

Budget 2023 - Six Expectations from Transfer Pricing Perspective

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Saurabh Dhadphale

Partner, Tax & Regulatory Services, M S K B & Associates LLP

The Transfer Pricing Regulations were introduced in India in the year 2001, with an objective of preventing erosion of Indian tax base. The Indian Transfer Pricing Regulations ('ITPR') are contained in Chapter X of the Income-tax Act, 1961 ("the Act").

The regulations initially witnessed interpretation and implementation related issues creating significant transfer pricing disputes around both, simple and complex inter-company transactions, which led to a roll out of alternative dispute resolution mechanisms in the form of Advanced Pricing Agreements ('APA') and increased opting of Mutual Agreement Procedures ('MAP') route by taxpayers.

ITPR have steadily evolved in last decade and will continue evolving in post Base Erosion and Profit Shifting ('BEPS') world. Having said that, there are certain immediate issues which need to be addressed from two perspectives - one, from ease of doing business perspective and two, from efficiency perspective.

Here are six expectations that taxpayers will have from Union Budget 2023.

- **'Tested Party' concept in Indian Transfer Pricing Regulations ('ITPR')**

In the existing ITPR, there is no specific mention or express recognition of 'tested party' concept.

Transfer pricing guidelines issued by Organization for Economic Cooperation and Development ('OECD') defines the tested party as "the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparable can be found, i.e., it will most often be the one that has the less complex functional analysis. This concept has been defined on similar basis under United Nations ('UN') Transfer Pricing manual as well.

While India is not OECD member country, but it has been an observer country and has actively participated in OECD's all the key taxation related projects, including BEPS. Further, the said concept of tested party is recognized by Indian tribunals and Indian courts and thus, backed up by judicial precedents as well.

CBDT may consider formally incorporating the definition of tested party and its application while selection of the most appropriate method in the Indian TP Regulations.

- **Alignment of transfer pricing compliances with tax return compliances for non-resident taxpayers**

Currently, Section 92E of the Act requires annual filing of an Accountant's Report in Form 3CEB for each financial year by all the taxpayers, (whether resident or non-resident) having international transactions with their Associated Enterprises. Finance Act, 2020, vide Section 115A provided an exemption to non-resident taxpayers with respect to the filing of income tax return if the taxable income is only in the nature of interest, dividend, fees from technical services, royalty, etc. and the tax has been withheld as

per the provisions of the Act.

It is expected that Section 92E is amended in line with Section 115A to provide an exemption from filing Accountant's Report as well, particularly keeping in mind the multiple penalties prescribed under ITPR for non-filing of Accountant's Report.

- **Fast processing of rollback and future APA applications -**

With the continuous and aggressive transfer pricing audits coupled with time-consuming resolution of such disputes through traditional litigation routes (Commissioner of income-tax - Appeals, Income Tax Appellate Tribunal, Courts) in India, Central Board of Direct Taxes ('CBDT') rolled out an APA program like those in the US and other OECD member countries.

It received overwhelming response from taxpayers. In the first three years, more than 500 applications were filed and as the program completes 10 years in 2022, the number of applications has reached to 1,500. While CBDT has entered into more than 425 agreements, the inventory is significantly high. The inventory now also includes APA renewal applications pending for disposal.

To fast track the closure of pending APAs, CBDT may consider taking the below steps:

Timeframe for conclusion of Unilateral APAs

CBDT may consider putting in place maximum time limit for conclusion of APAs involving a smaller number of transactions, say up to two transactions. Israeli Tax Authority, for instance, has prescribed a 120-day timeframe for conclusion/rejection of APA.

Revisiting Site Visits requirement

Current APA regulations require revenue authorities mandatorily to conduct a site visit for each APA application, including renewal applications. However, given the nature of certain transactions, the site visit may not be necessary with respect to all the applications. For instance, payment of brand usage fee, trading activity, etc. In applications involving such transactions, CBDT may consider relaxing requirement of site visits. This measure will help concluding APAs on fast-track basis.

- **Fast processing APA renewal applications -**

CBDT may consider putting in place an application filtration system to manage renewal applications efficiently wherein the applications may be categorized in certain baskets such as - (i) simple roll over of original APA (ii) same proposition by taxpayer as agreed under original APA (iii) different terms and conditions, with change in facts, etc. This measure will help concluding simple and rollover renewal APA applications on fast-track basis.

- **E-filing of APA applications -**

In line with other technology initiatives, Government should adopt e-filing for APA applications, submissions and all other documentation.

- **Safe harbour Rules**

The international tax landscape is changing at a fast pace, particularly, post BEPS project. Along with India, Multinational Groups are actively considering countries such as Philippines, Poland, etc. for setting up their captive design and other service centers.

CBDT may consider revisiting the safe harbour mark-up levels to maintain competitiveness of Indian captive service providers.