

# Transfer Pricing Country Summary India

April 2018

## Legislation

### Existence of Transfer Pricing Laws/Guidelines

Section 92 of the Income-tax Act, 1961 requires international transactions or specified domestic transactions to be arm's length in nature when occurring between associated enterprises. The provisions shall not apply for determination of allowance for any expense or interest expense allocated or apportioned, if it has the effect of reducing the income chargeable to tax or increasing the loss in respect of the previous year in which the international transaction was entered into. Specified Domestic Transactions would only be covered if the aggregate of such transactions entered into exceeds INR 200 million with effect from FY 2015-16; the said limit was INR 50 million for FY 2012-13 and FY 2013-14.

#### **Finance Act 2017 has made the amendment in the definition of Specified domestic transaction –**

The CBDT has deleted clause (i) of section 92BA of the Income Tax Act, which read as "the expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of Sub section (2) of Section 40A of income tax act". This has now been omitted from the definition of Specified Domestic Transaction.

Under Section 92D, the enterprise is required to maintain the prescribed documentation in support of the arm's length price of the international transactions. In addition, Section 92E requires a report from a chartered accountant that discloses factual information on the international related party transactions and Specified Domestic Transactions, including the price and method used in arriving at the arm's length price and stating an opinion as to whether the prescribed method has been followed.

### Definition of Related Party

Section 92A describes basic and additional conditions under which two parties are deemed to be associated ('associated enterprises' or 'AEs'):

#### Basic conditions:

- One enterprise participates directly or indirectly in the management, control or capital of the other enterprise; or

#### Additional conditions:

- One enterprise holds, directly or indirectly, 26% or more voting power in another enterprise;
- One enterprise or person holds, directly or indirectly, 26% or more voting power in two enterprises;
- One enterprise participates, directly or indirectly or through one or more intermediaries, in the management or control of the other enterprise;
- One enterprise advances a loan constituting not less than 51% of book value of the total assets of another enterprise;
- One enterprise guarantees not less than 10% of the total borrowings of another enterprise;

- More than half of the board of directors or one or more executive directors of one enterprise are appointed by the other enterprise;
- More than half of the board of directors or one or more executive directors of the two enterprise are appointed by the same person(s);
- One enterprise has complete dependence on the other for intellectual property rights;
- 90% or more of the raw material used by one enterprise is supplied by the other enterprise or the persons specified by such other enterprise;
- One enterprise sells to the other enterprise or to a person specified by the other enterprise, where the prices or other conditions are influenced by the other enterprise;
- One enterprise is controlled by an individual and the other enterprise is controlled by such an individual or his relative or jointly by an individual and his relative;
- One enterprise is controlled by Hindu Undivided Family (HUF) and the other enterprise is controlled by a member of HUF or by a relative of such a member or jointly by a member of HUF and his relative;
- One enterprise is a firm/association of persons (AOP)/body of individuals (BOI) and the other enterprise holds not less than 10% interest in such a firm/AOP/BOI; or
- The two enterprises have a relationship of mutual interest, as may be prescribed.

It should be noted that a transaction entered into by a taxpayer with persons other than an AE would be required to comply with the arm's length standard if there exists a prior agreement in relation to the said transaction or the terms of the said transaction are determined in substance between the taxpayer and the AE.

