

Recent trends in Transfer pricing

January 2020



Agenda

1

Blast from the past – Key decisions, clarifications & proposals

2

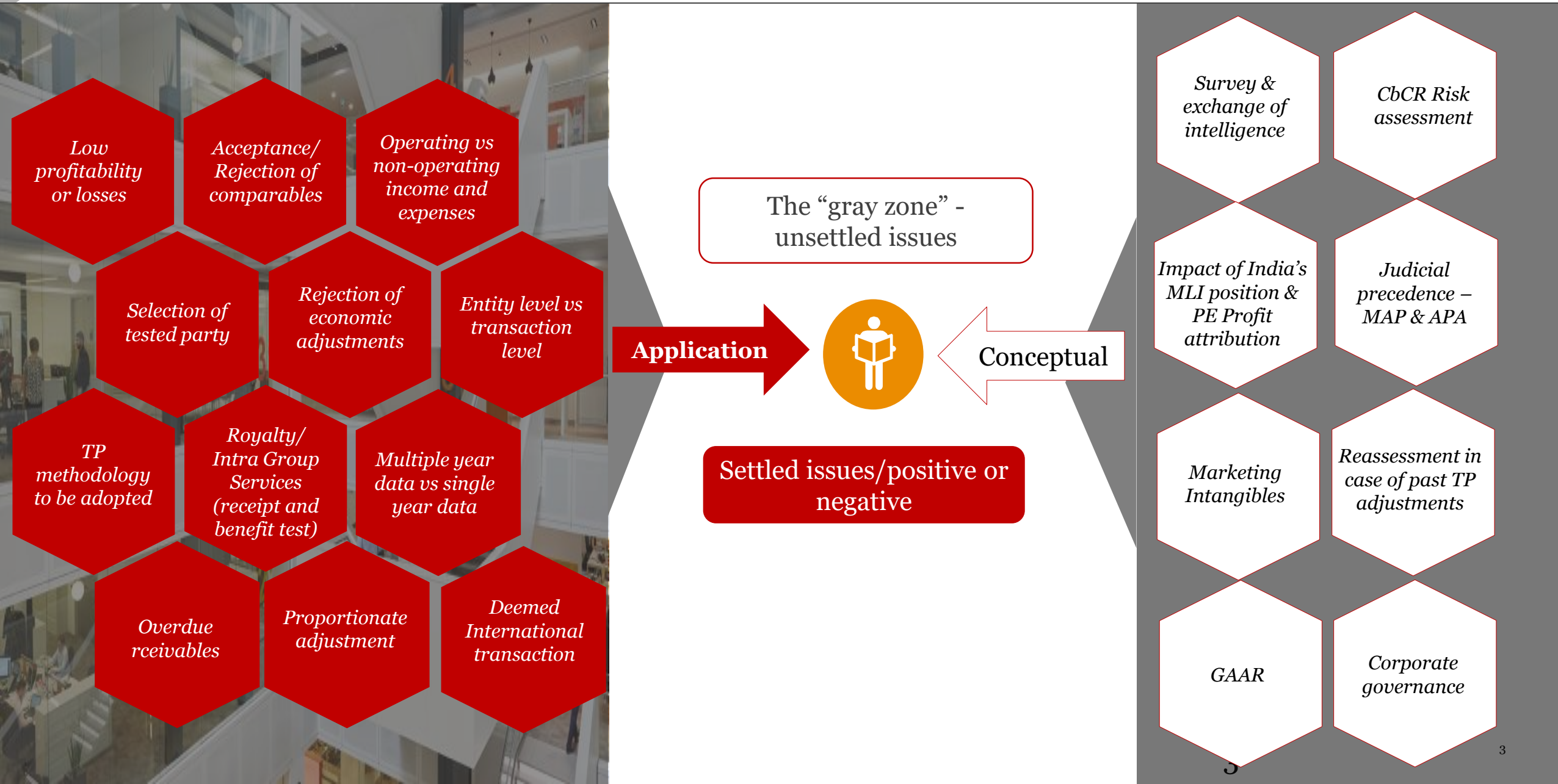
Emerging focus areas - Potential impact to MNEs

3

Key watch-out areas



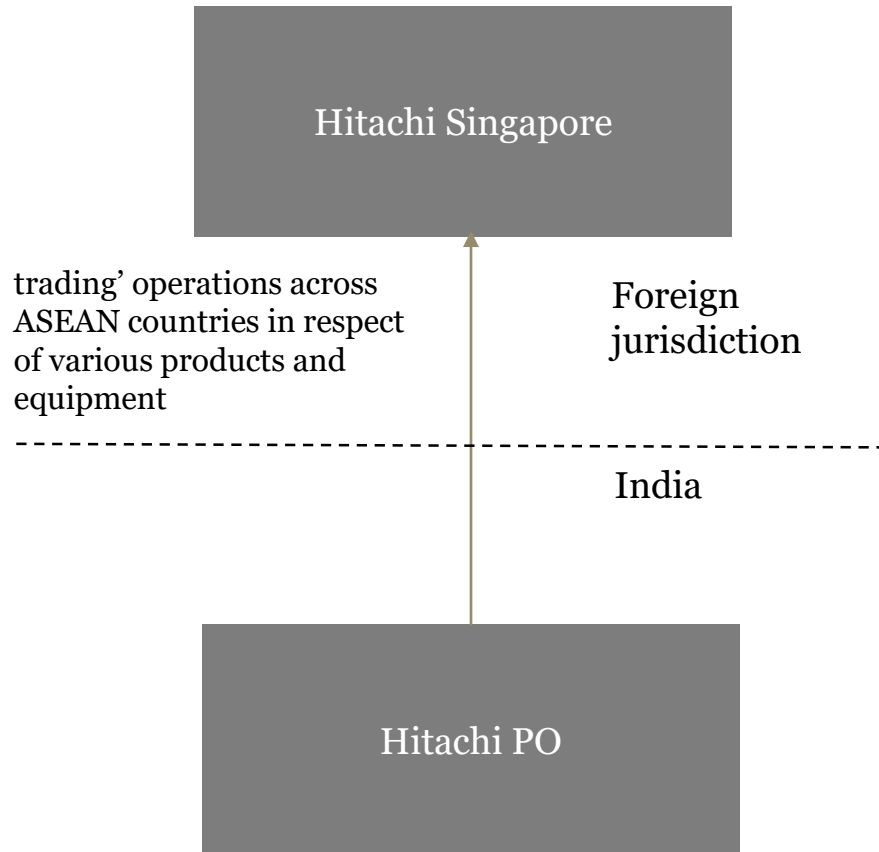
Context setting – A paradigm shift in focus!!





I Recent decisions in TP – The year gone by!

ITAT : Hitachi Singapore's LO constitutes PE in India; Directs profit-attribution under TNMM



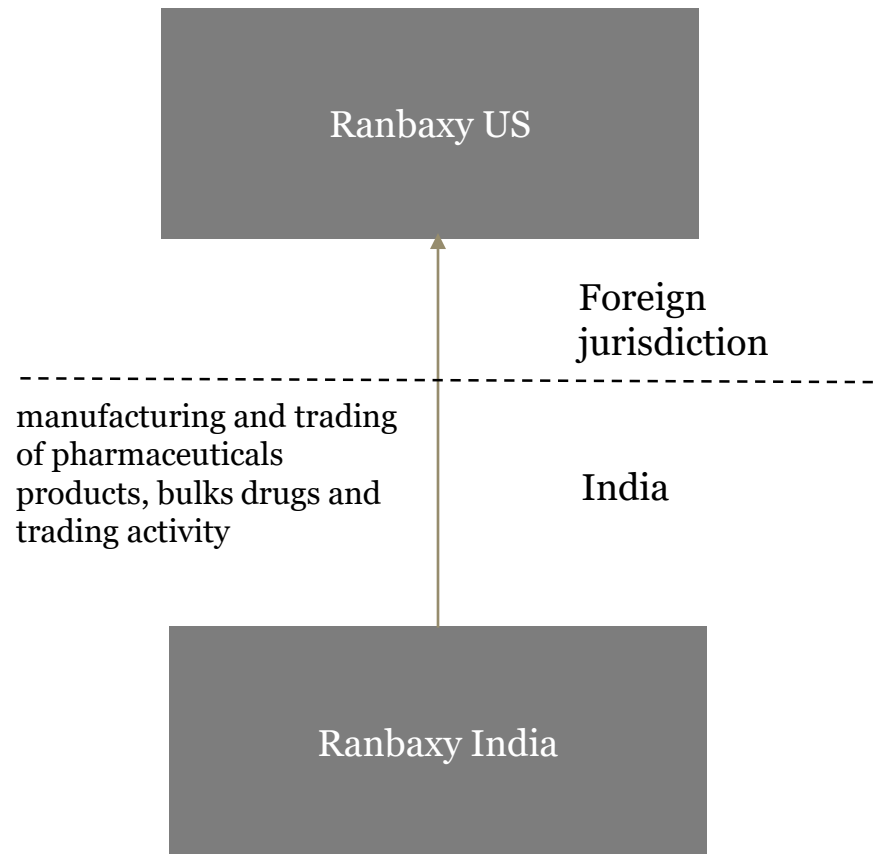
- ITAT [in second round of litigation] rules that Liaison Office ('LO') of Hitachi High Technologies', incorporated in Singapore constitutes a PE in India
- Rejects assessee's stand that activities carried by LO in India were preparatory / auxiliary in nature and hence fell under the Exclusionary clause of Article 5(7)(e) of the India-Singapore DTAA
- However, ITAT sets aside PE profit attribution computation adopted by AO
 - Accepts assessee's stand that "the operating margins resulting from attribution made by the Revenue are in the range of 163% to 2357%, which is not only excessive but absurd"
- Directs AO to re-compute the attribution of profit to LO [PE] by applying TNMM as most appropriate method

HC: Upholds PE-constitution for GE Group entities, affirms 26% profit-attribution for 'marketing' activity

Key observations of the HC Ruling

- During a survey conducted at the liaison office (LO) premises in India of GE Inc, it was observed that expatriates were deputed in India to undertake the marketing activities/sale functions of the overall GE group
- The tax officer also held that “GE India” consisting of expatriate employees of the GE group entities and the employees of GE India Industrial P Ltd (GEIPL) constituted the taxpayer’s dependent agency PE in India
- The HC opined that entering into a contract with stakeholders involved a complex matrix of technical specifications, commercial terms, financial terms and other policies of GE
 - At one end of the spectrum of their activities, was information gathering and analysis (which helped develop business and commercial opportunities), whereas, at the other end, were intensive negotiations with respect to change of technical parameters of specific goods and products, which had to be made to suit the customers
 - The Court noted that the above process was time consuming and involved a series of consultations between the client, its technical and financial experts and also its headquarters
 - Upon perusal of e-mail communications and chain mails with clients, the Court noted that they appeared to show important roles of GE India employees in the negotiating process.
- **The Court held that the taxpayers’ employees were not merely liaisoning with the clients and the headquarters office but the core activity of GE India involved discussing the contractual terms and the associated consideration payable, the warranty and other commercial terms.**
- **Attribution of Profits:** The Court upheld the Tribunal’s two-stage analysis for profit attribution purpose with regard to (i) estimating income at 10% of the sales made in India and (ii) attributing 26% of such profit to the marketing activity carried out by the PE in India.

