Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

# Transfer Pricing 2025

Definitive global law guides offering comparative analysis from top-ranked lawyers

**India: Law and Practice**
Deepak Chopra, Harpreet Singh Ajmani, Rohan Khare, Pulkit Pandey and Priyam Bhatnagar
AZB & Partners

# INDIA


## Law and Practice

**Contributed by:**
Deepak Chopra, Harpreet Singh Ajmani, Rohan Khare,
Pulkit Pandey and Priyam Bhatnagar
**AZB & Partners**

## Contents

**Contributed by:** Deepak Chopra, Harpreet Singh Ajmani, Rohan Khare, Pulkit Pandey and Priyam Bhatnagar, **AZB & Partners**

**AZB & Partners** is full-service law firm which was founded in 2004 by Mr Ajay Bahl, Ms Zia Mody and Mr Bahram N Vakil. Apart from other practices, the firm fields a highly regarded team that provides a wide variety of direct and indirect tax assistance. The tax team is well versed in handling an array of issues such as income tax and transfer pricing, and has a good track record of litigation and investigations concerning various sections of the Income Tax Act, having represented clients across fora including the High Courts and the Supreme Court of India. Further, the team has represented an array of multinational clients with presence across India in various sectors and has been instrumental in arguing numerous matters and securing various precedent-setting judgments.

## Authors

**Deepak Chopra** is a senior partner, and head of tax litigation at AZB & Partners. He has 34 years of tax advisory and litigation experience. His work includes advising on domestic and international taxation, transfer pricing, tax litigation and tax restructuring issues, search and seizure and raid matters. Deepak has represented an array of multinational clients PAN India in various sectors and has been instrumental in arguing numerous matters and securing various precedent-setting judgments. He is ranked for tax by Chambers and Partners in their Asia-Pacific Guide.

**Harpreet Singh Ajmani** is a partner at AZB & Partners and an Advocate-on-Record in the Supreme Court of India, as well as a qualified company secretary, having more than 15 years of experience in tax advisory and litigation. His tax litigation profile and experience include representation and handling complex income tax matters across fora from the First Appellate Authority to the Supreme Court of India on a PAN India basis in the areas of domestic law, international taxation and transfer pricing. He has represented a wide range of multinational clients in various sectors and has been instrumental in assisting, arguing and securing various judgments which have been considered landmark.

**Rohan Khare** is a partner at AZB & Partners and has over a decade of professional experience in the field of direct tax advisory and litigation. Rohan specialises in direct tax advisory and litigation, focusing on transfer pricing and international tax issues. He represents Fortune 500 companies as well as other multinational clients. Rohan has successfully handled complex litigation matters involving international tax issues for companies engaged in the business of freight logistics as well as media and broadcasting companies. His expertise also lies in handling complex transfer pricing matters. He regularly advises and represents clients on diverse tax issues and has contributed to securing landmark judgments in tax matters.

**Pulkit Pandey** is an associate at AZB & Partners, and qualified as a lawyer at the School of Law, UPES Dehradun in 2021. After a brief stint in KMA Attorneys where he was handling civil litigation and arbitration, he joined the international tax practice at AZB & Partners in September 2022. Pulkit has been assisting in tax litigation for various multinational corporations and in tax advisory assignments.

**Priyam Bhatnagar** is an associate at AZB & Partners, and is a qualified lawyer from Symbiosis Law School, NOIDA (2022), as well as having attended a course on international taxation law conducted by Leiden University, the Netherlands (2020). He has completed two years as a litigating lawyer, during which he gained experience working on various legal cases including representation and handling of complex income tax matters across fora from the First Appellate Authority to the Supreme Court of India on a PAN India basis in the areas of domestic law, international taxation and transfer pricing. He has represented a range of multinational clients in various sectors.

## AZB & Partners

AZB House
Plot No A-7 and A-8
Sector 4
Noida 201301
National Capital Region
India

Tel: +91 120 417 9999
Fax: +91 120 417 9900
Email: delhi@azbpartners.com
Web: www.azbpartners.com

AZB & PARTNERS
ADVOCATES & SOLICITORS

**Contributed by:** Deepak Chopra, Harpreet Singh Ajmani, Rohan Khare, Pulkit Pandey and Priyam Bhatnagar, **AZB & Partners**

# 1. Rules Governing Transfer Pricing

## 1.1 Statutes and Regulations

The Income Tax Act, 1961 (*"IT Act"*) contains a specific chapter, namely Chapter X, which deals with special anti-avoidance rules in the form of transfer pricing regulations as applicable to companies entering into related-party transactions. Sections 92 to 92F of the IT Act, which forms part of *"Chapter X – Special provisions relating to avoidance of tax"*, deals with transfer pricing regulations mandating the determination of arm's length price of related-party transactions entered into by the taxpayer. These regulations are required to be read with Rules 10A to 10THD of the Income Tax Rules, 1962(*"IT Rules"*). These regulations are also governed through the issuance of circulars as well as notifications by the Central Board of Direct Taxes (CBDT) from time to time.

## 1.2 Current Regime and Recent Changes

Historically, the main intention for the introduction of transfer pricing provisions was to discourage companies from shifting profit to overseas associated enterprises (AE) through under-pricing or over-pricing of cross-border transactions. In India, transfer pricing regulations were introduced for the first time in 2001, following the UN Model Transfer Pricing Regulations, which were, in turn, based on the Organisation for Economic Co-operation and Development's (OECD) Model Transfer Pricing Regulations introduced in 1980. Though India is not a member of the OECD, India is still a key partner country that actively participates in various committees, workshops and working groups of the OECD. The OECD and India have enhanced their co-operation in dealing with issues related to transfer pricing and to promote better tax compliance in order to improve the prevention of cross-border disputes. These transfer pricing regulations were introduced to avoid base erosion of the Indian tax base and discourage shifting of profits out of India by multinational enterprises (MNE). Since then, these regulations have been constantly amended to be in line with the various global and local practices and some of the landmark changes are highlighted below.