## Transfer Pricing Scrutiny

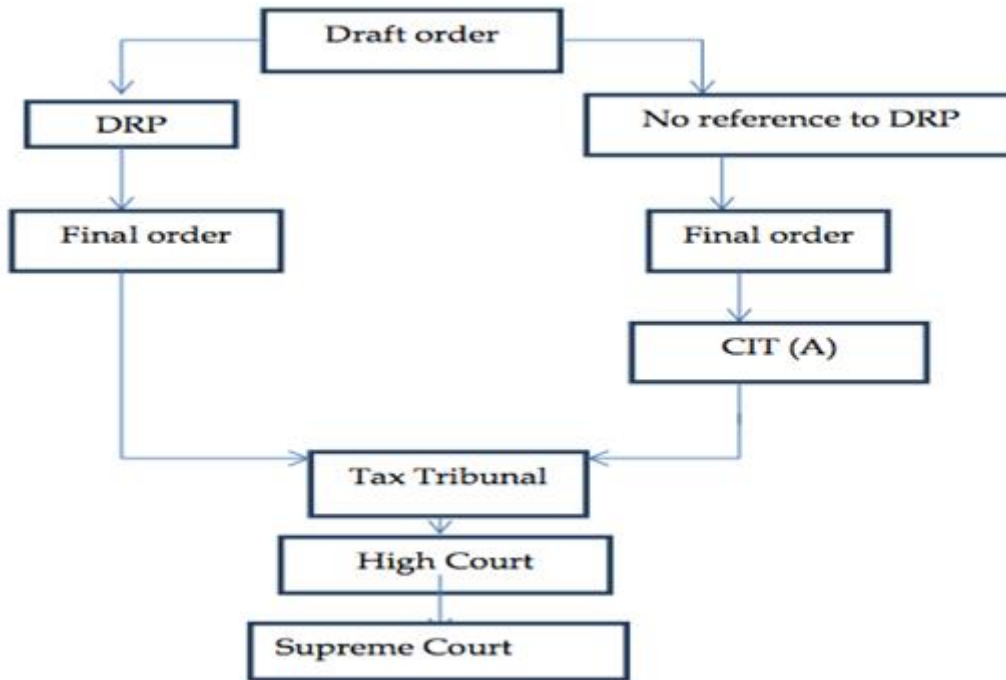
There is a high risk of transfer pricing scrutiny assessment for companies with cross-border related party transactions where the addition in earlier assessment years on a recurring issue of law or fact exceeds INR 100 million and where:

- a. Such an addition in assessment has become final as no further appeal was/has been filed; or
- b. Such an addition has been confirmed at any stage of appellate process in favour of revenue and assessee has not filed further appeal; or
- c. Such an addition has been confirmed at 1st stage appeal in favour of revenue or subsequently and further appeal of assessee is pending.

The current threshold detailed above is based on an internal instruction by Central Board of Direct Taxes for selecting the cases for transfer pricing scrutiny. The transfer pricing scrutiny assessment order is to be passed within 30 months from the end of the assessment year in which the income was first assessable (applicable from A/Y 2018-19).

An appeal against the order of the transfer pricing audit lies with the Commissioner (Appeals) and further appeals lies with the Tribunal, High Court and Supreme Court respectively. However, taxpayers for whom transfer pricing adjustments have been proposed can file objections against adjustment before the Dispute Resolution Panel for a speedier resolution of the dispute. An appeal against the order of the Dispute Resolution Panel lies with the Tribunal.

The sequence of dispute resolution forums available to tax payers in India is depicted below:



## Penalties

New section 257B added penalties for failure on furnishing a report or for furnishing an inaccurate report under section 286 of the Act. The below table provides the penalties established:

No.	Particulars	Fault	Penalty
1	Non-furnishing the Country by Country report by Indian parent or the alternate reporting entity resident in India	Less than a month from due date	INR 5.000 per day
		More than a month from due date	INR 15.000 per day for a period exceeding a month
		Continuing default beyond service of penalty order	INR 50.000 per day from the date of service of the penalty order
2	Non-submission of information	Before initial request date	INR 5.000 per day
		Continuing default beyond service of penalty order	INR 50.000 per day from the date of service of the penalty order
3	Provision of inaccurate information in the Country by Country Report	Taxpayer is aware of inaccuracy at time of furnishing the report but fails to inform the prescribed authority	

		Inaccuracy discovered after filling and taxpayer fails to inform and furnish correct report within 15 days of such discovery	INR 500.000
		Furnishing of inaccurate information of document in response to notice issued	
4	Non-furnishing of prescribed information and document with the prescribed authority	Taxpayer fails to furnish the information and document with the prescribed authority	INR 500.000
5	Failure to furnish the Master File	Taxpayer fails to furnish the information and document with the prescribed authority	INR 500.000