ITAT : Treats Ranbaxy's foreign-AE as tested party; Rejects plea to constitute Special Bench



- ITAT accepts selection of foreign AE as tested party for assessee for AYs 2009-10 & 2010-11
- ITAT follows co-ordinate bench ruling in **assessee's own case for AY 2008-09 which applied subsequent year's (AY 2014-15) signed APA to accept selection of foreign AEs as tested party under TNMM considering it was the least complex entity**
 - Draws support from Hon'ble Madras HC ruling in L.G. Ramamurthi wherein it was held that to take a different opinion from earlier bench, Tribunal should place the matter before ITAT President to have the case referred to a Full Bench of Tribunal consisting of three or more members
 - Also follows SC ruling in Ambika Parsad Mishra upholding similar view

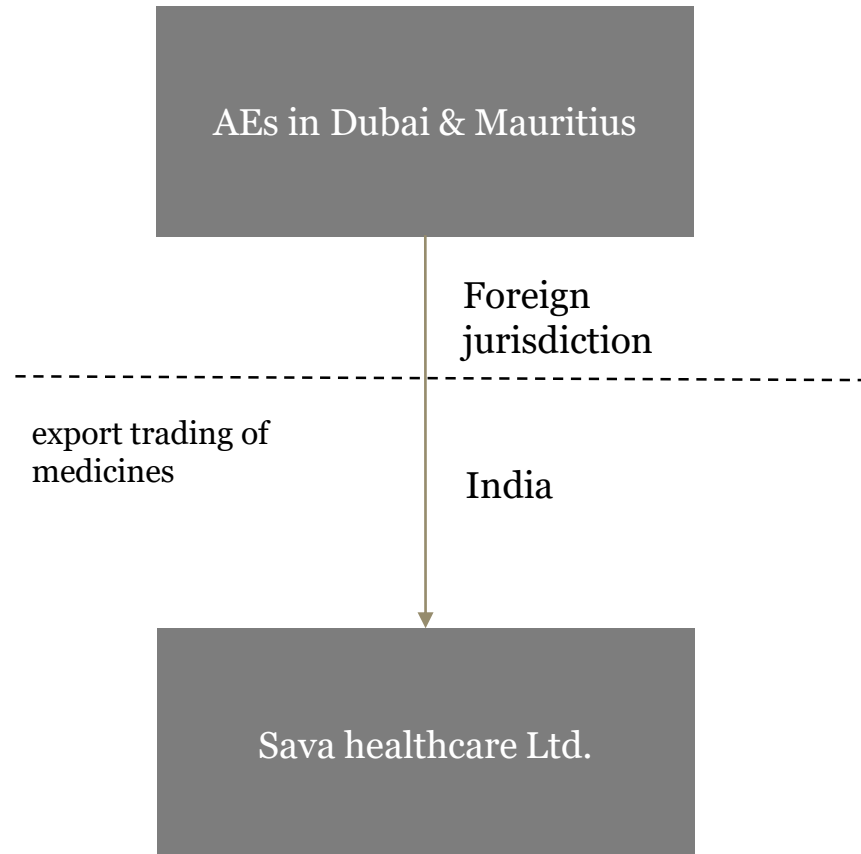
ITAT : Deletes TP-addition on performance guarantee considering assessee's profit from arrangement, if invoked

Key observations of the ITAT Ruling

- ITAT deletes TP-addition on account of various guarantees (performance guarantee, performance bank guarantee and advance payment guarantee) provided by assessee on behalf of its AE (wholly owned subsidiary)
- Notes that assessee carried no risk in issuing the performance guarantee on behalf of its AE for indemnification of losses on AE's failure, if any, as assessee entered into an agreement with AE that in the event of failure of performance and the guarantee getting invoked, the contract awarded to the AE gets assigned in favour of the assessee, which would result in huge profits to the assessee
- ITAT deletes the TP-adjustment and concludes that **assessee was fully justified in not charging any commission from its AE**

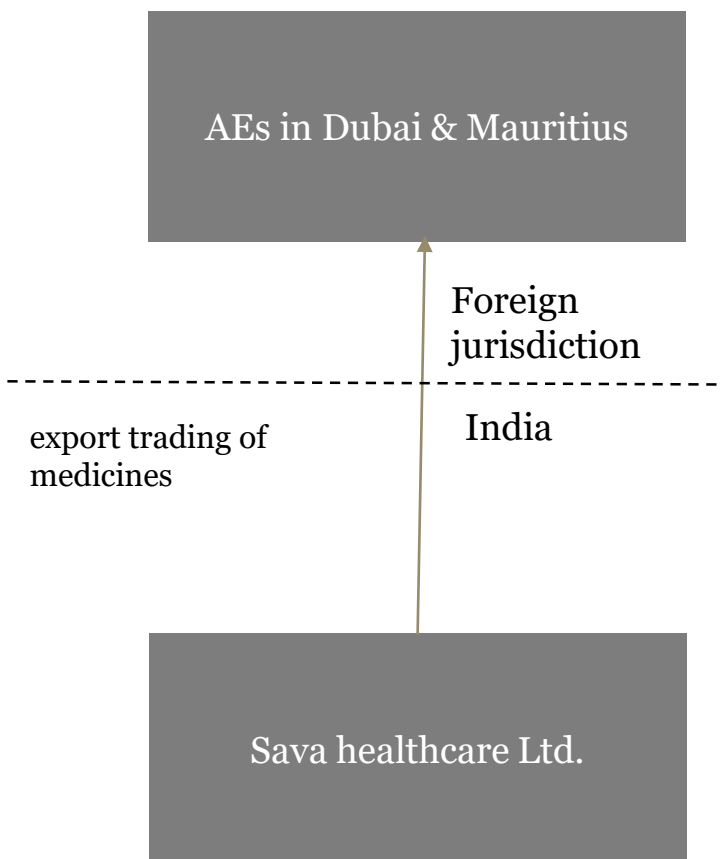


ITAT : TPO lacks jurisdiction to determine assessee's POEM; Quashes TP proceedings



- Referring to the functional profiles of group entities (in Mauritius, Dubai, Singapore etc.), TPO had noted that:
 - all the brain and functions of the group are situated in India and that AEs in Dubai and Mauritius were not doing any functions other than receiving and sending money,
 - goods were dispatched to Singapore godown, but the bills were made in the name of AEs in Mauritius and Dubai
 - the entire global purchases were routed through AEs at Mauritius and Dubai, who had earned huge income, which was subsequently brought back to India, by way of dividend and salary to the group promoter;
- TPO concluded that the control and management of the affairs of assessee group was wholly in India
- TNMM based benchmarking rejected
 - Profit Split Method [PSM], whereby 70% of world profits were added in the hands of assessee;

ITAT : TPO lacks jurisdiction to determine assessee's POEM; Quashes TP proceedings (Contd.)



- ITAT agreed to assessee's view that "no international transaction arises on the premise of benchmarking transaction of control and management of AE parties from India – issue not dealt with by TPO & DRP
 - entire TP proceedings were in violation of Sec. 92CA(1) and thus illegal;
- ITAT finds that "the issue of deciding the control and management of affairs of assessee is a 'status of residence' to be decided in the hands of assessee"
 - such decision of 'status of residence' is not in the realm of determining ALP of international transactions" → It is the AO who has to come to a finding
- ITAT accepts assessee's stand that TPO had erred in benchmarking a different alleged transaction of control and management from India
- ITAT accepts assessee's challenge to modality adopted by DRP while applying PSM method, observes that Revenue failed to consider any external comparables on its own

ITAT : Deletes TP-addition on performance guarantee considering assessee's profit from arrangement, if invoked

Key observations of the ITAT Ruling

- ITAT deletes TP-adjustment on account of performance bank guarantee given by assessee to third party on behalf of its AE
 - accepts assessee's argument that 0.93% guarantee commission charged by Bank of India (BOI) to assessee could be considered as the most direct internal uncontrolled comparable transaction to benchmark the rate of guarantee commission
 - Rejects TPO's observation that assessee should have charged a higher commission as AE's creditworthiness being a newly floated company was much lower
 - Rejects selection of comparable in the form of rate of commission charged by a banker to third parties as such rate would vary from one customer to another customer based on their creditworthiness
 - Deletes TP-adjustment on account of guarantee commission paid by assessee to BOI on account of advance payment guarantee given by assessee to third party on behalf of its AE on the same parity of reasons as given for deletion of performance bank guarantee



ITAT : Cash-PLI not restrictive to capital intensive industry, accepts application for software developer

