the manner in which the said income is to be determined, as is reasonably attributable to the operations carried out in India by or on behalf of that person, being a non-resident,

during any period not exceeding four previous years preceding the first of the previous years for which the APA applies in respect of the international transaction to be undertaken.

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The CBDT has, vide *Notification No.23/2015 dated 14.3.2015*, in exercise of the powers conferred by 92CC(9A) read with section 295, notified following conditions, procedure and manner for determining the arm's length price or for specifying the manner in which arm's length price is to be determined in relation to an international transaction:

Rule	Particulars	Conditions, Procedure & Manner of determination of ALP
10F(ba)	**Definition of Applicant**	A person who has made an application.
10F(ha)	**Definition of Rollback year**	Any previous year, falling within the period **not exceeding four previous years,** preceding the first of the five consecutive previous years referred to in section 92CC(4).
10MA	**Roll back of the agreement**	The said rule provides the following: **1.** The agreement may provide for determining the arm's length price or specify the manner in which arm's length price shall be determined in relation to the international transaction entered into by the person during the rollback year (hereinafter referred as "rollback provision"). **2. Conditions for applying for rollback provisions:** The agreement shall contain rollback provision in respect of an international transaction subject to the following, namely:- (i) the international transaction is same as the international transaction to which the agreement (other than the rollback provision) applies; (ii) the return of income for the relevant rollback year has been or is furnished by the applicant before the due date as specified in *Explanation 2* of section 139(1). (iii) the report in respect of the international transaction had been furnished in accordance with section 92E; (iv) the applicability of rollback provision, in respect of an international transaction, has been requested by the applicant for all the rollback years in which the said international transaction has been undertaken by the applicant; and (v) the applicant has made an application seeking rollback in Form 3CEDA in accordance with sub-rule (5);

<table>
<tr><td></td><td></td><td>3. Non-applicability of Rollback provision: Rollback provision shall not be provided in respect of an international transaction for a rollback year, if,-
(i) the determination of arm's length price of the said international transaction for the said year has been subject matter of an appeal before the Appellate Tribunal and the Appellate Tribunal has passed an order disposing of such appeal at any time before signing of the agreement; or
(ii) the application of rollback provision has the effect of reducing the total income or increasing the loss, as the case may be, of the applicant as declared in the return of income of the said year.
4. Manner for determining arm length price to be the same for rollback years and other previous years: Where the rollback provision specifies the manner in which arm's length price shall be determined in relation to an international transaction undertaken in any rollback year then such manner shall be the same as the manner which has been agreed to be provided for determination of arm's length price of the same international transaction to be undertaken in any previous year to which the agreement applies, not being a rollback year.
5. Time limit for filling application for rollback provision: The applicant may furnish along with the application for advance pricing agreement, the request for rollback provision in Form No. 3CEDA with proof of payment of an additional fee of ₹ 5 lakh.</td></tr>
<tr><td>10RA</td><td>Procedure for giving effect to rollback provision of an Agreement</td><td>Rule 10RA lays down the "Procedure for giving effect to rollback provision of an Agreement" as follows:
(i) The applicant shall furnish modified return of income referred to in section 92CD in respect of a rollback year to which the agreement applies along with the proof of payment of any additional tax arising as a consequence of and computed in accordance with the rollback provision.
(ii) The modified return in respect of rollback year shall be furnished along with the modified return to be furnished in respect of first of the previous years for which the agreement has been requested for in the application.
(iii) If any appeal filed by the applicant is pending before the Commissioner (Appeals), Appellate Tribunal or the High</td></tr>
</table>

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		Court for a rollback year, on the issue which is the subject matter of the rollback provision for that year, the said appeal to the extent of the subject covered under the agreement shall be withdrawn by the applicant before furnishing the modified return for the said year.
		(iv) If any appeal filed by the Assessing Officer or the Principal Commissioner or Commissioner is pending before the Appellate Tribunal or the High Court for a rollback year, on the issue which is subject matter of the rollback provision for that year, the said appeal to the extent of the subject covered under the agreement, shall be withdrawn by the Assessing Officer or the Principal Commissioner or the Commissioner, as the case may be, within three months of filing of modified return by the applicant.
		(v) The applicant, the Assessing Officer or the Principal Commissioner or the Commissioner, shall inform the Dispute Resolution Panel or the Commissioner (Appeals) or the Appellate Tribunal or the High Court, as the case may be, the fact of an agreement containing rollback provision having been entered into along with a copy of the same as soon as it is practicable to do so.
		(vi) In case effect cannot be given to the rollback provision of an agreement in accordance with this rule, for any rollback year to which it applies, on account of failure on the part of applicant, the agreement shall be cancelled.

Subsequent to the notification of the rules, the CBDT has issued *Circular No. 10/2015 dated 10.6.2015* adopting a Question and Answer format to clarify certain issues arising out of the said Rules. The questions raised and answers to such questions as per the said Circular are given hereunder:

Question 1

Under rule 10MA(2)(ii) there is a condition that the return of income for the relevant roll back year has been or is furnished by the applicant before the due date specified in Explanation 2 to section 139(1). It is not clear as to whether applicants who have filed returns under section 139(4) or 139(5) of the Act would be eligible for roll back.

Answer

The return of income under section 139(5) can be filed only when a return under section 139(1) has already been filed. Therefore, the return of income filed under section 139(5) of the Act, replaces the original return of income filed under section 139(1). Hence, if there is

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a return which is filed under section 139(5) to revise the original return filed before the due date specified in *Explanation 2* to sub-section (1) of section 139, the applicant would be entitled for rollback on this revised return of income.

However, rollback provisions will not be available in case of a return of income filed under section 139(4) because it is a return which is not filed before the due date.

Note – *A belated return filed under section 139(4) can also be revised under section 139(5). In such a case, the revised return would replace the belated return. Therefore, an applicant would not be entitled for roll back provisions on a revised return which replaces a belated return.*

Question 2

Rule 10MA(2)(i) mandates that the rollback provision shall apply in respect of an international transaction that is same as the international transaction to which the agreement (other than the rollback provision) applies. It is not clear what is the meaning of the word "same". Further, it is not clear whether this restriction also applies to the Functions, Assets, Risks (FAR) analysis.

Answer

The international transaction for which a rollback provision is to be allowed should be the same as the one proposed to be undertaken in the future years and in respect of which the agreement has been reached. There cannot be a situation where rollback is finalised for a transaction which is not covered in the agreement for future years. The term same international transaction implies that the transaction in the rollback year has to be of same nature and undertaken with the same associated enterprise(s), as proposed to be undertaken in the future years and in respect of which agreement has been reached. In the context of FAR analysis, the restriction would operate to ensure that rollback provisions would apply only if the FAR analysis of the rollback year does not differ materially from the FAR validated for the purpose of reaching an agreement in respect of international transactions to be undertaken in the future years for which the agreement applies.

The word "materially" is generally being defined in the Advance Pricing Agreements being entered into by CBDT. According to this definition, the word "materially" will be interpreted consistently with its ordinary definition and in a manner that a material change of facts and circumstances would be understood as a change which could reasonably have resulted in an agreement with significantly different terms and conditions.

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Question 3

Rule 10MA(2)(iv) requires that the application for rollback provision, in respect of an international transaction, has to be made by the applicant for all the rollback years in which the said international transaction has been undertaken by the applicant. Clarification is required as to whether rollback has to be requested for all four years or applicant can choose the years out of the block of four years.

Answer

The applicant does not have the option to choose the years for which it wants to apply for rollback. The applicant has to either apply for all the four years or not apply at all. However, if the covered international transaction(s) did not exist in a rollback year or there is some disqualification in a rollback year, then the applicant can apply for rollback for less than four years. Accordingly, if the covered international transaction(s) were not in existence during any of the rollback years, the applicant can apply for rollback for the remaining years. Similarly, if in any of the rollback years for the covered international transaction(s), the applicant fails the test of the rollback conditions contained in various provisions, then it would be denied the benefit of rollback for that rollback year. However, for other rollback years, it can still apply for rollback.

Question 4

Rule 10MA(3) states that the rollback provision shall not be provided in respect of an international transaction for a rollback year if the determination of arm's length price of the said international transaction for the said year has been the subject matter of an appeal before the Appellate Tribunal and the Appellate Tribunal has passed an order disposing of such appeal at any time before signing of the agreement. Further, Rule 10 RA(4) provides that if any appeal filed by the applicant is pending before the Commissioner (Appeals), Appellate Tribunal or the High Court for a rollback year, on the issue which is subject matter of the rollback provision for that year, the said appeal to the extent of the subject covered under the agreement shall be withdrawn by the applicant.

There is a need to clarify the phrase "Tribunal has passed an order disposing of such appeal" and on the mismatch, if any, between Rule 10MA(3) and Rule 10RA(4).

Answer

The reason for not allowing rollback for the international transaction for which Appellate Tribunal has passed an order disposing of an appeal is that the ITAT is the final fact finding authority and hence, on factual issues, the matter has already reached finality in that year.

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However, if the ITAT has not decided the matter and has only set aside the order for fresh consideration of the matter by the lower authorities with full discretion at their disposal, the matter shall not be treated as one having reached finality and hence, benefit of rollback can still be given.

There is no mismatch between Rule 10MA(3) and Rule 10RA(4).

Question 5

Rule 10MA(3)(ii) provides that rollback provision shall not be provided in respect of an international transaction for a rollback year if the application of rollback provision has the effect of reducing the total income or increasing the loss, as the case may be, of the applicant as declared in the return of income of the said year. It may be clarified whether the rollback provisions in such situations can be applied in a manner so as to ensure that the returned income or loss is accepted as the final income or loss after applying the rollback provisions.

Answer

It is clarified that in case the terms of rollback provisions contain specific agreement between the Board and the applicant that the agreed determination of ALP or the agreed manner of determination of ALP is subject to the condition that the ALP would get modified to the extent that it does not result in reducing the total income or increasing the total loss, as the case may be, of the applicant as declared in the return of income of the said year, the rollback provisions could be applied. For example, if the declared income is ₹ 100, the income as adjusted by the TPO is ₹ 120, and the application of the rollback provisions results in reducing the income to ₹ 90, then the rollback for that year would be determined in a manner that the declared income ₹ 100 would be treated as the final income for that year.

Question 6

Rule 10RA(7) states that in case effect cannot be given to the rollback provision of an agreement in accordance with this rule, for any rollback year to which it applies, on account of failure on the part of applicant, the agreement shall be cancelled. It is to be clarified as to whether the entire agreement is to be cancelled or only that year for which roll back fails.

Answer

The procedure for giving effect to a rollback provision is laid down in Rule 10RA. Sub-rules (2), (3), (4) and (6) of the Rule specify the actions to be taken by the applicant in order that

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effect may be given to the rollback provision. If the applicant does not carry out such actions for any of the rollback years, the entire agreement shall be cancelled.

This is because the rollback provision has been introduced for the benefit of the applicant and is applicable at its option. Accordingly, if the rollback provision cannot be given effect to for any of the rollback years on account of the applicant not taking the actions specified in sub-rules (2), (3), (4) or (6), the entire agreement gets vitiated and will have to be cancelled.

Question 7

If there is a Mutual Agreement Procedure (MAP) application already pending for a rollback year, what would be the stand of the APA authorities? Further, what would be the view of the APA Authorities, if MAP has already been concluded for a rollback year?

Answer

If MAP has been already concluded for any of the international transactions in any of the rollback year under APA, rollback provisions would not be allowed for those international transactions for that year but could be allowed for other years or for other international transactions for that year, subject to fulfilment of specified conditions in Rules 10MA and 10RA. However, if MAP request is pending for any of the rollback year under APA, upon the option exercised by the applicant, either MAP or application for roll back shall be proceeded with for such year.

Question 8

Rule 10MA(1) provides that the agreement may provide for determining ALP or manner of determination of ALP. However, Rule 10MA(4) only specifies that the manner of determination of ALP should be the same as in the APA term. Does that mean the ALP could be different?

Answer

Yes, the ALP could be different for different years. However, the manner of determination of ALP (including choice of Method, comparability analysis and Tested Party) would be same.

Question 9

Will there be compliance audit for roll back? Would critical assumptions have to be validated during compliance audit?

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Answer

Since rollback provisions are for past years, ALP for the rollback years would be agreed after full examination of all the facts, including validation of critical assumptions. Hence, compliance audit for the rollback years would primarily be to check if the agreed price or methodology has been applied in the modified return.

Question 10

Whether applicant has an option to withdraw its rollback application? Can the applicant accept the rollback results without accepting the APA for the future years?

Answer

The applicant has an option to withdraw its roll back application even while maintaining the APA application for the future years. However, it is not possible to accept the rollback results without accepting the APA for the future years. It may also be noted that the fee specified in Rule 10MA(5) shall not be refunded even where a rollback application is withdrawn.

Question 11

For already concluded APAs, will new APAs be signed for rollback or earlier APAs could be revised?

Answer

The second proviso to Rule 10MA(5) provides for revision of APAs already concluded to include rollback provisions.

Question 12

For already concluded APAs, where the modified return has already been filed for the first year of the APA term, how will the time-limit for filing modified return for rollback years be determined?

Answer

The time to file modified return for rollback years will start from the date of signing the revised APA incorporating the rollback provisions.

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Question 13

In case of merger of companies, where one or more of those companies are APA applicants, how would the rollback provisions be allowed and to which company or companies would it be allowed?

Answer

The agreement is between the Board and a person. The principle to be followed in case of merger is that the person (company) who makes the APA application would only be entitled to enter into the agreement and be entitled for the rollback provisions in respect of international transactions undertaken by it in rollback years. Other persons (companies) who have merged with this person (company) would not be eligible for the rollback provisions.

To illustrate, if A, B and C merge to form C and C is the APA applicant, then the agreement can only be entered into with C and only C would be eligible for the rollback provisions. A and B would not be eligible for the rollback provisions. To illustrate further, if A and B merge to form a new company C and C is the APA applicant, then nobody would be eligible for rollback provisions.

Question 14

In case of a demerger of an APA applicant or signatory into two or more companies (persons), who would be eligible for the rollback provisions?

Answer

The same principle as mentioned in the previous answer, i.e., the person (company) who makes an APA application or enters into an APA would only be entitled for the rollback provisions, would continue to apply. To illustrate, if A has applied for or entered into an APA and, subsequently, demerges into A and B, then only A will be eligible for rollback for international transactions covered under the APA. As B was not in existence in rollback years, availing or grant of rollback to B does not arise.

(4) Section 92CD provides for the following procedure for giving effect to an APA -

(i) In case a person has entered into an APA and prior to the date of entering into such APA, he has furnished the return of income under the provisions of section 139 in respect of any assessment year relevant to a previous year to which the APA applies, then, such person shall, within a period of three months from the end of the

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month in which the said agreement was entered into, furnish a modified return, notwithstanding any contrary provision contained in section 139.

(ii) Such modified return shall be in accordance with and limited to the provisions of such APA i.e., modifications can only be made on account of such APA in the return to be filed.

(iii) All other provisions of this Act shall apply as if the modified return is a return furnished under section 139, unless anything to the contrary is provided in this section.

(iv) If the assessment or reassessment proceedings for an assessment year relevant to a previous year to which the APA applies have been completed before the expiry of period allowed for furnishing of modified return, the Assessing Officer shall, in a case where modified return is filed in accordance with the provisions of this section, pass an order modifying the total income of the relevant assessment year determined in such assessment or reassessment, as the case may be, having regard to and in accordance with the APA, instead of proceeding to assess or reassess the total income.