- Advance Pricing Agreement programme (*"APA programme"*) – the APA programme was introduced in India vide the Finance Act, 2012 by introducing Section 92CC and Section 92CD to the IT Act. The APA programme sought to provide certainty to the taxpayer by allowing them to opt for a unilateral, bilateral or multilateral APA, for five prospective years along with a roll back option for four previous years. Further, the APA programme does not impose any threshold in terms of the value of the transaction upon a taxpayer.
- Safe harbour provisions – *"safe harbour"*, in a transfer pricing regime, is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a jurisdiction's general transfer pricing rules. It substitutes simpler obligations for those under the general transfer pricing regime. Therefore, for this purpose, CBDT has notified Rules 10TA to 10TG of the IT Rules in relation to *"safe harbour rules"* for *"international transactions"*, and Rules 10TH to 10THD of the IT Rules in relation to *"safe harbour rules"* for *"specified domestic transactions"*. The objective for introduction of such rules was to provide an optional dispute avoidance mechanism that prescribes the minimum cost-plus mark-up/transfer price that an eligible taxpayer has to maintain in relation to eligible categories of international transactions for a specified block of financial years (FY).

- Secondary adjustments – these provisions were introduced in India in the year 2017, thereby mandating an adjustment in the books of accounts of both the Indian taxpayer and its AE, to reflect that the actual allocation of profits is based on the arm's length principle. These provisions also require repatriation of excess money in the hands of the taxpayers into India within a prescribed time-limit, failing which the amount not repatriated is treated as deemed advance on which interest would be chargeable. In 2019, amendments were introduced, thereby allowing the taxpayer to repatriate secondary adjustment from any of its AEs and also gives an option to pay an additional tax at 18% (plus applicable surcharge on tax) in case the taxpayer is not able to repatriate the money into India.
- Mutual Agreement Procedure (MAP) – statutory framework for MAP was initially introduced by insertion of Part IX-C under the IT Rules, for the benefit of taxpayers, tax authorities and competent authorities of treaty partners. Thereafter, Circular No.F.No.500/09/2016-APA-I dated 07.08.2020 (as modified by Circular No.F.No.500/09/2016-APA-I dated 10.06.2022) was issued by the CBDT providing guidance on the procedure as well as mechanism to cover aspects of access to and denial of MAP route, technical issues and implementation of MAP outcomes. Among other things, it has been stated in the guidance that India is committed to endeavour to resolve MAP cases within an average timeframe of 24 months.
- Thin Capitalisation – Section 94B was introduced in the IT Act vide the Finance Act, 2017 to limit interest deduction to 30% of Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA) with a carry forward period of eight years for balance interest amount. This provision applies for interest payments to the associated enterprises or any lender (to whom the AEs have provided an explicit or implicit guarantee) exceeding INR10 million. In 2020, interest payments on loans taken from an Indian branch of a foreign bank have been excluded from the purview of the provision for limitation of interest deduction.

## 2. Definition of Control/Related Parties

### 2.1 Application of Transfer Pricing Rules

In terms of the mandate provided under Section 92(1) of the IT Act, a taxpayer is required to comply with the transfer pricing provisions in a case where he/she has entered into an international transaction or a specified domestic transaction with its associated enterprise. Further, in order to understand the application of the transfer pricing regulations in India, it is pertinent to understand the meaning of following terms.

- Arms' Length Price – Section 92F(ii) of the IT Act defines arm's length price (ALP) to mean a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions.
- Associated enterprises – in terms of Section 92A(1) of the IT Act, two enterprises are considered to be AEs when one party (directly or indirectly) participates in the management, control or capital of the other party; or a common person (or persons) participates in the management, control or capital of both enterprises. Further, Section 92A(2) of the IT Act, in the case where two enterprises do not fall into the criteria laid down in Section 92A(1) of the IT Act, but fall into one of the 13

criteria provided under Section 92A(2) of the IT Act, then such enterprises may be deemed to be AEs, and may also be considered as an international transaction for the purposes of Section 92B(2) of the IT Act.

- Transactions – as per Section 92F(v) of the IT Act, the term transaction includes an arrangement, understanding or action in concert, whether or not such arrangement, understanding or action is formal or in writing; or whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding.
- International transactions – in terms of Section 92B of the IT Act, an international transaction is a transaction between two or more AEs, and at least one of the parties in such transaction is a non-resident.
- Specified domestic transactions – these are specific transactions between two domestic AEs which have been enumerated in Section 92BA and exceed INR200 million in value.

In essence, a wide power has been bestowed with the Indian Tax Authorities for assumption of jurisdiction to determine ALP of an international transaction under the provisions of Chapter X of the IT Act.

## 3. Methods and Method Selection and Application

### 3.1 Transfer Pricing Methods

The ALP of an international transaction has to be determined by a Transfer Pricing Officer (TPO) in accordance with Section 92C/92CA of the IT Act read with Rule 10B of the IT Rules. Rule 10B of the IT Rules prescribes the following methods for benchmarking the price of an international transaction:

- comparable uncontrolled price (CUP);
- resale price method (RPM);
- cost-plus method (CPM);
- profit split method (PSM);
- transactional net margin method (TNMM); and
- such other method as may be prescribed by the CBDT.

It is relevant to mention that CUP, RPM and CPM are considered as traditional methods and PSM and TNMM are considered as transactional methods.

### 3.2 Unspecified Methods

The Indian Transfer Pricing Regulations require taxpayers to compute ALP using any of the six methods prescribed under Section 92C of the IT Act (see **3.1 Transfer Pricing Methods**). In terms of available judicial precedent, preference is given to traditional methods over transactional methods whilst selecting the most appropriate method.

Section 92C(2) of the IT Act read with Rule 10B of the IT Rules, prescribes the concept of *"most appropriate method"* for determination of ALP and provides that the comparability of an international transaction or a specified domestic transaction with an uncontrolled transaction shall be judged with reference to the following, namely:

- the specific characteristics of the property transferred or services provided in either transaction;
- the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- 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; and
- 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.

It is further mandated that an uncontrolled transaction shall be comparable to an international transaction or a specified domestic transaction if:

- none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or
- reasonably accurate adjustments can be made to eliminate the material effects of such differences.

CBDT has prescribed the *"other method"* by inserting Rule 10AB to the IT Rules. For determination of ALP in relation to an international transaction, the *"other method"* 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-AE, under similar circumstances, considering all the relevant facts.

Generally speaking, the other method acts as *"residuary method"*, which allows taxpayers some flexibility for using data around prices that would have been charged between third parties under a comparable scenario for the arm's length exercise. However, in the authors' experience, the *"other method"* is subjected to a higher threshold of contemporaneous evidence for being selected as the most appropriate method.

## 3.3 Hierarchy of Methods

As mentioned, the OECD Transfer Pricing Guidelines outline five transfer pricing methods (refer to **3.1 Transfer Pricing Methods**), which are segregated into two general categories: (i) traditional transaction methods (CUP, RPM & CPM) and (ii) transactional profit methods (PSM and TNNM).