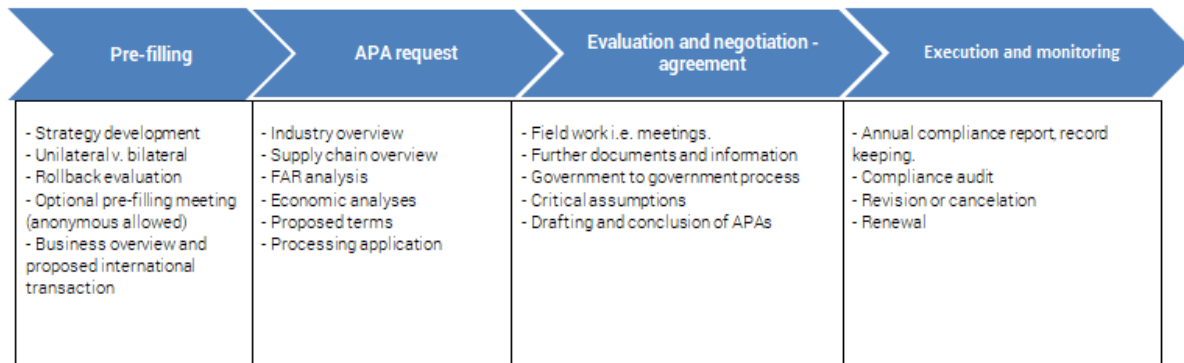
### Advance Pricing Agreement (APA)

APA Provisions were introduced in the Indian Union Budget of 2012; detailed rules in this regard were also notified in notification no. 36 of 2012 dated 30 August 2012. The option of entering into an APA is applicable only for international transactions and not for SDTs. APA is an advance price agreement between CBDT and any person determining the arm's length price in advance, in relation to an international transaction to be entered by that person for the period specified by the APA. APAs can be unilateral, bilateral or multilateral and taxpayers have the option to convert unilateral APA applications into bilateral before they are agreed or conclude.

The APAs are valid for not more than 5 years. The provisions also contemplate the APA to provide for a roll back mechanism for a period up to 4 prior years from the first year of the APA. Therefore, the combined impact of an APA with rollback provisions is tax certainty for 9 years.

The taxpayer may first undertake pre-filing consultations, which may be done on an anonymous basis, prior to filing a formal APA application and it is also required to file an Annual Compliance Report (ACR) during the applicability of the APA. ACR may be subject to scrutiny by the Indian Revenue Authority.

The stages involved in an APA process in India is as follows:



The table and below depict the number of Agreements that have been entered up to April 2017, year-wise:

Fiscal Year	Agreements signed
2013-14	5
2014-15	4
2015-16	55
2016-17	88
<b>Total</b>	<b>153</b>

Source: Advance Pricing Agreement (APA) Programme of India, Annual Report 2016-17, Central Board of Direct Taxes April 2017 <https://www.incometaxindia.gov.in/Lists/Latest%20News/Attachments/161/Advance-Pricing-Agreement-01-05-2017.pdf>

## Safe Harbor

As per section 92CB Safe Harbor rules means binding rules laid under law which obliges income-tax authorities to accept the transfer price declared by the assessee. CBDT has been empowered to make safe harbor rules and on 18 September 2013 issued the final following Safe Harbor Rules:

No. of EIT	Eligible International Transaction (EIT)	Threshold limit prescribed	Safe harbor margin
1	Provision of software development services other than contract R&D with insignificant risks.	Up to INR 1 billion	17% or more of Operating Profit Margin to Operating Expenses
2		Above INR 1 billion but does not exceed INR 2 billion	18% or more of Operating Profit Margin to Operating Expenses
3	Provision of information technology enabled services other than contract R&D with insignificant risks.	Up to INR 1 billion	20% or more on total operating costs
4		Above INR 1 billion but does not exceed INR 2 billion	18% or more of Operating Profit Margin to Operating Expenses
5	Provision information technology enabled services being knowledge processes outsourcing services	Up to INR 2 billion	Operating Profit margin to Operating Expenses can be declared by the eligible