Such order for assessment or reassessment or re-computation of total income shall be passed within a period of 1 year from the end of the financial year in which the modified return was furnished. This shall apply notwithstanding the period of limitation contained under section 153 or 153B or 144C.

The appeal against such order shall lie to Commissioner (Appeals) [Section 246A]

(v) Where the assessment or reassessment proceedings for an assessment year relevant to the previous year to which the APA applies, are pending on the date of filing of modified return, the Assessing Officer shall proceed to complete the assessment or reassessment proceedings in accordance with the APA taking into consideration the modified return so furnished.

In this case, the time period of completion of pending assessment or reassessment mentioned under section 153 or 153B or 144C shall be extended by 12 months. This shall apply notwithstanding the period of limitation contained under section 153 or 153B or 144C.

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(vi) 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 section 143(2) till the expiry of the limitation period provided under the said section.

VIII. Secondary Adjustment [Section 92CE]

(1) Meaning of Primary Adjustment and Secondary Adjustment

"Primary adjustment" to a transfer price means the determination of transfer price in accordance with the arm's length principle resulting in an increase in the total income or reduction in the loss, as the case may be, of the assessee.

"Secondary adjustment" means an adjustment in the books of accounts of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.

(2) Forms of Secondary Adjustment - As per the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD transfer pricing guidelines), secondary adjustment may take the form of constructive dividends, constructive equity contributions, or constructive loans.

(3) Alignment of economic benefit of the transaction with the arm's length position - The provisions of secondary adjustment are internationally recognised and are already part of the transfer pricing rules of many leading economies in the world. Whilst the approaches to secondary adjustments by individual countries vary, they represent an internationally recognised method to align the economic benefit of the transaction with the arm's length position.

(4) Cases where secondary adjustment has to be made - In order to align the transfer pricing provisions in line with OECD transfer pricing guidelines and international best practices, section 92CE provides that the assessee shall be required to carry out secondary adjustment where the primary adjustment to transfer price:

(a) has been made *suo motu* by the assessee in his return of income; or

(b) made by the Assessing Officer has been accepted by the assessee; or

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(c) is determined by an advance pricing agreement entered into by the assessee under section 92CC on or after the 1.4.2017; or

(d) is made as per the safe harbour rules framed under section 92CB; or

(e) is arising as a result of resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or 90A for avoidance of double taxation.

(5) No requirement of secondary adjustment in certain cases - Such secondary adjustment, however, shall not be carried out if, the amount of primary adjustment made in the case of an assessee in any previous year does not exceed ₹ 1 crore **or** the primary adjustment is made in respect of A.Y.2016-17 or an earlier assessment year.

(6) Non-repatriation of excess money by the associated enterprise deemed to be an advance - Where, as a result of primary adjustment to the transfer price, there is an increase in the total income or reduction in the loss, as the case may be, of the assessee, the excess money or part thereof, as the case may be, which is available with its associated enterprise, if not repatriated to India within the time as may be prescribed, shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance, shall be computed as the income of the assessee, in the prescribed manner.

Such excess money or part thereof may be repatriated from any of the associated enterprises of the assessee which is not resident in India.

"Excess money" means the difference between the arm's length price determined in primary adjustment and the price at which the international transaction has actually taken place.

(7) Time limit for repatriation of excess money or part thereof

Rule 10CB(1) prescribes the time limit for repatriation of excess money or part thereof i.e., on or before **90 days** from the date given in column (3) in the cases mentioned in column (2) of the table below. The period from which interest is chargeable on the excess money or part thereof which is not repatriated in such cases is given in column (4).

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	Case	Date	Period
(1)	(2)	(3)	(4)
(i)	Where primary adjustments to transfer price has been made *suo-motu* by the assessee in his return of income	the due date of filing of return u/s 139(1)	the due date of filing of return u/s 139(1)
(ii)	If primary adjustments to transfer price as determined in the order of the Assessing Officer or the appellate authority has been accepted by the assessee	the date of the said order	the date of the said order
(iii)	Where primary adjustment to transfer price is determined by an advance pricing agreement (APA) entered into by the assessee under section 92CC in respect of a previous year -		
	• If the APA has been entered into on or before the due date of filing of return for the relevant P.Y.	the date of filing of return u/s 139(1)	the due date of filing of return u/s 139(1)
	• If the APA has been entered into on or after the due date of filing of return for the relevant P.Y.	The end of the month in which the APA has been entered into	The end of the month in which the APA has been entered into
(iv)	Where option has been exercised by the assessee as per the safe harbour rules under section 92CB	the due date of filing of return u/s 139(1)	the due date of filing of return u/s 139(1)
(v)	Where the primary adjustment to the transfer price is determined by a resolution arrived at under Mutual Agreement Procedure under a DTAA has been entered into u/s 90 or 90A	the date of giving effect by the A.O. under Rule 44H to such resolution	the date of giving effect by the A.O. under Rule 44H to such resolution

(8) Rate of interest for the purpose of computation on interest on excess money or part thereof, if not repatriated within the prescribed time

Rule 10CB(2) prescribes the rate at which the per annum interest income shall be computed in case of failure to repatriate the excess money or part thereof within the above

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time limit. The interest would be computed at the rates mentioned in column (3) in respect of the cases mentioned in column (2) of the table below:

	Case	Rate
(1)	(2)	(3)
(i)	Where the international transaction is denominated in Indian rupee	At the one year marginal cost of fund lending rate of SBI as on 1st April of the relevant previous year + 3.25%
(ii)	Where the international transaction is denominated in foreign currency	At six month London Interbank Offered Rate (LIBOR) as on 30th September of the relevant previous year + 3.00%

Note *– In case (ii) above, the rate of exchange for the calculation of the value of international transaction denominated in foreign currency shall be the telegraphic transfer buying rate of such currency on the last day of the previous year in which such international transaction was undertaken.*

(9) Option to pay additional income-tax, if the excess money not repatriated: In a case where the excess money or part thereof has not been repatriated within the prescribed time as mentioned above, the assessee has the option to pay additional income-tax @ **20.9664%** (i.e., tax@18% plus surcharge@12% plus cess@4%) on such excess money or part thereof, as the case may be.

Where additional income-tax is so paid by the assessee, he will **not** be required to make secondary adjustment and compute interest from the date of payment of such tax. This implies that he would, in any case, be required to compute interest upto the date of payment of such additional tax.

The additional income-tax so paid by the assessee shall be treated as the final payment of tax in respect of excess money or part thereof not repatriated and no further credit would be allowed to the assessee or to any other person in respect of the amount of additional income-tax so paid.

Further, no deduction in respect of the amount on which such additional income-tax has been paid, would be allowed under any other provision of the Act.

ILLUSTRATION 6

On 1.4.2024, PQR Ltd., an Indian company, advanced a loan of ₹ 6 crores to XYZ Inc., a company resident in Singapore. As on the date of loan, the book value of total assets in the books of XYZ Inc. was ₹ 10 crores. XYZ Inc. paid the entire loan along with interest thereon on 31st August,

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2024. During the Financial Year 2024-25, PQR Ltd. also entered into an agreement with XYZ Inc. to provide 20,000 medical equipments at a cost of ₹ 7,400 per unit. The Assessing Officer treats them as associate enterprises and wants to re-compute the income of PQR Ltd. at arms' length price. You are required to answer the following questions in this respect:

(1) Would PQR Ltd. and XYZ Inc. be treated as associate enterprises for the purpose of transfer pricing adopted by the Assessing Officer? If yes, why?

(2) Calculate the arms length price of PQR Ltd. which sells the same equipment at the rate of ₹ 9,000 per unit to Y Ltd. and at the rate of ₹ 9,500 per unit to X LLP (both of them are unrelated parties in respect of PQR Ltd.). PQR Ltd. is not a wholesale dealer.

(3) What are the options available to PQR Ltd. in respect of such increase in transfer price by income tax authorities, if PQR Ltd. accepts such transfer price?

SOLUTION

(1) Two enterprises are deemed to be associated enterprises as per section 92A(2)(c), if a loan advanced by one enterprise to the other enterprise constitutes not less than 51% of the book value of total assets of the other enterprise at any time during the previous year. Since PQR Ltd., an Indian company, advanced loan of an amount of ₹ 6 crores to XYZ Inc., a Singapore company, which is 60% of the book value of the total assets of XYZ Inc. (i.e., 60% of ₹ 10 crores), PQR Ltd. and XYZ Inc. are deemed to be associated enterprises.

(2) PQR Ltd. sells equipment at the rate of ₹ 9,000 per unit to Y Ltd. and at ₹ 9,500 per unit to X LLP, both of them being unrelated parties. Since the transactions can be considered as comparable uncontrolled transactions for the purpose of determining the arm's length price, Comparable Uncontrolled Price (CUP) method would be most appropriate method.

Since two prices are determined by the most appropriate method, and data set comprises of only two entries, the arm's length price shall be the arithmetical mean of both the values included in the dataset.

Accordingly, arm's length price would be ₹ 9,250 [(₹ 9,000 + ₹ 9,500)/2]. Since the deviation between the arm's length price and actual sale price of the equipment to XYZ Inc. i.e., ₹ 7,400 per unit is 25%, which far exceeds the maximum percentage deviation which can be notified by the Central Government[4], the arm's length price would be

[4] Which cannot exceed 3% in any case

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₹ 9,250 per unit and the total income would increase by ₹ 3.7 crores [i.e. ₹ 1,850 (₹ 9,250 – ₹ 7,400) x 20,000 units]

(3) On account of the primary adjustment of ₹ 3.7 crores (₹ 1850 x 20,000 units) made by the Assessing Officer, in the total income of PQR Ltd. for A.Y.2025-26, secondary adjustment has to be made under section 92CE, since –

(1) The company has accepted the primary adjustment made by the Assessing Officer;

(2) The primary adjustment is in respect of A.Y.2025-26; and

(3) The primary adjustment exceeds ₹ 100 lakhs.

Accordingly, the excess money i.e., ₹ 3.7 crores available with the XYZ Inc. has to be repatriated to India within 90 days of the date of the order of the Assessing Officer.

Alternatively, PQR Ltd. can opt to pay additional income-tax @20.9664% (tax @18% *plus* surcharge @12% *plus* cess@4%) on ₹ 3.7 crores, which amounts to ₹ 77,57,568.

IX. Records to be maintained [Section 92D]: A taxpayer undertaking international transaction with the associated enterprise has to compute the income, expense or allocation of cost arising from such international transaction having regard to the arm's length price. To substantiate the arm's length price, the taxpayer is required to maintain the three tier documentation i.e. a Master file, a local file as prescribed under section 92D of the Act and Country by country report as prescribed under section 286 of the Act.

(1) Persons responsible for keeping and maintaining prescribed information and document - Section 92D imposes responsibility on every person

(i) who **enters into an international transaction** to keep and maintain such information and documents in respect thereof as may be prescribed;

(ii) being a **constituent entity of an international group**, to keep and maintain the prescribed information and document **in respect of an international group**.

The constituent entity is required to keep and maintain the information and document irrespective of the fact **whether or not any international transaction is undertaken** by such constituent entity.

The constituent entity has to furnish the information and document to the authority prescribed under section 286(1), i.e., Joint Director as designated by PDGIT (Systems) or DGIT(Systems) in the prescribed manner, on or before prescribed date.

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(2) **Information and documents to be kept and maintained for prescribed period -** The CBDT is empowered to prescribe the period for which the information and documents shall be kept and maintained.

(3) **Assessing Officer & Commissioner (Appeals) empowered to require persons entering into international transaction to furnish prescribed information and documents -** The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceedings under the Income-tax Act, require any person who has entered into an international transaction to furnish any such prescribed information or documents within a period of **10 days** from the date of receipt of a notice issued in this regard. The requisition period may, on request, be extended further for a period not exceeding thirty days by the Assessing Officer or the Commissioner (Appeals).

Information to be kept and maintained under section 92D [Rule 10D]

Records to be maintained

Rule 10D (1) provides for the information and documents to be kept and maintained by the assessee under section 92D(1)(i). Under this Rule, the following information and documents have to be maintained:

(i) A description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;

(ii) A profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the assessee, and ownership linkages among them;

(iii) A broad description of the business of the assessee and the industry in which the assessee operates, and the business of the associated enterprises with whom the assessee has transacted;

(iv) The nature and terms (including prices) of international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;

(v) A description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transactions;

(vi) A record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee for the business as a whole and for each division or

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product separately, which may have a bearing on the international transactions entered into by the assessee;

(vii) A record of uncontrolled transactions taken into account for analysing their comparability with the international transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be of relevance to the pricing of the international transactions;

(viii) A record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction;

(ix) A description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanation as to why such method was so selected, and how such method was applied in each case;

(x) A record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used to apply the most appropriate method, and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions;

(xi) The assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price;

(xii) Details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under the Income-tax Rules and consequent adjustment made to the total income for tax purposes;

(xiii) Any other information, data or documents, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

Threshold limit for maintenance of prescribed information and documents [Rule 10D(2)]

Rule 10D(2) provides that in a case where the aggregate value of international transactions does not exceed ₹ 1 crore, it will not be obligatory for the assessee to maintain the above information and documents.

Threshold limit for maintenance of records

However, it is provided that in the above cases also the assessee will have to substantiate that the income arising from the international transactions with associated enterprises, as disclosed by the accounts, is in accordance with section 92. This will mean that, even if the aggregate value of the international transactions is less than ₹ 1 crore, the

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assessee will have to maintain adequate records and evidence to show that the international transactions with associated enterprises are on the basis of arm's length principle.

Information to be supported by authentic documents [Rule 10D(3)]

The information to be maintained by the assessee, is to be supported by authentic documents. These documents may include the following:

(i) Official publications, reports, studies and data bases from the Government of the country of residence of the associated enterprise, or of any other country;

(ii) Reports of market research studies carried out and technical publications brought out by institutions of national or international repute;

(iii) Price publications including stock exchange and commodity market quotations;

(iv) Published accounts and financial statements relating to the business affairs of the associated enterprises;

(v) Agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transactions similar to the international transactions;

(vi) Letters and other correspondence documenting any terms negotiated between the assessee and the associated enterprise;

(vii) Documents normally issued in connection with various transactions under the accounting practices followed.

It is also provided that the information and documents to be maintained should be contemporaneous and should exist latest by the specified date.

Meaning of specified date

The date one month prior to the due date for furnishing the return of income under section 139(1) for the relevant assessment year i.e., 31st October of the relevant assessment year.

In the case of international transactions which continue to have effect over more than one financial year, fresh documents will not be required to be maintained for each year if there are no significant change which may affect the determination of arm's length price.

The above information and documents are required **to be maintained for a period of eight years** from the end of the relevant assessment year.

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X. Audit Report [Section 92E]

Under section 92E, every person who enters into an international transaction during a previous year is required to obtain a report from a chartered accountant and furnish such report on or before the specified date in the prescribed form.

Rule 10E provides that the auditor's report shall be in Form No.3CEB. It requires the auditor to state that he has examined the accounts and records of the assessee relating to the international transactions entered into by the assessee during the relevant year. He has also to give his opinion whether the prescribed information and documents relating to the above transactions have been kept by the assessee. Further, he has to state that the particulars stated in the Annexure to his report are true and correct.

In Part A of the Annexure, general information of the assessee (Name of the assessee, address, PAN or Aadhaar No., nature of business etc.) is required to be reported.