Further, the OECD Transfer Pricing Guidelines do not provide any hierarchy per se within the transfer pricing methods enumerated in **3.1 Transfer Pricing Methods**. Nonetheless, traditional transaction methods are commonly considered a most direct way of determining ALP, since reliance is placed on comparable data from uncontrolled transactions with conditions such as product, entity and market characteristics, contractual terms, assets employed in the transaction, functions and risks assumed by each party, highly similar to the transaction under review. On the other hand, transactional profit methods focus more on the specific transactions between related parties and rely more on internal data.

Such an approach of the OECD has also been adopted by the Indian Revenue Authorities and, as mentioned, the traditional or the transactional profit methods are preferred over the usage of the residuary method.

## 3.4 Ranges and Statistical Measures

Until March 2014, to arrive at ALP, the margin of the tested party (company with which the margin is to be compared) was compared with the arithmetic mean of the comparable companies.

To provide flexibility to taxpayers, the CBDT introduced the concept of arm's length range in place of arithmetic mean, applicable in the case of all transfer pricing methods except PSM and *"other methods"*. The aforementioned concept has been applicable from April 2014 onwards. For PSM or other methods, the earlier concept of arithmetic mean has to be adopted for calculating the ALP. Also, the range concept applies only when the data set is of at least six comparable companies.

The arm's length range is defined as 35th percentile and the 65th percentile of the data set of comparable companies arranged in ascending order. If the transaction falls within the aforesaid range, then the transaction is deemed to be at arm's length. Furthermore, in case of less than six comparable companies, the earlier concept of arithmetic mean must be followed. These amended rules provide a certain flexibility in arriving at the ALP by the taxpayers in India.

### 3.5 Comparability Adjustments

Rule 10B(3) of the IT Rules allows for making reasonably accurate adjustments to an uncontrolled transaction in order to remove material effect of differences which emerges during the course of its comparison with an international transaction or specified domestic transaction. However, since the obligation is on the taxpayer to maintain proper documentation and information under Section 92D of the IT Act, the onus to prove *"reasonably accurate comparability adjustment"* is also on the taxpayer. Thus, comparability adjustments, if any, cannot be sought as a matter of right and must be substantiated/backed by contemporaneous data.

## 4. Intangibles

### 4.1 Notable Rules

At the time of writing, there is no specific provision in the transfer pricing regulations in India, which would cater only to the valuation of Intangibles. Having said that, the definition of the term *"international transaction"* itself makes a specific reference to intangibles. This implies that rules applicable to all international transactions apply mutatis mandis to intangibles. Further, the term *"intangible property"* is defined under Explanation (ii) of Section 92B of the IT Act, including:

- marketing-related intangible assets, such as trade marks, trade names, brand names, logos;
- technology-related intangible assets, such as process patents, patent applications, technical documentation such as laboratory notebooks, and technical know-how;
- artistic-related intangible assets, such as literary works and copyrights, musical compositions, copyrights, maps, and engravings;
- data processing-related intangible assets, such as proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;
- engineering-related intangible assets, such as industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, and proprietary documentation;
- customer-related intangible assets, such as customer lists, customer contracts, customer relationship, and open purchase orders;
- contract-related intangible assets, such as favourable supplier, contracts, licence agreements, franchise agreements, and non-compete agreements;
- human capital-related intangible assets, such as trained and organised work force, employment agreements, and union contracts;

- location-related intangible assets, such as leasehold interest, mineral exploitation rights, easements, air rights, and water rights;
- goodwill-related intangible assets, such as institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, and general business going concern value;
- methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data; and
- any other similar item that derives its value from its intellectual content rather than its physical attributes.

Apart from the above, OECD Transfer Pricing Guidelines which on various occasions have fulfilled the role of a guide in the journey of navigating through the transfer pricing landscape in India, provides for an extensive literature on transfer pricing with respect to intangibles and are often referred to by the courts of the country whenever required.

### 4.2 Hard-to-Value Intangibles

Hard-to-value intangibles (HTVIs) in terms of Paragraph 6.1893 of BEPS Action Plan 8–10, have been defined to mean those *"intangibles"* or *"rights in intangibles"* where there is an absence of a reliable comparable/future cash flow or expected income projections from the transfer of such intangible to an AE at a future date. The transfer pricing regime in India as on date does not have specific provisions governing such situations.

### 4.3 Cost Sharing/Cost Contribution Arrangements

As per the UN Practical Manual on Transfer Pricing for Developing Countries 2021, Cost Contribution Arrangements (CCA) are contractual agreements between associated enterprises in an MNE group in which the participants share certain costs and risks in return for having a proportionate interest in the expected outcomes arising from the CCA. Broadly, there are two distinct categories of CCAs:

- arrangements for sharing in the costs and benefits of inter-company services (service sharing arrangements); and
- arrangements established for the development, production, or obtaining of intangibles or tangible assets (development arrangements, most typically intangibles development arrangements).

The Indian transfer pricing provisions are equally applicable to cost-sharing/cost-contribution arrangements. For discussion purposes, the authors have discussed the former category; ie, arrangement for benefits of inter-company services. In the case of availing of services like accounting, tax, marketing, HR, general advisory, etc, by the Indian enterprise, more often than not, such arrangements are questioned by the Indian Tax Authorities by examining the *"business exigency"*, *"commercial prudence"* and *"need"* for availing such services whilst seeking refuge under the argument of an independent third-party refraining from entering such an arrangement.

In this context, the OECD whilst acknowledging such a view of the authorities has also cautioned the tax administrations to not automatically assume that by entering into such arrangements the multinational corporations (MNCs) are manipulating profits. Further, the OECD whilst addressing the issue has advised the authorities to restrict themselves to ascertain whether intra-group services have been rendered or not.

The courts of India whilst taking cue from the OECD have also come down heavily on the Revenue Authorities for serving the same wine in a different bottle whilst applying the benefit test in different shapes or forms. For example, historically, the department would question the need/benefit of an international transaction whilst determining the ALP of the transaction at NIL, ie, questing the prudence of the taxpayer for entering into a transaction. When the courts of the country rejected such an approach and clearly demarcated the role of the TPO to be restricted to determination of the ALP and not to determine the need/benefit of the transaction, the department started justifying such determination of the ALP at NIL whilst alleging the nature of the transaction as *"shareholder activity"*. However, as stated, such an approach of the department has more often than not been condemned by the courts.