	with insignificant risks		<p>assessee as under:</p> <table border="1"> <thead> <tr> <th><b>Employee cost to Operating Expense</b></th> <th><b>Operating profit margin to Operating Expense</b></th> </tr> </thead> <tbody> <tr> <td>0 – 40%</td> <td>not less than 18%</td> </tr> <tr> <td>40% - 60%</td> <td>not less than 21%</td> </tr> <tr> <td>more than 60%</td> <td>not less than 24%</td> </tr> </tbody> </table>	<b>Employee cost to Operating Expense</b>	<b>Operating profit margin to Operating Expense</b>	0 – 40%	not less than 18%	40% - 60%	not less than 21%	more than 60%	not less than 24%				
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6	Advancing of intra-group loan denominated in Indian Rupees	No treshold limit	<p>Interest rate is equal to or greater than 1 year marginal cost of funds lending rate of SBI as on 1st April of the relevant Previous year plus</p> <table border="1"> <thead> <tr> <th><b>AE has Crisil rating between</b></th> <th><b>SBI rate mentioned above Plus Basis points</b></th> </tr> </thead> <tbody> <tr> <td>AAA to A, or its equivalent</td> <td>175 Basis points</td> </tr> <tr> <td>BBB-, BBB, BBB+ or its equivalent</td> <td>325 Basis points</td> </tr> <tr> <td>BB to B, or its equivalent</td> <td>475 Basis points</td> </tr> <tr> <td>C to D or its equivalent</td> <td>624 Basis points</td> </tr> <tr> <td>Not available</td> <td>425 Basis points, where the amount of loan advanced to the AE including loans to all AEs does not exceed INR 1,000 millionas on 31st March of the relevant Previous Year</td> </tr> </tbody> </table>	<b>AE has Crisil rating between</b>	<b>SBI rate mentioned above Plus Basis points</b>	AAA to A, or its equivalent	175 Basis points	BBB-, BBB, BBB+ or its equivalent	325 Basis points	BB to B, or its equivalent	475 Basis points	C to D or its equivalent	624 Basis points	Not available	425 Basis points, where the amount of loan advanced to the AE including loans to all AEs does not exceed INR 1,000 millionas on 31st March of the relevant Previous Year
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7	Advancing of intra-group loan denominated in Foreign Currency	No threshold limit	Interest rate is equal to or greater than 6 months London Inter-Bank Offer Rate of relevant foreign currency plus below mentioned basis point <table border="1" data-bbox="1099 344 1390 1637"> <thead> <tr> <th data-bbox="1099 344 1249 566">AE has Crisil rating between</th> <th data-bbox="1256 344 1390 566">London Inter Bank rate mentioned above Plus basis points</th> </tr> </thead> <tbody> <tr> <td data-bbox="1099 575 1249 678">AAA to A, or its equivalent</td> <td data-bbox="1256 575 1390 678">150 Basis points</td> </tr> <tr> <td data-bbox="1099 687 1249 790">BBB-, BBB, BBB+ or its equivalent</td> <td data-bbox="1256 687 1390 790">300 Basis points</td> </tr> <tr> <td data-bbox="1099 799 1249 902">BB to B or its equivalent</td> <td data-bbox="1256 799 1390 902">450 Basis points</td> </tr> <tr> <td data-bbox="1099 911 1249 974">C to D or its equivalent</td> <td data-bbox="1256 911 1390 974">600 Basis points</td> </tr> <tr> <td data-bbox="1099 983 1249 1637">Not available</td> <td data-bbox="1256 983 1390 1637">400 Basis points, where the amount of loan advanced to the AE including loans to all AEs does not exceed INR 1,000 millionas on 31st March of the relevant Previous Year</td> </tr> </tbody> </table>	AE has Crisil rating between	London Inter Bank rate mentioned above Plus basis points	AAA to A, or its equivalent	150 Basis points	BBB-, BBB, BBB+ or its equivalent	300 Basis points	BB to B or its equivalent	450 Basis points	C to D or its equivalent	600 Basis points	Not available	400 Basis points, where the amount of loan advanced to the AE including loans to all AEs does not exceed INR 1,000 millionas on 31st March of the relevant Previous Year
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8	Providing explicit corporate guarantee to wholly owned subsidiary (WOS)	No threshold limit	The commission or fee declared in relation to the international transaction is at the rate of 1% or more per annum on the amount guaranteed												
9	Provision of specified contract R&D services wholly or partly relating to software development with insignificant risks	Upto INR 2 Billion	24% or more of Operating Profit by Operating Expenses												
10	Provision of contract R&D services wholly or partly relating to generic pharmaceutical drugs with insignificant risks	Upto INR 2 Billion	24% or more of Operating Profit by Operating Expenses												