In Part B of the Annexure, the particulars about the international transactions are required to be stated. Broadly, these particulars include list of associated enterprises, particulars and description of transactions in tangible property, intangible property, particulars in respect of lending or borrowing of money, particulars of deemed international transaction etc.

In Part C of the Annexure, particulars related to list of associated enterprises with whom the assessee has entered into specified domestic transactions, particulars in respect of transactions in the nature of transfer or acquisition of goods or services, etc. are required to be reported.

"Specified date" means the date one month prior to the due date for furnishing the return of income under section 139(1) for the relevant assessment year. The due date for filing of transfer pricing report under section 92E in Form 3CEB is 31st October of the assessment year.

XI. Power of Assessing Officer: Section 92C(3) and (4) gives power to the Assessing Officer to determine the arm's length price under the following circumstances and also empowers the Assessing Officer to re-compute total income of the assessee having regard to arm's length price determined by him. It also provides that deduction under section 10AA and Chapter VI-A shall not be allowed from the additional income computed by him.

For example, if the total income declared by the assessee in his return of income is, say ₹ 7 lakhs and the total income computed by the Assessing Officer applying the arm's length principle is, say ₹ 9 lakhs, the difference of ₹ 2 lakhs will not qualify for deduction under section 10AA or Chapter VI-A.

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The Assessing Officer may invoke the power to determine arm's length price, if during the course of any proceeding, he is of the opinion that, on the basis of material or information or documents in his possession:

(a) The price charged or paid in an international transaction has not been determined in accordance with section 92C(1) and (2); or

(b) Any information and documents relating to an international transaction has not been kept and maintained by the assessee in accordance with the provisions contained in section 92D(1) and the rules made in this behalf (Rule 10D); or

(c) The information or data used in computation of the arm's length price is not reliable or correct; or

(d) The assessee has failed to furnish within the specified time, any information or documents which he was required to furnish by a notice issued under section 92D(3).

Before invoking the power to determine arm's length price, an opportunity of being heard is to be given to the assessee.

Second proviso to section 92C(4) provides that if the total income of an associated enterprise is computed under this section on the determination of arm's length price paid to another associated enterprise, from which tax is deducted or deductible at source, the income of the other associated enterprise shall not be recomputed on this count.

For example, if "A" Ltd. has paid royalty to "B" Ltd. (Non-Resident) @10% of sales and tax is deducted at source, "B" Ltd. cannot claim refund if the Assessing Officer has determined 8% as arm's length price in the case of "A" Ltd. and disallowed 2% of the royalty amount.

Bright Line Test – To cater to the Indian market, MNC sets up subsidiaries in India. The Indian subsidiaries act as a distributor/provider of goods/services and generally incurred certain expenses for promoting the brand or product of the foreign company, which are popularly known as Advertisement, marketing and sale promotion expenditure (**"AMP expenses"**). The intellectual property rights (**"IPR"**) in products/services and the brands lies with the parent entities. To test that whether the transaction is at ALP or not and to determine the excess/non-routine advertising, marketing and promotion (AMP) expenditure incurred by the taxpayer for building brand of its associated enterprises in India, Revenue Authorities' sometimes adopt the Bright Line Test (**"BLT"**). The issue under consideration is whether bright line test can be used by the Assessing Officer to determine the excess/non-routine advertising, marketing and promotion (AMP) expenditure incurred by the taxpayer for building brand of its associated enterprises in India.

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The Delhi High Court, in *Bausch & Lomb Eyecare (India) (P.) Ltd. v. Addl. CIT [2016] 381 ITR 227*, held that advertisement expense is not an international transaction and there is no machinery provision for computation of AMP expense adjustment.

In *Sony Ericsson Mobile Communications India (P) Ltd v. CIT (2015) 374 ITR 118*, the Delhi High Court held that bright line test has no statutory mandate and a broad-brush approach is not mandated or prescribed. It further opined that the exercise to separate "routine" and "non-routine" advertising, marketing and promotion or brand building exercise by applying the bright line test of non-comparables should not be sanctioned.

Applying the rationale of the above rulings of the High Court, the Revenue Authorities' are not justified in adopting the "Bright Line Test" for disallowing or adjusting the advertisement expenditure in computing arm's length price.

XII. Penalties

Stringent penalties are provided in various sections for non-compliance with the requirements provided under the transfer pricing provisions. These are as under:

Penalty for failure to report any international transaction or any transaction deemed to be an international transaction: Under section 270A, penalty@50% of tax payable on under-reported income is leviable. However, the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer would not be included within the scope of under-reported income under section 270A, where the assessee had maintained information and documents, as prescribed under section 92D, declared the international transactions under Chapter X and disclosed all material facts relating to the transaction.

Interestingly, clause (d) of section 270A(6) does not provide similar immunity from penalty if the addition/disallowance is made by TPO in relation to a specified domestic transaction.

Further, failure to report any international transaction or any transaction deemed to be an international transaction or specified domestic transaction to which the provisions of Chapter X applies would constitute **'misreporting of income'** under section 270A(9), in respect of which penalty@200% would be attracted.

Penalty for failure to keep and maintain information and documentation [Section 271AA]: In order to ensure compliance with the transfer pricing regulations, section 271AA provides that, the Assessing Officer or Commissioner (Appeals) may direct the person entering into an international transaction to pay a penalty@2% of the value of each international transaction entered into by him, if the person:

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(1) fails to keep and maintain any such document and information as required by section 92D(1) or section 92D(2);

(2) fails to report such international transaction which is required to be reported; or

(3) maintains or furnishes any incorrect information or document.

Penalty for failure to furnish information or document under section 92D [Section 271G]

Section 271G provides that if any person who has entered into an international transaction fails to furnish any such information or document as required by Assessing Officer or TPO or Commissioner (Appeals) within a period of 10 days from the date of receipt of a notice issued in this regard, then such person shall be liable to a penalty up to 2% of the value of each international transaction.

Penalty for failure to furnish report under section 92E [Section 271BA]

If any person fails to furnish a report from an accountant, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ₹ 1 lakh.

Penalty for failure to comply with TP provisions : A Summary		
Section	**Nature of default**	**Penalty**
270A(9)	Failure to report any International transaction or deemed International transaction to which the provision of Chapter X applies would constitute 'misreporting of income'	200% of the tax payable on under-reported income
271BA	Failure to furnish a report from an accountant as required under section 92E	₹ 1 lakh
271G	Failure to furnish info or doc as required by Assessing Officer or CIT(A) u/s 92D(3) within 10 days from the date of receipt of notice or extended period not exceeding 30 days, as the case may be.	2% of the value of the international transaction for each failure
271AA	(1) Failure to keep and maintain any such document and information as required by section 92D(1)/(2); (2) Failure to report such international transaction which is required to be reported; or (3) Maintaining or furnishing any incorrect information or document.	2% of the value of each such international transaction

Notes:

- ***The penalty u/s 271AA is in addition and not in substitution of penalty u/s 271BA.***
- ***If the assessee proves that there was reasonable cause for the failure, no penalty would be leviable under section 271BA, 271G and 271AA.***

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(2) Furnishing of report in respect of international group in line with BEPS Action Plan – Country by Country Report and Master File

(i) Transfer Pricing provisions under the Income-tax Act, 1961

Chapter X of the Income-tax Act, 1961 comprising sections 92 to 92F contain provisions relating to transfer pricing regime.

Section 92D requires maintenance of prescribed information and document relating to the international transaction and specified domestic transaction.

(ii) Requirements as per OECD report on Action 13 of BEPS Action Plan

In order to tackle the base erosion and profit shifting by the MNCs, the OECD/G20 BEPS Action Plan 13 report provides for:

(a) detailed transfer pricing documentation; and

(b) a template for country-by-country reporting of income, earnings, taxes paid and certain measure of economic activity.

This measure is recommended to ensure that the MNEs are reporting the profits in the jurisdiction where the economic activities are performed.

(iii) Three-tier structure mandated by BEPS

The BEPS report recommends that countries adopt a standardised approach to transfer pricing documentation; it mandates the following three-tier structure:-

	Document	Information
(1)	Master File	Standardised information relevant for all multinational enterprises (MNE) group members
(2)	Local file	Specific reference to material transactions of the local taxpayer
(3)	Country-by-country report	Information relating to the global allocation of the MNE's income and taxes paid; and Indicators of the location of economic activity within the MNE group.

(iv) Advantages of the three tier structure [as per BEPS Report]:

(a) Taxpayers will be required to articulate consistent transfer pricing positions;

(b) Tax administrations would get useful information to assess transfer pricing risks;

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(c) Tax administrations would be able to make determinations about where their resources can most effectively be deployed, and, in the event audits are called for, provide information to commence and target audit enquiries.

(v) Country-by-country Report: Reporting Requirements of MNEs

The Country-by-Country (CbC) report has to be submitted by parent entity of an international group to the prescribed authority in its country of residence. This report is to be based on consolidated financial statement of the group.

(a) MNEs have to report annually and for each tax jurisdiction in which they do business:

(1) the amount of revenue;

(2) profit before income tax; and

(3) income tax paid and accrued.

(b) MNEs have to report their total employment, capital, accumulated earnings and tangible assets in each tax jurisdiction.

(c) MNEs have to identify each entity within the group doing business in a particular tax jurisdiction and provide an indication of the business activities each entity engages in.

(vi) Master File: Objective & Features

(a) The master file would provide an overview of the MNE groups business, including:

(1) the nature of its global business operations,

(2) its overall transfer pricing policies, and

(3) its global allocation of income and economic activity

in order to assist tax administrations in evaluating the presence of significant transfer pricing risk.

(b) The master file is intended to provide a high-level overview in order to place the MNE group's transfer pricing practices in their global economic, legal, financial and tax context.

(c) The master file shall contain information which may not be restricted to transaction undertaken by a particular entity situated in particular country.

(d) Thus, information in master file would be more comprehensive than the existing regular transfer pricing documentation.

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(e) The master file shall be furnished by each entity to the tax authority of the country in which it operates.

(vii) Implementation of international consensus in India

India is one of the active members of BEPS initiative and part of international consensus. For the purpose of implementing the international consensus, a specific reporting regime in respect of CbC reporting and also the master file has been incorporated in the Income-tax Act, 1961.

(viii) Elements relating to CbC reporting requirement and related matters which have been incorporated in the Income-tax Act, 1961 [Section 286]

(a) Threshold limit for applicability of CbC reporting [Sub-section (7)]: The reporting provision shall apply in respect of an international group for an accounting year, if the total consolidated group revenue as reflected in the consolidated financial statement (CFS) for the accounting year preceding such accounting year is above a threshold to be prescribed ***i.e., ₹ 6,400 crore***.

Where the total consolidated group revenue of the international group, as reflected in the consolidated financial statement, is in foreign currency, the rate of exchange for the calculation of the value in rupees of such total consolidated group revue shall be the telegraphic transfer buying rate (TTBR) of such currency on the last day of the accounting year preceding the accounting year [Rule 10DB(7)].

(b) Time limit for furnishing CbC report [Sub-section (2)]: The parent entity of an international group or the alternate reporting entity, if it is resident in India shall be required to furnish the report in respect of the group to the Joint Director, designated by the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, for every reporting accounting year, within a period of twelve months from the end of the said reporting accounting year for which the report is being furnished, in Form No. 3CEAD.

(c) Details to be furnished by constituent entity resident in India [Sub-section (1)]: Every constituent entity, resident in India, of an international group having parent entity that is not resident in India, shall notify the Joint Director, designated by the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, at least two months prior to the due date for furnishing CbC report –

(1) whether it is the alternate reporting entity of the international group; or

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(2) the details of the parent entity or the alternate reporting entity, if any of the international group, and the country of territory of which the said entities are resident.

The report shall be furnished in Form No.3CEAC.

(d) Details/ information to be included in CbC report [Sub-section (3)]: It should contain aggregate information in respect of:

(1) the amount of revenue,

(2) profit and loss before income-tax,

(3) amount of income-tax paid and accrued,

(4) details of stated capital, accumulated earnings, number of employees, tangible assets other than cash or cash equivalent in respect of each country or territory along with details of each constituent's incorporation country and residential status, nature and details of main business activity or activities of each constituent entity and any other information as may be prescribed.

This shall be based on the template provided in the OECD BEPS report on Action Plan 13.

(e) Furnishing of CbC report by resident constituent entity [Sub-section (4): A constituent entity of an international group resident in India, other than the parent entity or the alternate reporting entity, shall be required to furnish CbC report within the twelve months from the end of the reporting accounting year to the Joint Director, designated by the Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems), if the parent entity of the group is resident of a country or territory,-

(1) in which it is not obligated to file report of the nature of CbC report;

(2) with which India does not have an arrangement for exchange of the CbC report; or

(3) there has been a systemic failure of the country or territory i.e., such country is not exchanging information with India even though there is an agreement and this fact has been intimated to the entity by the prescribed authority.

However, in case the parent entity of the constituent entity is resident of a country or territory, where, there has been a systemic failure of the country or territory and the said failure has been intimated to such constituent entity, the period for submission of the report would be **six months from the end of the month in which said systemic failure has been intimated**.

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(f) Nomination of one constituent entity for furnishing CbC report [Proviso to sub-section (4)]: If there are more than one such constituent entity of the group, resident in India, other than the parent entity or the alternate reporting entity, then, the report shall be furnished by any one constituent entity, if the group has nominated such entity on behalf of all the constituent entities resident in India and information has been conveyed in writing on behalf of the group to the prescribed authority in Form No. 3CEAE.

(g) No obligation to furnish CbC report in certain cases [Sub-section (5)]: If an international group, having parent entity which is not resident in India, had designated an alternate entity for filing its report with the tax jurisdiction in which the alternate entity is resident and such alternate entity has furnished such report on or before the date specified by that country or territory, then, the entities of such group operating in India would not be obliged to furnish report if -

- the report is required to be furnished under the law for the time being in force in the said country or territory
- the report can be obtained under the agreement of exchange of such reports by Indian tax authorities
- No systemic failure in respect of the said country or territory has been conveyed to any constituent entity of the group that is resident in India
- the said country or territory has been informed in writing by the constituent entity that it is the alternative reporting entity on behalf of the international group
- the same has been informed to the prescribed authority by the entity in accordance with section 286(1).

(h) Entity to furnish documents and information called for [Sub-section (6)]: The Joint Director, designated by the PDGIT (Systems) or DGIT (Systems) may call for such document and information from the entity furnishing the report as it may specify in notice in writing for the purpose of verifying the accuracy. The entity shall be required to make submission within thirty days of receipt of notice or further period if extended by the prescribed authority, but extension shall not be beyond a further period of 30 days.

(ix) Penalty for non-furnishing of the report by any reporting entity which is obligated to furnish such report [Section 271GB(1) & (3)]

	Period of delay/ default	Penalty
(a)	Not more than a month	₹ 5,000 per day

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(b)	beyond one month	₹ 15,000 per day for the period exceeding one month
(c)	Continuing default even after service of order levying penalty either under (a) or under (b)	₹ 50,000 per day of continuing failure beginning from the date of service of order

(x) Penalty for failure to produce information and documents within prescribed time [Section 271GB(2) & (3)]

	Default	Penalty
(a)	Failure to produce information and documents before prescribed authority within the period allowed u/s 286(6)	₹ 5,000 per day of continuing failure, from the day immediately following the day on which the period for furnishing the information and document expires.
(b)	Continuing default even after service of penalty order	₹ 50,000 per day for the period of default beyond the date of service of order.