## 5. Adjustments

### 5.1 Upward Transfer Pricing Adjustments

The IT Act provides the taxpayer an option to make suo-moto adjustments in their return of income, where they believe their controlled (related party) transactions are not at arm's length. Such adjustments should also be disclosed in the accountant's report (Form No 3CEB) – ie, the certificate required to be furnished annually in respect of such related-party transactions. It is also important to note that secondary adjustment is an example wherein taxpayer is permitted to make suo-moto transfer pricing adjustments in its income tax return.

### 5.2 Secondary Transfer Pricing Adjustments

The provisions pertaining to secondary adjustment were introduced in India in the year 2017, thereby mandating an adjustment in the books of accounts of both the Indian taxpayer and its AE to reflect that the actual allocation of profits is based on the ALP. The provisions also require repatriation of excess money in the hands of the taxpayers into India within a prescribed time-limit, failing which the amount not repatriated is treated as deemed advance on which interest would be chargeable.

Section 92CE(1) of the IT Act enlists following circumstances, wherein a taxpayer shall be required to carry out secondary adjustment:

- the primary adjustment to transfer price, has been made suo-motu by the taxpayer in his/her return of income;
- adjustment made by the Assessing Officer has been accepted by the taxpayer;
- adjustment is determined by an advance pricing agreement entered into by the taxpayer under Section 92CC of the IT Act, on or after 1 April 2017;
- adjustment is made as per the safe harbour rules framed under Section 92CB of the IT Act; or
- adjustment 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 of the IT Act.

Further proviso to Section 92CE(1) enlists exceptional circumstances wherein secondary adjustment shall not be carried out, if:

- the amount of primary adjustment made in the case of a taxpayer in any previous year does not exceed one crore rupees (ie, INR10 million); or

- the primary adjustment is made in respect of an assessment year commencing on or before 1 April 2016.

In 2019, amendments were introduced thereby allowing the taxpayer to repatriate secondary adjustment from any of its AE and also gave an option to pay an additional tax at 18% (plus applicable surcharge on tax) in case the taxpayer is not able to repatriate the money into India.

## 6. Cross-Border Information Sharing

### 6.1 Sharing Taxpayer Information

India has a strong tax treaty network that includes double-tax avoidance agreements (DTAA) with around 104 countries (a comprehensive agreement with 96 countries/territories and a limited agreement with eight jurisdictions) and tax information exchange agreements with 23 countries/territories.

### 6.2 Joint Audits

Although there is no formal framework for joint audits under the Indian transfer pricing regime, the Tax Authorities have actively been exercising the option of seeking data under Exchange of Information agreements and also evaluating data from the master file and the local file maintained under country-by-country (CbC) reporting.

## 7. Advance Pricing Agreements (APAs)

### 7.1 Programmes Allowing for Rulings Regarding Transfer Pricing

The APA programme was introduced in India in the Finance Act, 2012 and which aimed at providing certainty to the taxpayer by allowing them to opt for a unilateral, bilateral or multilateral APA, for five prospective years along with a roll back option for four previous years. Further, the APA programme does not impose any threshold in terms of the value of the transaction upon a taxpayer.

As per data available at the time of writing, during FY 2023–24, India has entered into 86 Unilateral APAs covering 224 international transactions, and 39 Bilateral APAs (BAPAs) covering 181 international transactions. Unilateral APAs involve AEs spread across 74 countries, with the majority being in the United States, the United Kingdom, Singapore, Australia, and Germany. In the case of BAPA, the USA is the front-runner. Other treaty partners include the UK, Japan, Singapore, Germany, and France.

### 7.2 Administration of Programmes

In India, the APA programme is administered by CBDT. There are two different set-ups for the processing of APAs and to help the CBDT to enter into an APA.

The first set-up comprises the competent authority of India (which is the Joint Secretary (FT&TR-I) in the Ministry of Finance], and their representatives.

The second set-up is the APA team which is a defined term in Rule 10F(j) of the IT Rules, which means Advance Pricing Agreement team consisting of Income Tax Authorities as constituted by the CBDT and including such number of experts in economics, statistics, law or any other field as may be nominated by the DGIT (International Taxation). In terms of the data available in public domain, at present the APA team, constituted by the CBDT, consists of one

**Contributed by:** Deepak Chopra, Harpreet Singh Ajmani, Rohan Khare, Pulkit Pandey and Priyam Bhatnagar, **AZB & Partners**

Commissioner, four Additional Commissioners and four Deputy Commissioners.

### 7.3 Co-Ordination Between the APA Process and Mutual Agreement Procedures

MAP and APA are two alternate mechanisms for resolving income tax disputes pending under the IT Act, which in turn provides finality on such pending disputes to the taxpayers being non-resident(s). Further, these alternate mechanisms significantly contribute to promoting an investor-friendly environment and ease of doing business initiative launched by the government of India.

MAP is governed by the provision of the DTAA(s) entered into by India wherein, as per the procedure specified in the IT Act, the taxpayer undergoing scrutiny assessment may apply to the competent authority of either country for resolving such dispute by way of negotiation between the competent authorities of both the countries. Whereas, APA originates from Section 92CC of the IT Act which provides that an eligible taxpayer could enter into APA for determining the ALP of the international transactions entered into with related parties by the taxpayer or for ascertaining the taxability of the income attributable under Section 9(1)(i) of the IT Act. In respect of a bilateral or multilateral APA, the competent authorities of the countries involved (including India) are required to first reach an arrangement through MAP. This arrangement must be accepted by the taxpayer before a bilateral or multilateral APA can be entered into.

### 7.4 Limits on Taxpayers/Transactions Eligible for an APA

In terms of Rule 10G of the IT Rules, any taxpayer who has entered into an international transaction or is contemplating to enter into an international transaction, is eligible to apply for APA. Further, Section 92CC(1) of the IT Act provides that APA can be entered into in respect of all the international transactions and transactions carried out by a non-resident under Section 9(2)(i) of the IT Act and, hence, there are no monetary thresholds prescribed for being eligible to apply for an APA.

Further, Unilateral APAs, Bilateral APAs and Multilateral APAs have been defined under the IT Rules, as follows.

