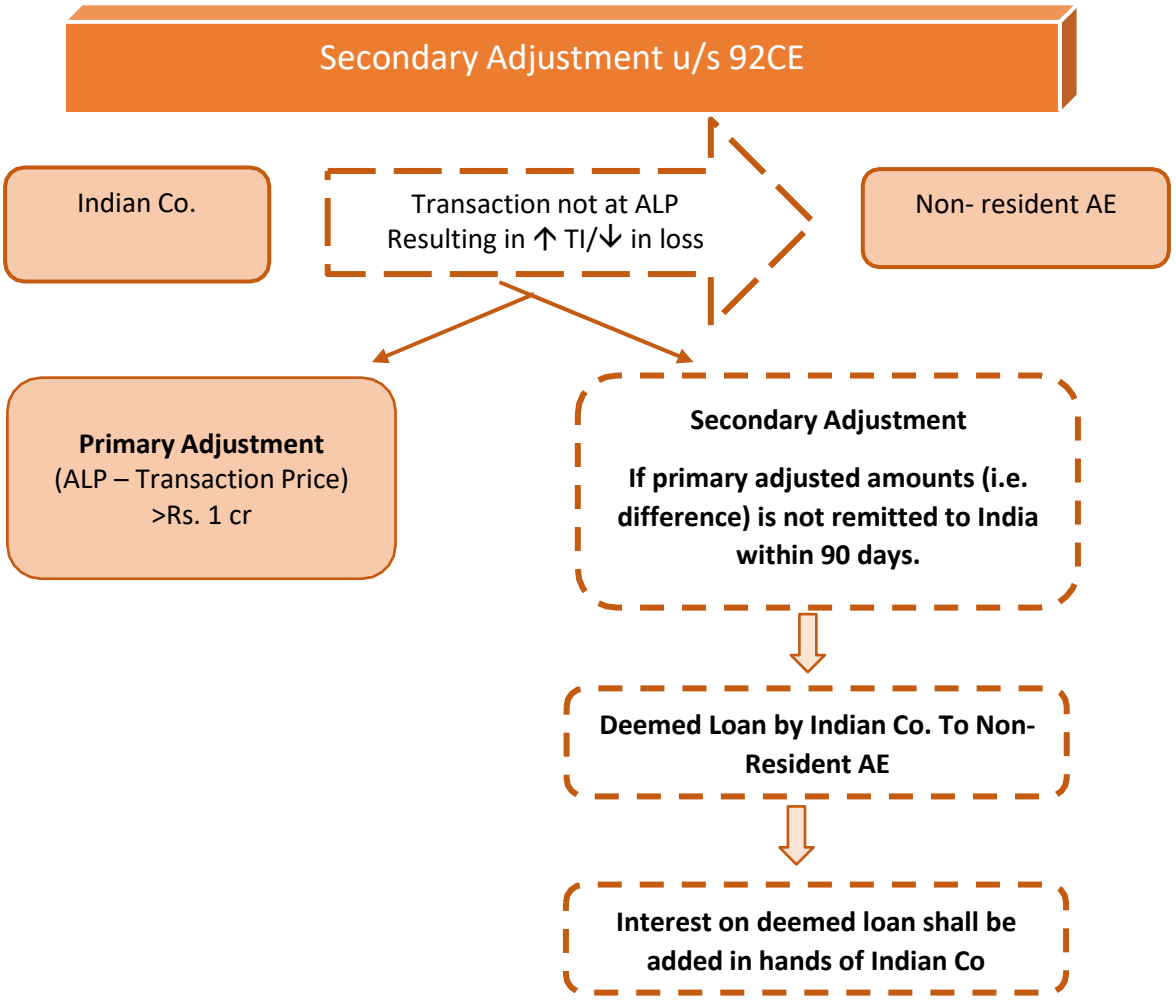
1. Secondary Adjustment [Section 92CE]



What is primary Adjustments -	"Primary Adjustment" to a transfer price means the determination of transfer price in accordance with the arm's length principle resulting in an increase in the total income or reduction in the loss, as the case may be, of the assessee.
What is secondary Adjustment	"Secondary Adjustment" means an adjustment in the books of account of the assessee and its AE to reflect that the actual allocation of profits between the assessee and its AE is consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.
When secondary adjustment will be applicable -	Secondary adjustments will be applicable in the following situations: 1. Where a primary adjustment to transfer price has been made by Suo-moto by the assessee in his return of income. 2. Where primary adjustment to transfer price made by the AO has been accepted by the assessee. 3. Where a primary adjustment to transfer price is determined by an APA entered into by assessee u/s 92CC. 4. Where a primary adjustment to transfer price is made as per the safe harbor rules framed u/s 92CB. 5. Where primary adjustment to transfer price is arising as a result of resolution of an assessment by way of the mutual agreement procedure under DTAA entered into u/s 90 /90A.
Threshold limit-	When secondary adjustment is not applicable- If the following two conditions are not satisfied, secondary adjustment is NOT REQUIRED- a. The amount of primary adjustment made in the case of an assessee in any previous year **DOESN'T EXCEED Rs. 1 CRORE**; and b. The primary adjustment is made in respect of the AY 2016-17(or any earlier assessment year)
Quantification of secondary adjustment	1. As a result of primary adjustment to the transfer price**, there is an increase in the total income or reduction in the loss**, as the case may be, of the assessee. 2. The **difference between the ALP determined in Primary adjustment and the price, at which the international transaction has actually been undertaken, is "Excess Money**". Such excess money may be repatriated by the non-resident assessee. Excess money means the difference between the arm's length price determined in primary adjustment and the price at which international transaction has actually taken place. 3. The excess money is not repatriated to India by the associated enterprise within 90 days(in general term, repatriation means effectively reversing the funds so that the account of the parties involved are in line with the economic intend of the primary adjustment). **The excess money (which is not repatriated to India) shall be deemed to be an advance made by the assessee to such associated enterprise and the interest on such advance shall be computed as the income of the assessee** in the manner as may be prescribed.

<table>
<tr><td>The imputed per annum interest income on excess money which is not repatriated within the time limit shall be computed,—</td><td>(i) at the 1 year marginal cost of fund lending rate of SBI as on 1st of April of the relevant PY + 325 basis points in the cases where the international transaction is denominated in Indian rupee; or
(ii) at 6 month LIBOR as on 30th September of the relevant PY + 300 basis points in the cases where the international transaction is denominated in foreign currency.</td></tr>
<tr><td>Repatriation of excess money and interest on non-repatriated excess money</td><td>The CBDT vide Notification No.76/2019 dated 30.09.2019 has prescribed the time limit for repatriation of excess money or part thereof i.e. on or before 90 days from specified date.
<table>
<tr><td>Case</td><td>Time limit for repatriation of excess money within 90 days from</td><td>Date from which interest is chargeable on non-repatriated excess money within the specified time-limit</td></tr>
<tr><td>Where primary adjustments are made to transfer price suo-motu by the assessee in his return of income</td><td>Due date of filing return of income u/s 139(1)</td><td>Due date of filing return of income u/s 139(1)</td></tr>
<tr><td>If primary adjustments to transfer price as determined in the order of the Assessing Officer or the appellate authority has been accepted by the assessee</td><td>the date of the said order</td><td>the date of the said order</td></tr>
<tr><td>Where primary adjustment has been determined by an agreement for advance pricing been entered into by the assessee
E. If APA has been entered into on or before due date of filing return for relevant PY</td><td>Date of filing of return u/s 139(1)</td><td>Due date of filing of return u/s 139(1)</td></tr>
<tr><td>F. If the APA has been entered into on or after</td><td>The end of the month in which APA</td><td>The end of month in which APA has been entered into</td></tr>
</table></td></tr>
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	the due date of filing of return for relevant PY	has been entered into	
	Where option has been exercised by the assessee as per the safe harbour rules under section 92CB	the due date of filing of return u/s 139(1)	the due date of filing of return u/s 139(1)
	Where agreement under the Mutual agreement procedure under a DTAA has been entered into u/s 90 or 90A	The date of giving effect by the AO to such resolution	The date of giving effect by the AO to such resolution
Option to pay additional tax, if the excess money is not repatriated	In a case where the excess money or part thereof has not been repatriated within the prescribed time as mentioned above, the assessee has the option to pay additional income-tax @ 20.9664% (i.e., tax@18% plus surcharge@12% plus cess@4%) on such excess money or part thereof, as the case may be. Where additional income-tax is so paid by the assessee, he will not be required to make secondary adjustment and compute interest from the date of payment of such tax. This implies that he would, in any case, be required to compute interest upto the date of payment of such additional tax. The additional income-tax so paid by the assessee shall be treated as the final payment of tax in respect of excess money or part thereof not repatriated and no further credit would be allowed to the assessee or to any other person in respect of the amount of additional income-tax so paid. Further, no deduction in respect of the amount on which such additional income-tax has been paid, would be allowed under any other provision of the Act.		

2. Safe Harbour

Meaning

Refers to determination of price margin which are acceptable to tax authorities. In other words, it refers to **<u>circumstances under which the tax authorities may accept the transfer</u> price declared by the taxpayers**

Applicability

- Applicable for period not exceeding 5 years
- Not applicable, if AE located in territory notified u/s 94A

INTERNATIONAL TRANS^{N}☑

CERTAIN SDT

Safe harbour rules relevant for A.Y.2021-22 are yet to be notified by the CBDT.