(xi) Penalty for submission of inaccurate information in the CBC report [Section 271GB(4)]

If the reporting entity has provided any inaccurate information in the report, the penalty would be ₹ 5,00,000 if ,-

(a) the entity has knowledge of the inaccuracy at the time of furnishing the report but does not inform the prescribed authority; or

(b) the entity discovers the inaccuracy after the report is furnished and fails to inform the prescribed authority and furnish correct report within a period of fifteen days of such discovery; or

(c) the entity furnishes inaccurate information or document in response to notice of the prescribed authority under section 286(6).

(xii) Non-levy of penalty if reasonable cause for failure is proved [Section 273B]

Section 273B provides for non-levy of penalty under various sections if the assessee proves that there was reasonable cause for such failure. Section 271GB has been included within the scope of section 273B. Therefore, the entity can offer reasonable cause defence for non-levy of penalties mentioned above.

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(xiii) Maintenance and furnishing of Master file: Consequent amendments in the Income-tax Act, 1961

	Section	Provision
(1)	92D(1)(ii)	Every person, being constituent entity of an international group, has to keep and maintain the prescribed information and document in respect of the international group. Constituent entity has to keep and maintain such prescribed information and document irrespective of the fact whether or not any international transaction is undertaken by such constituent entity. The rules shall, thereafter, prescribe the information and document as mandated for master file under OECD BEPS Action 13 report;
(2)	92D(4)	The information and document shall also be furnished to the prescribed authority u/s 286(1) within such period as may be prescribed and the manner of furnishing may also be provided for in the rules
(3)	271AA(2)	For non-furnishing of the information and document to the prescribed authority, a penalty of ₹ 5 lakh shall be leviable.
(4)	273B	Reasonable cause defence against levy of penalty shall be available to the entity.

(xiv) Maintenance and furnishing of information and documents by certain person under section 92D [Rule 10DA]

Rule	Particulars
10DA(1)	<u>Persons required to keep and maintain the information and documents:</u> Every person, being a constituent entity of an international group shall – (i) if the consolidated group revenue of the international group, of which such person is a constituent entity, as reflected in the consolidated financial statement of the international group for the accounting year, exceeds ₹ 500 crore; and (ii) the aggregate value of international transactions – (A) during the accounting year, as per the books of accounts, exceeds ₹ 50 crore, or (B) in respect of purchase, sale, transfer, lease or use of intangible property during the accounting year, as per the books of accounts, exceeds ₹ 10 crore keep and maintain information and documents of the international group.

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	Note – The rate of exchange for the calculation of the value in rupees of the consolidated group revenue in foreign currency shall be the telegraphic transfer buying rate (TTBR) of such currency on the last day of the accounting year. [Rule 10DA(7)] Part A of Form No. 3CEAA **(Master File)**, however, shall be furnished by every person, being a constituent entity of an international group, whether or not the above conditions are satisfied [Rule 10DA(3)].
	Information and documents required to be kept and maintained: The constituent entity shall keep and maintain the following information and documents of the international group, namely:- (a) a list of all entities of the international group along with their addresses; (b) a chart depicting the legal status of the constituent entity and ownership structure of the entire international group; (c) a description of the business of international group during the accounting year including,- (I) the nature of the business or businesses; (II) the important drivers of profits of such business or businesses; (III) a description of the supply chain for the five largest products or services of the international group in terms of revenue and any other products including services amounting to more than five per cent. of consolidated group revenue; (IV) a list and brief description of important service arrangements made among members of the international group, other than those for research and development services; (V) a description of the capabilities of the main service providers within the international group; (VI) details about the transfer pricing policies for allocating service costs and determining prices to be paid for intra-group services; (VII) a list and description of the major geographical markets for the products and services offered by the international group; (VIII) a description of the functions performed, assets employed and risks assumed by the constituent entities of the international group that contribute at least ten per cent. of the revenues or assets or profits of such group; and (IX) a description of the important business restructuring transactions, acquisitions and divestments;

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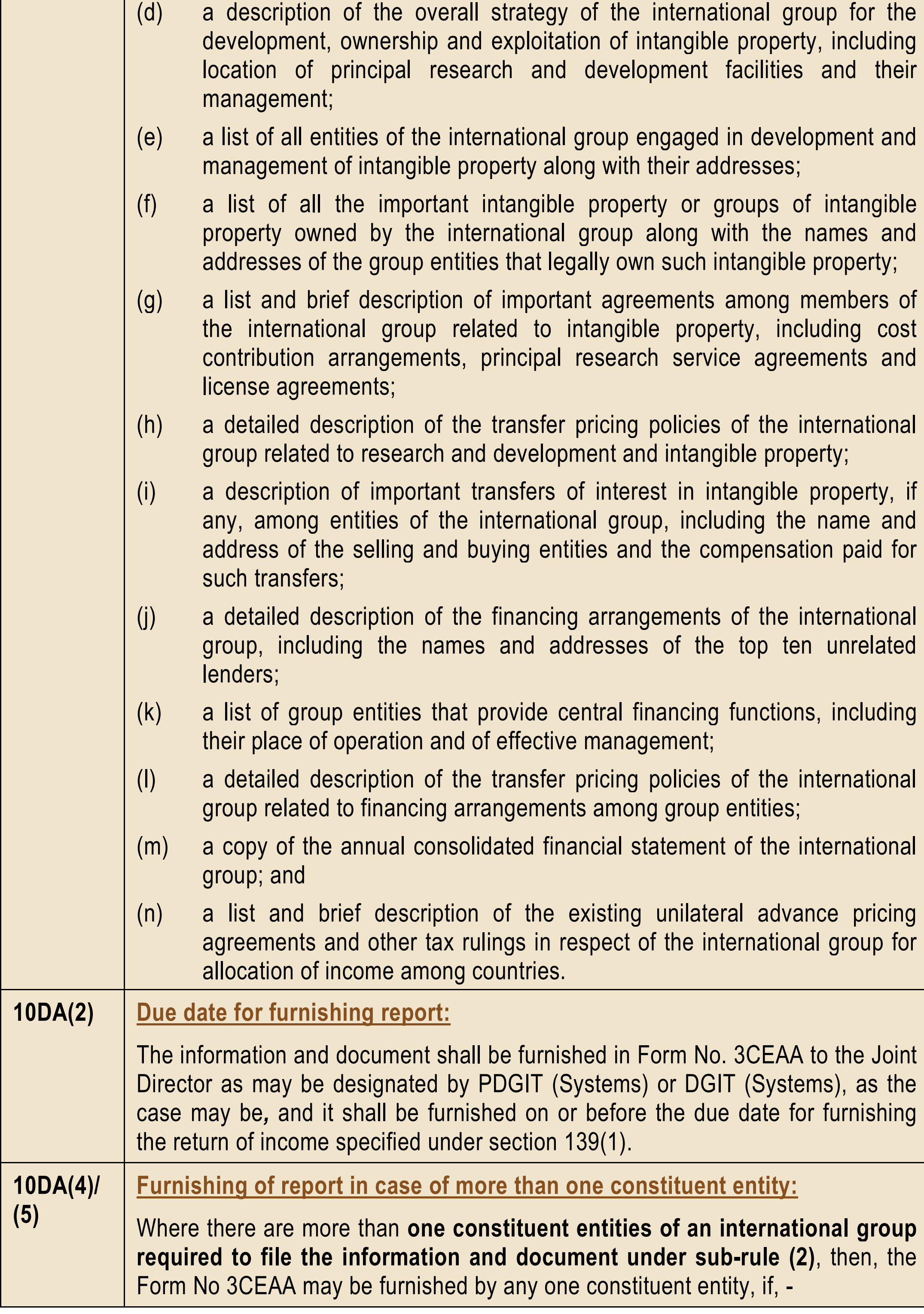

	(d) a description of the overall strategy of the international group for the development, ownership and exploitation of intangible property, including location of principal research and development facilities and their management; (e) a list of all entities of the international group engaged in development and management of intangible property along with their addresses; (f) a list of all the important intangible property or groups of intangible property owned by the international group along with the names and addresses of the group entities that legally own such intangible property; (g) a list and brief description of important agreements among members of the international group related to intangible property, including cost contribution arrangements, principal research service agreements and license agreements; (h) a detailed description of the transfer pricing policies of the international group related to research and development and intangible property; (i) a description of important transfers of interest in intangible property, if any, among entities of the international group, including the name and address of the selling and buying entities and the compensation paid for such transfers; (j) a detailed description of the financing arrangements of the international group, including the names and addresses of the top ten unrelated lenders; (k) a list of group entities that provide central financing functions, including their place of operation and of effective management; (l) a detailed description of the transfer pricing policies of the international group related to financing arrangements among group entities; (m) a copy of the annual consolidated financial statement of the international group; and (n) a list and brief description of the existing unilateral advance pricing agreements and other tax rulings in respect of the international group for allocation of income among countries.
10DA(2)	**Due date for furnishing report:** The information and document shall be furnished in Form No. 3CEAA to the Joint Director as may be designated by PDGIT (Systems) or DGIT (Systems), as the case may be, and it shall be furnished on or before the due date for furnishing the return of income specified under section 139(1).
10DA(4)/ (5)	**Furnishing of report in case of more than one constituent entity:** Where there are more than **one constituent entities of an international group required to file the information and document under sub-rule (2)**, then, the Form No 3CEAA may be furnished by any one constituent entity, if, -

	(a) the international group has designated such entity for this purpose and (b) the information has been conveyed to the Joint Director as may be designated by PDGIT (Systems) or DGIT (Systems), as the case may be, in Form No 3CEAB, in this behalf at least 30 days before the due date of furnishing the Form No. 3CEAA.
10DA(6)	**Period for which such information and document to be kept or maintained:** The information and documents shall be kept and maintained for a period of eight years from the end of the relevant assessment year.

(xv) Meaning of certain terms [Section 286(9)]

	Term	Meaning
(a)	**Accounting year**	<table><tr><th>Case</th><th>Accounting year</th></tr><tr><td>In a case where the parent entity is resident in India; or</td><td>A previous year</td></tr><tr><td>In any other case</td><td>An annual accounting period, with respect to which the parent entity of the international group prepares its financial statements under any law for the time being in force or the applicable accounting standards of the country or territory of which such entity is resident.</td></tr></table>
(b)	**Agreement**	A combination of all of the following agreements, namely – (i) an agreement referred to in section 90(1) or section 90A(1); or (ii) an agreement for exchange of the CbC report referred to in section 286(2) as may be notified by the Central Government.
(c)	**Alternate reporting entity**	Any constituent entity of the international group that has been designated by such group, in the place of the parent entity, to furnish the CbC report in the country or territory in which the said constituent entity is resident on behalf of such group.
(d)	**Constituent entity**	(i) any separate entity of an international group that is included in the consolidated financial statement of the said group for financial reporting purposes, or may be so included for the said purpose, if the equity share of any entity of the international group were to be listed on a stock exchange; (ii) any such entity that is excluded from the consolidated financial statement of the international group solely on the basis of size or materiality; or

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		(iii) any permanent establishment of any separate business entity of the international group included in sub clause (i) or sub clause (ii), if such business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting or internal management control purposes
(e)	**Group**	This includes a parent entity and all the entities in respect of which, for the reason of ownership or control, a consolidated financial statement for financial reporting purposes,— (i) is required to be prepared under any law for the time being in force or the accounting standards of the country or territory of which the parent entity is resident; or (ii) would have been required to be prepared had the equity shares of any of the enterprises were listed on a stock exchange in the country or territory of which the parent entity is resident.
(f)	**Consolidated financial statement**	The financial statement of an international group in which the assets, liabilities, income, expenses and cash flows of the parent entity and the constituent entities are presented as those of a single economic entity
(g)	**International group**	Any group that includes,— (i) two or more enterprises which are resident of different countries or territories; or (ii) an enterprise, being a resident of one country or territory, which carries on any business through a permanent establishment in other countries or territories;
(h)	**Parent entity**	A constituent entity, of an international group holding, directly or indirectly, an interest in one or more of the other constituent entities of the international group, such that,— (i) it is required to prepare a consolidated financial statement under any law for the time being in force or the accounting standards of the country or territory of which the entity is resident; or (ii) it would have been required to prepare a consolidated financial statement had the equity shares of any of the enterprises were listed on a stock exchange, and, there is no other constituent entity of such group which, due to ownership of any interest, directly or indirectly, in the first mentioned constituent entity, is required to prepare a consolidated financial statement, under the circumstances referred to in sub clause (i) or sub clause (ii), that includes the separate financial statement of the first mentioned constituent entity.

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(i)	**Permanent establishment**	Meaning assigned to it in clause (iiia) of section 92F i.e., includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.
(j)	**Reporting accounting year**	The accounting year in respect of which the financial and operational results are required to be reflected in the report to be furnished every year by the parent entity or the alternate reporting entity, resident in India, in respect of the international group of which it is a constituent under section 286(2) or by a constituent entity of an international group referred to in section 286(4).
(k)	**Reporting entity**	The constituent entity including the parent entity or the alternate reporting entity, that is required to furnish a report referred to in section 286(2).
(l)	**Systemic failure**	Systemic failure, with respect to a country or territory, means that the country or territory has an agreement with India providing for exchange of report of the nature referred to in section 286(2), but— (i) in violation of the said agreement, it has suspended automatic exchange; or (ii) has persistently failed to automatically provide to India the report in its possession in respect of any international group having a constituent entity resident in India

(3) Transfer pricing for Specified Domestic Transactions

(i) **Income from domestic related party transactions to be subject to transfer pricing [Section 92(2A)]:** Section 92 provides that any income arising from an international transaction shall be computed having regard to the arm's length price. Even in case of certain domestic transaction, the tax arbitrage takes place due to differences in tax rates. For example, if the entity has two units – one in DTA and other in non-DTA, the entity can undertake the transfer of goods at price which results in lower profits in taxable unit and higher profits in non-taxable unit. In order to ensure objectivity in determination of income from domestic related party transactions and determination of reasonableness of expenditure between related domestic parties, the provisions of section 92 have been extended to include within its ambit the specified domestic transactions. Section 92(2A) provides that, any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price. However, as per section 92(3), the provisions of this section would not apply if such allowance for expense or interest under section 92(2A) has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be.

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(ii) Meaning of "specified domestic transaction" [Section 92BA]: Section 92BA provides the meaning of "specified domestic transaction". As per section 92BA, for the purpose of sections 92, 92C (Computation of arm's length price), 92D (Maintenance and keeping of information and documents) and 92E (Furnishing of report from an accountant), in case of an assessee the specified domestic transaction shall mean any of the following transactions, not being an international transaction, namely,-

(1) any transaction referred to in section 80A i.e., inter-unit transfer of goods and services by an undertaking or unit or enterprise or eligible business to other business carried on by the assessee or *vice versa*, for consideration not corresponding to the market value on the date of transfer;

(2) any transfer of goods or services referred to in section 80-IA(8) i.e., inter-unit transfer of goods or services between eligible business and other business, where the consideration for transfer does not correspond with the market value of goods and services;

(3) any business transacted between the assessee carrying on eligible business and other person as referred to section 80-IA(10);

(4) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of section 80-IA(8) or section 80-IA(10) are applicable; or

(5) any business transacted between a company opting for section 115BAB and person with whom the company has close connection; or

(6) any business transacted between a co-operative society opting for section 115BAE and person with whom the co-operative society has close connection; or

(7) any other transaction as may be prescribed,

However, the above mentioned transactions shall not be treated as specified domestic transaction in case the aggregate of such transactions entered into by the assessee in the previous year does not exceed a sum of ₹ 20 crore.