- As per Rule 10F(k), *“unilateral agreement”* means an agreement between the CBDT and the applicant, which is neither a bilateral nor multilateral agreement.
- As per Rule 10F(c), *“bilateral agreement”* means an agreement between the CBDT and the applicant, subsequent to, and based on, any agreement referred to in Rule 44GA between the competent authority in India with the competent authority of the other country regarding the most appropriate transfer pricing method or the ALP.
- As per Rule 10F(h), *“multilateral agreement”* means an agreement between the CBDT and the applicant, subsequent to, and based on, any agreement referred to in Rule 44GA between the competent authority in India with the competent authorities in the other countries regarding the most appropriate transfer pricing method or the arm’s length price.

### 7.5 APA Application Deadlines

The timeline for an APA has been prescribed under Rule 10I of the IT Rules, as follows.

- In respect of transactions which are of a continuing nature, ie, dealings that are already occurring/recurring in nature – at any time before the 1st day of the previous year

relevant to the 1st assessment year for which such application is made.
- In respect of remainder transactions – at any time before undertaking the transaction/s.

### 7.6 APA User Fees
In terms of Rule 10-I of the IT Rules, the application for an APA shall be accompanied with a statutory fee which is determined in the following manner:

- if the international transaction entered into or proposed to be entered into does not exceed INR100 crore (1 crore equals 10 million), the statutory fee for filing of APA shall be INR10 lakhs (1 lakh equals 100,000);
- if the international transaction entered into or proposed to be entered into does not exceed INR200 crore, the statutory fee for filing of APA shall be INR15 lakhs; and
- if the international transaction entered into or proposed to be entered into exceeds INR200 crore, the statutory fee for filing of APA shall be INR20 lakhs.

### 7.7 Duration of APA Cover
The Indian APA programme seeks to provide certainty to taxpayers for five prospective years. The law also offers a roll back option for the previous four years, subject to certain conditions. Thus, in India, an APA can give certainty for a total of nine years with roll back, and five years without roll back.

### 7.8 Retroactive Effect for APAs
In terms of the repose to **7.1 Programmes Allowing for Rulings Regarding Transfer Pricing**, subject to fulfilment of certain conditions prescribed under the IT Act and IT Rules, there is provision for the roll back option to cover the previous four years.

## 8. Penalties and Documentation

### 8.1 Transfer Pricing Penalties and Defences
Chapter XXI of the IT Act spanning from Section 270 to 275 provides for various penalties which are imposable under the Act. The following provisions specifically pertain to penalties in a transfer pricing context.

Section 271AA(1) of the IT Act provides for a levy of penalty at the rate of 2% of the aggregate of international transactions in the following events:

- failure to keep the transfer pricing documentation ready on or before the due date;
- failure to report any international or specified domestic transaction;
- maintaining/furnishing incorrect information or an incorrect document; or
- failure to furnish the transfer pricing documentation on request to Tax Authorities within the permitted time period.

Section 271G of the IT Act provides for a levy of penalty at the rate of 2% of the value of the transaction in question, where a person fails to furnish any information required to be furnished as per Section 92D(3) of the IT Act.

Further, in terms of Section 273B of the IT Act, no penalty would be imposable provided there exists *"reasonable cause"* on the part of the taxpayer for the failure contemplated in the charging section.

### 8.2 Transfer Pricing Documentation
Section 92D of the IT Act provides that every person who has entered into an international transaction or specified domestic transaction shall keep and maintain such information and document in respect thereof as may be pre-

scribed and if the same is a constituent entity of an international group, it should keep and maintain such information and document in respect of an international group as may be prescribed under the law.

The Indian Transfer Pricing Regulations are largely modelled on the transfer pricing principles laid down under the OECD Transfer Pricing Guidelines, including transfer pricing documentation requirements. Indian Transfer Pricing Regulations have always required taxpayers to prepare transfer pricing documentation or perform a transfer pricing study annually to substantiate the arm's length principle for their international/specified domestic transactions. However, in 2016, keeping up with the country's commitment to the OECD's BEPS action plans, by insertion of Section 286 of the IT Act, the Indian government introduced the concept of three-tier transfer pricing documentation in India and re-aligned transfer pricing documentation requirements in India with the OECD's recommended structure. As a result of this change, taxpayers who are part of an MNC are required to comply with the following requirements.

- Local file – it refers to a transfer pricing document or a transfer pricing study which is a detailed contemporaneous document maintained by the taxpayer to justify the arm's length pricing of transactions, which should include various prescribed particulars such as:
  (a) a business overview of the group, AE and the taxpayer;
  (b) an overview of the industry/market in which the taxpayer operates;
  (c) functional, asset and risk analysis;
  (d) reasons for selection/rejection of the most appropriate method;
  (e) economic analysis; and
  (f) other prescribed particulars/documents.
- Master file – this was introduced in India in 2016 pursuant to the OECD's BEPS action plans. The constituent entity should maintain and furnish the information and documents electronically in Form No 3CEAA and Form 3CEAB, 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 INR5 billion and the aggregate value of international transactions:
  (a) during the accounting year of the constituent entity, as per the books of accounts, exceeds INR500 million; 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 INR100 million; or
- CbC reporting (CbCR) – CbCR is required to be electronically filed in Forms 3CEAC, 3CEAD and 3CEAE by the ultimate parent entity (UPE) of an MNE group that is resident in India, having an annual consolidated group revenue in the immediately preceding accounting year of more than INR64 billion. The statutory due date for e-filing is 12 months from the end of the reporting accounting year of the UPE. The UPE can designate another group entity as an alternative reporting entity for the purposes of filing CbCR. Where the UPE is outside India, in a country with which India has an agreement for the exchange of CbCR-related information, the Indian constituent entity is obliged to file a notification specifying the details of the group entity filing such CbCR. Such notification must be filed at least two months before the due date of the CbCR filing.

In this context, the following key terms defined under Section 286 of the IT Act are as follows.

- *"Alternate reporting entity"* means any constituent entity of the international group that has been designated by such group, in the place of the parent entity, to furnish the report as prescribed under the law. *"Constituent entity"* means (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 (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. *"Group"* 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. *"International group"* means 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. *"Parent entity"* means 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, in accordance with the law.

## 9. Alignment With OECD Transfer Pricing Guidelines

### 9.1 Alignment and Differences

Though India is not a member of the OECD, India is still a key partner country that actively participates in various committees, workshops and working groups of the OECD. The OECD and India have enhanced their co-operation in dealing with issues related to transfer pricing and to promote better tax compliance to improve the avoid cross border disputes. The transfer pricing rules in India largely follow the principles which were enunciated in OECD Transfer Pricing Guidelines and United Nations Model Transfer Pricing Regulations. More often than not, even the judiciary has recognised and takes cognisance of the OECD Guidelines issued from time to time to adjudicate on litigation between the taxpayer and Revenue Authorities.

