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## India's advance pricing agreement program: room for reform

Shilpa Goel (Tax Lawyer) · Monday, December 24th, 2018

Transfer pricing cases in India are estimated to account for more than half of the world's transfer pricing disputes. Prolonged transfer pricing litigation due to overburdened courts and tribunals is a sad reality for many companies doing business in India. The consequence is that a cloud of uncertainty constantly hangs over cross-border, intra-group transactions routinely undertaken by these companies.

An advance pricing agreement (APA) is one way to address this. Unlike mutual agreement procedure (MAP), which is invoked in reaction to a tax dispute, the significance of APAs lies in the fact that they aim at preventing transfer pricing disputes from occurring in the first place.

According to latest statistics published by the Central Board of Direct Taxes (CBDT), India received approximately 1,000 APA applications in the last six years. Out of these, close to 200 applications are for bilateral APAs (with the number increasing every financial year). Many would link the surge in bilateral APA applications to the success of India's APA program. However, there are two reasons why it is naïve to do so.

Firstly, while it is true that the number of bilateral APA applications has increased, that number is still far less than what ought to have been the case. It is difficult to stomach that a country that accounts for more than half of the world's transfer pricing disputes received only 200 bilateral APA applications in six years, i.e. approximately 30 applications in a year.

### Reasons for the increase

In fact, whatever little rise that we see in the number of bilateral APA applications is not because of proactive steps taken by the CBDT. Instead, that rise is largely attributable to several external factors.

An important one is the OECD's ongoing work under the BEPS project. The OECD's BEPS recommendations and their impending implementation by world governments, including India, have already brought and, will further bring, immense uncertainty in the meaning and application of transfer pricing rules. As a result, more companies have been actively looking to secure their related-party transactions through the use of APAs and avoid future transfer pricing litigation.

Next is the opening up of the India-US bilateral APA program in February 2016.

Last but not least, some companies feared that applying for APAs would mean supplying detailed

documentation that is not otherwise required under the Income Tax Act. However, with the introduction of new transfer pricing documentation requirements as part of BEPS Action 13, intentional exposure to transfer pricing assessment risks and issues relating to confidentiality of information shared are no longer a cause for concern for these companies.

It is true that the Finance Ministry recently lifted an important hurdle in the APA regime by allowing APA applications even in the absence of a corresponding adjustment clause in tax treaties dealing with transfer pricing adjustments. This is a welcome step. However, that clarification was made only in November 2017 and cannot be said to have any bearing in the number of APA applications received prior to that month.

There is little transparency in the APA process and companies do not want to run the risk of getting entangled in the bureaucratic processes.

Further, there is significant delay in concluding APAs and that certainly is a disincentive to many.

The APA filing fees are exorbitant and no step has been taken to rationalize the fees to ensure a level-playing field.

### **More APAs coming CBDT's way**

In any event, the success of the APA program cannot be measured in terms of the number of applications received by the CBDT. It is important to point out that there will be a drastic increase in the number of bilateral APA applications in the years to come due to the very reasons discussed above. Naturally, it is imperative to address some of the key problems underlying the APA program to improve its overall effectiveness in preventing transfer pricing disputes.

The recent APA statistics published by the CBDT show that it takes an average time of nearly four years to conclude a bilateral APA. The CBDT last week announced that it has signed a total of 24 APAs in the last years. This means that over 150 applications are pending as on date. This is a big cause for concern among companies.

Given the lack of transparency in the APA program, what causes the delay is not clearly known. However, the delay is attributable to either the applicant in submitting documentation or otherwise dilly-dallying around, or to the CBDT in processing the application and preparing or approving what is called an 'APA Position Paper', or to the foreign tax authority in prolonging bilateral negotiations.

### **Improving the APA program**

There are few things that could be done at the CBDT's end to increase efficiency of the APA program and make it more attractive for companies.

Firstly, more personnel need to be hired at the Commissioners-level to quickly and effectively process and conclude APA applications. The lack of human resource in CBDT's APA team seems to be an ongoing problem.

Secondly, some of the stages of the APA process may be done away with. A pre-filing consultation, though optional, is routinely requested for and this needs to change. Further, not every request made by an applicant for a pre-filing consultation needs to be obliged.

Thirdly, the CBDT must set timelines not only for the entire APA process but also for each stage of the APA process. The CBDT must commit to concluding APAs, say, within two years from the date of filing, similar to the two-year minimum standard for reaching agreement in MAP cases.

Finally, the CBDT must consider introducing an e-service for filing of APA-related documentation for the sake of speed, ease and efficiency.

There is an old saying that prevention is better than cure. However, given the prolonged transfer pricing litigation and uncertainty surrounding the MAP program, preventing transfer pricing disputes from taking place seems to be the cure.

The CBDT is best aware of the benefits that the APA program has and how it creates a conducive and certain tax environment for companies. Thus, it becomes all the more important for the CBDT to own up to the challenges and provide the APA regime with the infrastructure, resources and expertise that it needs.

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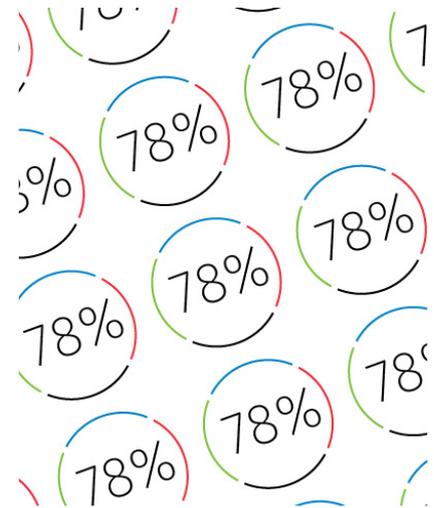
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