(iii) Arm's length price and income of a specified domestic transaction to be computed in the same manner as applicable to an international transaction [Sections 92 & 92C]: In order to determine the arm's length price in respect of the specified domestic transaction, the provisions of section 92 and 92C shall apply to the specified domestic transaction as they apply to the international transaction. Accordingly, the methods of computation of

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arm's length price for an international transaction would be applicable to a specified domestic transaction also.

(iv) **Persons entering into a specified domestic transaction to maintain information and documents and furnish report of an accountant [Section 92D & 92E]:** With a view to create a legally enforceable obligation on assessees entering into a specified domestic transaction to maintain proper documentation and obtain and furnish report of a Chartered Accountant on or before the specified date, the provisions of section 92D and 92E have been made applicable to a specified domestic transaction as they apply to an international transaction.

(v) **Reference to Transfer Pricing Officer for computation of arm's length price of specified domestic transaction [Section 92CA]:** According to section 92CA, where any person has entered into an international transaction or a specified domestic transaction in any previous year, the Assessing Officer can with the previous approval of the Principal Commissioner or Commissioner, if he considers necessary or expedient to do so, refer the computation of the arm's length price of such transaction to the Transfer Pricing Officer (TPO).

When such reference is made, TPO can call upon the assessee to produce evidence in support of the computation of arm's length price made by him in respect of such transaction.

The TPO can also determine the ALP of other specified domestic transactions identified subsequently in the course of proceedings before him as if such transaction is a specified domestic transaction referred to the TPO by the Assessing Officer under section 92CA(1).

Where in respect of a specified domestic transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the TPO during the course of proceeding before him, the transfer pricing provisions shall apply as if such transaction is a specified domestic transaction referred to the TPO by the Assessing Officer under section 92CA(1).

The TPO has to pass an order determining the arm's length price in respect of the specified domestic transaction after considering the evidence, documents, etc. produced by the assessee and after considering the material gathered by him. He has to send a copy of his order to the Assessing Officer as well as the assessee.

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(vi) Penalty provisions to apply to specified domestic transactions as they apply to an international transaction [Sections 271AA, 271BA & 271G]: The penalty provisions under sections 271AA, 271BA and 271G shall apply to the specified domestic transaction as they apply to an international transaction defined under section 92B.

Failure to furnish the report under section 92E from an accountant would attract penalty of ₹ 1,00,000 under section 271BA.

In addition,

(i) in case of failure to keep and maintain information, document as required under section 92D(1) or 92D(2); or

(ii) failure to report such specified domestic transaction which is required to be reported; or

(iii) maintain or furnishes incorrect information or document

penalty under section 271AA at 2% of the value of each transaction would be attracted.

Penalty@2% of value of specified domestic transaction would be attracted under section 271G for failure to furnish the prescribed information or document as required under section 92D(3) within the period of 10 days from the date of receipt of notice or the extended period not exceeding another 30 days, as the case may be.

(vii) Market value to be the arm's length price of goods or services in a specified domestic transaction [Section 80A & 80-IA(8)]: As per the provisions of section 80A(6), in a case where the goods or services held for the purpose of the undertaking or unit or enterprise or eligible business are transferred to any other business carried on by the assessee or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the undertaking or unit or enterprise or eligible business and the consideration for transfer as recorded in the accounts does not correspond to the market value of such goods or services as on the date of transfer, then, for the purpose of any deduction under Chapter VI-A, profits and gains of such undertaking or unit or enterprise or eligible business shall be determined at the market value of such goods or services as on the date of transfer.

Clause (iii) of *Explanation* to section 80A(6) clarifies that "market value" in relation to any goods or services sold, supplied or acquired, means the arm's length price as defined under section 92F of such goods or services, if it is a specified domestic transaction referred to in section 92BA i.e., the aggregate value of all such transaction specified in section 92BA exceeds **₹ 20 crore**.

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Therefore, in case the transfer of goods and services between undertaking or unit or enterprise or eligible business and any other business of the assessee takes place at the arm's length price, such arm's length price shall be the market value for the purpose of section 80A(6), and no further adjustment would be required in respect of the same, if the transaction is a specified domestic transaction.

(viii) Similarly, for the purpose of section 80-IA(8), the market value, in relation to any goods or services transferred between the eligible business and any other business carried on by the assessee, shall mean -

(1) the price that such goods or services would ordinarily fetch in the open market; or

(2) the arm's length price as defined under section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.

(ix) Profit from transactions between an assessee carrying on "eligible business" and other assessees to be determined as per arm's length price [Section 80-IA(10)]: Under section 80-IA(10), the Assessing Officer is empowered to make an adjustment while computing the profit and gains of the eligible business on the basis of the reasonable profit that can be derived from the transaction, in case the transaction between the assessee carrying on the eligible business under section 80-IA and any other person is so arranged that the transaction produces excessive profits to the eligible business.

It has been provided that if the aforesaid arrangement between the assessee carrying on the eligible business and any other person is a specified domestic transaction referred to in section 92BA, then, the amount of profit of such transaction shall be determined having regard to arm's length price as defined under section 92F and not as per the reasonable profit from such transaction.

(x) Transfer Pricing Rules made applicable to Specified Domestic Transactions

The transfer pricing provisions have been extended to Specified Domestic Transactions. Accordingly, the transfer pricing rules prescribed for international transactions have been suitably amended to make the same applicable for specified domestic transactions, as well.

Rule No.	Particulars	Amendment
10A	**Meaning of expressions used in computation of Arm's length price**	**Definition of "associated enterprise" and "enterprise" included** **"Associated Enterprise"** shall - (i) have the same meaning as assigned to it in section 92A; and

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		(ii) in relation to a specified domestic transaction entered into by an assessee, include - (A) other units or undertakings or businesses of such assessee in respect of a transaction referred to in section 80A or section 80-IA(8); (B) any other person referred to in section 80-IA(10) in respect of a transaction referred to therein; (C) other units, undertakings, enterprises or business of such assessee, or other person referred to in section 80-IA(10) or in respect of a transaction referred to in section 10AA or the transactions referred to in Chapter VI-A to which the provisions of section 80-IA(8) or section 80-IA(10) are applicable; **"Enterprise"** shall have the same meaning as assigned to it in clause (iii) of section 92F and shall, for the purposes of a specified domestic transaction, include a unit, or an enterprise, or an undertaking or a business of a person who undertakes such transaction.
10AB	**Other methods of determination of ALP**	This Rule provides that for the purpose of section 92C(1)(f), the other method for determination of the arm's length price in relation to an international transaction shall be any method which takes into account the price which has been charged or paid or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts. This Rule has been made applicable to specified domestic transactions as well.
10B	**Determination of ALP under section 92C**	The methods for determination of arm's length price specified in this Rule for the purpose of section 92C(2) in relation to an international transaction shall also be made applicable in respect of specified domestic transactions.
10C	**Most appropriate method**	Sub-rule (1) provides that, for the purposes of section 92C(1), the most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction, and which provides the most reliable measure of an arm's length price in relation to an international transaction.

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		Sub-rule (2) specifies the factors to be taken into account in selecting the most appropriate method. This Rule is made applicable in respect of a specified domestic transaction as well.
10D	**Information and documents to be kept and maintained under section 92D**	Sub-rule (1) requires every person who has entered into an international transaction or specified domestic transaction to maintain the requisite information and documents as detailed thereunder. As per sub-rule (2), maintenance of information and documents shall not apply where the aggregate value of international transactions does not exceed ₹ 1 crore. However, sub-rule (1) shall be applicable for every specified domestic transaction irrespective of its value.
10E	**Report from an accountant to be furnished under section 92E**	This rule provides for submission of audit report from a chartered accountant by every person who has entered into an international transaction. This provision would also apply to a person entered into a specified domestic transaction as well.

(xi) Safe Harbour Rules notified for Specified Domestic Transactions [Rule 10TH to Rule 10THD]

Section 92CB provides that determination of

- income referred to in section 9(1)(i); or
- arm's length price under section 92C or Section 92CA

shall be subject to Safe Harbour rules. Section 92CB(2) empowers the CBDT to prescribe safe harbour rules.

Safe Harbour means circumstances in which the income-tax authorities shall accept the transfer price or income, deemed to accrue or arise under section 9(1)(i), as the case may be, declared by the assessee.

Accordingly, the CBDT has, in exercise of the powers conferred by section 92CB and 92D, read with section 295, inserted Rules 10TH, 10THA, 10THB, 10THC & 10THD providing the safe harbour rules for specified domestic transactions.

Rule	Rule heading	Particulars
10TH	**Definitions:**	
	Appropriate Commission →	Meaning assigned to it in section 2(4) of the Electricity Act, 2003.

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		Appropriate Commission means the Central Regulatory Commission referred to in sub-section (1) of section 76 or the State Regulatory Commission referred to in section 82 or the Joint Commission referred to in section 83, as the case may be, of the Electricity Act, 2003.
	Government Company →	Meaning assigned to it in section 2(45) of the Companies Act, 2013. Government company means any company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company. "Paid-up share capital" shall be construed as "total voting power", where shares with differential voting rights have been issued.
10THA	**Eligible assessee**	• A person who has exercised a valid option for application of safe harbour Rules in accordance with the provisions of Rule 10THC, **AND** • is a Government company engaged in the business of generation, supply, transmission or distribution of electricity; or • is a co-operative society engaged in the business of procuring and marketing milk and milk products.
10THB	**Eligible Specified Domestic Transaction**	A specified domestic transaction undertaken by an eligible assessee and which comprises of: (i) supply of electricity; or (ii) transmission of electricity; or (iii) wheeling of electricity; or (iv) purchase of milk or milk products by a co-operative society from its members.
10THC	**Safe harbour**	(1) Where an eligible assessee has entered into an eligible specified domestic transaction in any previous year relevant to an assessment year and the option exercised by the said assessee is treated to be validly exercised under Rule 10THD, the transfer price declared by the assessee in respect of such transaction for that assessment year shall be accepted by the income-tax authorities, if it is in

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accordance with the circumstances specified in Rule 10THC(2).

(2) The following are the circumstances in respect of the eligible specified domestic transaction.

S. No.	Eligible specified domestic Transaction	Circumstances
1	Supply of electricity, transmission of electricity, wheeling of electricity	The tariff in respect of supply of electricity, transmission of electricity, wheeling of electricity, as the case may be, is determined or the methodology for determination of the tariff is approved by the Appropriate Commission in accordance with the provisions of the Electricity Act, 2003.
2	Purchase of milk or milk products by a co-operative society from its members	The price of milk or milk products is determined at a rate which is fixed on the basis of the quality of milk, namely, fat content and Solid Not Fat (SNF) content of milk; and – (a) the said rate is irrespective of,- (i) the quantity of milk procured; (ii) the percentage of shares held by the members in the co-operative society; (iii) the voting power held by the members in the society; and (b) such prices are routinely declared by the co-operative society in a transparent manner and are available in public domain.

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		(3) No comparability adjustment and allowance under the second proviso to section 92C(2) shall be made to the transfer price declared by the eligible assessee and accepted by the income-tax authority. (4) The provisions of sections 92D relating to maintenance and keeping of information and document and section 92E for submission of report from an accountant in respect of a specified domestic transaction shall apply irrespective of the fact that the assessee exercises his option for safe harbour in respect of such transaction.
10THD	**Procedure**	**Furnishing of Form 3CEFB** The assessee has to furnish Form 3CEFB, complete in all respects, to the Assessing Officer on or before the due date for furnishing the return of income for the relevant assessment year specified in *Explanation 2* to section 139(1), for exercising the option of safe harbour. The return of income should be furnished on or before the date of submitting the Form 3CEFB. **Verification by the Assessing Officer** Before treating the option for safe harbor by the assessee as validly exercised, the Assessing Officer has to verify whether the assessee exercising the option is an eligible assessee and the transaction in respect of which the option is exercised is an eligible specified domestic transaction. **Furnishing of documents or information required by the Assessing Officer** Assessing Officer may issue a notice to the assessee to furnish such information or documents or other evidence as he may consider necessary. The assessee has to furnish the same within the specified time in such notice. **Circumstances when option exercised can be declared Invalid** The Assessing Officer has to, by order in writing, declare the option exercised by the assessee as invalid and cause a copy of the order to be served on the assessee if – (i) the assessee does not furnish the information or documents or other evidence required by the Assessing Officer

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		(ii) the Assessing Officer finds that the assessee is not an eligible assessee (iii) the Assessing Officer finds that the specified domestic transaction in respect of which option has been exercised is not an eligible specified domestic transaction (iv) the tariff is not in accordance with the circumstances specified in Rule 10THC. **Order by Assessing Officer** The Assessing Officer has to pass the order declaring the option exercised by the assessee as invalid within a period of 3 months from the end of the month in which Form 3CEFB is received by him. No order can be passed declaring the option exercised by the assessee invalid unless an opportunity of being heard is given to him. **Filling of objections against the order of Assessing Officer by the assessee** If the assessee objects to the order of the Assessing Officer declaring the option to be invalid, he may file his objections with the Principal Commissioner or the Commissioner or the Principal Director or the Director, as the case may be, to whom the Assessing Officer is subordinate, **within 15 days of receipt of the order of the Assessing Officer**. On receipt of objection, the Principal Commissioner or Commissioner or Principal Director or Director, as the case may be, shall, after providing an opportunity of being heard to the assessee, pass appropriate order, **within a period of 2 months from the end of the month** in which the objection filed by the assessee is received by him, in respect of the validity or otherwise of the option exercised by the assessee. A copy of the said order has to be served on the assessee and the Assessing Officer. If the Assessing Officer or the Principal Commissioner or the Commissioner or the Principal Director or the Director, as the case may be, does not pass an order within the specified time, then the option for safe harbour exercised by the assessee shall be treated as valid.

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(xii) Information and documents to be kept and maintained under section 92D in case of an eligible assessee referred to in Rule 10THA in respect of eligible specified domestic transaction [Rule 10D(2A)]:

Section 92D(1)(i) provides that every person who has entered into an international transaction or specified domestic transaction shall keep and maintain prescribed information and document.

Rule 10D(1) provides for information and documents to be maintained under section 92D. Sub-rule (2A) in Rule 10D provides that nothing contained in Rule 10D(1) in so far as it relates to specified domestic transaction referred to in Rule 10THB, shall apply in the case of an eligible assessee referred to in Rule 10THA.

The information and documents to be maintained by an eligible assessee referred to in Rule 10THA relating to an eligible specified domestic transaction referred to in Rule 10THB are given in Rule 10D(2A) as follows:

Rule	Eligible Assessee	Information and documents to be kept and maintained
10THA(i)	**A government company engaged in the business of generation, supply, transmission or distribution of electricity**	(i) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises; (ii) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted; (iii) the nature and terms (including prices) of specified domestic transactions entered into with each associated enterprise and the quantum and value of each such transaction or class of such transaction; (iv) a record of proceedings, if any, before the regulatory commission and orders of such commission relating to the specified domestic transaction; (v) a record of the actual working carried out for determining the transfer price of the specified domestic transaction;

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		(vi) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the transfer price; and (vii) any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the transfer price.
10THA(ii)	**A co-operative society engaged in the business of procuring and marketing milk and milk products**	(i) a description of the ownership structure of the assessee co-operative society with details of shares or other ownership interest held therein by the members; (ii) description of members including their addresses and period of membership; (iii) the nature and terms (including prices) of specified domestic transactions entered into with each member and the quantum and value of each such transaction or class of such transaction; (iv) a record of the actual working carried out for determining the transfer price of the specified domestic transaction; (v) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the transfer price; (vi) the documentation regarding price being routinely declared in transparent manner and being available in public domain; and (vii) any other information, data or document which may be relevant for determination of the transfer price.
The above information should be supported by authentic documents. Both the information and documents must be contemporaneous and should exist latest by the specified date [i.e., the date one month prior to the due date of filing return under section 139(1)] i.e., 31st October of the assessment year. Such information and documents have to be kept and maintained for a period of eight years from the end of the relevant assessment year.		