Key observations of the ITAT Ruling

- ITAT approves cash-PLI application for non-capital intensive industry, accepts assessee's AE/non-AE segment reporting and cost allocation and rules on comparables for assessee engaged in provision of software development services for AY 2010-11
- Rejects Revenue's claim that net profit is appropriate PLI for assessee and cash profit margin is appropriate only for a company which operates in capital intensive industry, accepts that cash profit margin ratio under TNMM is an appropriate PLI which places the tested party and comparable companies on equal footing
- Clarifies that "The cash profit margin ratio is also applicable to other companies, as profit level indicator (PLI) and it is not only restricted to capital intensive industries; that is, it is equally applicable to other industries also";
- ITAT accepts assessee's segment reporting though it did not form part of the audited accounts, relies on co-ordinate bench in assessee's case for AY 2011-12 wherein it was observed that assessee being a SMSE, the AS-17 was not mandatory and the management prepared the segmental details exclusively for the purpose of application of TNMM for computing PLI
- Rejects Revenue's claim of improper cost allocation, accepts assessee's area utilised as an appropriate allocation key for dividing the electricity charges and rent and manpower for all the remaining allocable expenses



ITAT: Applies OECD's 'portfolio strategy' approach, approves taxpayer's aggregation of inter-dependent divisions

Key observations of the ITAT Ruling

- ITAT accepts aggregation approach for benchmarking international transactions undertaken by assessee (engaged in developing & selling packaging material, importing & reselling straws and manufacturing processing equipment) for AY 2009-10
- ITAT notes that TPO was of the view that revenue from straws division and processing equipment division should have been benchmarked separately
 - But DRP had upheld assessee's aggregation approach considering them as closely linked to sale of packaging material
 - Assessee had sold straws along with packaging material at reduced price to keep the cost of total packaging low in order to create a demand for the consumables manufactured by it
- ITAT opines that this approach (portfolio strategy) is recognized in para 3.10 of OECD Transfer Pricing Guidelines, 2010 and **"Once the business strategy adopted by the assessee is an accepted manner of conducting its business, then the same should be accepted and should not be segregated"**
- Draws support from definition of 'transaction' as prescribed in Rule 10A(d) of the Rules, US TP regulations, ICAI's Guidance Note on Sec 92E report and OECD TP guidelines wherein approach of aggregating closely linked transactions has been approved





II Key CBDT clarifications

Key Clarifications -1/2

Secondary adjustment

- Amends Rule 10CB relating to computation of interest income pursuant to secondary adjustments

In case of APA, [as against return filing due date u/s 139(1) mentioned earlier], specifies that time limit for repatriation shall be:

- a) from the date of filing of return u/s 139(1), if the APA has been entered into on/ before the due date of filing of return for the relevant previous year,
- b) from the end of the month in which the APA has been entered into if the said agreement has been entered into after the due date of filing of return for the relevant previous year

In case of resolution under MAP, specifies that the time limit shall be from the date of giving effect by the AO under Rule 44H to the resolution arrived under MAP [as against return filing due date u/s 139(1) mentioned earlier]

Inserts new sub-rule (3) to provide the period from which interest shall be chargeable on excess money or part thereof which is not repatriated

Exchange of Information

- CBDT cautions Revenue officers against sharing of information received under EOI process of tax treaties for non-tax purposes “without the express consent of the Competent Authority of the sending jurisdiction”; Stresses on maintaining ‘confidentiality’ of the information obtained from foreign jurisdiction under EOI.

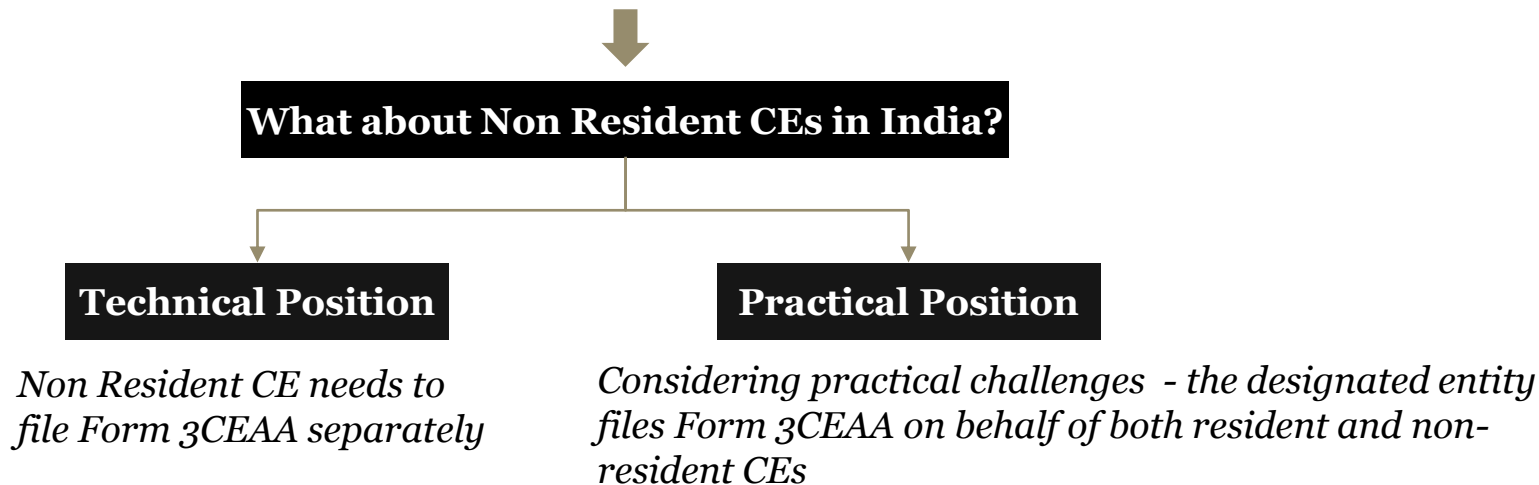
Key Clarifications -2/2

Master file – Filing requirement – Amendment w.e.f April 1, 2020

Who are required to file Form 3CEAA?

Part A → **Every CE** (resident or non-resident) → No Ambiguity; Irrespective of threshold being met; Having international transactions; should be a CE of the international group

Part B → CE or Designated Entity, in case of multiple CEs resident in India – subject to crossing the threshold



**Provided there are more than one CE resident in India*



III Trends in MAP and APA and impact in domestic litigation

CBDT's third APA Annual Report (2018-19)

Total APA tally to 271 (240 Unilateral and 31 Bilateral)

- Cumulative tax certainty of 1779 years (including 477 years covered in rollback period) → even if 50% of these cases would have faced TP adjustments, the APA Programme has already ended about 890 litigations that would have otherwise clogged the ITATs and courts
- 52 APAs (41 Unilateral and 11 Bilateral) were signed during 2018-19 – 30% dip
- Average time to conclude 41 Unilateral APAs in 2018-19 was 45.22 months
- Average time to conclude 41 Unilateral APAs in 2018-19 was 45.22 months

23% of the unilateral APAs have been concluded within 2 years

Almost 80% of the total Bilateral APA applications are with only 4 countries – USA, UK, Japan and Switzerland and states that highest number of Bilateral APAs (11) were signed in 2018-19

Impact of MAP resolution on domestic litigation – 9 interesting facts!



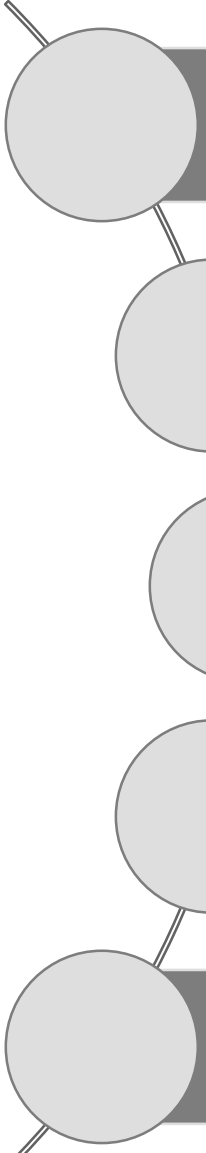
Out of 86 rulings, 5 rulings have been delivered by High Court (HC) and remaining 81 rulings by Tribunals

- Out of 5 HC rulings, 2 rulings were delivered by Karnataka HC and 1 ruling each by Delhi, Bombay and Punjab & Haryana HCs.
- Out of 81 Tribunal rulings, majority rulings have been delivered by Bangalore ITAT (48 rulings, 56%) followed by Delhi ITAT (18 rulings, 21%) and Mumbai ITAT (6 rulings, 7%)

The 5 major countries involved in MAP-resolution are USA, UK, Japan, Australia and Denmark

5 key industries covered in the rulings considering MAP resolution pertain to ITeS (24 rulings, 28%), IT (17 rulings, 20%), IT & ITeS (11 rulings, 13%), Manufacture of machinery/ equipment (13 rulings, 15%) and Automobile (8 rulings, 9%)

Impact of MAP resolution on domestic litigation – 9 interesting facts!



5 key international transactions covered in the rulings considering MAP resolution pertain to Provision of ITeS/BPO services (18 rulings, 21%), Provision of software development/ IT services (12 rulings, 14%) Provision of IT & ITeS (6 rulings, 7%), Management service charges (3 rulings, 4%) and Royalty payment (5 rulings, 6%)

Out of 86 rulings, 43 rulings (50%) have considered MAP-resolution to decide contested TP-issues on merits, 23 rulings (27%) have dismissed appeals as infructuous and in 20 rulings (23%) Assessee/Revenue were permitted to withdraw appeals, since TP-issues were resolved under MAP

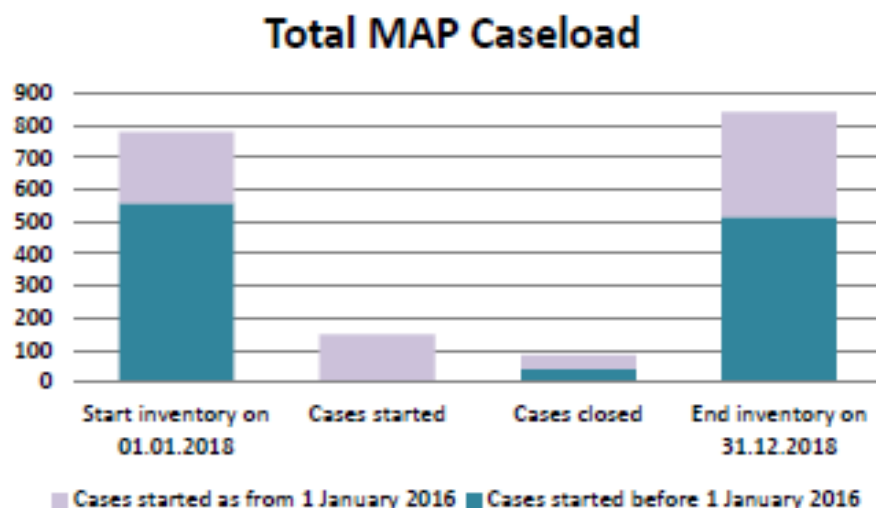
Out of the 86 rulings, 5 rulings have considered MAP resolution to decide penalty (1 ruling), miscellaneous petition (2 rulings) and stay of demand issues (2 rulings).

