

F.No. 500/9/2015-APA-II
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
Foreign Tax and Tax Research Division-I
APA-II Section

New Delhi, dated 16th October, 2015

Subject: Revised and Updated Guidance for Implementation of Transfer Pricing Provisions - Regarding

The provisions relating to transfer pricing are contained in Sections 92 to 92F of the Income-tax Act (hereinafter referred to as 'the Act'). These provisions came into force w.e.f. Assessment Year 2002-2003 and have seen a number of amendments over the years, including the insertion of Safe Harbour and Advance Pricing Agreement provisions and the extension of the applicability of transfer pricing provisions to Specified Domestic Transactions.

2. In terms of the provisions, any income arising from an international transaction or specified domestic transaction between two or more associated enterprises shall be computed having regard to the Arm's Length Price. Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers and the Assessing Officers to operationalise the transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 is being replaced with this Instruction to provide updated and adequate guidance on the transfer pricing provisions pertaining to international transactions.

3. **Reference to Transfer Pricing Officer (TPO)**

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction is contained in sub-section (3) of Section 92C of the Act. However, Section 92CA of the Act, *inter-alia*, provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he

may refer the computation of ALP in relation to an international transaction to the Transfer Pricing Officer (TPO). Sub-section (3) of Section 92CA provides that the TPO, after taking into account the material available with him shall, by an order in writing, determine the ALP in accordance with sub-section (3) of Section 92C of the Act. Sub-section (4) of Section 92CA provides that on receipt of the order of the TPO, the AO shall proceed to compute the total income of the taxpayer in conformity with the ALP determined by the TPO. Thus, while the determination of ALP, wherever reference is made to him, is required to be done by the TPO under sub-section (3) of Section 92CA read with sub-section (3) of Section 92C, the computation of total income in conformity with the ALP so determined by the TPO is required to be done by the AO under sub-section (4) of Section 92C read with sub-section (4) of Section 92CA of the Act.

3.2 In order to make a reference to the TPO, the AO has to first satisfy himself that the taxpayer has entered into an international transaction with an associated enterprise. One of the sources from which the factual information regarding international transaction can be gathered is Form No. 3CEB filed by the taxpayer, which is in the nature of an accountant's report containing basic details of an international transaction entered into by the taxpayer during the year and the associated enterprise with which such transaction is entered into, the nature of documents maintained and the method followed. Thus, the primary details regarding such international transactions would normally be available in the accountant's report. The AO can arrive at a prima facie belief on the basis of these details whether a reference to the TPO is necessary. No detailed enquiries are needed at this stage and the AO should not embark upon scrutinising the correctness or otherwise of the price of the international transaction at this stage. However, in the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction before he proceeds to determine the ALP under sub-section (3) of Section 92C of the Act or to refer the matter to the TPO to determine the ALP under sub-section (1) of Section 92CA of the Act:

- a) where the taxpayer has not filed the Accountant's report under Section 92E of the Act but international transactions undertaken by it come to the notice of the AO;
- b) where the taxpayer has not declared one or more international transaction in the Accountant's report filed under Section 92E of the

Act and the said transaction or transactions come to the notice of the AO; and

- c) where the taxpayer has declared the international transaction or transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transaction or transactions are not international transactions or do not impact the income of the taxpayer.

In all the above situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise.

3.3 The exercise of finding out whether any income arises and/or is affected or potentially arises and/or is potentially affected by the determination of the ALP of the international transaction would certainly be a factor, in addition to other factors, in determining whether or not it is necessary or expedient to refer the matter to the TPO. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act, then the prima-facie view of the AO would be sufficient before referring the international transaction to the TPO for determining the ALP. However, where the applicability of Chapter X [Sections 92 to 92F] of the Act to the facts of the taxpayer's case is objected to, the assessee's objection should be considered and specifically dealt with so as to make sufficient compliance with the principles of natural justice.

3.4 Before making a reference to the TPO, the AO has to seek the approval of the Principal Commissioner or Commissioner as provided in the Act. The provisions of Section 92CA of the Act, *inter-alia*, refer to the international transaction. Hence, all international transactions, in relation to which a reference to the TPO is considered necessary, have to be explicitly mentioned in the letter through which the reference is being made.

3.5 Since transfer pricing cases are now being selected for scrutiny on the basis of risk parameters, there is no requirement of selecting a transfer pricing case for scrutiny on the basis of the value of the international transaction. Consequently, there would be no requirement of referring an international transaction to the TPO for determination of its ALP merely because the value of the international transaction is above a particular limit. In particular, where a case has been selected for scrutiny only on non-TP issues and the case also involves international transactions with AEs, the case shall not be referred to the TPO irrespective of the value of the

international transaction or aggregate value of all international transactions. The only exception to this would be a case selected for scrutiny on non-TP parameters where the AO comes to know that the taxpayer has entered into international transaction or transactions but the taxpayer has either not filed the Accountant's report under Section 92E or has not disclosed the said international transaction or transactions in the Accountant's report filed. In such exceptional situations, the AO may refer the matter to the TPO after providing an opportunity of being heard to the taxpayer.

3.6 Since the case will be selected for scrutiny before making the reference to the TPO, the AO may proceed to examine other aspects of the case during the pendency of assessment proceedings but must wait for the report/order of the TPO on the value of international transactions before making final assessment.