However, having said so, it would be pertinent to mention that where there is a conflict between the statutory provisions and the OECD Guidelines, the Indian judiciary has leaned in favour of interpretating the law as per the statutory provisions. Illustratively, the OECD recognises use of multiple-year data for comparability, however, Rule 10B of the IT Rules gives preference to use of single-year data. Thus, on account of this mismatch, the courts have interpretated that the provisions of Rule 10B of the IT Rules would take precedence over the OECD Guidelines.

## 9.2 Arm's Length Principle

The existing transfer pricing provisions allow determination of ALP in terms of the prescribed methods and also gives an option to an eligible taxpayer to exercise an option of safe harbour which is an alternate mechanism to benchmark the related-party transactions, which is a formulary apportionment approach. In this regard, in terms of explanation of Section 92CB(2) of the IT Act, *"safe harbour"* means circumstances in which the Tax Authorities should accept the transfer price or income, as declared by the taxpayer, if circumstances as provided under Rule 10TD of the IT Rules are satisfied.

## 9.3 Impact of the Base Erosion and Profit Shifting (BEPS) Project

Consequent to the BEPS action plans, India has introduced various changes in its domestic transfer pricing regulations, including the following.

- Thin Capitalisation – the provision to limit interest deduction to 30% of EBIDTA was introduced in India in 2017 with a carry-forward period of eight years for balance interest amount. This provision applies for interest payments to the AEs or any lender (to whom the AEs have provided an explicit or implicit guarantee) exceeding INR10 million. In 2020, interest payments on loans taken from an Indian branch of a foreign bank have been excluded from the purview of the provision for limitation of interest deduction.
- Three-tier transfer pricing documentation – the rules pertaining to filing of master file and CbC report along with the local file or transfer pricing study discussed in detail in **8.2 Transfer Pricing Documentation** were introduced in 2016 pursuant to the introduction of BEPS Action Plan 13.

## 9.4 Impact of BEPS 2.0

One of the most interesting developments post introduction of BEPS 2.0 was the introduction of the Equalisation Levy (EL) by insertion of Chapter VIII to the Finance Act, 2016 and 2020, whereby a levy was charged on specified services/e-commerce services provided by a non-resident to an Indian resident. However, by way of the Finance Act (No 2), 2024 and the Finance Act, 2025, a sunset clause has been inserted thereby restricting the applicability of EL on the specified services and e-commerce services from the specified dates.

## 9.5 Entities Bearing the Risk of Another Entity's Operations

The Indian Transfer Pricing Regulations do not contain any specific provisions permitting – or restricting – an entity in terms of bearing the risk of another entity's operations by guaranteeing the other entity a return. Practically, limited-risk structures being compensated on a cost-plus basis are quite common in India for MNEs. For this, Indian taxpayers generally place reliance on the overall transfer pricing principles provided under the Indian law as well as international transfer pricing guidelines issued by the OECD, the UN, and others, to determine a suitable business/pricing model for their intra-group transactions based on the detailed review of the functions performed, assets deployed and risks assumed by the AEs involved.

## 10. Relevance of the United Nations Practical Manual on Transfer Pricing

### 10.1 Impact of UN Practical Manual on Transfer Pricing

Similar to the impact of OECD Transfer Pricing Regulations on Indian Transfer Pricing Regulations as discussed in **9.1 Alignment and Differences**, the United Nations Practical Manual is often used as a reference point by taxpayers and the department for interpretation in certain circumstances.

## 11. Safe Harbours or Other Unique Rules

### 11.1 Transfer Pricing Safe Harbours

The Indian safe harbour rules are an optional dispute avoidance mechanism that prescribes the minimum cost-plus mark-up/transfer price that an eligible taxpayer has to maintain in relation to eligible categories of international transactions for one or more specified FYs, and they are updated from time to time.

### 11.2 Rules on Savings Arising From Operating in the Jurisdiction

Location savings refer to the net cost savings an MNE achieves by relocating its core operations from a high-cost jurisdiction to a lower-cost one, such as India. The primary goal is to generate additional profits by leveraging benefits such as reduced labour and material costs, more affordable or subsidised capital, and access to better production, distribution, technology, and logistics support. Additionally, a broader customer base and increased spending capacity can further enhance the MNE's competitive advantage. As a result, the MNE can see significant profit gains from relocating its operations to India. These savings and profits must be carefully managed from a transfer pricing standpoint to ensure that profits are properly allocated across the group according to the arm's length principle.

### 11.3 Unique Transfer Pricing Rules or Practices

In India, there are several notable transfer pricing rules and practices that are unique and must be considered while dealing with transactions between AEs. Taxpayers have been subjected to a lot of transfer pricing litigation on the issues of selection of comparables, most appropriate method, allowability of adjustments and even on the existence of an international transaction. Here are a few illustrations relevant to transfer pricing practices in India.

- Marketing and promotion expenses:
  - (a) Benchmarking of excessive advertisement, marketing and promotion expenses – in India, the Tax Authorities have often been taking a position that incurring of excessive advertising, marketing and promotion expenses by the Indian taxpayer results in brand building and brand promotion of the foreign AE, which is the legal owner of the brand. Accordingly, the TPO has been proceeding to separately determine ALP of excessive advertising, marketing and promotion expenses as a separate international transaction whilst applying the bright line test.
  - (b) Having said so, the higher judiciary (Tribunal and High Court) has been coming forward to the rescue of taxpay-

ers and has time and again concluded that the onus is on the Revenue Authorities to first establish existence of *"transaction"/"international transaction"* of brand promotion/marketing intangibles between the AEs and such threshold cannot be met only on surmises but should be supported by evidence. However, the final verdict is still awaited as the legal issue is sub-judice before the Hon'ble Supreme Court of India.

- Customer and contract-related intangible assets:
  (a) By insertion of explanation to Section 92B of the IT Act, the expression *"intangible property"* includes customer-related intangible assets such as customer list, customer contracts, customer relationships and open purchase orders. Similarly, the expression intangible property shall also include contract-related intangible assets such as favourable supplier, contracts, licence agreements, franchise agreements and non-compete agreements. In this context, the Tax Authorities have been increasingly focused on ensuring that profits related to customer- and contract-related intangibles are correctly allocated.

### 11.4 Financial Transactions

The definition of *"international transaction"* as defined under Section 92B of the IT Act is an inclusive definition and specifically includes any type of capital financing including 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 and, hence, the rules governing international transactions ipso facto apply to financing transactions as well.