3. Advance Pricing Agreement (APA)

Meaning	An Advance Pricing Agreement (APA) is **AN AGREEMENT ENTERED BETWEEN A TAXPAYER AND A TAXING AUTHORITY** to determine ALP or specifying the manner in which ALP shall be determined, in relation to such **INTERNATIONAL TRANSACTION or Income referred to in Section 9(1)(i) or specifying the manner in which the said income is to be determined, as is reasonably attributable to the operations carried out in India by or on behalf of the NR.** It is pertinent to note that the provisions of APA shall override the normal provisions of determination of arm's length price.
Transaction Covered	**INTERNATIONALTRANSACTION** ☑ **Income referred to in Section 9(1)(i)**
Period covered under APA	• Not exceeding **5 consecutive previous years** • Rollback mechanism is provided for **period not exceeding 4 PY preceding the first of the PY for which the APA applies** • **[i.e. 5 future years + 4 preceding years]**
Roll back provisions	In order to reduce current pending as well as future litigation in respect of the transfer pricing matters, roll back mechanism is provided for period not exceeding 4 PY preceding the first of the PY for which the APA applies in respect of the international transaction to be undertaken or the income referred to in Sec. 9(1)(i). APA can be applied for the transaction undertaken in past 4 years.

Conditions	a. International transaction is same as the international transaction to which the agreement (other than the rollback provision) applies; b. Return of income for the relevant rollback year has been or is furnished by the applicant before the due date as specified in Explanation 2 of section 139(1). c. Report in respect of the international transaction had been furnished in accordance with section 92E;
Non-Applicability	a. The determination of ALP of the said international transaction for the said year has been subject matter of an appeal before the Appellate Tribunal and the Appellate Tribunal has passed

		an order disposing of such appeal at any time before signing of the agreement b. The application of rollback provision has the effect of reducing the total income or increasing the loss, as the case may be, of the applicant as declared in the return of income of the said year
	Time-limit	Roll back application shall be made in Form3CEDA with ₹5 Lakhs fee a. before the first day of the PY relevant to the first AY for which the application for APA is made, in respect of transactionswhich are of a continuing nature from dealings that are already occurring; or b. before undertaking the transaction in respect of remaining transactions
Binding on Whom	a) the person in whose case, and in respect of the transaction in relation to which, the APA has been entered into; and b) the Commissioner or Principal Commissioner and the Income-tax Authorities subordinate to him, in respect of the said person and the said transaction. Further, the APA shall not be binding if there is any change in law or facts having bearing on such APA. Accordingly, APA shall not have binding effect on the High Court.	

Procedure for APA

1. **Pre-filing consultation:** This involves:
   a) Determining the scope of agreement
   b) Identifying TP issues
   c) Determining suitability of international transaction for the agreement
   d) Discussing terms of agreement.

The pre-filing consultation shall not bind the Board or the person to enter into agreement nor it will be deemed to mean that the person has applied for an agreement

2. **Application for the APA**

   Application can be made in the prescribed form and by payment of fees to the Director General of IT (International Tax) in case of unilateral agreement or to the competent authority in case of bilateral or multilateral agreement.

   Application can be made at any time –

   a) Before the first day of the PY for which the application is made, in respect of transactions are of continuing nature from dealings that are already occurring or
   b) Before undertaking the transaction in respect of remaining transactions

   The applicant may withdraw the application for agreement at any time before the finalization of the terms of agreement. However the application fee will not be refunded.

3. **Approval of CG** – The APA will be entered into with the applicant by the Board only after the approval of CG.

4. **Terms of agreement-**

   The agreement would include

   a) International transactions covered by the agreement
   b) Agreed TP methodology
   c) Definition of relevant terms used
   d) Critical assumptions made, which if changed will lead to revocation of agreement
   e) Rollback prvision

5. **Furnishing of annual compliance report –** The assessee shall furnish the annual compliance report in quadruplicate to the DGIT (International Tax) for each covered year, within 30 days of due date of filing ITR for that year or within 90 days of entering into agreement whichever is later

6. **Compliance audit of the agreement**

The TPO having the jurisdiction over the assessee shall carry out the compliance audit of the agreement for each of the covered year. For this purpose, TPO may require assessee to substantiate the compliance with terms and assumptions of the agreement, to submit any information or documents to ensure compliance of terms. The compliance audit report shall be furnished by TPO within 6 months from the month in which annual compliance report is received by the TPO.

7. **Revision of the agreement -** An agreement, after being entered, may be revised by the Board either suo moto or on request of the assessee or the competent authority in India or the Director General of Income-tax

(International Taxation), if -

a) there is a change in critical assumptions or failure to meet a condition subject to which the agreement has been entered into;
b) there is a change in law that modifies any matter covered by the agreement but is not of the nature which renders the agreement to be non-binding; or
c) there is a request from competent authority in the other country requesting revision of agreement, in case of bilateral or multilateral agreement.
d) Except when the agreement is proposed to be revised on the request of the assessee, the agreement shall not be revised unless an opportunity of being heard has been provided to the assessee and the assessee is in agreement with the proposed revision.
e) The revised agreement shall include the date till which the original agreement is to apply and the date from which the revised agreement is to apply.

8. **Cancellation of the agreement -** An agreement shall be cancelled by the Board for any of the following reasons:

the compliance audit has resulted in the finding of failure on the part of the assessee to comply with the terms of the agreement;

a) the assessee has failed to file the annual compliance report in time;
b) the annual compliance report furnished by the assessee contains material errors; or

the assessee is not in agreement with the revision proposed in the agreement or the agreement is to be cancelled under rule 10RA(7);.

c) The Board shall give an opportunity of being heard to the assessee, before proceeding to cancel an application.
d) The order of cancellation shall also specify the effective date of cancellation of the agreement, where applicable.

9. Mere filing of an application for an agreement under these rules shall not prevent the operation of Chapter X of the Act for determination of arms' length price under that Chapter till the agreement is entered into. [Rule 10T(1)].
10. The negotiation between the competent authority in India and the competent authority in the other country or countries, in case of bilateral or multilateral agreement, shall be carried out in accordance with the provisions of the tax treaty between India and the other country or countries.

11. Procedure for roll back - The assessee should make application for all the roll back years and in Form 3CEDA.

a) The applicant shall furnish modified return of income referred to in section 92CD in respect of a rollback year to which the agreement applies along with the proof of payment of any additional tax arising as a consequence of and computed in accordance with the rollback provision.
b) The modified return in respect of rollback year shall be furnished along with the modified return to be furnished in respect of first of the previous years for which the agreement has been requested for in the application.
c) If any appeal filed by the applicant is pending before the CIT (Appeals), ITAT or the High Court for a rollback year, on the issue which is the subject matter of the rollback provision for that year, the said appeal to the extent of the subject covered under the agreement shall be withdrawn by the applicant before furnishing the modified return for the said year.
d) If any appeal filed by the AO/PCIT/CIT is pending before the ITAT or the High Court for a rollback year, on the issue which is subject matter of the rollback provision for that year, the said appeal to the extent of the subject covered under the agreement, shall be withdrawn by the AO/PCIT/CIT, as the case may be, within three months of filing of modified return by the applicant.
e) The applicant, the AO/PCIT/CIT, shall inform the DRP/CIT(A) or the ITA or the High Court, as the case may be, the fact of an agreement containing rollback provision having been entered into along with a copy of

the same as soon as it is practicable to do so.

f) In case effect cannot be given to the rollback provision of an agreement in accordance with this rule, for any rollback year to which it applies, on account of failure on the part of applicant, the agreement shall be cancelled.

Question 1

For the roll back there is a condition that the ITR for the relevant roll back year has been or is furnished by the applicant before the due date specified in Explanation 2 to section 139(1). It is not clear as to whether applicants who have filed revised or belated returns would be eligible for roll back.

Answer

Revised return can be filed only when a return under section 139(1) has already been filed as it replaces theoriginal return of income. Hence, if the applicant has filed the revised return, the applicant would be entitled for rollback on this revised return of income.

However, rollback provisions will not be available in case of a belated return of income filed under section 139(4) because it is a return which is not filed before the due date. Further, a revised return revising belated return will also not be eligible.

Question 2

Rule 10MA(2)(iv) requires that the application for rollback provision, in respect of an international transaction, has to be made by the applicant for all the rollback years in which the said international transaction has been undertaken by the applicant. Clarification is required as to whether rollback has to be requested for all four years or applicant can choose the years out of the block of four years.

Answer

The applicant does not have the option to choose the years for which it wants to apply for rollback. The applicant has to either apply for all the four years or not apply at all. However, if the covered international transaction(s) did not exist in a rollback year or there is some disqualification in a rollback year, then the applicant can apply for rollback for less than four years. Accordingly, if the covered international transaction(s) were not in existence during any of the rollback years, the applicant can apply for rollback for the remaining years. Similarly, if in any of the rollback years for the covered international transaction(s), the applicant fails the test of the rollback conditions contained in various provisions, then it would be denied the benefit of rollback for that rollback year. However, for other rollback years, it can still apply for rollback.