In IT/ITeS space, 15 rulings have permitted application of margin approved under MAP-resolution with a particular country to AE-transactions with non-MAP countries, 1 ruling has not permitted the same and 5 rulings have remitted matter back with direction to apply MAP agreed margins to AE-transactions with non-MAP countries only if FAR is similar

In manufacturing space, 1 ruling has permitted application of MAP-agreed margins to transactions with non-MAP countries while 1 ruling has not permitted the same

India MAP Statistics – An Overview

<http://www.oecd.org/tax/dispute/2018-map-statistics-india.pdf>



Cases started before 1 January 2016	2018 Start inventory	Cases started	Cases closed	2018 End inventory
Transfer pricing cases	460	0	42	418
Other cases	97	0	0	97

Cases started as from 1 January 2016	2018 Start inventory	Cases started	Cases closed	2018 End inventory
Transfer pricing cases	199	133	40	292
Other cases	22	15	3	34

Average time needed to close MAP cases

Cases started before 1 January 2016	Average time
Transfer pricing cases	60.53
Other cases	n.a.

Note: the average time taken to close MAP cases that started before 1 January 2016 was computed by applying the following rules:
 (i) start date: for MAP cases invoked by the Competent Authority based on the request of the taxpayers, the date of receipt of MAP request from the taxpayer; and for MAP cases which are invoked by the other Competent Authority, the date of receipt of MAP invocation letter from the other Competent Authority in the office of the Competent Authority; and
 (ii) end date: the date on which the letter was sent to the Indian tax authorities in the field to give effect to the MAP resolution arrived at between two Competent Authorities.

Cases started as from 1 January 2016	Start to End	Receipt to Start	Start to Milestone 1	Milestone 1 to End
Transfer pricing cases	15.06	0.97	7.89	6.74
Other cases	4.99	0.21	n.a.	n.a.

Note: the average times to close MAP cases that started as from 1 January 2016 were computed according to the MAP statistics reporting framework available at <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-reporting-framework.pdf>



IV India tax amendment – PE definition

India tax amendment - Section 9 (1) (i) – Explanation 2 – Amendment Comparison

For the removal of doubts, it is hereby declared that “business connection” shall include any business activity carried out through a person who, acting on behalf of non-resident

-has and habitually exercises in India, **an authority to conclude contracts on behalf of NR**, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

-has no such authority, but habitually maintains in India a stock of goods or merchandise from which he ***regularly delivers*** goods or merchandise on behalf of the NR; or

-habitually secures orders in India, mainly or wholly for the NR or for that NR and other NRs controlling, controlled by, or subject to the same common control, as that NR.

- has and habitually exercises in India, an authority to conclude contracts on behalf of NR or ***habitually concludes contracts or habitually plays the principle role leading to conclusion of contracts by NR and the contracts are –***

(i) in the name of NR; or (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that NR or that NR has the right to use; or (iii) for the provision of services by the NR; or

Maintenance of stock of goods and securing orders in India remained intact

India tax amendment - Section 9 (1) (i) – Explanation 2 – Amendment Comparison

Multilateral Instrument – Article 12

Explanation 2 (a)

- has and habitually exercises in India, an authority to conclude contracts on behalf of NR or **habitually concludes contracts or habitually plays the principle role leading to conclusion of contracts by NR and the contracts are –**

(i) *in the name of NR; or (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that NR or that NR has the right to use; or (iii) for the provision of services by the NR; or*

Maintenance of stock of goods and securing orders in India remained intact

- Exemption for purchase activities are withdrawn
- Expanded the scope of authority to conclude contracts - India's reservations

Article 12 of MLI

*where a person is acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise and, in doing so, habitually concludes contracts, or **habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise**, and these contracts are:*

a) in the name of the enterprise; or

b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or

c) for the provision of services by that enterprise,

Sourcing Activity

OECD Model Commentary 2017

68. *The first part of subparagraph d) relates to the case where premises are used solely for the purpose of purchasing goods or merchandise for the enterprise. Since this exception only applies if that activity has a **preparatory or auxiliary character**, it will typically not apply in the case of a fixed place of business used for the purchase of goods or merchandise **where the overall activity of the enterprise consists in selling these goods and where purchasing is a core function in the business of the enterprise.***

RCO is a company resident of State R that is a large buyer of a particular agricultural product produced in State S, which RCO sells from State R to distributors situated in different countries. RCO maintains a purchasing office in State S. The employees who work at that office are experienced buyers who have special knowledge of this type of product and who visit producers in State S, determine the type/quality of the products according to international standards (which is a difficult process requiring special skills and knowledge) and enter into different types of contracts (spot or forward) for the acquisition of the products by RCO. In this example, although the only activity performed through the office is the purchasing of products for RCO, which is an activity covered by subparagraph d), paragraph 4 does not apply and the office therefore constitutes a permanent establishment because that purchasing function forms an essential and significant part of RCO's overall activity.

Authority to Conclude Contracts – Substance is the key

- **Klaus Vogel – Para 140 (3rd Edition)**

*“The questions whether such a person has authority to conclude contracts within the meaning of treaty law must be decided not only with reference to private law but must also taken into consideration the **actual behavior** of the contracting parties. An approach relying solely on aspects of private law (the law of contracts) would make it easily possible to prevent an agent from being deemed a PE (and therefore, to prevent the enterprise from being taxed by the state in question) even when he is engaged most intensively in the enterprise’s business; he would be allowed to negotiate contracts upto a point when they were finalized and read to be signed, but the final signature, to satisfy the properties, would be reserved to someone from the enterprise’s headquarters in the other contracting state. **Such a formal split-up of business responsibilities on the one hand and legal authority on the other hand, is considered by Strobl & Kellmann to constitute a case of “tax circumvention” where substance should prevail over form: a permanent establishment, should therefore, be deemed to exist irrespective of what the formal arrangement.***

- **UK HMRC Manual – INTM266160** – In the UK, under common law, we interpret any actions carried out by an agent as having been performed for the principal and binding the principal in the same way as through they had carried out those actions themselves. For example, a contract arranged by an agent in the UK to deliver goods owned by a foreign principal to a customer would be treated for UK tax purposes as through the foreign principal themselves had contracted in the UK for the delivery. This is the case, regardless of whether the contract is written in the name of the principal or in the name of the agent

OECD Model Convention – India’s reservations on “authority to conclude contract”

- ❑ a person, who is authorised to negotiate the essential elements of the contract (***not necessarily all the elements of the contract***), on behalf of a foreign resident, would be deemed to have authority to conclude contracts;
- ❑ the mere fact that a person has attended or participated in negotiations between the foreign enterprise and the Indian customer, would in certain circumstances be sufficient to conclude that the person has exercised his authority to conclude contracts on behalf of the foreign enterprise;
- ❑ a person acting exclusively or almost exclusively on behalf of a foreign resident would not be considered as an independent agent even if the foreign enterprise is not closely related or if the activity was for a short period of time; and
- ❑ even a distribution of goods in India by a low risk distributor would not be exempt from being treated as a DAPE, if the conditions otherwise exist.



V PE Profit Attribution - CBDT Draft Consultation Committee recommendations

Taxation of non-residents in India

- Taxation of a non-resident in India is governed by the Act or Tax Treaty, whichever is more beneficial
- Taxation of business profits earned by non-residents in India depends upon their taxable presence in India
- In India, taxable presence is determined as under:
 - Business connection as per section 9 of the Act
 - **Only such part of the income as is reasonably attributable to the operations carried out in India is deemed to accrue or arise in India**
 - PE as defined under Article 5 of the Tax Treaty
 - Income attributable to PE in India is taxable in India under Article 7



Profit attribution to PE – Treaty Vs Act

Article 7 of the Tax Treaty

Article 7 of Tax Treaty provides for profit attribution to the PE as if it were a distinct and separate entity engaged in the same or similar activities and dealing independently with the enterprise of which it is a PE

Rule 10 of the Rules

If actual amount of income accruing to any non-resident cannot be definitely ascertained, the amount of such income may be calculated by any of the following three methods:

1. **Presumptive method** - percentage of the turnover as the tax officer may consider to be reasonable
2. **Proportionate method** - on any amount which bears the same proportion to the total profits and gains of the business of such person as the receipts so accruing or arising bear to the total receipts of the business
3. **Discretionary method** - in such other manner as the tax officer may deem suitable

Authorised OECD Approach - disregarded

- AOA seeks to allocate taxing rights by analyzing functions performed (labour), assets used (capital), and risk assumed i.e. FAR analysis
- AOA attempts to determine the profit attributable to PE based on OECD TP Guidelines
- AOA recommends two-step approach for profit attribution:
 - Step 1 – A functional and factual analysis aligned with FAR analysis
 - Step 2 – A comparability analysis to determine appropriate arm's length return for PE's transactions
- AOA thus equates the process of TP for determining arm's length price as analogous to the arm's length principle
- However, 'arm's length principle' conceptually broader than 'arm's length price'



...Article 7 of OECD Model Convention - Pre and post 2010

Pre-2010	Post 2010
<p>Committee's views on OECD Commentary</p> <p>OECD recognized and acknowledged the following factors as reasonable for apportioning profits to PE:</p> <ul style="list-style-type: none">• Receipts (or sales revenue); or• Expenses; or• Working capital	<p>Committee's views on OECD Commentary</p> <p>OECD approximated the process of profit attribution with that of TP, leading to an illusion that both of them are one and the same</p> <p>It only considered contributions made by supply side factors while ignoring contributions made by the markets and demand side factors</p>
<p>India's reservation to OECD Commentary</p> <p>No country, including India had documented any observation, reservation or position in respect of the same</p>	<p>India's reservation</p> <p>India Tax Treaties do not contain the revised Article 7 which prescribes profit attribution by way of FAR analysis</p> <p>Indian Tax Treaties continue to use the previous version of Article 7 (pre-2010)</p>

Indian Tax Treaties are largely based on pre-2010 OECD and UN Model (which is based on pre-2010 OECD) and do not recognize AOA/FAR for profit attribution to PE

Global precedence on demand and supply apportionment...