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24.6 TRANSFER OF INCOME TO NON RESIDENTS [SECTION 93]

A resident and ordinarily resident is subject to tax in India in respect of his global income whereas in case of a non-resident, income accruing or arising outside India would not be taxable in his hands in India if it is not deemed to accrue or arise in India and is not received in India. Thus, in order to reduce his tax liability, a resident Indian may transfer the ownership in his foreign asset to a non-resident, while continuing to enjoy the benefits of income derived therefrom. Section 93 hits at such transactions which are effected with a view to avoiding income-tax liability. For the purpose of this section, the word "non-resident" also includes a person who is not-ordinarily resident.

In order to attract the provisions of this section, the following conditions must be satisfied:

(a) There should be a transfer of assets.

(b) The said transfer may be made either alone or in conjunction with associated operations.

(c) The transfer of assets is effected in such a manner that the income from transferred assets becomes payable to a non-resident.

(d) As a consequence of the transfer, the transferor, either alone or in conjunction with associated operations, has acquired any right, by virtue of which he gets the power to enjoy the income from transferred assets, whether immediately or in future.

(e) Such income of the non-resident transferee would have been chargeable to tax in India, had it been the income of the resident transferor.

(f) The Assessing Officer is satisfied that avoidance of liability to tax in India is the purpose of the transfer.

In such a case, the income from transferred asset would be deemed to be the income of the resident transferor and would, accordingly, be taxable in his hands. Therefore, where assets are transferred to a body corporate outside India, in consideration of shares allotted by it to the transferor, he (the transferor), will become assessable under this section in respect of the income of the company derived by it from those assets. This section will not, however, apply to cases where it is shown to the satisfaction of the Assessing Officer that (i) neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation or (ii) it is provided to the satisfaction of the Assessing Officer that the transfer was effected for *bona fide* commercial purpose and with no intent to avoid tax.

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	Terms	Meaning
(i)	**Associated operation**	The expression 'associated operation," in relation to a transfer, means an operation of any kind effected by any person in relation to: (i) any of the assets transferred; (ii) any assets representing, whether directly or indirectly, any of the assets transferred; (iii) any income arising from such assets; (iv) any assets representing, whether directly or indirectly, the accumulation of income arising from such assets.
(ii)	**Assets**	It includes property or rights of any kind.
(iii)	**Transfer**	In relation to rights, includes creation of those rights
(iv)	**Benefit**	It includes a payment of any kind.

For purposes of this section, a person is deemed to have the power to enjoy the income of a non-resident if:

(i) the income, in fact, so dealt with by any person as to be calculated at some point of time to enure for the benefit of the transferor, whether in the form of the income or otherwise;

(ii) the receipt or accrual of the income operates to increase value of any assets held by the transferor or for his direct or indirect benefit;

(iii) the transferor receives or is entitled to receive at any time any benefit out of the income or out of any money available for the purpose by reason of the effect or successive effects of the associated operations on that income and the assets which represent that income;

(iv) the transferor is in a position to obtain for himself the beneficial enjoyment of the income by exercising any power of appointment or power of revocation or otherwise, whether with or without the consent of any other person, or

(v) the transferor is able to control, directly or indirectly, the application of the income in any manner whatsoever.

However, in determining whether a person has the power to enjoy the income, due regard shall be had to the substantial result and effect of the transfer and any associated operations; all benefits which may at any time accrue to such person as a result of the transfer and any associated operations must be taken into consideration irrespective of the nature or form of the benefits.

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It may be noted that where an assessee has been charged to tax in respect of a sum deemed to be his income under this section, the subsequent receipt of that sum by the assessee, whether as income or in any other form, shall not be liable to tax in his hands at the time of receipt.

24.7 INTRODUCTION OF SPECIFIC ANTI AVOIDANCE MEASURES IN RESPECT OF TRANSACTIONS WITH PERSONS LOCATED IN NOTIFIED JURISDICTIONAL AREA [SECTION 94A]

The objective of anti-avoidance measures is to discourage assessees from entering into transactions with persons located in countries or territories which do not have effective information exchange mechanism with India. The following are the anti-avoidance measures introduced -

(i) The Central Government is empowered to notify any country or territory outside India as a NJA (Notified Jurisdictional Area), having regard to the lack of effective exchange of information with such country or territory.

Clarification on removal of Cyprus from the list of notified jurisdictional area under section 94A of the Income-tax Act, 1961 – [Circular No. 15/2017, dated 21-04-2017]

Cyprus was specified as a "notified jurisdictional area" (NJA) under section 94A of the Income-tax Act, 1961 vide Notification No. 86/2013 dated 01.11.2013. The said Notification No. 86/2013 was subsequently rescinded vide Notification No. 114 dated 14.12.2016 and Notification No. 119 dated 16.12.2016 with effect from the date of issue of the notification.

The CBDT has, vide this Circular, clarified that Notification No. 86/2013 has been rescinded with effect from the date of issue of the said notification, thereby, removing Cyprus as a notified jurisdictional area with retrospective effect from 01.11.2013.

(ii) A transaction where one of the parties thereto is a person located in a NJA would be deemed to be an international transaction then all parties to the transaction to be deemed as associated enterprises, and accordingly, all the provisions of transfer pricing to be attracted in case of such a transaction. However, the benefit of permissible variation between the ALP and the transfer price based on the rate notified by the Central Government would not be available in respect of such transaction.

(iii) Such transaction may be in the nature of –

(1) purchase, sale or lease of tangible or intangible property or

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(2) provision of service or

(3) lending or borrowing money or

(4) any other transaction having a bearing on the profits, income, losses or assets of the assessee. It may include a mutual agreement or arrangement for allocation or apportionment of, or contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by or to the assessee.

(iv) Person located in a NJA shall include a person who is a resident of the NJA and a person, not being an individual, which is established in the NJA. It would also include a permanent establishment of any other person in the NJA.

(v) Payments made to any financial institution located in a NJA would not be allowed as deduction unless the assessee authorizes the CBDT or any other income-tax authority acting on its behalf to seek relevant information from the financial institution on behalf of the assessee.

(vi) No deduction in respect of any other expenditure or allowance, including depreciation, arising from the transaction with a person located in a NJA would be allowed unless the assessee maintains the relevant documents and furnishes the prescribed information.

(vii) Any sum credited or received from a person located in a NJA to be deemed to be the income of the recipient-assessee if he does not explain satisfactorily the source of such money in the hands of such person or in the hands of the beneficial owner, if such person is not the beneficial owner.

(viii) The rate of TDS in respect of any payment made to a person located in the NJA, on which tax is deductible at source, will be the higher of the following rates –

(1) rates specified in the relevant provision of the Income-tax Act, 1961; or

(2) rate or rates in force; or

(3) 30%.

ILLUSTRATION 7

A Ltd., an Indian company, provides technical services to a company, XYZ Inc., located in a NJA for a consideration of ₹ 40 lakhs in October, 2024. It charges ₹ 42 lakhs for similar services rendered to PQR Inc., which is not located in a NJA. PQR Inc. is not an associated enterprise of A Ltd.

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Discuss the tax implications under section 94A read with section 92C in respect of the above transaction of provision of technical services by A Ltd. to XYZ Inc.

SOLUTION

Since XYZ Inc. is located in a NJA, the transaction of provision of technical services by the Indian company, A Ltd., would be deemed to be an international transaction and XYZ Inc. and A Ltd. would be deemed to be associated enterprises. Therefore, the provisions of transfer pricing would be attracted in this case.

The price of ₹ 42 lakhs charged for similar services from PQR Inc, being an independent entity located in a non-NJA country, can be taken into consideration for determining the arm's length price (ALP) under Comparable Uncontrolled Price (CUP) Method.

Since the ALP is more than the transfer price, the ALP of ₹ 42 lakhs would be considered as the income arising from the international transaction between A Ltd. and XYZ Inc.

It may be noted that the benefit of permissible variation between the ALP and transfer price is not available in respect of a transaction entered into with an entity in NJA.

ILLUSTRATION 8

Mr. X, a non-resident individual, is due to receive interest of ₹ 5 lakhs during March 2025 from a notified infrastructure debt fund eligible for exemption under section 10(47). He incurred expenditure amounting to ₹ 10,000 for earning such income. Assuming that Mr. X is a resident of a NJA, discuss the tax implications under section 94A, read with sections 115A and 194LB.

SOLUTION

The interest income received by Mr. X, a non-resident, from a notified infrastructure debt fund would be subject to a concessional tax rate of 5% under section 115A on the gross amount of such interest income. Therefore, the tax liability of Mr. X in respect of such income would be ₹ 26,000 (being 5% of ₹ 5 lakhs *plus* health and education cess@4%).

Under section 194LB, tax is deductible @5% (*plus* health and education cess@4%) on interest paid by such fund to a non-resident. However, since X is a resident of a NJA, tax would be deductible@30% (*plus* health and education cess@4%) as per section 94A, and not @5% specified under section 194LB. This is on account of the provisions of section 94A(5), which provides that "**Notwithstanding anything contained in any other provision of this Act,** where a person located in a NJA is entitled to receive any sum or income or amount on which **tax is deductible under Chapter XVII-B,** the **tax shall be deducted at the highest of the following rates**, namely–

(a) at the rate or rates in force;

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(b) at the rate specified in the relevant provision of the Act;

(c) at the rate of thirty per cent."

Mr. X can, however, claim refund of excess tax deducted along with interest.

24.8 LIMITATION OF INTEREST DEDUCTION IN CERTAIN CASES [SECTION 94B]

(1) Preference of debt over equity as a measure to finance businesses: Debt and equity are the instruments through which a company is generally financed or capitalized. The manner in which a company is capitalized has a major impact on the amount of taxable profit as the tax laws of countries generally provide for a deduction in respect of interest paid or payable while arriving at the taxable profit. However, the dividend paid on equity contribution is not deductible. Therefore, the higher the level of debt in a company, and thus, the amount of interest it pays, the lower will be its taxable income. Due to this reason, debt is considered a more tax efficient method of finance than equity. Multinational groups are often able to structure their financing arrangements to maximize tax benefits through intra-group financing. In this manner, the MNEs are able to claim the excessive deduction of interest in the high tax jurisdiction and shift the profits to the low tax jurisdiction resulting in base erosion and profit shifting.

(2) Tax Rules to prevent shifting of profits through excessive interest payments: In order to address this issue, tax rules are in place in many countries to fix a ceiling limit on the amount of interest deductible in computing a company's profit for tax purposes. Such rules are designed to counter cross-border shifting of profit through excessive interest payments, with the objective of protecting a country's tax base.

(3) Relevant Action Plan of BEPS: Under the initiative of the G-20 countries, the Organization for Economic Co-operation and Development (OECD) in its Base Erosion and Profit Shifting (BEPS) project had taken up the issue of base erosion and profit shifting by way of excess interest deductions by the MNEs in Action Plan 4 and recommended certain measures in its final report.

(4) Insertion of provision in the Income-tax Act, 1961 in line with BEPS Action Plan 4: Section 94B has, accordingly, been inserted in the Income-tax Act, 1961, in line with the recommendations of OECD BEPS Action Plan 4, to provide that interest expenses claimed by an entity on loan borrowed from its associated enterprises shall not be deductible in computation of income under the "Profits and gains of business or profession" to the extent that it arises from excess interest.

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Excess interest shall mean an amount of

- total interest paid or payable* in excess of 30% of its earnings before interest, taxes, depreciation and amortization (EBITDA) of the borrower in the previous year or
- interest paid or payable to associated enterprise for that previous year

whichever is less.

**"Total interest paid or payable" to be interpreted as interest paid or payable to non-resident associated enterprise as per the intent expressed in section 94B(1) and also the Explanatory Memorandum to the Finance Bill, 2017.*

(5) **Applicability**: The provision shall be applicable to an Indian company, or a permanent establishment of a foreign company in India, being the borrower who incurs expenditure by way of interest or similar nature in respect of any form of debt issued by a non-resident who is an 'associated enterprise' of the borrower.

However, the provision of this section would be applicable only where the expenditure by way of interest or of similar nature exceeds **₹ 1 crore,** in respect of any form of debt issued by a non-resident, being an 'associated enterprise' of such borrower.

(6) **Meaning of debt**: Any loan, financial instrument, finance lease, financial derivative, or any arrangement that gives rise to interest, discounts or other finance charges that are deductible in the computation of income chargeable under the head "Profits and gains of business or profession".

(7) **Provision of guarantee and deposit of matching amount deemed to be debt issued**: Where the debt is issued by a lender which is not associated but an associated enterprise either

- provides an implicit or explicit guarantee to such lender or
- deposits a corresponding and matching amount of funds with the lender,

such debt shall be deemed to have been issued by an associated enterprise.

(8) **Carry forward of excess interest**: The disallowed interest expense can be carried forward upto eight assessment years immediately succeeding the assessment year for which the disallowance was first made and claimed as deduction against the income computed under the head "Profits and gains of business or profession" to the extent of maximum allowable interest expenditure.

(9) **Businesses excluded from applicability of the provisions of section 94B**: The following has been excluded from the applicability of the provisions of this section -

- an Indian company or permanent establishment of a foreign company which is engaged in the business of banking and insurance or
- ***a Finance Company located in any IFSC or***

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- such class of non-banking financial companies as may be notified by the Central Government or
- interest paid in respect of a debt issued by a lender which is a permanent establishment in India of a non-resident, being a person engaged in the business of banking.