Question 3

Rule 10MA(3) states that the rollback provision shall not be provided in respect of an international transaction for a rollback year if the determination of arm's length price of the said international transaction for the said year has been the subject matter of an appeal before the Appellate Tribunal and the Appellate Tribunal has passed an order disposing of such appeal at any time before signing of the agreement. Further, Rule 10 RA(4) provides that if any appeal filed by the applicant is pending before the Commissioner (Appeals), Appellate Tribunal or the High Court for a rollback year, on the issue which is subject matter of the rollback provision for that year, the said appeal to the extent of the subject covered under the agreement shall be withdrawn by the applicant.

There is a need to clarify the phrase "Tribunal has passed an order disposing of such appeal"
Answer

The reason for not allowing rollback for the international transaction for which Appellate Tribunal has passed an order disposing of an appeal is that the ITAT is the final fact finding authority and hence,on factual issues, the matter has already reached finality in that year. However, if the ITAT has not decided the matter and has only set aside the order for fresh consideration of the matter by the lower authorities with full discretion at their disposal, the matter shall not be treated as one having reached finality and hence, benefit of rollback can still be given.

Question 4

Rule 10RA(7) states that in case effect cannot be given to the rollback provision of an agreement in accordance with this rule, for any rollback year to which it applies, on account of failure on the partof applicant, the agreement shall be cancelled. It is to be clarified as to whether the entire agreementis to be cancelled or only that year for which roll back fails.

Answer

If the applicant does not carry out such actions for any of the rollback years,the entire agreement shall be cancelled.

Question 5

If there is a Mutual Agreement Procedure (MAP) application already pending for a rollback year, what would be the stand of the APA authorities? Further, what would be the view of the APA Authorities,

if MAP has already been concluded for a rollback year?

Answer

If MAP has been already concluded for any of the international transactions in any of the rollback year under APA, rollback provisions would not be allowed for those international transactions for that year but could be allowed for other years or for other international transactions for that year,

subject to fulfilment of specified conditions in Rules 10MA and 10RA. However, if MAP request is pending for any of the rollback year under APA, upon the option exercised by the applicant, either MAP or application for roll back shall be proceeded with for such year.

Question 6

Rule 10MA(1) provides that the agreement may provide for determining ALP or manner of determination of ALP. However, Rule 10MA(4) only specifies that the manner of determination of ALP should be the same as in the APA term. Does that mean the ALP could be different?

Answer

Yes, the ALP could be different for different years. However, the manner of determination of ALP (including choice of Method, comparability analysis and Tested Party) would be same.

Question7

Whether applicant has an option to withdraw its rollback application? Can the applicant accept the rollback results without accepting the APA for the future years?

Answer

The applicant has an option to withdraw its roll back application even while maintaining the APA application for the future years. However, it is not possible to accept the rollback results without accepting the APA for the future years. It may also be noted that the fee specified in Rule 10MA(5) shall not be refunded even where a rollback application is withdrawn.

Question 8

In case of merger of companies, where one or more of those companies are APA applicants, how would the rollback provisions be allowed and to which company or companies would it be allowed?

Answer

The agreement is between the Board and a person. The principle to be followed in case of merger is that the person (company) who makes the APA application would only be entitled to enter into the agreement and be entitled for the rollback provisions in respect of international transactions undertaken by it in rollback years. Other persons (companies) who have merged with this person (company) would not be eligible for the rollback provisions.

To illustrate, if A, B and C merge to form C and C is the APA applicant, then the agreement can only be entered into with C and only C would be eligible for the rollback provisions. A and B would not be eligible for the rollback provisions. To illustrate further, if A and B merge to form a new company C and C is the APA applicant, then nobody would be eligible for rollback provisions.

Question 9

In case of a demerger of an APA applicant or signatory into two or more companies (persons), who would be eligible for the rollback provisions?

Answer

The same principle as mentioned in the previous answer, i.e., the person (company) who makes an APA application or enters into an APA would only be entitled for the rollback provisions, would continue to apply. To illustrate, if A has applied for or entered into an APA and, subsequently,

demerges into A and B, then only A will be eligible for rollback for international transactions covered under the APA. As B was not in existence in rollback years, availing or grant of rollback to B does not arise.

Section 92CD provides for the following procedure for giving effect to an APA

i. In case a person has entered into an APA and prior to the date of entering into such APA, he has furnished the return of income under the provisions of section 139 in respect of any AY to which the APA applies, then, such person shall,within a period of 3 months from the end of the month in which the said agreement wasentered into, furnish a modified return,.

ii. Such modified return shall be in accordance with and limited to the provisions of such APA.

iii. All other provisions of this Act shall apply as if the modified return is a return furnished under section 139, unless anything to the contrary is provided in this section.

iv. If the assessment or reassessment proceedings for an AY to which the APA applies have been completed before the expiry of period allowed for furnishing of modified return, the AO shall, in a case where modified return is filed in accordance with the provisions of this section, shall pass an order modifying the totalincome of the relevant assessment year determined in such assessment or reassessment, as the case may be, having regard to and in accordance with the APA, instead of proceeding to assess or reassess the total income.

Such order for assessment or reassessment or re-computation of total income shall be passed within a period of 1 year from the end of the financial year in which the modified return was furnished. This shall apply notwithstanding the period of limitation contained under section 153 or 153B or 144C.

The appeal against such order shall lie to Commissioner (Appeals) [Section 246A]

v. Where the assessment or reassessment proceedings for an assessment year relevant to the previous year to which the APA applies, are pending on the date of filing of modified return, the Assessing Officer shall proceed to complete the assessment or reassessment proceedings in accordance with the APA taking into consideration the modified return so furnished.

In this case, the time period of completion of pending assessment or reassessment mentioned under section 153 or 153B or 144C shall be extended by 12 months. This shall apply notwithstanding the period of limitation contained under section 153 or 153B or 144C.

vi. The assessment or reassessment proceedings for an assessment year shall be deemed to have been completed where -

(a) an assessment or reassessment order has been passed; or

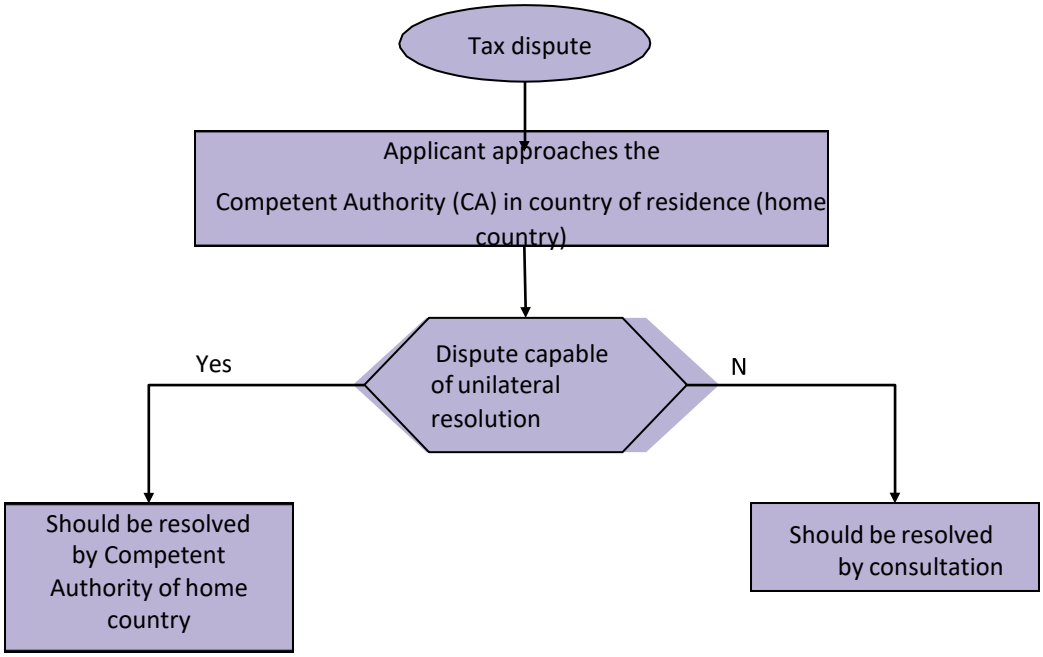
(b) no notice has been issued under section 143(2) till the expiry of the limitation period provided under the said section.