US – To determine the attribution of profits among different US States, a formula has been prescribed (called Massachusetts Formula) as $\frac{1}{3}$ rd of sales, $\frac{1}{3}$ rd of payroll and $\frac{1}{3}$ rd of assets or property.

– None of the US States follow a pure supply approach that ignores sales completely for profit attribution

European Union – To determine the attribution of profits among EU, a proposal for CCCTB introduced in 2016 proposes allocation of taxes within EU on the formula of $\frac{1}{3}$ rd of sales, $\frac{1}{3}$ rd of assets, $\frac{1}{6}$ th of manpower and $\frac{1}{6}$ th of wages

Canada – For attribution of profits among different provinces, equal weight is given to revenue and payroll factors. There are industry specific formulas for insurance companies, railway, airline and shipping corporations

Switzerland – Three different methods can be used for profit attribution:

1. Direct method – Attribution as per separate accounting;
2. Indirect method – apportionment is similar to US practice (equal weight to factors);
3. Mixed / combined method – first allocate profit as per separate accounting for different business line and subsequently, those part profits are distributed within divisions using indirect method

Germany – Uses formulary apportionment

China – Uses deemed profit method and deemed profit rates for different categories of business. There are three deemed profit methods which can be applied for different types of businesses

Committee recommendations...

- Three possible approaches for profit attribution:
 - **Supply approach** – allocation exclusively to the jurisdiction where supply chain and activities are located - not adopted anywhere except post 2010 version of Article 7 of OECD
 - **Demand approach** – allocation exclusively to the market jurisdiction where sales takes place – in some countries such approach is favoured
 - **Mixed approach** – allocation partly to jurisdiction where the customers are located and partly where supply activities are undertaken – most commonly adopted in international practice
- Within the mixed approach, Committee found considerable merit in “three factor” method based on equal weight to **S**ales (represents demand), and **E**mployees (manpower and wages) and **A**ssets (represent supply)
 - SEA formula preferred over FAR analysis

Committee favours mixed approach for profit attribution through SEA formula

Committee recommendations... Uncertainty Amidst Certainty?

- **Profits derived from India is higher of the following**
 - Revenue from India X Global operational profit margin
 - 2% of revenue derived from India (i.e. where an enterprise has global losses, or global profit margin is less than 2%, Committee noted the need to protect India's revenue interests by prescribing a floor rate of 2%)
- Profits attributable to operations / PE in India is determined by apportioning the above profit derived by SEA formula
- In case SEP is triggered in India, for example, by the existence of users beyond prescribed threshold, Committee recommends that users should be assigned a weight of 10% (in case of low and medium user intensity) or 20% (in case of high user intensity)
 - Users to be taken as the fourth factor where SEP created in the SEA formula

Departure from global consensus... just the beginning of series of unilateral actions

...Committee recommendations...

SEA formula under fractional apportionment

Side	Demand	Supply		SEP	Total weightage	
Factors	(Sales)	(Employees)	(Assets)	(Users)		
		Manpower	Wages			
Non-SEP business	33.33%	16.67%	16.67%	33.33%	NA	100%
SEP business (High user intensity)	30%	12.5%	12.5%	25%	20%	100%
SEP business (Low/medium user intensity)	30%	15%	15%	30%	10%	100%

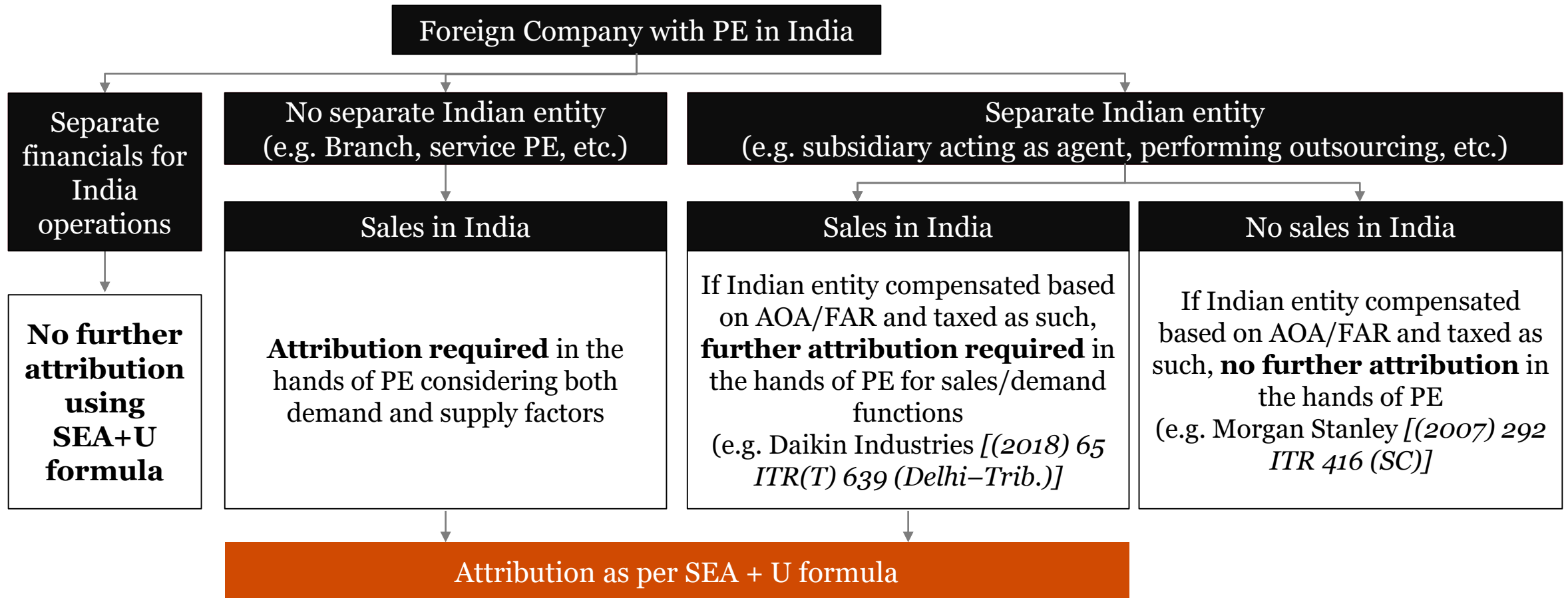
Refer Exhibit 1 for the detailed formula as recommended by Committee

...Committee recommendations...

Exemption from further attribution for lower sales/service receipts

- Where non-resident triggers business connection through activities of an AE in India:
 - No further profits will be attributed to the operations of the non-resident in India, if
 - the non-resident receives amount \leq INR 1 million, and
 - the AE is fully remunerated by an arm's length price
 - If either of above conditions not met, profits attributable to operations in India will be derived using “three factors” or “four factors” as may be applicable and deducting therefrom the profits that have already been subject to tax in the hands of AE

...Committee recommendations...

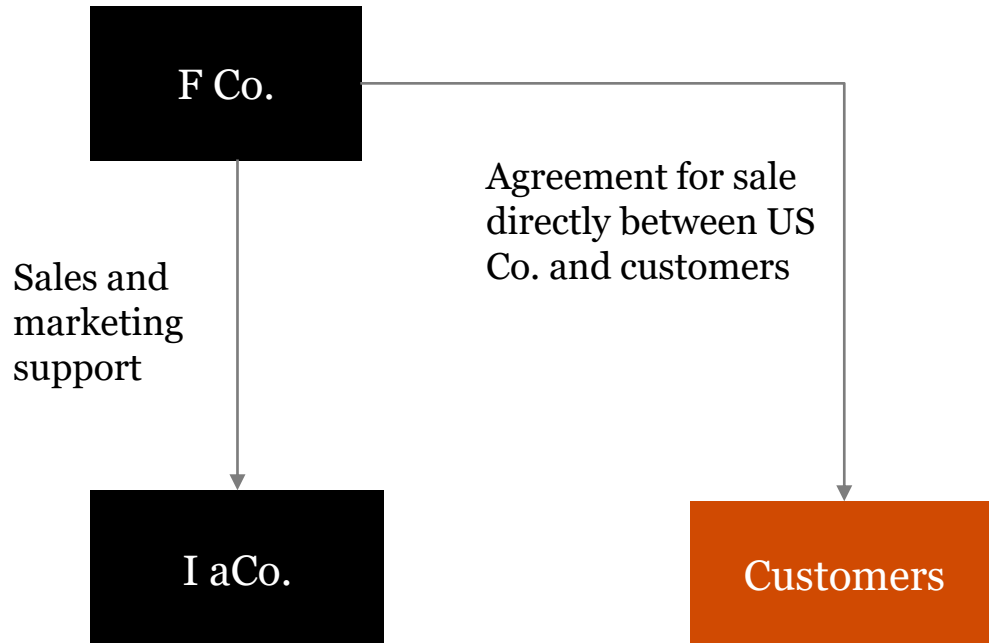




Open issues

- Date of entry into force – prospective or retrospective?
- Impact on pending assessments or disputes e.g. court cases, APAs and MAPs
- Implications on select Indian Tax Treaties like US, Netherlands, France where Agency PE definition imbibes ‘arms length conditions’
- Definition of key terms desired – Assets, Users, etc
- If Indian PE maintains separate books of account showing losses, such losses to be ignored?
- Profit margin to be computed at EBITDA level
- Challenge in producing global financials of a private group to determine global profit margin for Indian PE

Case study 1 – Agency PE



- I Co provides marketing and sales services to F Co, in relation to potential customers of F Co.
- I Co has a workforce of 30 employees
- I Co approaches potential customers, explains product features, discusses product price list, and negotiates and concluded contracts on behalf of F Co
- I Co is remunerated with a commission of 15% on sales of F Co in India