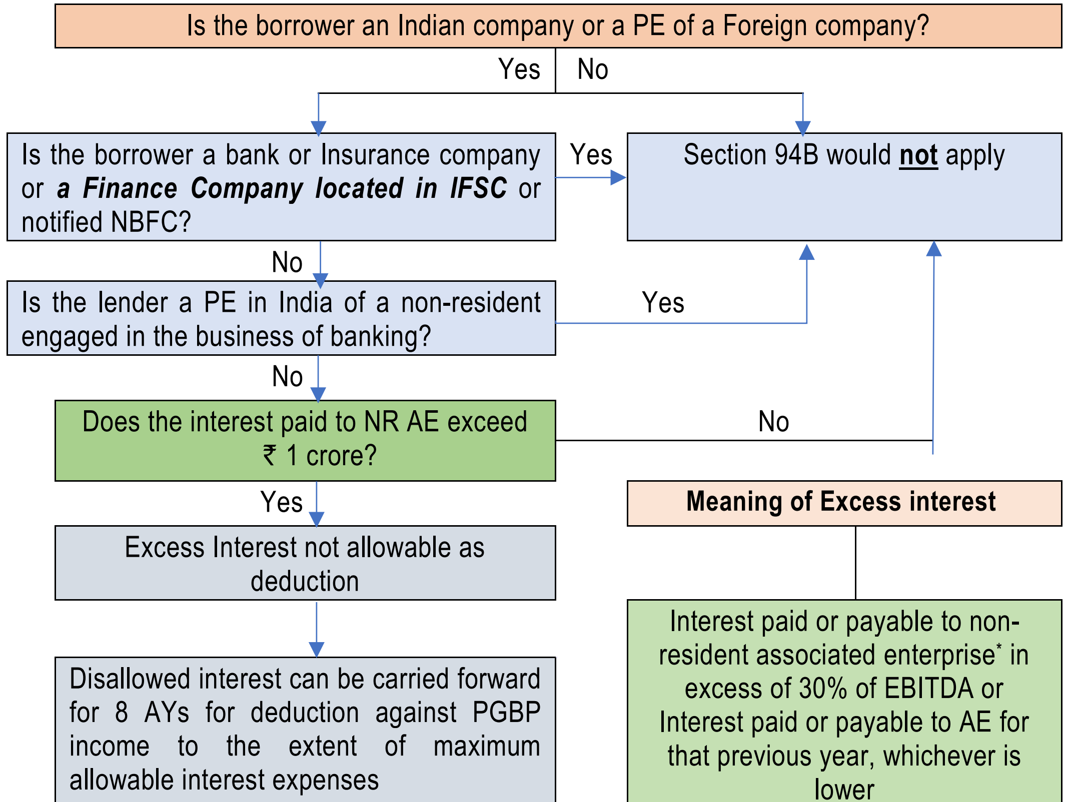
(10) Meaning of non-banking financial company: A non-banking financial company" means -

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other non-banking institution or class of such institutions, as may be notified by the Bank with the previous approval of the Central Government.

imitation of interest deduction (Section 94B): A Summary



**"Total interest paid or payable" may be interpreted as interest paid or payable to non-resident associated enterprise as per the intent expressed in section 94B(1) and also the Explanatory Memorandum to the Finance Bill, 2017.*

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ILLUSTRATION 9

ND Ltd., an Indian Company, has borrowed ₹ 90 crores on 01-04-2024 from M/s. TM Inc, a company incorporated in London, at an interest rate of 10% p.a. The said loan is repayable over a period of 5 years. Further, this loan is guaranteed by M/s TY Inc. incorporated in UK. M/s. TD Inc, a non-resident, holds shares carrying 40% of voting power both in M/s ND Ltd. and M/s TY Inc.

Net profit of M/s. ND Ltd. for P.Y. 2024-25 was ₹ 11 crores after debiting the above interest, depreciation of ₹ 5 crores and income-tax of ₹ 4 crores.

Calculate the amount of interest to be allowed to be claimed under the head "Profits and gains of business or profession" in the computation of M/s ND Ltd. giving appropriate reasons. Also explain allowability of such disallowed interest, if any.

SOLUTION

If an Indian company, being the borrower, incurs any expenditure by way of interest in respect of any debt issued by its non-resident associated enterprise (AE) and such interest exceeds ₹ 1 crore, then, the interest paid or payable by such Indian company in excess of 30% of its earnings before interest, taxes, depreciation and amortization (EBITDA) or interest paid or payable to associated enterprise, whichever is lower, shall **not** be allowed as deduction as per section 94B.

Further, where the debt is issued by a lender which is not associated but an associated enterprise either provides an implicit or explicit guarantee to such lender or deposits a corresponding and matching amount of funds with the lender, such debt shall be deemed to have been issued by an associated enterprise and limitation of interest deduction would be applicable.

In the present case, since M/s TD Inc holds 40% of voting power i.e., more than 26% of voting power in both ND Ltd and M/s TY Inc, ND Ltd. and M/s TY Inc are deemed to be associated enterprises.

Since loan of ₹ 90 crores taken by ND Ltd., an Indian company from M/s TM Inc, is guaranteed by M/s TY Inc, an associated enterprise of ND Ltd., such debt shall be deemed to have been issued by an associated enterprise and interest payable to M/s TM Inc shall be considered for the purpose of limitation of interest deduction u/s 94B.

Computation of interest to be allowed as per section 94B in the computation of income under the head profits and gains of business or profession of ND Ltd.

Particulars		₹ (in crores)
Net profit		11.00
Add: Interest already debited (₹ 90 crores x 10%)		9.00
Depreciation		5.00

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Income-tax		4.00
EBITDA		**29.00**
Interest paid or payable by ND Ltd.		**9.00**
Lower of the following would be disallowed		
- Total interest paid or payable in excess of 30% of EBITDA (₹ 9,00,00,000 – ₹ 8,70,00,000) = ₹ 30 lakhs	0.30	
- Interest paid or payable to non-resident AE	9.00	
Interest to be disallowed as deduction		**0.30**
Interest allowable as deduction under the head "Profits and gains from business or profession (₹ 9,00,00,000 – ₹ 30,00,000)		**8.70**

Disallowed interest of ₹ 30 lakhs can be carried forward to the subsequent assessment year and it would be allowed as deduction against profits and gains, to the extent of allowable interest expenditure u/s 94B.

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TEST YOUR KNOWLEDGE

Questions

1. *Examine the consequences that would follow if the Assessing Officer makes adjustment to arm's length price in international transactions of the assessee resulting in increase in taxable income. What are the remedies available to the assessee to dispute such adjustment?*

2. *Mr. Hari holds 30% of voting power in ABC Inc, a company incorporated under the laws of Country A. For the purpose of expansion of business, the said company enters into an agreement with XYZ Ltd., a company incorporated under the Indian laws. As per one of the clauses of the agreement, ABC Inc has the power to appoint 6 directors of XYZ Ltd., which has 12 directors on the board. Further, total purchases by XYZ Ltd. for the F.Y. 2024-25 is estimated to be ₹ 500 crores, out of which, purchases of ₹ 48 crores has been sourced locally and the balance shall be supplied by ABC Inc. The price for entire purchase has been fixed in the agreement and the conditions for supply are determined by ABC Inc.*

   Advise Mr. Hari as to whether ABC Inc and XYZ Ltd are Associated Enterprises, on the basis of the provisions of the Income-tax Act, 1961.

3. *I. Limited, an Indian Company supplied billets to its holding company, U. Limited, UK during the previous year 2024-25. I. Limited also supplied the same product to another UK based company, V. Limited, an unrelated entity. The transactions with U. Limited are priced at Euro 500 per MT (FOB), whereas the transactions with V. Limited are priced at Euro 700 per MT (CIF). Insurance and Freight amounts to Euro 200 per MT. Compute the arm's length price for the transaction with U. Limited.*

4. *X Ltd., operating in India, is the dealer for the goods manufactured by Yen Ltd. of Japan. Yen Ltd. owns 55% shares of X Ltd. and out of 7 directors of the company, 4 were appointed by them. The Assessing Officer, after verification of international transactions of ₹ 300 lakhs of X Ltd. for the relevant year and by noticing that the company had failed to maintain the requisite records and had also not obtained the accountants report, adjusted its income by making an addition of ₹ 30,00,000 to the declared income and also issued a show cause notice to levy various penalties. X Ltd seeks your expert opinion.*

5. *Anush Motors Ltd., an Indian company declared income of ₹ 300 crores computed in accordance with Chapter IV-D but before making any adjustments in respect of the following transactions for the year ended on 31.3.2025:*

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(i) *10,000 cars sold to Rida Ltd., US company, which holds 30% shares in Anush Motors Ltd. at a price which is less by $ 200 for each car than the price charged from Shingto Ltd.*

(ii) *Royalty of $ 1,20,00,000 was paid to Kyoto Ltd., a US company, for use of technical know-how in the manufacturing of car. However, Kyoto Ltd. had provided the same know-how to another Indian company for $ 90,00,000. Kyoto Ltd. is the sole owner of technology used by Anush Motors Ltd. in its manufacturing process and the manufacture of cars by Anush Motors Ltd is wholly dependent on the use of know-how owned by Kyoto Ltd.*

(iii) *Loan of Euro 1000 crores carrying interest @10% p.a. advanced by Dorf Ltd., a German company, was outstanding on 31.3.2025. The total book value of assets of Anush Motors Ltd. on the date was ₹ 90,000 crores. The said German company had also advanced a loan of similar amount to another Indian company @9% p.a. Total interest paid for the year was EURO 100 crores.*

Explain in brief the provisions of the Act affecting all these transactions and compute the income of the company chargeable to tax for A.Y.2025-26 keeping in mind that the value of 1$ and of 1 EURO was ₹ 63 and ₹ 84, respectively, throughout the year.

6. *What is the legislative objective of bringing into existence the provisions relating to transfer pricing in relation to international transactions? Examine.*

7. *XE Ltd. is an Indian Company in which Zilla Inc., a US company, has 28% shareholding and voting power. Following transactions were effected between these two companies during the financial year 2024-25.*

(i) *XE Ltd. sold 1,00,000 pieces of T-shirts at $ 2 per T-Shirt to Zilla Inc. The identical T-Shirts were sold to unrelated party namely Kennedy Inc., at $ 3 per T-Shirt.*

(ii) *XE Ltd. borrowed $ 2,00,000 from a foreign lender based on the guarantee of Zilla Inc. For this, XE Ltd. paid $ 10,000 as guarantee fee to Zilla Inc. To an unrelated party for the same amount of loan, Zilla Inc. collected $ 7000 as guarantee fee.*

(iii) *XE Ltd. paid $15,000 to Zilla Inc. for getting various potential customers details to improve its business. Zilla Inc. provided the same service to unrelated parties for $ 10,000.*

Assume the rate of exchange as 1 $ = ₹ 64

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XE Ltd. is located in a Special Economic (SEZ) and its income before transfer pricing adjustments for the year ended 31st March, 2025 was ₹ 1,200 lakhs.

Compute the adjustments to be made to the total income of XE Ltd. Assuming that such adjustments are made by the Assessing Officer, state whether it can claim deduction under section 10AA for the income enhanced by applying transfer pricing provisions.

8. *Examine with reasons whether the two enterprises referred to in the independent situations given below can be deemed to be associated enterprises under the Indian transfer pricing regulations:*

   (i) *PQR Inc, a US company having its place of effective management also in the USA, has advanced a loan equivalent to ₹ 170 crores to Mahanadi Ltd., an Indian company on 10-4-2024. The total book value of assets of Mahanadi Ltd. is ₹ 300 crores. The market value of the assets, however, is ₹ 320 crores. Mahanadi Ltd. repaid ₹ 30 crores before 31-3-2025.*

   (ii) *Queenland plc., a French company having its place of effective management also in the France, has the power to appoint 3 of the directors of Godavari Ltd, an Indian company, whose total number of directors in the Board is 8.*

   (iii) *Total value of raw materials and consumables of Saraswati Ltd., an Indian company, is ₹ 900 crores. Of this, supplies to the tune of ₹ 830 crores are by Zoel GmbH, a German company having its place of effective management in Germany, at prices and terms decided by the German company.*

9. *NP Ltd., an Indian Company, has borrowed ₹ 80 crores on 01-04-2024 from M/s. TL Inc, a company incorporated in London, at an interest rate of 10% p.a. The said loan is repayable over a period of 5 years. Further, loan is guaranteed by M/s ST Inc. incorporated in UK. M/s. Tweed Inc, a non-resident, holds shares carrying 40% of voting power both in M/s NP Ltd. and M/s ST Inc.*

   Net profit of M/s. NP Ltd. for P.Y. 2024-25 was ₹ 7 crores after debiting the above interest, depreciation of ₹ 6 crores and income-tax of ₹ 4 crores. Calculate the amount of interest to be disallowed under the head "Profits and gains of business or profession" in the computation of M/s NP Ltd., giving appropriate reasons.

10. *MNO Ltd., having its registered office in Mumbai, is engaged in multiple businesses. It has borrowed ₹ 200 crores from State Bank of India (SBI) for which 100% guarantee was given by the parent company, ABC Inc. of Country A. The total borrowings of MNO Ltd. is ₹ 1,000 crores.*

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MNO Ltd. buys mobile phones from ABC Inc. The mobile phones are branded for which royalty at ₹ 100 per mobile phone sold is paid to ABC Inc. Similar mobile phones are also sold to other customers in India by ABC Inc. but no royalty is charged from them. The credit period offered to MNO Ltd. is 2 months, whereas for other customers, the credit period is 1 month. During the year, 10 lakh mobile phones were bought for an aggregate sum of ₹ 2,600 crores from ABC Inc. The purchase could be assumed as uniform throughout the financial year 2024-25. The cost of capital may be adopted as 10% per annum. ABC Inc. would have billed ₹ 2,400 crores (excluding interest component for the delay beyond 1 month) for supply of identical quantity of similar mobile phones to other customers. It may be assumed that the entire purchase has been sold out by 31st March, 2025.

Determine the arm's length price (ALP) of the transaction of purchase of mobile phones by MNO Ltd. from ABC Inc., Country A and its impact on the assessable income, if any, for the assessment year 2025-26.

11. *Beta Ltd., an Indian company, has two units in India, a manufacturing unit in Hyderabad and a trading unit in Surat. Beta Ltd. has entered into various international transactions with its associate enterprises from both the units. The assessment of Beta Ltd., an Indian company, for A.Y.2025-26 is pending before the Assessing Officer who referred the matter to Transfer Pricing Officer (TPO) for determination of arm's length price (ALP) in respect of its manufacturing unit at Hyderabad. The TPO, however, expanded the scope of his work by calling for details in respect of the trading unit of Beta Ltd. located at Surat.*

    Examine the procedure to be followed by the Assessing Officer before making reference to TPO. Can the TPO enlarge his scope of work by calling for details of trading activity at Surat, when the Assessing Officer has made reference only in respect of the manufacturing unit at Hyderabad? Examine.

12. *Allepey Ltd. is an Indian Company in which Andes Inc., a Country Z company holds 38% shareholding and voting power. During the previous year 2022-23, the Indian company supplied computers to the Country Z based company @CZD 1100 per piece. The price of computer supplied to other unrelated parties in Country Z is @CZD 1400 per piece. During the course of assessment proceedings relating to A.Y.2023-24, the Assessing Officer carried out primary adjustments and added a sum of ₹ 168 lakhs, being the difference between actual price of computer and arm's length price for 700 pieces and it was duly accepted by the assessee. The Assessing Officer passed the order, in which the primary adjustments were made, on 1.6.2024. On account of this adjustment, the excess money of ₹ 168 lakhs is available with Andes Inc, Country Z. In this context, Allepey Ltd. wants to*

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know the effect of this transaction for the assessment year 2025-26 on the basis that it declared an income of ₹ 300 lakhs and the excess money is still lying with Andes Inc. till today. Assume the rate of exchange as 1 CZD = ₹ 80. [CZD stands for Country Z Dollars, which is the currency of Country Z]; six month LIBOR as on 30.9.2024 is 9.50%.

Answers

1. In case the Assessing Officer makes adjustment to arm's length price in an international transaction which results in increase in taxable income of the assessee, the following consequences shall follow:-

(1) No deduction under section 10AA or Chapter VI-A shall be allowed from the income so increased.

(2) No corresponding adjustment would be made to the total income of the other associated enterprise (in respect of payment made by the assessee from which tax has been deducted or is deductible at source) on account of increase in the total income of the assessee on the basis of the arm's length price so recomputed.

The remedies available to the assessee to dispute such an adjustment are:-

(1) In case the assessee is an eligible assessee under section 144C, he can file his objections to the variation made in the income within 30 days of the receipt of draft order by him to the Dispute Resolution Panel and Assessing Officer. Appeal against the order of the Assessing Officer in pursuance of the directions of the Dispute Resolution Panel can be made to the Income-tax Appellate Tribunal.

(2) In any other case, he can file an appeal under section 246 to the Joint Commissioner (Appeals)/ under section 246A to the Commissioner (Appeals) against the order of the Assessing Officer within 30 days of the date of service of notice of demand.

