

# Transfer Pricing Amendments

## Introduction

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Provisions of transfer pricing are brought into picture to prevent evasion of Indian tax revenue in the form of transaction with associates at lower rates, which leads to payment of lower taxes. Under this provision taxes are paid based on Arm's length prices (i.e prices at which transactions are done between persons other than associated enterprises, in uncontrolled conditions) so that there will be no loss to the revenue. In other words, Provisions of Transfer Pricing are brought to create a statutory framework for the computation of reasonable, fair and equitable profit and tax in India.

## Eligibility

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Transfer pricing provisions are applicable to transactions between two or more associated enterprises where both or at least one of them is Non - Resident. In case of such transactions, it is seen that whether the transactions are at Arm's Length Price (ALP) or not; there are various methods prescribed for calculating the same. However if the variation in actual prices and ALP doesn't exceed 5%, then the actual price shall be deemed to be the ALP. To make things simpler, Advance Pricing Agreement has been notified by the Govt. of India:

An APA(Advance Pricing Agreement) is an agreement between the Central Board of Direct Taxes and any person, which determines, in advance, the arm's length price or specifies the manner of the determination of arm's length price (or both), in relation to an international transaction. Hence, once APA has been entered into with respect to an international transaction, the arm's length price with respect to that international transaction, for the period specified in the APA, will be determined only in accordance with the APA. The APA process is voluntary and will supplement appeal and other Double Taxation Avoidance Agreement (DTAA) mechanism for resolving transfer pricing dispute. The term of APA can be a maximum of five years. The APA would be binding only on the taxpayer and the tax authorities, and only in respect of the international transactions for which the agreement is sought. These rules were to be effective from 1 July, 2012.

### Transfer Pricing amendments, 2012

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- Amendment to Section 90 and Section 90A of the Act to make submission of Tax Residency Certificate containing prescribed particulars, as a necessary but not sufficient condition for availing benefits of the agreements referred to in these Sections.
- These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years.
- Through finance act, 2012 the provisions of the Indian Income-tax Act, 1961, applicability of the transfer pricing regulations had been extended to certain transactions between domestic related parties and payments made to related parties(when the aggregate amount of transaction exceeds 5 Crores per year). This amendment will apply w.e.f 01/04/2013.
- The term "international transaction" had been amended to broaden its definition to apply to transactions involving intangibles, borrowing, guarantees, and other items. The new definition specifically included intangibles in various categories. This amendment had a retroactive effective

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date of 1 April 2002 and would apply in relation to Assessment Year 2002-03 and later.

- The 2012 amendment provided an upper ceiling of 3% as the tolerance range for purposes of determining the arm's length price. This proposal will be effective from 1 April 2013, and will apply in relation to AY 2013-14 and later.
- Due to practical difficulties in accessing contemporaneous comparable data, it was proposed that transfer pricing reports would be due by 30 November of the assessment year.
- Section 271AA - To provide a penalty at the rate of 2% of the value of the international transaction, if the taxpayer fails to maintain prescribed documents or information; fails to report any international transaction which is required to be reported or maintains or furnishes incorrect information or documents. This penalty would be in addition to the penalties that apply for failure to furnish the accountant's report in Form No.3CEB and for the failure to furnish information or documents as required. This amendment was to be effective from 1 July 2012.

Besides the legislation passed, the Finance Act 2012 also gives the CBDT power to declare the APA void in certain circumstances – these have to be exercised sparingly in cases of fraud, tax avoidance etc and that too in consultation with the competent authority of the foreign country. This part requires relook and also legislative amendment.

### Transfer Pricing proposals, 2013

It is proposed to amend sections 90 and 90A in order to provide that submission of a tax residency certificate is a necessary but not a sufficient condition for claiming benefits under the agreements referred to in sections 90 and 90A. This position was earlier mentioned in the memorandum explaining the provisions in Finance Bill, 2012, in the context of insertion of sub-section (4) in sections 90 & 90A.

These amendments will take effect retrospectively from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

## **Conclusion**

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With the help of tax residency certificate provision, Govt. has tried to plug in the loophole whereby the taxpayers who are not tax residents of a contracting country claim benefit under the DTAA entered into by the Government with that country. Thus, even third party residents claimed unintended treaty benefits. This time, with the new amendments, to take benefit of DTAA one has to furnish the tax residency certificate. Even so, the government has warned that it is not a sufficient condition for claiming benefits.