Case study 1 – Agency PE

FAR summary

Functions, Assets, Risks	HO	Sub Co	PE
Functions			
Demand estimation		X	X
Identifying customers		X	X
Local marketing strategy		X	X
Marketing & promotion		X	X
Customer selection		X	X
Negotiation & conclusion of contracts		X	X
Signing of sales contracts/ raising of invoices on customers	X		
Product ordering		X	X
Warehousing/ inventory management	X		
Delivery/ shipping	X		
Receivables management		X	X

Case study 1 – Agency PE

FAR summary

Functions, Assets, Risks	HO	Sub Co	PE	Remarks
Assets				
Inventory	X			Since inventory owned by HO
Receivables	X			Since receivables owned by HO
Warehouse	X			
Risks				
Inventory risk	X			Since inventory functions undertaken by HO
Credit risk	X		X	Since customer selection function undertaken by Sub Co (PE)
Product liability risk	X			
TP characterization		Service provider (Agent)	Distributor (with credit risk, but no inventory risk)	
Arm's length remuneration		15% commission	40% GP	Based on benchmarking analysis

Case study 1 – Agency PE

Profit attribution under AOA

PE P/L

Sales	100
<u>COGS (residual)</u>	<u>(60)</u>
GP*	40
SG&A (incurred by HO outside India specifically for India sales)	(5)
Agency commission paid to Sub Co**	(15)
Bad debts write off by HO	(5)
Inventory write off by HO	(3)
Indirect overheads incurred by HO and allocated to PE	(8)
Net profit as per P&L Account	<u>4</u>

PE tax computation

Net Profit as per P&L A/c	4
Add back: Allocation of indirect O/H	8
Less: General & Admin (incurred by HO outside India for the region - limited to 5% - S. 44C)	(5)
Taxable profit	<u>7</u>

Under the AOA, global profits do not directly determine the level of profits attributable to the PE. The profits attributable to the PE are determined commensurate with the PE's FAR profile.

* Based on benchmarking analysis (arm's length gross margin earned by distributors, adjusted downwards for lack of inventory risk)

** Subject to Indian WHT being discharged on the commission payment

Case study 1 – Agency PE

Profit attribution under proposed Fractional Apportionment Approach

Facts

- F Co. constituted agency PE in India by virtue of I Co's functions.
- Global operational profits margin i.e. EBITDA of F Co. is 30%
- Arm's length commission earned by I Co.: 15%
- The relevant details for SEA formula relating to Indian operations:

Particulars	Within India	Scenario 1 Outside India	Scenario 2 Outside India
Revenue	100	0	20
No. of employees	30	0	302*
Wages	30	0	350**
Assets deployed	10	0	250***
Profits derived from Indian operations	Scenario 1 30 (100*30%)		Scenario 2 36 (120*30%)

* 2 employees dedicated to India and 300 employees is a pro rata allocation of global employee strength to Indian operations basis turnover ratio

** Wages include remuneration paid employees dedicated to Indian operations as well as 300 employees allocated pro rata






*** Basis is a pro rata allocation

Case study 1 – Agency PE

Profit attribution under proposed Fractional Apportionment Approach

Particulars	Scenario 1		Scenario 2	
	Basis	Weights	Basis	Weights
Sales	$(100/100)*1/3$	33%	$(100/120)*1/3$	28%
No. of manpower	$(30/30)*1/6$	17%	$(30/302)*1/6$	2%
Wages	$(30/30)*1/6$	17%	$(30/350)*1/6$	1%
Assets	$(10/10)*1/3$	33%	$(10/250)*1/3$	1%
Multiplying factor		100%		32%
Profits attributable to PE	$30*100\%$	30	$36*32\%$	12
Less – profit already taxed in I Co's hands (commission as reduced by deductible expenses)	$(15 - 12)$	3	$(18 - 14)$	4
Net profits attributable		27		8

Proposals of the OECD for allocation of taxing rights

	Modified residual profit split method (“MRPS”)	Fractional apportionment method	Distribution based approaches
Method	<p>Determine total profits </p> <p>Remove routine profits </p> <p>Allocate non routine profits to market jurisdictions </p>	<p>Determine profits </p> <p>Select allocation key %</p> <p>Allocate profit to the market jurisdiction </p>	<p>Specify baseline profits for marketing, distribution and user related activities %</p> <p>Baseline profit could be modified by variables such as industry & market differences</p>
Considerations	<ul style="list-style-type: none"> • Development of rules to bifurcate total profit into routine and non-routine components • Developing appropriate allocation keys • Potential disputes on mechanisms that local administrations would require to confirm the non-routine profits 	<ul style="list-style-type: none"> • Would apply to both routine and non-routine profits • To consider overall profitability of the MNE Group in determining the profit to be divided, which would then be allocated between countries using an allocation key • Applying a global profit margin to local sales or and apportioning taxable profits based on employees, assets, sales, and users relatable to the operations in various tax jurisdictions 	<ul style="list-style-type: none"> • Guaranteeing a minimum marketing & distribution return (inc. routine returns) together with adjustments for Group profitability (incl. non-routine returns) • Potential options could be also be allocation of a higher return under traditional transfer pricing principles to market jurisdictions

Other issues to be explored

1. Taxing right may be limited to a particular type / size of businesses
2. Segment groups based on business-line/ regional basis
3. Must consider group losses



Emerging considerations (Contd.)

GloBE proposal – Key features

Provide jurisdictions with the ability to “tax back” group profits that are subject to a low effective tax rate

Multilateral solution to avoid uncoordinated rules increased complexity and risk of over-taxation

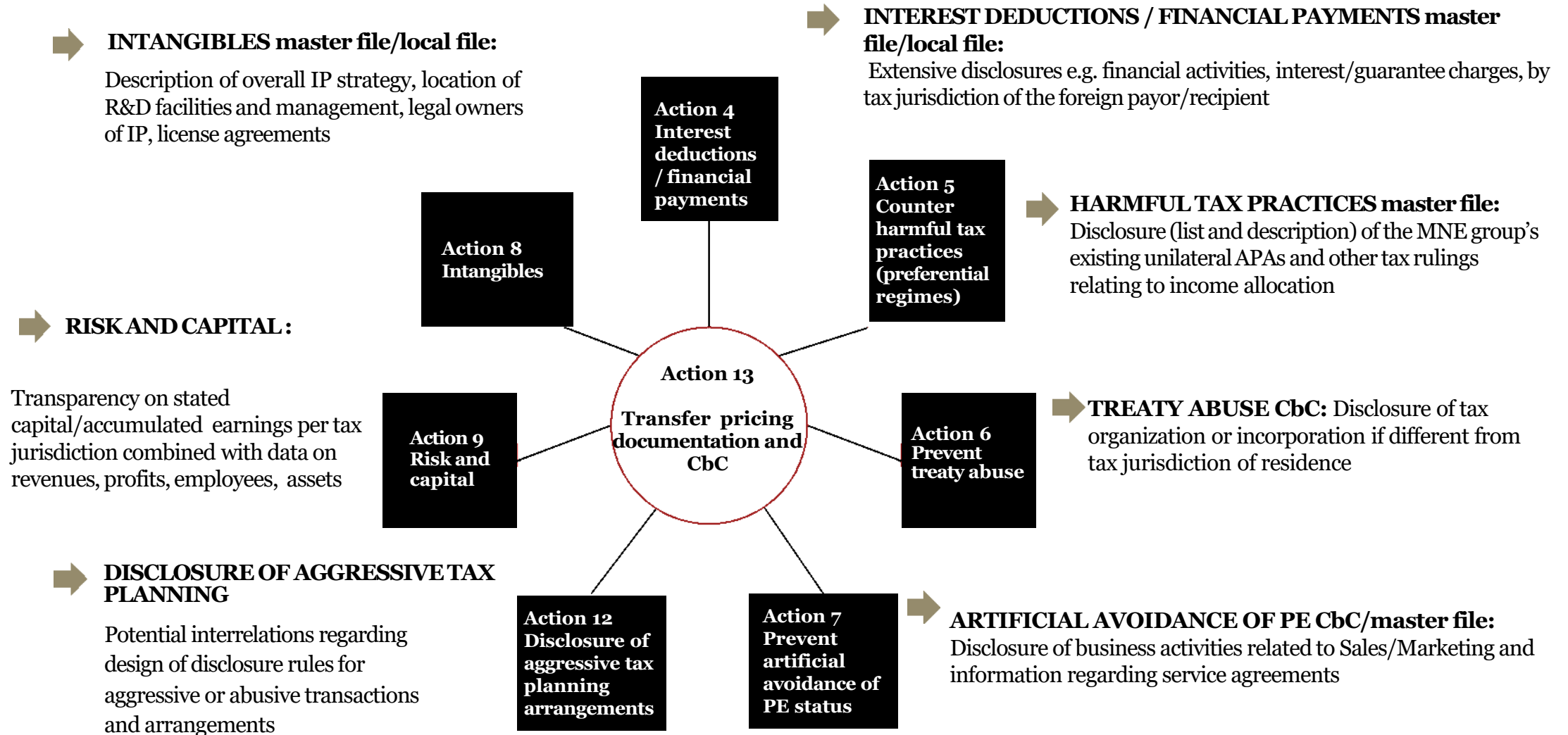
Reduce pressure on developing countries to grant tax incentives

Address profit shifting risk from intangibles but not ring fenced to digital economy



VI CbCR Risk assessment

Interrelation with other BEPS Action plan Items



Summary of CbCR Risk assessment parameters



The footprint of a group in a particular jurisdiction

Size may be used as an initial filter to identify if the group has the potential to pose more risk. For example, where a CbC Report indicates that the group has total revenues in the jurisdiction above a set threshold, this may flag the group for further risk assessment.



A group's activities in a jurisdiction are limited to those that pose less risk

CbC Report may be used to filter where the nature of activities in the jurisdiction suggest the tax at risk is likely to be low. For example, where a group only has a holding company in a particular jurisdiction (or has only limited other activities), the tax authority may see this as an indicator of low risk, if a participation exemption or other domestic rules mean that the level of taxable income in the jurisdiction is likely to be low.