(3) The assessee can opt to file an application for revision of order of the Assessing Officer under section 264 within one year from the date on which the order sought to be revised is communicated, provided the time limit for appeal to the Commissioner (Appeals) or the Income-tax Appellate Tribunal has expired or the assessee has waived the right of such an appeal. The eligibility conditions stipulated in section 264 should be fulfilled.

2. Two enterprises shall be deemed to be associated enterprises if, at any time during the previous year, more than half of the board of directors or members of the governing board,

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or one or more of the executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise.

In the present case, the power to appoint is only for half the number and not more than half. Hence, ABC Inc. and XYZ Ltd. are not associated enterprises under this criteria.

Two enterprises shall be deemed to be associated enterprises, if 90% or more of the raw materials and consumables required for the manufacture or processing of goods or article carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise.

In this case, ABC Inc. supplies more than 90% of the requirements of purchases of XYZ Ltd. Further, the price is controlled by the former by way of written agreement. Also, the conditions for supply are determined by ABC Inc. Hence, the two entities would be deemed to be associated enterprises under this criterion.

3. In this case, I. Limited, the Indian company, supplied billets to its foreign holding company, U. Limited. Since the foreign company, U. Limited, is the holding company of I. Limited, I. Limited and U. Limited are the associated enterprises within the meaning of section 92A.

As I. Limited supplies similar product to an unrelated entity, V. Limited, UK, the transactions between I. Limited and V. Limited can be considered as comparable uncontrolled transactions for the purpose of determining the arm's length price of the transactions between I. Limited and U. Limited Comparable Uncontrolled Price (CUP) method of determination of arm's length price (ALP) would be applicable in this case.

Transactions with U. Limited are on FOB basis, whereas transactions with V. Limited are on CIF basis. This difference has to be adjusted before comparing the prices.

	Amount (in Euro)
Price per MT of billets to V. Limited	700
Less: Cost of insurance and freight per M.T.	200
Adjusted Price per M.T.	500

Since the adjusted price for V. Limited, UK and the price fixed for U. Limited are the same, the arm's length price is Euro 500 per MT. Since the sale price to related party (i.e., U. Limited) and unrelated party (i.e., V. Limited) is the same, the transaction with related party U. Limited has also been carried out at arm's length price.

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4. The facts of the case indicate that X Ltd. and Yen Ltd. of Japan are associated enterprises since Yen Ltd. holds 55% shares of X Ltd. and has appointed more than half of the board of directors of X Ltd. Since Yen Ltd. is a non-resident, any transaction between X Ltd. and Yen Ltd. would fall within the meaning of "international transaction" under section 92B. Therefore, the income arising from such transactions have to be computed having regard to the arm's length price.

The action of the Assessing Officer in making addition to the declared income and issuing show cause notice for levy of various penalties is correct since X Ltd. had committed defaults, as listed hereunder, in respect of which penalty, as briefed hereunder, is imposable -

(i) Failure to report any international transaction or any transaction, deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X applies, would attract penalty @ 200% of the amount of tax payable since it is a case of misreporting of income referred under section 270A(9) read with section 270A(8).

(ii) Failure to maintain the requisite records as required under section 92D in relation to international transaction makes it liable for penalty under section 271AA which will be 2% of the value of each international transaction.

(iii) Failure to furnish report from an accountant as required under section 92E makes it liable for penalty under section 271BA i.e., a fixed penalty of ₹ 1 lakh.

The Assessing Officer shall give an opportunity of hearing to the assessee with a notice as to why the arm's length price should not be determined on the basis of material or information or document in the possession of the Assessing Officer.

Note: *It is assumed that X Ltd. has not entered into an APA and has also not opted to be subject to Safe Harbour Rules.*

5. Any income arising from an international transaction, where two or more "associated enterprises" enter into a mutual agreement or arrangement, shall be computed having regard to arm's length price as per the provisions of Chapter X of the Act.

Section 92A defines an "associated enterprise" and sub-section (2) of this section speaks of the situations when the two enterprises shall be deemed to associated enterprises. Applying the provisions of section 92A(2)(a) to (m) to the given facts, it is clear that "Anush Motors Ltd." is associated with :-

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(i) Rida Ltd. as per section 92A(2)(a), because this company holds shares carrying more than 26% of the voting power in Anush Motors Ltd.;

(ii) Kyoto Ltd. as per section 92A(2)(g), since this company is the sole owner of the technology used by Anush Motors Ltd. in its manufacturing process;

(iii) Dorf Ltd. as per section 92A(2)(c), since this company has financed an amount which is more than 51% of the book value of total assets of Anush Motors Ltd.

The transactions entered into by Anush Motors Ltd. with different companies are, therefore, to be adjusted accordingly to work out the income chargeable to tax for the A.Y. 2025-26.

Particulars		₹ (in crores)
Income of Anush Motors Ltd. as computed under Chapter IV-D, prior to adjustments as per Chapter X		300.00
Add:	Difference on account of adjustment in the value of international transactions:	
(i)	Difference in price of car @ $ 200 each for 10,000 cars ($ 200 x 10,000 x ₹ 63)	12.60
(ii)	Difference for excess payment of royalty of $ 30,00,000 ($ 30,00,000 x ₹ 63) [See Note below]	18.90
(iii)	Difference for excess interest paid on loan of EURO 1000 crores (₹ 84*1000*1/100)	840.00
Total Income		**1,171.50**

***Note**: It is presumed that Anush Motors Ltd. has not entered into an Advance Pricing Agreement or opted to be subject to Safe Harbour Rules.*

6. The presence of multinational enterprises in India and their ability to allocate profits in different jurisdictions by controlling prices in intra-group transactions prompted the Government to set up an Expert Group to examine the issues relating to transfer pricing.

There is a possibility that two or more entities belonging to the same multinational group can fix up their prices for goods and services and allocate profits among the enterprises within the group in such a way that there may be either no profit or negligible profit in the jurisdiction which taxes such profits and substantial profit in the jurisdiction which is tax haven or where the tax liability is minimum. This may adversely affect a country's share of due revenue. The increasing participation of multinational groups in economic activities in India has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same multinational group. The profits derived by such enterprises carrying on business in India can be controlled by the

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multinational group, by manipulating the prices charged and paid in such intra-group transactions, which may lead to erosion of tax revenue. Therefore, transfer pricing provisions have been brought in by the Finance Act, 2001 with a view to provide a statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India, in the case of such multinational enterprises.

7. XE Ltd, the Indian company and Zilla Inc., the US company are deemed to be associated enterprises as per section 92A(2)(a), since Zilla Inc. holds shares carrying not less than 26% of the voting power in XE Ltd.

As per *Explanation* to section 92B, the transactions entered into between these two companies for sale of product, lending or guarantee and provision of services relating to market research are included within the meaning of "international transaction".

Accordingly, transfer pricing provisions would be attracted and the income arising from such international transactions have to be computed having regard to the arm's length price. In this case, from the information given, the arm's length price has to be determined taking the comparable uncontrolled price method to be the most appropriate method.

Particulars	₹ in lakhs
Amount by which total income of XE Ltd. is enhanced on account of adjustment in the value of international transactions:	
(i) Difference in price of T-Shirt @ $ 1 each for 1,00,000 pieces sold to Zilla Inc. ($ 1 x 1,00,000 x ₹ 64)	64.00
(ii) Difference for excess payment of guarantee fee to Zilla Inc. for loan borrowed from foreign lender ($ 3,000 x ₹ 64)	1.92
(iii) Difference for excess payment for services to Zilla Inc. ($ 5,000 x ₹ 64)	3.20
	69.12
XE Ltd. cannot claim deduction under section 10AA in respect of ₹ 69.12 lakhs, being the amount of income by which the total income is enhanced by virtue of the first proviso to section 92C(4)	

8. **(i)** PQR Inc, a foreign company, has advanced loan of ₹ 170 crores to Mahanadi Ltd., an Indian company, which amounts to 56.67% of book value of assets of Mahanadi Ltd. Since the loan advanced by PQR Inc. is 51% or more of the book value of assets of Mahanadi Ltd., PQR Inc. and Mahanadi Ltd. are deemed to be associated enterprises under the Indian transfer pricing regulations.

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The deeming provisions would be attracted even if there is a repayment of loan during the same previous year which brings down the said percentage below 51%.

(ii) Queenland plc, a foreign company has the power to appoint 37.50% (3 out of 8) of the directors of an Indian company, Godavari Ltd.

Two enterprises would be deemed to be associated enterprises **if more than half of the board of directors** of one enterprise **are appointed by the other enterprise.**

In this case, since Queenland plc has the power to appoint only 37.50% (which is less than half) of the directors of an Indian company, Godavari Ltd., Queenland plc and Godavari Ltd. are **not** deemed to be associated enterprises.

(iii) Since Zoel GmbH, a German company, supplies 92.22% of the raw materials and consumables required by Saraswati Ltd., an Indian company, which is more than the specified threshold of 90%; and the prices and terms of supply are decided by the German company, the two companies are deemed to be associated enterprises.

9. If an Indian company, being the borrower, incurs any expenditure by way of interest in respect of any debt issued by its non-resident associated enterprise (AE) and such interest exceeds ₹ 1 crore, then, the interest paid or payable by such Indian company in excess of 30% of its earnings before interest, taxes, depreciation and amortization (EBITDA) or interest paid or payable to associated enterprise, whichever is lower, shall not be allowed as deduction as per section 94B.

Further, where the debt is issued by a lender which is not associated but an associated enterprise either provides an implicit or explicit guarantee to such lender or deposits a corresponding and matching amount of funds with the lender, such debt shall be deemed to have been issued by an associated enterprise and limitation of interest deduction would be applicable.

In the present case, since M/s Tweed Inc holds 40% of voting power i.e., more than 26% of voting power in both NP Ltd and M/s ST Inc, NP Ltd. and M/s ST Inc are deemed to be associated enterprises.

Since loan of ₹ 80 crores taken by NP Ltd., an Indian company from M/s TL Inc, is guaranteed by M/s ST Inc, an associated enterprise of NP Ltd., such debt shall be deemed to have been issued by an associated enterprise and interest payable to M/s TL Inc shall be considered for the purpose of limitation of interest deduction under section 94B.

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Computation of interest to be disallowed as per section 94B in the computation of income under the head profits and gains of business or profession of NP Ltd.

Particulars		₹
Net profit		7,00,00,000
Add: Interest already debited (₹ 80 crores x 10%)		8,00,00,000
Depreciation		6,00,00,000
Income tax		4,00,00,000
EBITDA		**25,00,00,000**
Interest paid or payable by NP Ltd.		8,00,00,000
Lower of the following would be disallowed		
- Total interest paid or payable in excess of 30% of EBITDA (₹ 8,00,00,000 – ₹ 7,50,00,000)	₹ 50,00,000	
- Interest paid or payable to non-resident AE	₹ 8,00,00,000	
Interest to be disallowed as deduction		**50,00,000**

10. MNO Ltd., an Indian company, and ABC Inc., a Country A based company, are associated enterprises as per section 92A, since ABC Inc. is a parent company of MNO Ltd. Thus, the transaction of purchase of mobile handsets by MNO Ltd. from ABC Inc. would be an international transaction. The value of international transaction is to be worked out on the basis of Arm's Length Price (ALP).

ABC Inc. is selling mobile phones to unrelated customers, which would be the comparable uncontrolled transaction in this case. The purchase price for unrelated customers has to be adjusted by taking into consideration the functional differences existing between the transactions of ABC Inc. with associated enterprise (MNO Ltd.) and other unrelated parties.

Accordingly, the arm's length price for purchase of mobile phones has to be computed for working out the impact on assessable value as per CUP method.

Computation of Arm's Length Price

Particulars	₹ in crores
Purchase price of mobile phones by unrelated parties from ABC Inc.	2,400
Adjustments for functional differences	
Add: Royalty payable by MNO Ltd. [₹ 100 per mobile phone x 10,00,000]	10

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Cost of capital for 1 month credit which is not given to unrelated party [10% x ₹ 2,400 crore x 1/12]	20
Arm's Length Price of 10,00,000 mobile phones (A)	**2430**
Purchase price of mobile phone by MNO Ltd. from ABC Inc., its parent company (associated enterprise) (B)	**2600**
Amount to be added to its total income (B) – (A)	**170**

***Note** – In case it is assumed that ₹ 10 crores is not included in the price of ₹ 2600 crores, the adjustment of royalty of ₹ 10 crores paid/payable is not required. The ALP in such a case would be ₹ 2,420 crores. The amount to be added to the total income would be ₹ 180 crores*

11. As per section 92CA(1), where the Assessing Officer considers it necessary or expedient so to do, he may refer the computation of the arm's length price in relation to the international transaction or specified domestic transaction entered by any person, being an assessee, to the Transfer Pricing Officer (TPO).

However, the Assessing Officer has to take the prior approval of the Principal Commissioner of Income-tax (PCIT)/Commissioner of Income-tax (CIT) before making such a reference.

As per section 92CA(2A), the Transfer Pricing Officer (TPO) can also determine the ALP of other international transactions or specified domestic transaction which have not been referred to him, but which have come to his notice subsequently in the course of proceedings before him.

The Assessing Officer has made reference for determination of ALP in respect of the manufacturing unit at Hyderabad which shall be taken as the proceedings before him (TPO).

The TPO can enlarge his scope of work during the course of proceedings before him of Hyderabad unit by calling for details of trading activity at Surat, and the same is within the powers conferred by section 92CA(2A).

12. In this case, Allepey Ltd., the Indian company, and Andes Inc., a Country Z company, are deemed to be associated enterprises as per section 92A(2) since Andes Inc. holds shares carrying not less than 26% voting power in Allepey Ltd.

On account of the primary adjustment of ₹ 168 lakhs made by the Assessing Officer, the total income of Allepey Ltd. for A.Y.2023-24 would increase by ₹ 168 lakhs.

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I. If Allepey Ltd. opts not to pay additional income-tax on such excess money not repatriated

In this case, secondary adjustment has to be made under section 92CE, since –

(1) The company has accepted the primary adjustment made by the Assessing Officer;

(2) The primary adjustment is in respect of A.Y.2023-24; and

(3) The primary adjustment exceeds ₹ 100 lakhs.

Accordingly, the excess money (i.e., ₹ 168 lakhs) available with the associated enterprise (i.e., Andes Inc., Country Z) not repatriated to India within 90 days of the date of the order of the Assessing Officer would be deemed as an advance made by the Allepey Ltd. to its associated enterprise, Andes Inc. Interest would be calculated on such advance at 12.50% [i.e., the rate of six month LIBOR as on 30th September, 2024 (i.e., 9.50%)+ 3%], since the international transaction is denominated in foreign currency. Such interest computed from 1.6.2024 to 31.3.2025 amounting to 303/365 x 168 lakhs x 12.50% = ₹ 17,43,288 would be added to its total income for A.Y.2025-26.

II. If Allepey Ltd. opts to pay additional income-tax on such excess money not repatriated

In such a case, Allepey Ltd. has to pay additional income-tax @20.9664% (tax @18% *plus* surcharge @12% *plus* cess@4%) on ₹ 168 lakhs, which amounts to ₹ 35,22,355. Where additional income-tax is so paid by Allepey Ltd., it will not be required to make secondary adjustment and compute interest from the date of payment of such tax. The additional income-tax so paid by Allepey Ltd. would be treated as the final payment of tax in respect of excess money not repatriated and no further credit would be allowed to Allepey Ltd. or to any other person in respect of the amount of additional income-tax so paid.

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