4. Mutual Agreement Procedure

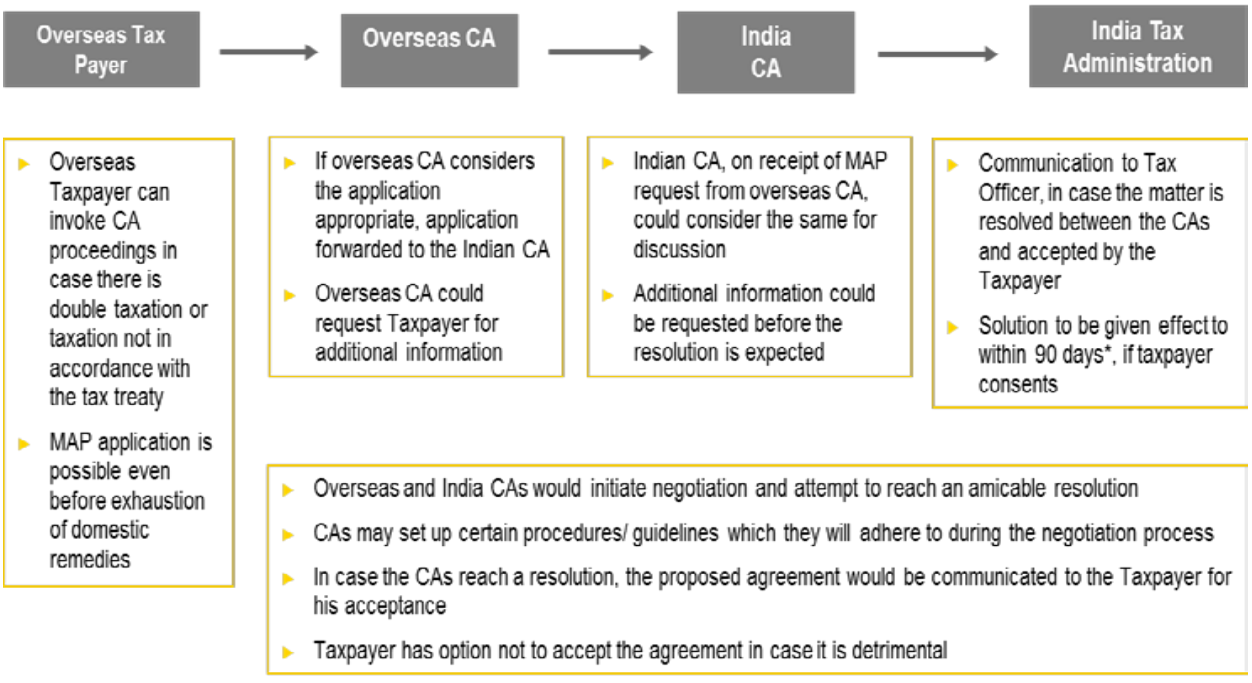
The mutual agreement procedure is a well-established means through which tax administrations consult to resolve disputes regarding the application of double tax conventions. This procedure, described and authorized by Article 25 of the OECD Model Tax Convention, can be used to eliminate double taxation that could arise from a transfer pricing adjustment.

Article 25 sets out three different areas where mutual agreement procedures are generally used. The first area includes instances of “taxation not in accordance with the provisions of the Convention” and is covered in paragraphs 1 and 2 of the Article. Procedures in this area are typically initiated by the

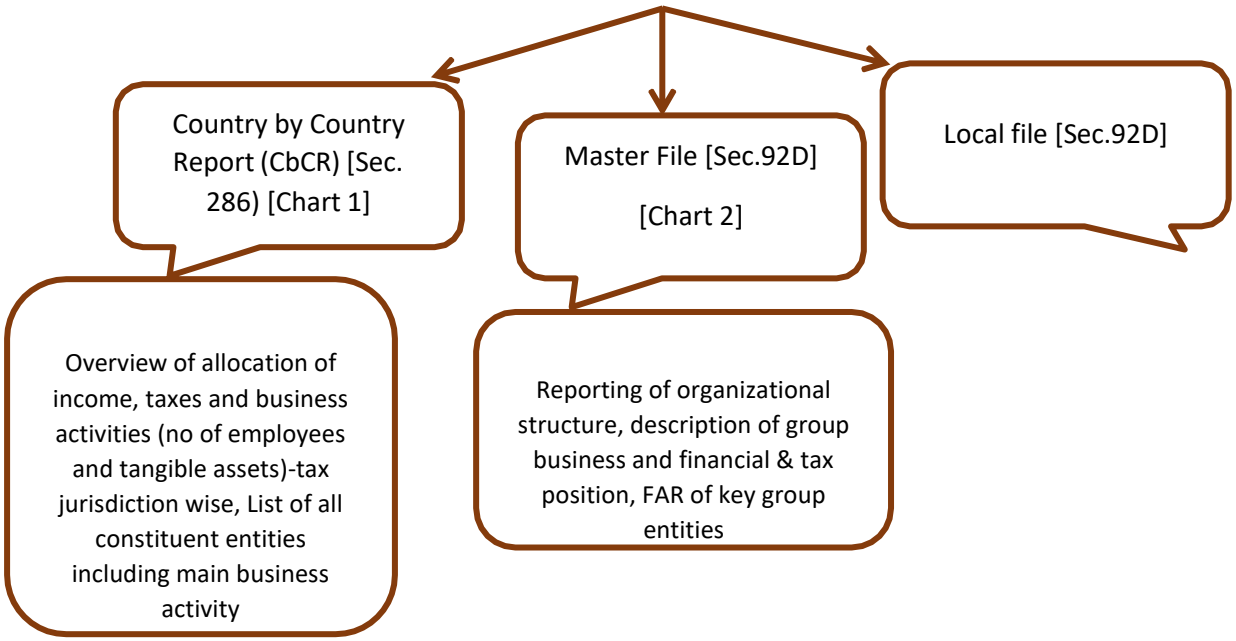
taxpayer. The other two areas, which do not necessarily involve the taxpayer, are dealt with in paragraph 3 and involve questions of “interpretation or application of the Convention” and “the elimination of double taxation in cases not otherwise provided for in the Convention”. Paragraph 10 of the Commentary on Article 25 makes clear that Article 25 is intended to be used by competent authorities in resolving not only problems of juridical double taxation but also those of economic double taxation arising from transfer pricing adjustments made pursuant to paragraph 1 of Article 9 (Article 9 – Associated enterprises).



Typical MAP process in India

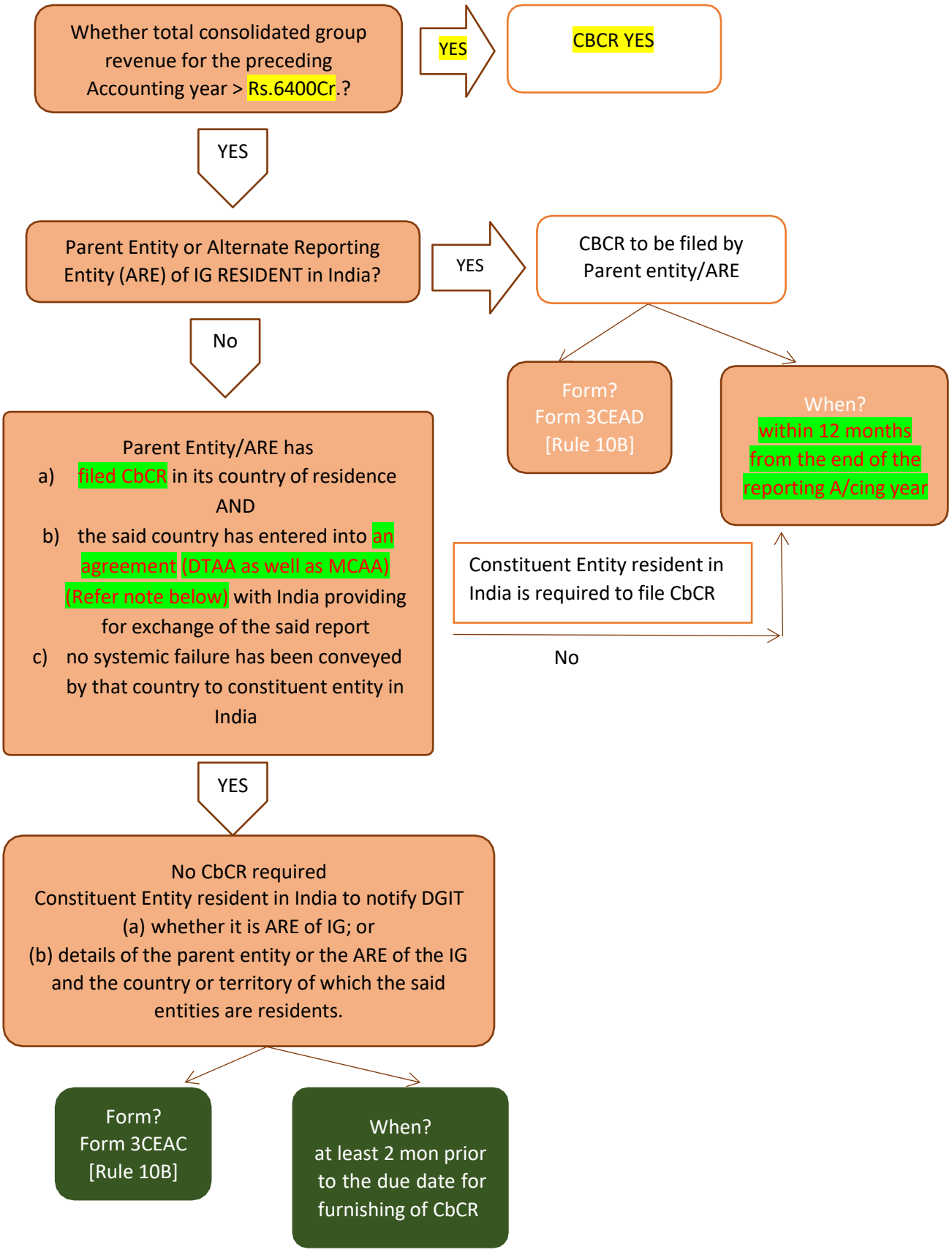


5. Documentation and Compliances



Transfer Pricing

Country by Country Report (CbCR) [Sec.286]



Terms:

(a) "Accounting year" means,—

(i) PY, in a case where the parent entity or alternate reporting entity is resident in India; or

(ii) an annual accounting period, with respect to which the parent entity of the international group prepares its financial statements under any law for the time being in force or the applicable accounting standards of the country or territory of which such entity is resident, in any other case

b) "agreement" means a combination of all of the following agreements, namely:—

(i) an agreement entered into u/s 90(1)/90A(1)[DTAA]; and

(ii) an agreement for exchange of the report referred to in sub-section (2) and notified by the Central Government [MCAA]

As per the existing provisions for CbC reporting in India, Indian residents of foreign MNCs are required to file only a notification and not the CbC report in India provided there existed either an agreement such as the DTAA ("Direct Tax Avoidance Agreement") or a notified agreement for exchange of the CbC report (i.e. "Multilateral Competent Authority Agreement"/ "MCAA"). The definition of agreement has now been amended to include a combination of both, an agreement such as the DTAA and an agreement for exchange of CbC report (e.g. MCAA) notified by the Central Government.