## 12. Co-Ordination With Customs Valuation

### 12.1 Co-Ordination Requirements Between Transfer Pricing and Customs Valuation

In India, different statutes govern the legal domain of transfer pricing and custom valuation. On one hand, customs-related matters are administered by the Central Board of Indirect Taxes and Customs, while on the other hand, transfer pricing matters fall under the purview of the CBDT. Although, there has been a development in exchange of information inter se between Customs Authorities and Tax Authorities, however, there is no statutory co-ordination mechanism which mandate synchronisation between the valuation adopted by both authorities (ie, the Customs Authorities and the Tax Authorities).

Having said so, in terms of the settled legal principle that two wings of the government cannot take different positions, any finding by either of the authorities does form *"persuasive factor"* for the other authority.

## 13. Controversy Process

### 13.1 Options and Requirements in Transfer Pricing Controversies

As a part of a scrutiny assessment, the TPO benchmarks the international transaction reported by a taxpayer and, based on his/her analysis, determines the ALP of the international transaction.

Thereafter, in the first instance, the Assessing Officer passes *"Draft Assessment Order"* whilst incorporating all the transfer pricing adjustments proposed by the TPO. At this stage, two options are available with the taxpayer.

- To get the assessment adjudicated by a collegium of three commissioners, ie, Dispute Resolution Panel (DRP) – in this process, the adjudication by the DRP is considered as continuation of assessment and, therefore, no tax demand is determined or becomes payable. Subsequent to the passing of the directions by the DRP, the Assessing Officer concludes the assessment by passing a Final Assessment Order and computes the tax demand in line with such directions issued by the DRP. Thereafter, in terms of Section 253 of the IT Act, only a taxpayer who is aggrieved by the Final Assessment Order, may directly file an appeal before the Income Tax Appellate Tribunal.
- To communicate with the Assessing Officer of his/her acceptance of the Draft Assessment Order so that the Assessing Officer can complete the assessment by passing a Final Assessment Order (in terms of finalising the Draft Assessment Order) – thereafter, the taxpayer can challenge the Final Assessment Order by filing an appeal before the Commissioner of Income Tax (Appeals) (CIT(A)). The Final Assessment Order is accompanied by a notice of demand and a penalty notice in case the Assessing Officer wishes to initiate penalty proceedings. At this stage, an option is also available to the taxpayer to file an application seeking stay on recovery of tax demand before the Assessing Officer under Section 220(6) of the IT Act. In terms of available judicial precedents, if a taxpayer can justify a strong prima facie case, balance of convenience and undue hardship, the Assessing Officer/Principal Commissioner of Income Tax may grant conditional or blanket stay during the pendency of appeal before the CIT(A). Subsequently, post-receipt of the order of the CIT(A), in case of any grievance with the order passed by the CIT(A), an appeal may directly be filed by the taxpayer or the Tax Authorities before the Income Tax Appellate Tribunal.

Where an appeal is filed by the taxpayer before the Income Tax Appellate Tribunal, then in terms of Section 254(2A) of the IT Act, subject to the condition that the taxpayer deposits not less than 20% of the amount of tax and interest or fee/penalty, or any other sum payable under the provisions of the IT Act, or furnishes security of equal amount in respect thereof, the Income Tax Appellate Tribunal may grant stay on recovery of tax demand. However, where the taxpayer may establish a strong prima facie case on merits whilst demonstrating that the tax demand is not recoverable on account of the issue/s being covered in its favour, then the Tribunal in its discretion may direct payment of a sum which is less than 20% of the outstanding tax demand.

Thereafter, the taxpayer or Indian Tax Authorities being aggrieved from the order of the Income Tax Appellate Tribunal may file a statutory appeal before the Hon'ble High Court which would be maintainable only in a case where there is *"substantial question of law"*. Subsequently, any person aggrieved by the order of the Hon'ble High Court has an option to approach the Hon'ble Supreme Court of India under Section 260B of the IT Act or under Article 136 of the Constitution of India (which is a discretionary jurisdiction).

Apart from the above-mentioned routes, in terms of Article 226 of the Constitution of India, a taxpayer may also have the remedy of directly approaching the Hon'ble High Court by filing a

Writ Petition, which is an extra-ordinary jurisdiction in cases where the order passed by the statutory authority is in gross violation of principles of natural justice or has been passed without the authority of law or overreaching the mandate of the statutory provision or on account of violation of fundamental rights.

## 14. Judicial Precedent

### 14.1 Judicial Precedent on Transfer Pricing

Since 2001, India has developed a very rich repository of judicial precedents on transfer pricing issues. It would be prudent to mention that transfer pricing is one of the most highly litigated areas under the Income Tax regime on both factual and legal issues. Some of the burning issues decided by the Indian tax tribunals and courts, providing guidance and precedence, are:

- existence of an international transaction;
- existence of relationship as an AE;
- selection of the tested party;
- selection of the most appropriate method;
- selection of the comparables;
- allowability of adjustments; and
- scope and levy of penalty.

### 14.2 Significant Court Rulings

The following are some important transfer pricing decisions which were rendered in the last year.

- In a case where a taxpayer filed an application under MAP with the competent authority of the US under Article 27 of India US-DTAA and settled the transfer pricing adjustments – thereafter, with respect to transfer pricing adjustments made on account of similar transactions with other group AEs in a different jurisdiction, the Tribunal proceeded to apply the rate agreed between the competent authority of India and the USA. In this context when the matter travelled to the High Court, it was opined that MAP proceedings, being based on mutual agreement between the competent authorities, would only be binding on such transactions and cannot be automatically applied across the board on transactions with third/other parties. [Refer: Aon Consulting (P.) Ltd. v PCIT, [Order dated 06.02.2025 in ITA 244 of 2024 (Delhi HC)]
- In a case where, in the absence of any additions proposed by the TPO, the Assessing Officer passed the Draft Order by making a transfer pricing addition of INR2,541 crores on account of demerger of the mobile security division of the taxpayer – aggrieved, a Writ petition challenging the assumption of jurisdiction by the Assessing Officer was filed before the Hon'ble High Court of Delhi. After considering the submission made on behalf of the taxpayer, the Hon'ble High Court, whilst specifically carving out the distinct jurisdictions of the Assessing Officer as well as the TPO, categorically noted that when no transfer pricing adjustment on account of demerger of the company was proposed by the TPO to begin with, the Assessing Officer was barred from making such adjustment in the draft order. With this background, the Hon'ble High Court was pleased to set aside the order whilst directing the Assessing Officer to proceed in accordance with the law. [Refer: Giesecke and Devrient India (P.) Ltd. v DCIT, Order dated 01.04.2024 in W.P.(C) 5429 of 2021 (Delhi HC)]
- The Hon'ble High Court of Delhi concluded that in a case where the taxpayer was providing call centre services to its AE, whilst undertaking comparability analysis, the comparables engaged in providing knowledge process

outsourcing services could not be considered as a good comparable. [Refer: PCIT v Symphony Marketing Solutions India (P.) Ltd., Order dated 25.11.2024 in ITA No 717 of 2018 (Delhi HC)]