There is a high value or high proportion of related party revenues in a particular jurisdiction

Where an entity receives a significant amount of related party revenue, this increases the potential that an error in the transfer prices applied could give rise to a significant tax difference the tax authority may look at other factors, such as whether there are substantial activities in the foreign jurisdiction, the nature of those activities, and the effective tax rate, before deciding whether the group could pose a higher tax risk in its own jurisdiction.



There are jurisdictions with significant profits but little substantial activity

CbC Reports contain information on the level of revenues, profits and activity, which can be used as initial indicators that the group have entities in certain jurisdictions with earnings that appear to be disproportionate to their level of economic activity. For example, flags may be raised where the group has operations in a jurisdiction with some or all of the following characteristics: High proportion of related party revenues, low substantial activities in proportion to revenues or profit before tax, profitability exceed that of the group as a whole, etc.



The results in a jurisdiction do not reflect market trends

Changes in the group's performance would typically be expected to reflect market trends. For example, if the market for a group's products is expanding, and the level of sales by the group is growing, it would be expected that the profitability of entities contributing to those sales would increase. If the group's results are not consistent with these expectations, this could indicate a possible transfer pricing or other BEPS-related risk which might warrant further investigation.



The results in a jurisdiction deviate from potential comparables

Key financial ratios for a jurisdiction where the group has activities may be compared with those of other jurisdictions within the group; with the group as a whole; with potentially comparable entities outside the group; or with industry averages. Ratios for comparison include profit margin, effective tax rate, revenue or profits per unit of economic activity, pre-tax return on equity

Summary of CbCR Risk assessment parameters



There are jurisdictions with significant profits but low levels of tax accrued

A potential tax risk may be highlighted where the group has substantial profits in a particular jurisdiction, but has no tax or only a low level of tax accrued for the period, in particular where this is substantially lower than the headline rate of corporate tax in that jurisdiction. This may be indicated where the following characteristics are present : substantial profits in a jurisdiction, low effective tax rate, etc.



There are jurisdictions with significant activities but low levels of profit (or losses)

Where an established entity has a persistently low (or negative) profit before tax which cannot be readily explained. The characteristics of the entity shall include profit generating activities, high proportion of related party revenues, high cost base, effective tax rate is not low



A group has activities in jurisdictions which pose a BEPS risk

CbC Reports could be an important tool to help the tax authority identify if the groups is involved in BEPS activities . This may include, for example, foreign jurisdictions with a low or zero level of corporate tax, or those with tax rules and treaty policies which facilitate the use of entities as conduits to pass through



A group has mobile activities located in jurisdictions where the group pays a lower rate or level of tax

A tax authority may view an group's tax risk as increased where the group has located globally mobile activities in a foreign jurisdiction where it pays a low level of tax. (Mobile activities include holding or managing IP; purchasing or procurement; sales, marketing or distribution; internal group finance or insurance)



There have been changes in a group's structure, including the location of assets

Potential risks may be identified where there are frequent changes in the number of entities in a jurisdiction (which may indicate that entities are being established for the purposes of specific transactions) or where a temporary increase in the number of entities in a jurisdiction is mirrored by a temporary increase in revenues in that jurisdiction.



Intellectual property (IP) is separated from related activities within a group

CbC report also shows whether the ownership and management of IP is in a different jurisdiction to the group's activities that give rise to the IP or use it to create value, including research and development, manufacturing or production, sales, marketing or distribution, and the provision of services to unrelated parties.



Income tax paid is consistently lower than income tax accrued

It is expected that the level of a group's tax accrued in a jurisdiction, and the level of tax paid in that jurisdiction, should broadly align. Where this does not happen, and in particular where the level of tax paid in a jurisdiction is materially and persistently lower than the level of tax accrued, this may be an indicator of possible tax risk

Summary of CbCR Risk assessment parameters



A group has marketing entities located in jurisdictions outside its key markets

There is also a risk that marketing companies are used to reduce the level of income subject to tax in the jurisdiction where sales occur. Therefore, where a CbC Report shows that if the group includes entities engaged in marketing located in jurisdictions where the group does not have a significant level of sales, this may indicate a possible tax risk in the jurisdictions where sales take place, for consideration by those tax



A group has procurement entities located in jurisdictions outside its key manufacturing locations

There can be good business reasons for the use of centralized procurement entities, but there is also a risk that this can be used to reduce the level of taxable income in the jurisdictions where manufacturing occurs



A group includes dual resident entities

Typically it is difficult for a tax authority to identify dual resident entities, unless there are other indicators that suggest the entity is engaged in BEPS. The information contained in the report may make this easier, in particular for the tax authority in the incorporation jurisdiction, which would otherwise expect to see the entity listed as resident in its jurisdiction.



A group includes entities with no tax residence

The group includes an entity with no tax residence, this should be apparent CbC Report, which also lists the jurisdiction in which the entity is incorporated or established. Tax authorities in jurisdictions where the group has operations should then consider whether the entity poses a tax risk for their jurisdiction.



A group discloses stateless revenues in Table 1

Where an entity in the group is not resident in any jurisdiction, its attributes are categorised as "stateless". Any material level of stateless revenues is likely to be flagged as a potential



Information in a group's CbC Report does not correspond with information previously provided by a constituent entity

There may be cases where information contained in an group's CbC Report either differs from information previously provided by constituent entities resident in a jurisdiction, or does not appear to be consistent with that information.



VII What to expect in the budget

Key watch-out areas

Significant Economic presence

- Proposes to tax digital transactions on the basis of 'significant economic presence' vis-à-vis 'physical presence'
- Would treaty-partners agree for re-negotiation of treaty terms? – US has clearly expressed its views on non adoption



- Appears that India is adopting a multi-pronged approach to tax e-commerce trade to demand its "fair" share of taxes!
- Principles of profit attribution could be complex



How is the digital PE triggered?



- Could it be on the basis of no of users which taxpayers interacts with?
- What happens in business models where interaction is on a free for all basis?

Secondary adjustment provision to be abolished in the event of abolition of DDT

Block assessment for 3/5 years

Extension of use of multiple year data to tested party also

Increase in APA team headcount to address huge backlog of APA cases

Modifications to interest deduction limitation provisions

Renewal of Safe Harbour provisions

Thank you!



VIII Appendix

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
ITeS (including BPO)				
Amazon Development Centre (India) Pvt Ltd	2008-09 and 2009-10	ITeS	USA	Applies USA MAP resolution representing 93% turnover to non-USA transaction
Convergys Information Management (India) Pvt Ltd	2005-06	Not evident	USA	Holds ALP under MAP inapplicable to non- MAP transactions
Convergys India Services Pvt Ltd	2008-09	IT Enabled Customer Care and Employee Care Support services	USA	Sets aside TP-issue to give effect to Rs 65.58cr relief under Indo-US MAP-order
Convergys India Services Pvt Ltd	2009-10	Not Evident	USA	Dismisses appeal as infructuous; TP-issues involving adjustments resolved under India-USA MAP
Dell International Services India Pvt. Ltd	2006-07	Call Centre and share services transactions	USA	US-MAP pricing applicable to non-US AE transactions only if FAR similar
Dell International Services India Pvt Ltd	2009-10	ITeS	USA	Directs application of US-MAP pricing to non-US AE-transactions,if FAR similar
Dell International Services India Private Limited	2009-10	ITeS	USA	Allows assessee-MP, Directs application of US-MAP pricing to non-US AE-transactions, if FAR similar
Global e-Business Operations Pvt Ltd	2004-05	ITeS	USA	Assessee to justify different margin on non-US transaction considering 24% margin under US-MAP
Global e-Business Operations Pvt Ltd	2005-06	ITeS	USA	Remits applicability of MAP margin on US transactions to non-US transactions
IBM Daksh Business Process Services Pvt Ltd	2006-07	BPO Services	US/UK	Applies US/UK MAP-agreed margins to other countries AE-transactions
IBM Daksh Business Process Services Pvt Ltd	2008-09	BPO Services	USA/ UK	Applies US/UK MAP-agreed margins to other countries AE-transactions

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
ITeS (including BPO)				
Concentrix Daksh Services India Pvt Ltd (Erstwhile known as IBM Daksh Business Process Services Pvt. Ltd)	2010-11 & 2011-12	BPO Services	UK/USA	Applies net profit-margin rate agreed under USA/UK MAP for transactions with non-US/UK countries
J P Morgan Services P Ltd	2006-07	ITeS	USA	Applies markup agreed under MAP for US entities to non-US transactions, absent distinction
J P Morgan Services P Ltd	2007-08	Not evident	USA	Upholds US-MAP margin application to non-US transactions, considers similar approach in APA
J P Morgan Services P Ltd	2008-09	ITeS	USA	Applies markup agreed under US-MAP to non-US transactions, follows earlier order
J P Morgan Services P Ltd	2009-10	ITeS	USA	Applies MAP-approved margin on transactions with US-entities to Non-US entities
J P Morgan Services P Ltd	2010-11	ITeS	USA	Remits TP-adjustment in ITeS-segment; Directs application of Indo-US MAP agreed margin
Northern Operating Services Pvt Ltd	2007-08	ITeS	USA	Dismisses cross appeals of assessee and Revenue; TP-issue resolved under MAP
Northern Operating Services Pvt Ltd	2009-10	Not evident	USA	Dismisses assessee's appeal as withdrawn; TP-issues resolved under MAP
Northern Operating Services Pvt Ltd	2010-11	Not evident	USA	Dismisses cross appeals as TP-issues resolved under Indo-USA MAP
Novo Nordisk Service Centre (India) Pvt Ltd	2012-13	ITeS	Denmark	Applies MAP-agreed 17% markup for Denmark AE transactions to non-Denmark AE transactions
Quintiles Data Processing Centre	2009-10	Management fee	Not evident	Remits ALP-computation of management fees for verification in terms of MAP-resolution