This means that where there is a DTAA existing with another tax jurisdiction but no MCAA, the Indian resident of the foreign MNC would have to file the CbC report in India and not the notification i.e. for cases where the parent reporting entity/ ARE is in US , China etc. This is also applicable in a vice versa situation i.e. where the Indian Government may have a MCAA with the foreign jurisdiction but not a DTAA i.e. Uruguay and Chile.

(c) **"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 CbCR in the country or territory in which the said constituent entity is resident on behalf of such group

(d) **"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;

(e) **"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,

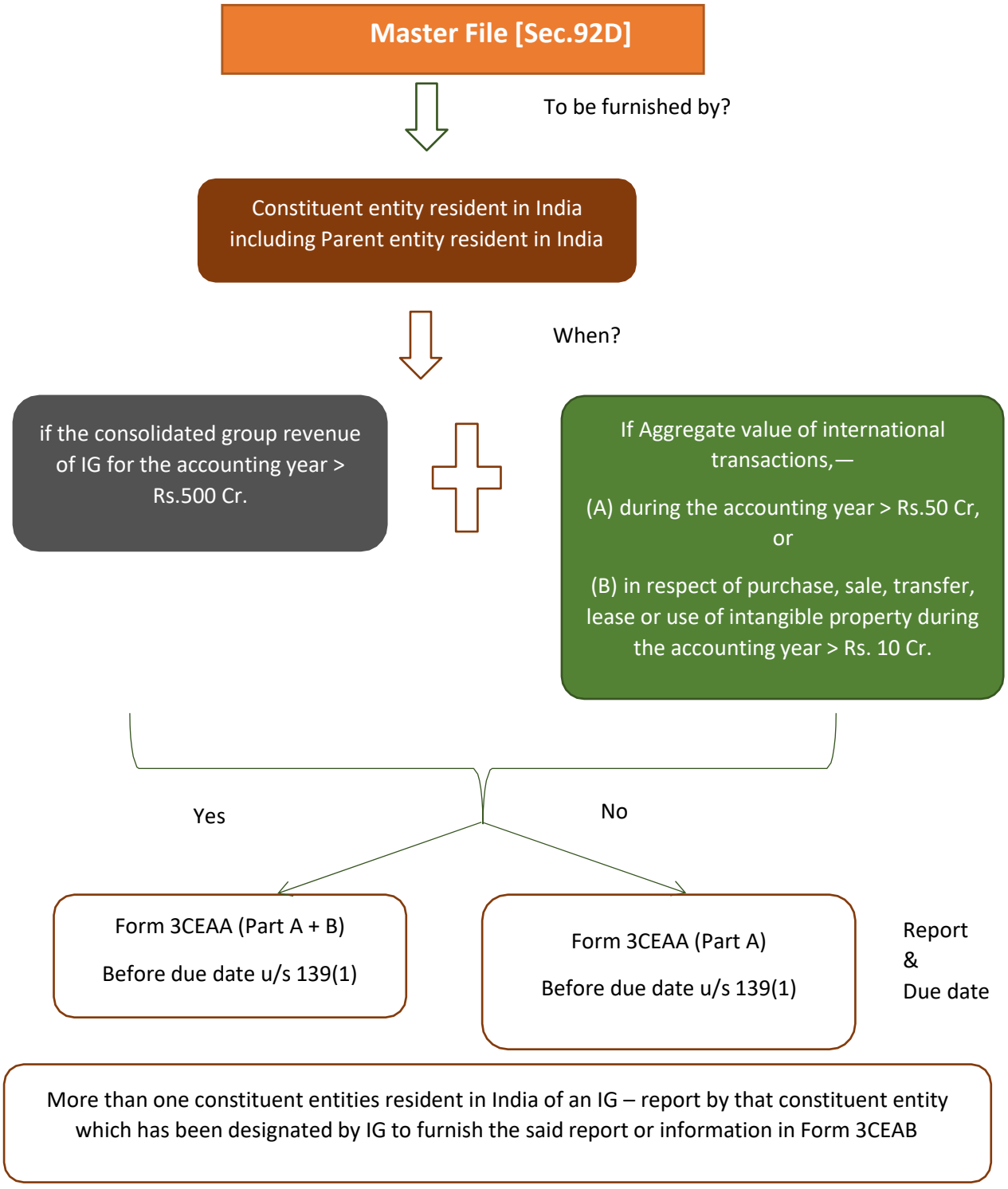
(f) **"international group"** means any group that includes,—

(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

Transfer Pricing

CA Prerna Peshori



Local File

Every person

(a) who enters into an international transaction to keep and maintain such information and documents in respect thereof as may be prescribed by CBDT

(b) being a constituent entity of an international group to keep and maintain the prescribed information and document in respect of an international group.

The constituent entity is required to keep and maintain the information and document irrespective of the fact whether or not any international transaction is undertaken by such constituent entity.

The constituent entity has to furnish the information and document to the authority prescribed under section 286(1), i.e., Director General of Income-tax (Risk Assessment) in the prescribed manner, on or before prescribed date

(2) Information and documents to be kept and maintained for prescribed period - The CBDT is empowered to prescribe the period for which the information and documents shall be kept and maintained.

(3) Assessing Officer & Commissioner (Appeals) empowered to require persons entering into international transaction to furnish prescribed information and documents - The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceedings under the Income-tax Act, require any person who has entered into an international transaction to furnish any such prescribed information or documents within a period of from the date of receipt of a notice issued in this regard. The requisition period may, on request, be extended further for a period not exceeding thirtydays by the Assessing Officer or the Commissioner (Appeals).

Rule 10D(2) provides that in a case where the aggregate value of international transactions does not exceed Rs. 1 crore, it will not be obligatory for the assessee to maintain the above information and documents.

(4) Audit Report [Section 92E]:

Under section 92E, every person who enters into an international transaction during a previous year is required to obtain a report from a chartered accountant and furnish such report on or before the specified date on the prescribed form.

Rule 10E provides that the auditor's report shall be in Form No.3CEB. It requires the auditor to state that he has examined the accounts and records of the assessee relating to the international transactions entered into by the assessee during the relevant year. He has also to give his opinion whether the prescribed information and documents relating to the above transactions have been kept by the assessee. Further, he has to state that the particulars stated in the Annexure to his report are true and correct. The Annexure is in two parts.

In the first part of the Annexure, general information of the assessee is required to be reported. In the second part of the Annexure, the particulars about the international transactions are required to be stated. Broadly stated these particulars include list of associated enterprises, particulars and description of transactions relating to purchase, sales, provisions of service, loans, advances, etc.

"Specified date" shall have the same meaning as assigned to due date in Explanation 2 below sub-section (1) of section 139. The due date for filing of transfer pricing report under section 92E in Form 3CEB is 30th October of the assessment year.

6. Penalties

Stringent penalties are provided in various sections for non-compliance with the above provisions. These are as under:

1. **Penalty for failure to report any international transaction or any transaction deemed to be an international transaction:** Under section 270A, penalty@50% of tax payable on under- reported income is leviable. However, the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer would not be included within the scope of under-reported income under section 270A, where the assessee had maintained information and documents, as prescribed under section 92D, declared the international transactions under Chapter X and disclosed all material facts relating to the transaction.

   Interestingly, clause (d) of section 270A(6) does not provide similar immunity from penalty if the addition/disallowance is made by TPO in relation to a specified domestic transaction.

   Failure to report any international transaction or any transaction deemed to be an international transaction to which the provisions of Chapter X applies would constitute 'misreporting of income' under section 270A(9), in respect of which penalty@200% would be attracted.

2. **Penalty for failure to keep and maintain information and documentation [Section 271AA]:** In order to ensure compliance with the transfer pricing regulations, section 271AA provides that, the Assessing Officer or Commissioner (Appeals) may direct the person entering into an international transaction to pay a penalty@2% of the value of each international transaction entered into by him, if the person:
   i. fails to keep and maintain any such document and information as required by section 92D(1) or section 92D(2);
   ii. fails to report such international transaction which is required to be reported; or
   iii. maintains or furnishes any incorrect information or document.