4. **Role of Transfer Pricing Officer**

4.1 The role of the TPO begins after a reference is received from the AO. In terms of Section 92CA of the Act, this role is limited to the determination of the ALP in relation to international transaction(s) referred to him by the AO. However, if any other international transaction comes to the notice of the TPO during the course of the proceedings before him, then he is empowered to determine the ALP of such other international transactions also by virtue of sub-sections (2A) and (2B) of Section 92CA of the Act. The transfer price has to be determined by the TPO in terms of Section 92C of the Act. The price has to be determined by using any one of the methods stipulated in sub-section (1) of Section 92C and by applying the most appropriate method referred to in sub-section (2) thereof. There may be occasions where application of the most appropriate method provides results which are different but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in rules contained in Rule 10C. The TPO, after taking into account all relevant facts and data available to him, shall determine the ALP and pass a speaking order. The TPO, being an Additional/Joint CIT, shall obtain the approval of the jurisdictional CIT (Transfer Pricing) before passing the order. On the other hand, the TPO, being a Deputy/Assistant CIT, shall obtain the approval of the jurisdictional Additional/Joint CIT before passing the order. The jurisdictional CIT (TP)

should assign a limited number of important and complex cases, not exceeding 50, to the Additional/Joint CsIT (TPOs) working in the same jurisdiction. For the selection of such important and complex cases by the CsIT (TP), the concerned CCsIT (International Taxation) shall frame appropriate guidelines.

4.2 The order passed by the TPO should contain details of the data used, reasons for arriving at a certain price and the applicability of methods. It may be emphasised that the application of method including the application of the most appropriate method, the data used, factors governing the applicability of respective methods, computation of price under a given method will all be subjected to judicial scrutiny. It is, therefore, necessary that the order of the TPO contains adequate reasons on all these counts. Copies of the documents or the relevant data used in arriving at the arm's length price should be made available to the AO for his records and use at subsequent stages of appellate or penal proceedings.

4.3 In addition to the above, the TPO is required to carry out the Compliance Audit of the Advance Pricing Agreements (APAs) entered into by the Board and the taxpayers in accordance with Rule 10 P of the Income-tax Rules.

4.4 The TPO is also required to play an important role in respect of Safe Harbour provisions. Whenever a reference is made to the TPO under sub-rule (4) or sub-rule (10) of Rule 10 TE of the Income-tax Rules, the TPO has to carefully examine all the facts and circumstances of the taxpayer's exercise of an option for Safe Harbour and pass an order in writing as mandated in sub-rule (6) or sub-rule (11) of the said Rule, respectively.

5. **Role of the AO after Determination of ALP**

Under sub-section (4) of Section 92C of the Act, the AO has to compute the total income of the assessee having regard to the ALP determined by him under sub-section (3) of the same Section. Where the determination of ALP is done by the TPO under sub-section (3) of Section 92CA of the Act, the AO has to compute the total income of the assessee under sub-section (4) of Section 92C (read with sub-section (4) of Section 92CA) in conformity with the ALP so determined by the TPO.

6. **Maintenance of Data Base**

It is to be ensured by the CIT (Transfer Pricing) that the references received from the AOs by the TPOs in his jurisdiction are dealt with expeditiously and accurate record of all events connected with the whole process of determination of ALP is maintained. This record is to be maintained by each TPO in the format enclosed as Annexure-I to this Instruction. This format will serve as an important database for future action and also help in bringing about uniformity in the determination of the ALP in identical or substantially identical cases. The CsIT (TP) must ensure that the separate data maintained by all TPOs under their jurisdiction are consolidated into one report for the entire charge after the completion of each transfer pricing audit cycle.

7. **Applicability**

The above guidance is applicable only to transfer pricing provisions in respect of international transactions. Similar guidance in respect of transfer pricing provisions pertaining to specified domestic transactions are under consideration of the CBDT. Till such time the guidance pertaining to specified domestic transactions is not issued, paragraph 3.5 of this Instruction shall apply to the effect that where a case has been selected for scrutiny on non-TP parameters and the case also involves specified domestic transactions with AEs, the case shall not be referred to the TPO irrespective of the value of the specified domestic transaction or aggregate value of all specified domestic transactions. The only exception to this would be a case selected for scrutiny on non-TP parameters where the AO comes to know that the taxpayer has entered into specified domestic transaction or transactions but the taxpayer has either not filed the Accountant's report under Section 92E of the Act or has not disclosed the said specified domestic transaction or transactions in the Accountant's report filed. In such exceptional situations, the AO may refer the matter to the TPO after providing an opportunity of being heard to the taxpayer.

8. This Instruction issues under Section 119 of the Act and supercedes Instruction No. 3 of 2003 with immediate effect.



[Sobhan Kar]

Director (APA), Government of India

16.10.15

To,

- (a) Chairperson, Members and all other Officers of the Central Board of Direct Taxes.
- (b) Pr. CCsIT/Pr. DsGIT/CCsIT/DsGIT with a request to circulate among all Officers in their Region/Charge.
- (c) ITCC Section of CBDT (3 copies).
- ✓(d) Database Cell for uploading on the IRS Officers website.


12.10.15

[Sobhan Kar]

Director (APA), Government of India