11	Manufacture and export of core auto components	No threshold limit	12% or more of Operating Profit to Operating expense
12	Manufacture and export of noncore auto components	No threshold limit	8.5% or more of Operating Profit to Operating expense
13	Receipt of low value intra group services	Upto INR 100 Million (including the Markup)	Markup not exceeding 5% of cost pool Provided cost pooling method, exclusion of shareholder cost & duplicate cost from the cost pool and reasonableness of allocation keys for allocation of cost to assessee by overseas AE is certified by accountant.

## Documentation and Disclosure Requirements

### Disclosures

An accountant's report is required to be furnished by the tax return due date (i.e., 30 November 2018) that provides details on the international related party transactions and provides an opinion on whether the required documentation has been maintained by the taxpayer.

### Level of Documentation

The Indian TP regulations require every person who has entered into an international transaction to maintain prescribed information/documents for substantiating the arm's length price of its transactions with the related parties. A new section 286 has been inserted in ITA 1961 which will be applicable from FY 2016-17 onwards which provides for Master File and CbCR documentation. The TP documentation required under Indian legislation is:

#### a) Local file

There is no specific amendment in relation to the Local File after BEPS Action 13. It is, therefore, presumed that the current filing requirements as set out in section 92D of the ITA 1961 will continue to apply. The documentation is required to be prepared and maintained by 30th November following the year in which the transactions are entered into.

Rule 10D of the Income Tax Rule, 1962, provides in more detail the nature of the information that is required to be maintained by taxpayers who enter into international related party transactions that are valued at more than INR10 million. This includes:

#### Principal Documentation

- Nature and terms of the transaction;
- Profile of the multinational/domestic group - name, address and legal status of each of the associated enterprises within the group;
- Description of industry and business of associated enterprise;
- Description of functions performed, risks assumed and assets employed by the assessee and the associated enterprise;
- Record of economic analyses, forecasts and estimates used by the assessee, which may have a bearing on the international transaction;
- Pricing methods considered and method selected;
- Record of working, comparable and adjustments made to arrive at the arm's length price;
- Description of assumptions, policies and price negotiations that influenced pricing; and
- Details of ownership structure of the assessee enterprise.

Supporting documentation - The information would need to be supported by authentic documentation including:

- Official publications, databases from the Government of the country of residence of the associated enterprise or any other country;
- Market research studies brought out by institutions of national and international repute;
- Price publications, including stock exchange and commodity market quotes;
- Published accounts and financial statements, agreements and contracts between the associated enterprises; and
- Agreements and contracts entered into with associated enterprises.

## Record Keeping

The relevant documentation should be maintained for 8 years from the end of the financial year in which the tax return is filed.

### b) Master File

To be filed on or before the due date for filing the return of Income, except for the FY 2016-17 (AY 2017-18) which is on or before 31<sup>st</sup> March 2018.