3. Penalty for failure to furnish information or document under section 92D [Section 271G]

Section 271G provides that if any person who has entered into an international transaction fails to furnish any such information or document as required by Assessing Officer or TPO or Commissioner (Appeals) within a period of 30 days from the date of receipt of a notice issued in this regard, then such person shall be liable to a penalty up to 2% of the value of each international transaction.

4. Penalty for failure to furnish report under section 92E [Section 271BA]

If any person fails to furnish a report from an accountant, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of Rs. 1 lakh.

Penalty for failure to comply with TP provisions : A Summary		
Section	**Nature of default**	**Penalty**
270A(9)	Failure to report any International transaction or deemed International transaction to which the provision of Chapter X applies would constitute 'misreporting of income'	200% of the tax payable on under- reported income

271BA	Failure to furnish a report from an accountant as required under section 92E	₹ 1 lakh
271G	Failure to furnish info or doc as required by Assessing Officer or CIT(A) u/s 92D(3) within 30 days from the date of receipt of notice or extended period not exceeding 30 days, as the case may be.	2% of the value of the International transaction for each failure
271AA	(1) Failure to keep and maintain any such doc**ument** and infor**mation** as required by sec**tion** 92D(1)/(2); (2) Failure to report such International transaction which is required to be reported; or **(3)** Maintaining or furnishing any incorrect infor**mation or document.**	2% of the value of each such International transaction
Notes: • ***The penalty u/s 271AA shall be in addition and not in substitution of penalty u/s 271BA.*** • ***If the assessee proves that there was reasonable cause for the failure, no penalty would be leviable under section 271BA, 271G and 271AA.***		

(i) Penalty for non-furnishing of the report by any reporting entity which is obligated to furnish such report [Section 271GB(1) & (3)]

	Period of delay/default	Penalty
(a)	Not more than a month	Rs. 5,000 per day
(b)	beyond one month	Rs. 15,000 per day for the period exceeding one month
(c)	Continuing default even after service of order levying penalty either under (a) or under (b)	Rs. 50,000 per day of continuing failure beginning from the date of service of order

(ii) Penalty for failure to produce information and documents within prescribed time [Section 271GB(2) & (3)]

	Default	Penalty
(a)	Failure to produce information and documents before prescribed authority within the period allowed u/s 286(6)	Rs. 5,000 per day of continuing failure, from the day immediately following the day on which the period for furnishing the information and document expires.
(b)	Continuing default even after service of penalty order	Rs. 50,000 per day for the period of default beyond the date of service of order.

(iii) Penalty for submission of inaccurate information in the CBC report [Section 271GB(4)]

If the reporting entity has provided any inaccurate information in the report, the penalty would be Rs. 5,00,000 if ,-

(a) the entity has knowledge of the inaccuracy at the time of furnishing the report but does

not inform the prescribed authority; or

(b) the entity discovers the inaccuracy after the report is furnished and fails to inform the prescribed authority and furnish correct report within a period of fifteen days of such discovery; or

(c) the entity furnishes inaccurate information or document in response to notice of the prescribed authority under section 286(6).

(iv) Non-levy of penalty if reasonable cause for failure is proved [Section 273B]

Section 273B provides for non-levy of penalty under various sections if the assessee proves that there was reasonable cause for such failure. Section 271GB has been included within the scope of section 273B. Therefore, the entity can offer reasonable cause defence for non-levy of penalties mentioned above.

7. Transfer Pricing Assessment

I. Reference to Transfer Pricing Officer [Section 92CA]: This section provides for a procedure for reference to a Transfer Pricing Officer (TPO) of any issue relating to computation of arm's length price in an international transaction. The procedure is as under -

(1) The option to make reference to TPO is given to the Assessing Officer. Where the assessee has entered into an international transaction in any previous year and if Assessing Officer considers it necessary or expedient to do so he may refer the computation of the arm's length price in relation to the said international transaction to the TPO. This option is not, however, available to the assessee.

(2) The Assessing Officer has to take the approval of the Principal Commissioner of Income-tax (PCIT)/Commissioner of Income-tax (CIT) before making such a reference.

(3) Any Joint /Deputy/Assistant Commissioner of Income-tax, authorised by CBDT, can be appointed as TPO.

(4) When such reference is made, TPO would serve a notice to the assessee requiring him to produce on a date specified in the notice, any evidence on which the assessee relied in support of the computation of arm's length price made by him in relation to the international transaction.

(5) The TPO can also determine the ALP of other international transactions identified subsequently in the course of proceedings before him as if such transaction is referred to the TPO by the Assessing Officer under section 92CA(1) [Sub-section (2A)].

(6) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the TPO during the course of proceeding before him, the transfer pricing provisions shall apply as if such transaction is referred to the TPO by the Assessing Officer under section 92CA(1) [Sub-section (2B)].

(7) The TPO has to pass an order determining the arm's length price after considering the evidence, documents, etc. produced by the assessee and after considering the material gathered by him. He has to send a copy of his order to Assessing Officer as well as the assessee.

(8) The order of the Transfer Pricing Officer determining the arm's length price of an international transaction is binding on the Assessing Officer and the Assessing Officer shall proceed to compute the total income in conformity with the arm's length price determined by the Transfer Pricing Officer [Sub-section (4)].

(9) In order to provide sufficient time to the Assessing Officer to complete the assessment in a case where reference is made to the Transfer Pricing Officer, section 92CA(3A) provides for determination of arm's length price of international transactions by the Transfer Pricing Officer at least 60 days before the expiry of the time limit under section 153 or section 153B for making an order of assessment by the Assessing Officer. This provision would apply in a case where reference is made on or after 1.6.2007 or in a case where reference is made before that date but the order of the Transfer Pricing Officer is pending on that date [Sub- section (3A)].

(10) In many cases, it becomes necessary to seek information from foreign jurisdictions for the purpose of determining the arm's length price by the TPO. At times, proceedings before the TPO may also be stayed by a court order.

Taking into consideration such cases, it has been provided that where assessment proceedings are stayed by any court or where a reference for exchange of information has been made by the competent authority under an agreement referred to in section 90 or 90A, the time available to the Transfer Pricing Officer for making an order after excluding the time for which assessment proceedings were stayed or the time taken for receipt of information, as the case may be, is less than 60 days, then, such remaining period shall be extended to 60 days.

(11) The TPO has power to rectify his order under section 154 if any mistake apparent from the record is noticed. If such rectification is made, the Assessing Officer has to rectify the assessment order to bring it in conformity with the same.

(12) The TPO can exercise all or any of the powers specified in clause (a) to (d) of section 131(1) or section 133(6) or section 133A for determination of arm's length price once the above reference is made to him.

(13) The Central Government may make a scheme, by way of notification for the purposes of determination of the arm's length price, so as to impart greater efficiency, transparency and accountability by –

(a) eliminating the interface between the Transfer Pricing Officer and the assessee or any other person to the extent technologically feasible;

(b) optimising utilisation of the resources through economies of scale and functional specialisation;

(c) introducing a team-based determination of arm's length price with dynamic jurisdiction [Sub-section (8)].

(14) The Central Government may, for the purpose of giving effect to the scheme made, direct that any of the provisions of this Act would not apply or would apply with such exceptions, modifications and adaptations as may be specified.

However, no direction shall be issued after 31st March, 2022. [Sub-section (9)].

(15) Every notification issued under sub-section (8) and sub-section (9) shall, as soon as may be after the notification is issued, be laid before each House of Parliament [Sub-section (10)].

Power of Assessing Officer: Section 92C(3) and (4) gives power to the AO to determine the arm's length price under the following circumstances and also empowers the AO to re-compute total income of the assessee having regard to arm's length price determined by him. It also provides that deduction under section 10AA and Chapter VI-A shall not be allowed from the additional income computed by him.

The AO may invoke the power to determine arm's length price, if during the course of any proceeding, he is of the opinion that, on the basis of material or information or documents in his possession:

(a) The price charged or paid in an international transaction has not been determined in accordance with section 92C(1) and (2); or

(b) Any information and documents relating to an international transaction has not been kept and maintained by the assessee in accordance with the provisions contained in section 92D(1) and the rules made in this behalf (Rule 10D); or

(c) The information or data used in computation of the arm's length price is not reliable or correct; or

(d) The assessee has failed to furnish within the specified time, any information or documents which he was required to furnish by a notice issued under section 92D(3).