- The Hon'ble High Court of Delhi opined that in a case where there was no material or evidence which may have tended to establish existence of an arrangement between the Indian entity and its AE, or which may have been viewed as evidence of them acting in concert, advertising, marketing and promotional expenses did not amount to brand building for benefit of the AE. [Refer: PCIT v Beam Global Spirits & Wine (India) (P.) Ltd., Order dated 07.03.2025 in ITA No 155 and 156 of 2022 (Delhi HC); PCIT v Pernod Ricard India (P.) Ltd., Order dated 29.08.2024 in ITA No 872 of 2019 (Delhi HC); and PCIT v Pepisco India Holding (P.) Ltd., Order dated 16.05.2024 in ITA No 682 of 2019 (Delhi HC);]
- The Hon'ble High Court of Punjab and Haryana held that in a case where the Income Tax Appellate Tribunal remanded the matter to the TPO to pass a fresh order under Section 92CA(3) of the IT Act and, thereafter, the Assessing Officer passed the final order under Section 143(3) of the IT Act without, at the first instance, passing a draft order as mandated under Section 144C of the IT Act, the said order would not be sustainable in law. [Refer: Mavenir India (P.) Ltd. v DCIT, Order dated 11.12.2024 in CWP 2367 of 2019 (O&M) (Punjab & Haryana HC)]
- The Hon'ble High Court of Delhi held that a company engaged in content creation and which is a full-fledged channel company could not be a good comparable to a company engaged in the distribution of TV channels. [Refer: PCIT v Warnermedia India (P.) Ltd., Order dated 10.09.2024 in ITA No 437 of 2020 (Delhi HC)]
- The Kolkata Bench of the Income Tax Appellate Tribunal held that where a taxpayer had paid royalties for goods which had been imported by it and the TPO took royalties as NIL by holding that with imported goods, payment of royalty was embedded and, thus, an upward adjustment was made, since Customs Authorities had given a categorical finding that royalties were not included in the invoice value of goods imported by the taxpayer, upward adjustment in respect of payment of royalty was to be deleted. [Refer: Reckitt Benckiser (India) (P.) Ltd. v DCIT, Order dated 18.03.2025 in ITA No 78/Kol/2018 (Kolkata Tribunal)]
- The Delhi Bench of the Income Tax Appellate Tribunal held that where the taxpayer had availed administrative support services from its AE and had submitted cost benefit analysis and relevant documentary evidence of these services, transfer pricing adjustments made by Tax Authorities for want of documents to establish availing of administrative support services deserved to be deleted. [Refer: Corteva Agriscience India (P.) Ltd. v DCIT, Order dated 12.02.2025 in ITA No 1574/Del/2018 (Delhi Tribunal)]
- The Delhi Bench of the Income Tax Appellate Tribunal held that where a parent company accorded consent to a taxpayer to export specific models of two-wheelers to certain countries on payment of export commission at a rate of 5% of free on-board value of such exports, but Tax Authorities determined ALP of said export commission at NIL holding that no service was provided by the AE to deserve any commission, since the taxpayer had successfully demonstrated not only benefits but had also shown that profitability was higher, Tax Authorities were directed to delete the addition on account of export commission. [Refer: Honda Motorcycle & Scooter India (P.)

Ltd. v ACIT, Order dated 05.02.2024 in ITA No 1524/Del/2024 (Delhi Tribunal)]

## 15. Foreign Payment Restrictions

### 15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions

The IT Act does not restrict any outbound payments per se relating to uncontrolled transactions, however, the said payment should not be prohibited by law and should adhere to the relevant provisions in other statutes like the Foreign Exchange Management Act, 1999 (FEMA) and the rules and regulations thereunder.

### 15.2 Restrictions on Outbound Payments Relating to Controlled Transactions

Any outbound payment to related parties needs to adhere to the relevant transfer pricing provisions including the determination of ALP. Furthermore, such payments should not be prohibited by law and should adhere to the relevant provisions in other statutes like FEMA and the rules and regulations thereunder.

### 15.3 Effects of Other Countries' Legal Restrictions

A taxpayer and the Tax Authorities are bound to act/work within the four corners of the IT Act and the rules and regulations framed thereunder. Thus, as such, there is no compulsion or necessity to comply with the laws of other jurisdictions. Having said that, an illustrative case where the effect of legal restrictions in other countries may have a bearing on taxation in India, is a scenario where the provisions of the DTAA allow the benefit of availing foreign tax credit subject to satisfaction of certain preconditions, then, unless that condition is satisfied, the benefit may not be availed/granted to the taxpayer even in India.

## 16. Transparency and Confidentiality

### 16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes

The Indian government regularly issues press releases to provide statistical updates and details of any landmark developments (such as the signing of Bilateral APAs, the signing of APAs for new or complex transactions, the number of APAs signed in a FY, and updates on any extensive audits/search and seizure operations without sharing any confidential details).

As per data available at the time of writing, during FY 2023–24, India entered into 86 Unilateral APAs which had 224 covered international transactions, and 39 Bilateral APAs entered into had 181 covered international transactions. Unilateral APAs involve AEs spread across 74 countries, with the majority being in the United States, the United Kingdom, Singapore, Australia, and Germany. In the case of BAPA, the USA is the frontrunner. Other treaty partners include the UK, Japan, Singapore, Germany, and France.

### 16.2 Use of "Secret Comparables"

The Indian transfer pricing regime does not allow the tax authority to use secret comparables. However, having said that, Section 133 of the IT Act grants tax authorities/TPOs the power to seek information from any person in relation to such points or matters that may help them in computing the arm's length price. Tax Authorities often use these powers to access non-public financial or other key information in order to determine and benchmark the international transaction.

## CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Rob.Thomson@chambers.com