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
ITeS (including BPO)				
24/7 Customer P Ltd	2008-09	ITeS	USA	Dismisses assessee's appeal as withdrawn; TP-issues resolved under Indo-US MAP
24/7 Customer P Ltd	2009-10	ITeS	Not evident	Allows assessee's appeal withdrawal as TP-issue resolved under MAP
IT (Incl. KPO)				
Agile Software Enterprises Private Limited	2008-09	Not evident	Not evident	Dismisses assessee & Revenue's cross appeals; TP-issues resolved under MAP
CGI Information System and Management Consultants Pvt Ltd	2005-06	IT Services	USA/Canada	Applies margin under USA/Canada MAP to transactions with UK/Australia Aes
CGI information Systems and Management Consultants Pvt Ltd	2006-07	Software development services	USA / Canada	Notes MAP-resolution with USA / Canada, allows 8% software services margin to UK / Australian Aes
CGI Information Systems Management Consultants Pvt Ltd	2007-08	IT Services	USA / Canada	Applies margin under USA/Canada MAP to transactions with other Aes
First Indian Corporation Private Limited	2006-07	Not evident	Not evident	Dismisses assessee's appeal as 'not pressed'; TP-issues resolved under MAP
Hewlett Packard (India) Software Operation Pvt. Ltd	2009-10	Not evident	Not evident	Allows assessee's appeal withdrawal as TP-issues resolved under MAP
NDS Limited (India Branch Office)	2005-06	Software development services	UK	No adjudication of TP ground required since issue resolved under India-UK MAP
NDS Limited (India Branch Office)	2006-07	Software development services	UK	India-UK MAP resolves TP adjustment; TP grounds of appeal before ITAT withdrawn

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
IT (Incl. KPO)				
SIEBEL SYSTEMS SOFTWARE (INDIA) P LTD	2006-07	Software development services	Not evident	Dismisses Revenue's appeal as infructuous; TP-issue resolved under MAP
Symantec Software India Pvt Ltd	2007-08 to 2010-11	Software development/ Research and Development services	USA	Dismisses cross appeals of assessee and Revenue; TP-issues resolved under India- USA MAP
Symantec Software and Services India Private Limited	2010-11	Software development/ Research and Development services	Not evident	Dismisses Revenue's appeal; TP-issues resolved under MAP
Texas Instruments (India) Pvt Ltd	2004-05 and 2006-07	Software development services	Not evident	Dismisses assessee's appeal; TP-issues resolved under MAP
Texas Instruments (India) Pvt. Ltd	2005-06	Software development services	USA	CIT(A) to re-examine ALP alteration when dispute resolved under Indo-US MAP
Texas Instruments (India) Private Limited	2007-08	Software development services	Not evident	Dismisses assessee's ground as withdrawn; TP-adjustment on software-segment resolved under MAP
Textron India Pvt Ltd	2008-09	Not evident	USA/ Canada	Applies margin under US/Canada MAP to transactions with UK/Australia Aes
Virtusa (India) Pvt. Ltd	2005-06	Software development services	USA	Directs CIT(A) to readjudicate TP adjustment on transactions not covered under MAP
Yahoo Software Development India P Ltd	2007-08 & 2008-09	Not evident	USA	Dismisses 'infructuous' cross appeals post India-USA MAP resolution in Yahoo case

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
IT & ITeS				
Affiliated Computer Services of India Pvt. Ltd	2006-07	Not evident	Not evident	Allows assessee's appeal withdrawal as TP-issue resolved under Indo-USA MAP
Affiliated Computer Services of India Pvt. Ltd	2007-08	Software development services and ITeS	USA	Dismisses assessee's appeal; TP-issues resolved under MAP
Affiliated Computer Services of India Pvt. Ltd	2010-11	Not evident	Not evident	Dismisses appeal as TP-issues resolved
ANZ Operations & Technology Pvt Ltd	2007-08 & 2008-09	Software development services and ITeS	Australia	Directs application of MAP-agreed rate for Australian AEs to non-Australian AE transactions
Colt Technology Services India Pvt Ltd	2006-07	Not evident	Not evident	Remits TP-issue; AO to take appropriate action after considering MAP outcome
Colt Technology Services India Pvt Ltd	2009-10	Contract software development services and ITeS	Not evident	Remits TP-issue to AO for taking appropriate action after considering MAP outcome
Fidelity Business Services India Pvt Ltd	2007-08 and 2008-09	IT & ITeS	USA	Applies margin agreed for IT/ITeS with US- AE for similar non-US AE transactions
Informatica Business Solutions P Ltd	2005-06	Not evident	USA	Dismisses Revenue's appeal, TP issues resolved under MAP as per India-USA DTAA
Informatica Business Solutions P Ltd	2006-07 & 2007-08	Not evident	Not evident	Remits TP-issue to AO for examining whether disputed issue settled under MAP
Informatica Business Solutions P Ltd	2008-09	IT & ITeS	Not evident	Dismisses appeal as infructuous; TP- matter involving IT/ITES transactions resolved under MAP
Ocwen Financial Solution Pvt Ltd	2007-08	Contract software development services and ITeS	USA	Dismisses assessee's appeal as infructuous; TP-adjustment issue resolved under Indo-US MAP proceedings

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
Manufacture of machinery / equipment				
British Engines (India) P Ltd	2010-11	Purchase of raw materials and sale of finished goods in CMP & Rotary power segments	UK	Dismisses appeals as withdrawn considering TP-adjustment issue resolved under MAP
Flowserve India Controls Pvt Ltd	2005-06	Management service charges	USA	Remits ALP-determination of management service charges; Considers MAP-resolution for subsequent years
Flowserve India Controls Pvt Ltd	2007-08	Management service charges	USA	Allows assessee appeal withdrawal on 'management charges' pursuant to India- US MAP resolution
Flowserve India Controls Pvt Ltd	2008-09	Not evident	Not evident	Allows assessee's appeal; Adjudication of TP-issues not necessary in view of resolution under MAP
Flowserve India Controls Pvt Ltd	2009-10	Not evident	Not evident	Allows assessee's withdrawal as TP-issues resolved under MAP
Flowserve India Controls Pvt Ltd	2011-12	Engineering design services	USA	Applies US-MAP agreed margin for non-US AE-transactions for engineering design service provider
GKN Driveline (India) Ltd	2008-09	Payment towards management consultancy and UK business auxiliary services	UK	Considers MAP outcome for deciding allowance of payments towards management consultancy, know-how & trademarks
GKN Driveline (India) Ltd	2009-10	Payment towards trademark sub-license fees	Not evident	Dismisses assessee's appeal on trademark sub-license fees adjustment considering MAP resolution
GKN Driveline (India) Ltd	2010-11	Payment towards trademark sub-license fees	Not evident	Dismisses cross appeals considering resolution of TP-issues under MAP
JCB INDIA LTD	2011-12	Royalty	UK	Disposes assessee's appeal & writ considering resolution of royalty TP-adjustment under Indo-UK MAP
JCB INDIA LTD	2010-11 & 2011-12 and 2009-10 & 2013-14	Royalty	UK	UK-MAP parameters not applicable to non-UK AE-transactions, sets aside ALP- determination to TPO

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
Manufacture of machinery / equipment				
Molex India Ltd	2005-06, 2006-07, 2007-08, 2009-10, 2010-11	Not evident	Not evident	Dismisses MP as liberty to revive appeals, if issues unresolved by MAP, granted
Yaskawa India Pvt Ltd	2012-13	Manufacturing	Japan	Allows assessee's appeal withdrawal considering TP-issues resolved under India-Japan MAP
Telecom				
BT Global Communications India Pvt Ltd	2011-12	Not evident	UK	Dismisses Revenue's appeal considering assessed income determined at NIL post MAP resolution
Motorola Solutions India Pvt. Ltd	2005-06	Not evident	USA	Quashes demand recovery notice pending India-US MAP proceedings
Automobile				
Rolls Royce India Ltd	2005-06	Commercial information and marketing support services	UK	Dismisses TP-ground as infructuous in view of resolution under India-UK MAP
Toyota Kirloskar Auto Parts Pvt Ltd	2004-05	Payment of engineering fees	Japan	Dismisses assessee's appeal as infructuous; TP-issues Indo-Japan MAP resolved
Toyota Kirloskar Auto Parts Private Ltd	2005-06	Royalty and Technical assistance fees	Japan	Allows assessee's appeal withdrawal as infructuous; TP-issues resolved under Indo-Japan MAP
Toyota Kirloskar Motor Private Ltd	2005-06	Not evident	Not evident	Dismisses writ; Concealment penalty imposed on TP-adjustment determined under MAP, not ultra-vires
Toyota Kirloskar Motor (P) Ltd	2006-07	Not evident	Japan	Allows assessee's appeal withdrawal post Rs. 148 cr TP-relief under India-Japan MAP
Volvo India Private Limited	2007-08	Payment of management/marketing support fees and Provision of engineering design services	Not evident	Dismisses assessee's appeal as withdrawn; TP-issues resolved under MAP

Impact of MAP resolution on domestic litigation – Summary

Assessee	AY	Nature of transaction	Country	Conclusions
Food products				
McDonald's India Pvt Ltd	2009-10	Royalty and franchise fee	Not evident	Remits Forex loss/R&D cess disallowance to consider impact of MAP resolution
McDonald's India Pvt Ltd	2010-11 & 2011-12	Not evident	Not evident	Dismisses assessee's appeal as not pressed; TP-grounds resolved under MAP
Healthcare				
Quintiles Research (India) Pvt Ltd	2006-07	Not evident	USA	Allows assessee's appeal withdrawal considering resolution of grounds under Indo-US MAP
Quintiles Research (India) Pvt Ltd	2007-08	Not evident	USA	Permits assessee's appeal withdrawal absent Revenue's objection; TP-issues resolved under India-USA MAP
Quintiles Research (India) Pvt Ltd	2010-11	Not evident	USA	Dismisses assessee's appeal as withdrawn; TP-issues resolved under MAP
Consulting				
Deloitte Support Services India Pvt. Ltd	2005-06	Not evident	USA	Allows assessee's appeal withdrawal as TP-issues resolved under Indo-US MAP DTAA
Deloitte Support Services India Pvt. Ltd	2006-07	Not evident	USA	Cites MAP-resolution; Refuses adjudication on revised returns claiming higher mark-up & 10A deduction
Media & Entertainment				
Turner International India Pvt. Ltd	2005-06 & 2006-07	Distribution of TV channels	USA	Service-provider incomparable to distributor; Assessee's acceptance of TP-adjustment under MAP, not consent