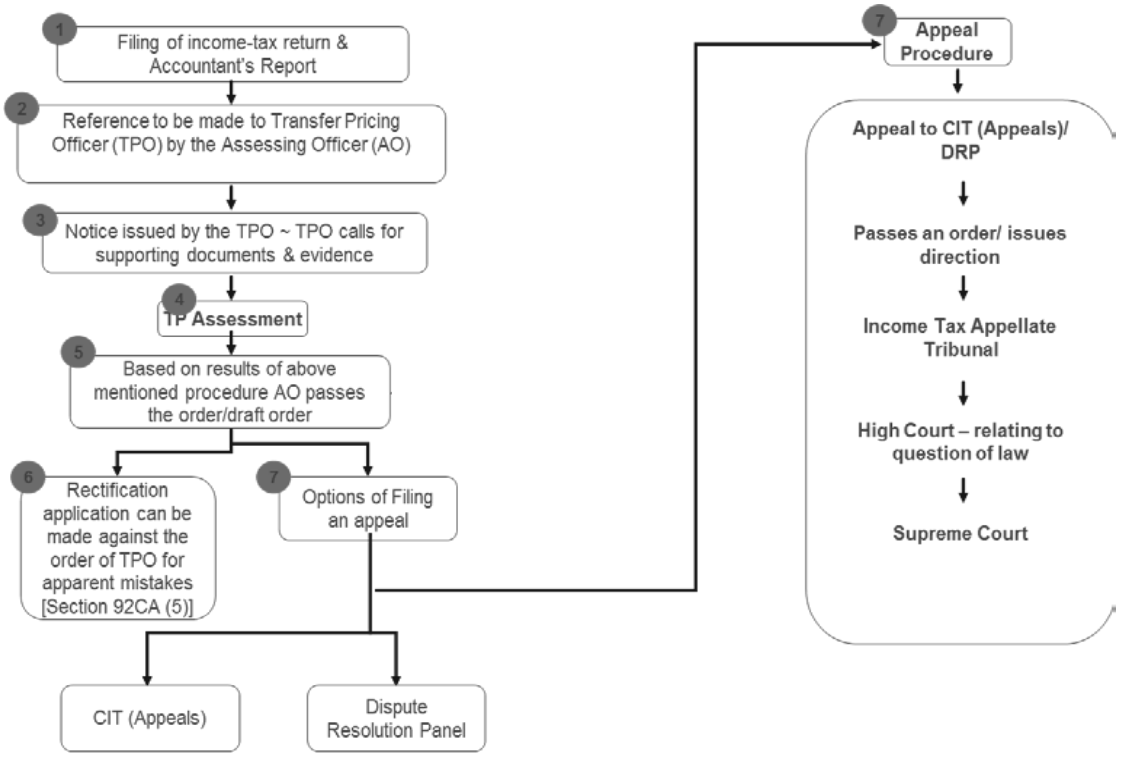
Before invoking the power to determine arm's length price, an opportunity of being heard is to be given to the assessee.

Second proviso to section 92C(4) provides that if the total income of an associated enterprise is computed under this section on the determination of arm's length price paid to another associated enterprise, from which tax is deducted or deductible at source, the income of the other associated enterprise shall not be recomputed on this count.

For example, if "A" Ltd. has paid royalty to "B" Ltd. (Non-Resident) @10% of sales and tax is deducted at source, "B" Ltd. cannot claim refund if the Assessing Officer has determined 8% as arm's length price in the case of "A" Ltd. and disallowed 2% of the royalty amount.

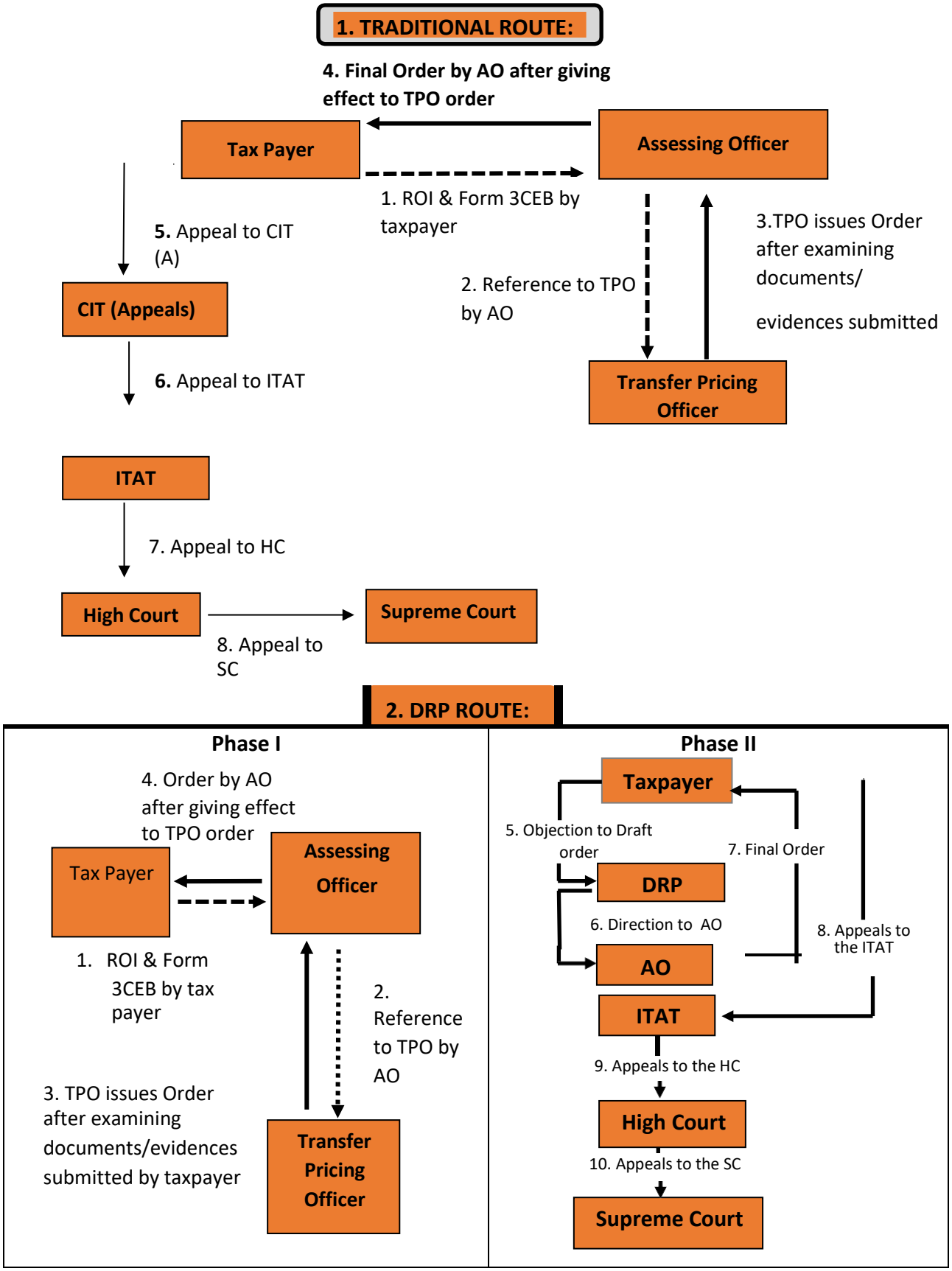
Transfer Pricing

CA Prerna Peshori



Transfer Pricing

CA Prerna Peshori



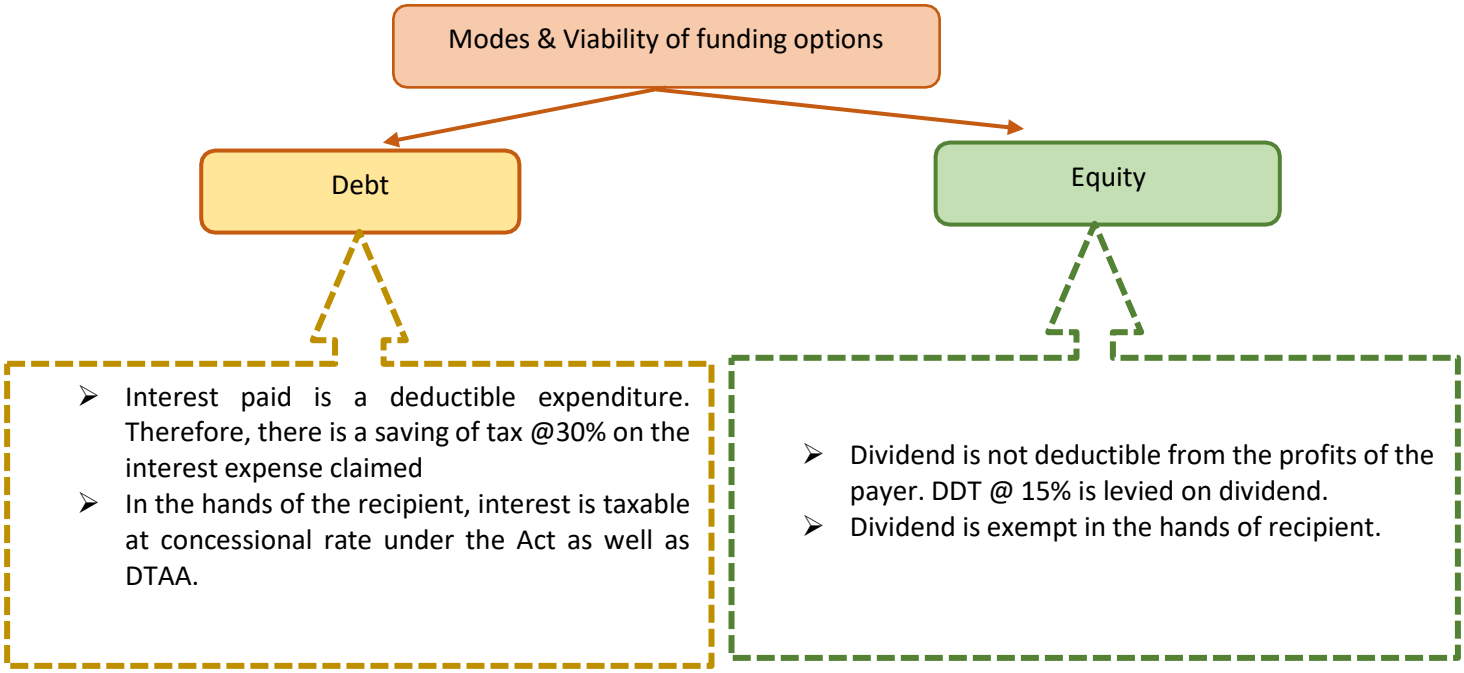
Earlier PCIT/CIT if he objected to directions of DRP, could direct AO to file appeal with ITAT against DRP's order within 60 days from date of passing of order. However, NOW