Eligible entity	Form No.	Due date of furnishing
<b>In case there is one constituent entity</b>		
1. Constituent entity (CE) of an international group whether or not it satisfies the threshold applicability as stated below in point 2.	Part A of the Form No.3CEAA Requires the disclosure of basic details such as: -Name of the group -Number of CEs in India -Name, addresses and PAN of CEs in India	To be filed on or before the due date for filing the return of Income, except for the FY 2016-17 (AY 2017-18) which is on or before 31 <sup>st</sup> March 2018.
2. A constituent entity, having: a. Consolidated group revenue of more than INR 5001 crore for the accounting year; and, b. Aggregate value of international transactions during the accounting year : - Exceeds INR 50 crore; or - Exceeds INR 10 crore in respect of purchase, sale, transfer, lease or use of intangible property	Part B of the Form No.3CEAA To be filed by those CEs which satisfy both of the thresholds.	To be filed on or before the due date for filing the return of Income, except for the FY 2016-17 which is on or before 31 <sup>st</sup> March 2018.
<b>In case there are more than one Constituent entity in India:</b>		
1. In case there are more than one constituent entities resident in India, designated constituent entity will file an intimation to Director General of Income tax	- Form No. 3CEAB (Intimation to be filed by Designated CE) - Form No. 3CEAA (Part A and Part B as applicable)	Form No. 3CEAB – at least 30 days before the due date of filing the report i.e.: -Form No. 3CEAA, except for FY 2016-17 which is on or before 1 March 2018 -Form No. 3CEAA (Part A and

<p>*Simply Put, if there is only one CE in India, form 3CEAB is not required to be filed. 2. The designated entity, where there are multiple CEs resident in India.</p>		<p>Part B) - by due date of furnishing ROI, except for FY 2016-17 which is on or before 31 March 2018.</p>
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### c) Country by Country Report (“CbCr”)

CbC reporting requirements would apply to an international group for an accounting year, if the total consolidated group revenue, as reflected in the consolidated financial statement for the preceding accounting year exceeds INR55 billion

Eligible entity	Form No.	Due date of furnishing
<p>1. Every Constituent entity resident in India, of an international group, whose parent is a non-resident (Section 286(1))</p>	<p>Form No. 3CEAC. Vide this form the Constituent entity will intimate:</p> <ul style="list-style-type: none"> <li>• whether it is the alternate reporting entity of the international group; or</li> <li>• The details of the parent entity or the alternate reporting entity as the case may be, of the international group, and the country or territory of which, the said entities are resident.</li> </ul>	<p>January 31 following the relevant fiscal year</p>
<p>2. Parent entity, or alternate reporting entity, which is resident in India (Section 286(2))</p>	<p>Form 3CEAD for every reporting accounting year</p>	<p>Within 12 months from the end of the reporting accounting year – March 31 following the relevant fiscal year</p>
<p>3. Constituent entity resident in India, of an international group, whose parent entity is not resident in India – Specified cases [Section 286 (4) i.e. no agreement for exchange of CbCR or systematic failure</p>	<p>In case there are more than one CEs resident in India, the international group may opt to designate a CE, wherein the Form 3CEAD has to be filed only by the designated CE. Intimation of the designated entity needs to be filed by the designated CE in Form3CEAE</p>	<p>Within 12 months from the end of the reporting accounting year – March 31 following the relevant fiscal year. For filing of intimation of designated CE in Form 3CEAE - the due date of filing this form has not been prescribed.</p>

## Language for Documentation

TP Documentation should be prepared in English.

## Small and Medium Sized Enterprises (SMEs)

There are no specific transfer pricing rules for SMEs.

## Deadline to Submit Documentation

The accountant's report needs to be submitted together with the annual income tax return; the local file itself does not need to be submitted until requested during the transfer pricing audit.

## Statute Of Limitations

The relevant documentation should be maintained for 8 years from the end of the financial year in which the tax return is filed.

## Transfer Pricing Methods

Section 92C specifies the transfer pricing methods that are allowed to be used in determining the arm's length price of an international related party transaction. There are 6 methods prescribed in the Act. Out of these 5 methods are those which are the generally accepted methods that are outlined in the OECD Transfer Pricing Guidelines. The sixth method is such other method as prescribed by the Board. The Rules specify this method to 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.

Section 92C(2) states that if the variation between the arm's length price determined and the price at which the international transaction has actually been undertaken does not exceed such percentage as may be notified for the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length. The variation notified for FY 15-16 was 1% for wholesalers and 3% for others.

## Comparables

The Indian Income Tax Department has a strong preference for local comparables being used in benchmarking studies, although comparables from other markets may be acceptable depending on the facts and circumstances.