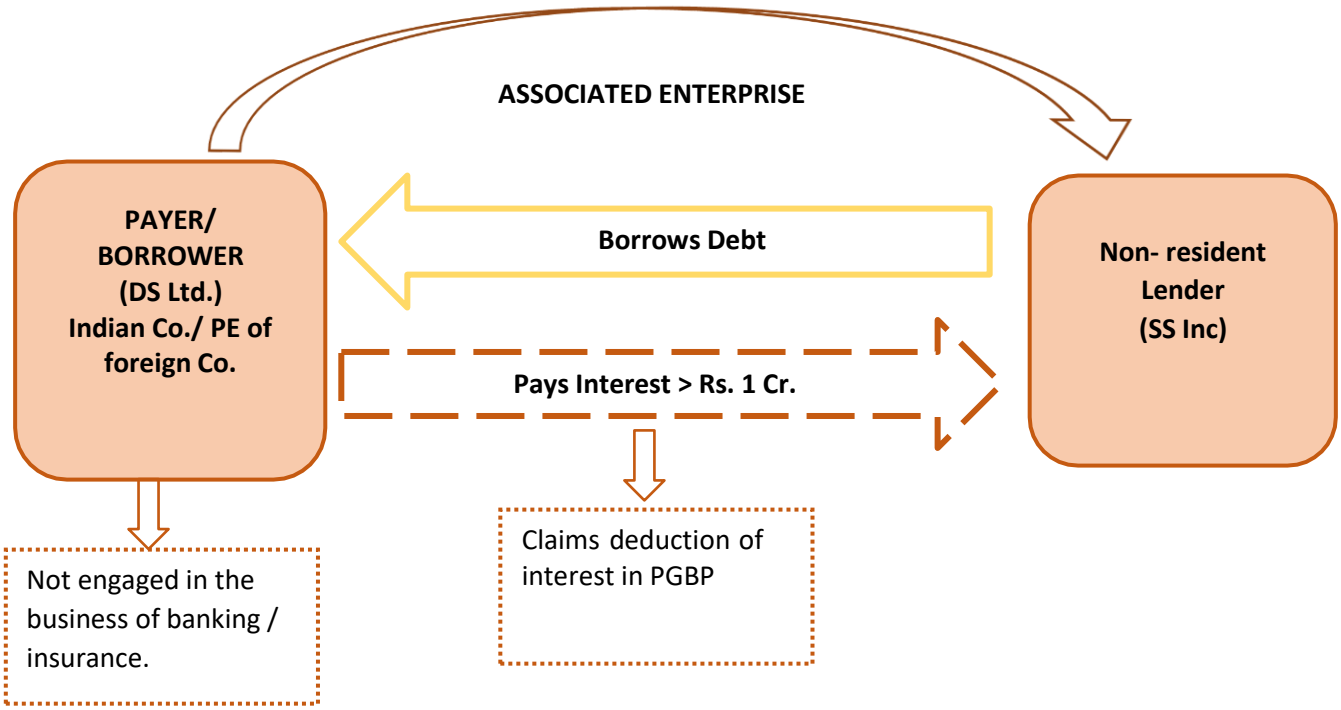
DEPARTMENT CANNOT FILE APPEAL AGAINST ORDER OF DRP AND ONLY ASSESSEE CAN FILE APPEAL AGAINST THE SAME.

❋**Time limit for completion of assessment where reference is made to TPO:**

Provision	Time limit
• Completion of assessment u/s 143(3) or u/s 144	21 months
	From end of AY in which income was first assessable
• Reassessment u/s 147	24 months
	From the end of FY in which notice u/s 148 is served
• Completion of fresh assessment in pursuance of order passed u/s 254/263/264	24 months
	From the end of FY in which order u/s 254 is received by CC or CIT or order is passed u/s 263/264 by CIT

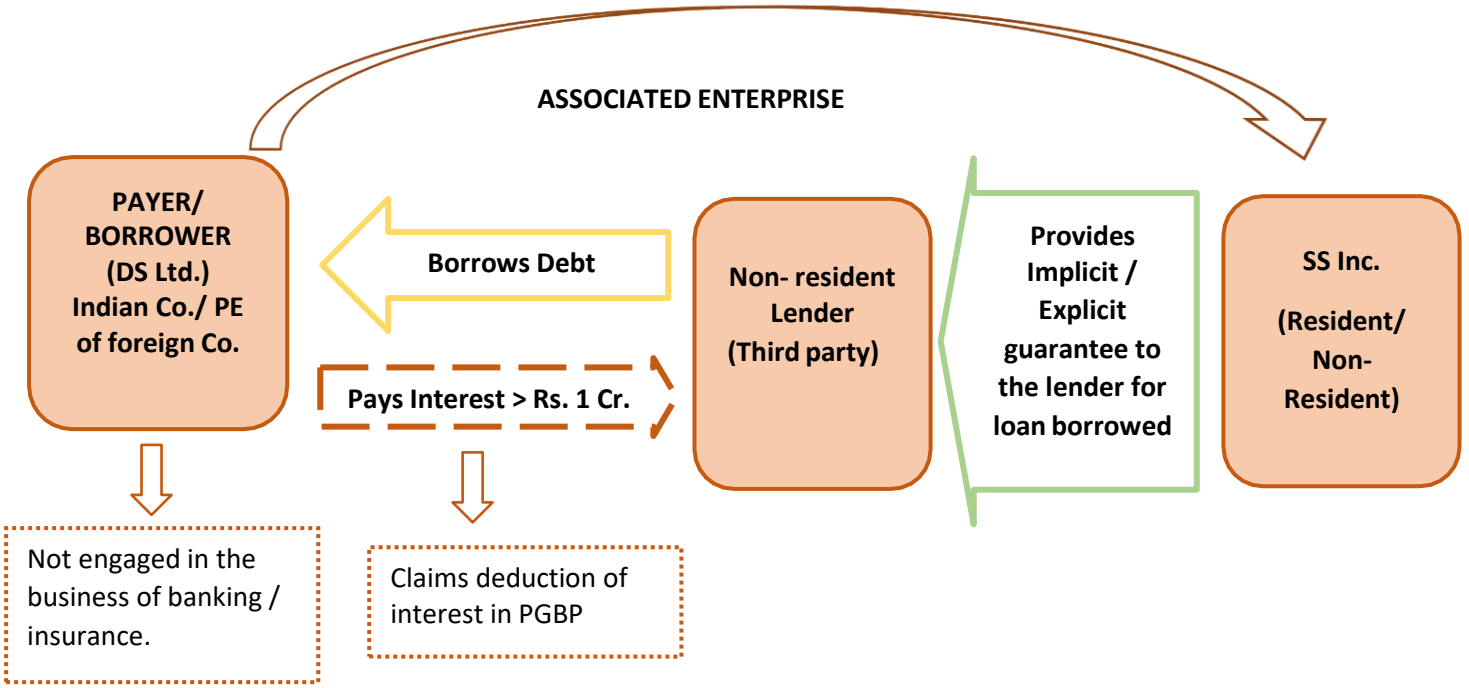
8. Thin Capitalization Rules [Section 94B]





Transfer Pricing

CA Prerna Peshori



If the above conditions are satisfied

INTEREST

shall NOT BE DEDUCTED while computing income under the head PGBP to the **EXTENT** that it arises from the **EXCESS INTEREST** (i.e. excess interest shall be disallowed u/s 94B)

Excess Interest is

Lower

A

Step 1:-
Consider total interest paid on debt

Step 2:-
30% of earning (before interest, taxes, depreciation & amortization) EBIDTA of borrower

Step 3:- Total interest over & above 30%of EBITDA
Step 2 – Step 1

B

Interest paid on Debt borrowed from AE

Borrower	Lender	Guarantor	94B Applicable?
Indian Company / PE	Non-resident AE	No guarantee	Yes
Indian Company / PE	Resident AE	No guarantee	No
Indian Company / PE	Non-resident	Resident AE	Yes
Indian Company / PE	Resident	Non-resident AE	No (since debt not from non-resident)
Indian Company / PE	Resident	Resident AE	No (since debt not from non-resident)
Foreign company (with a POEM in India)	Non-resident AE	No guarantee by AE	No
Foreign company (with a POEM in India)	Non-resident	Guarantee by AE	No

9. Notified Jurisdictional Area [Section 94A]

The Central Government (CG) is empowered to notify any country or territory outside India as a notified jurisdictional area in relation to transactions entered into by any assesse, if such country lack effective exchange of information with India. Cyprus was notified as NJA by CG.

Circular 15/2017

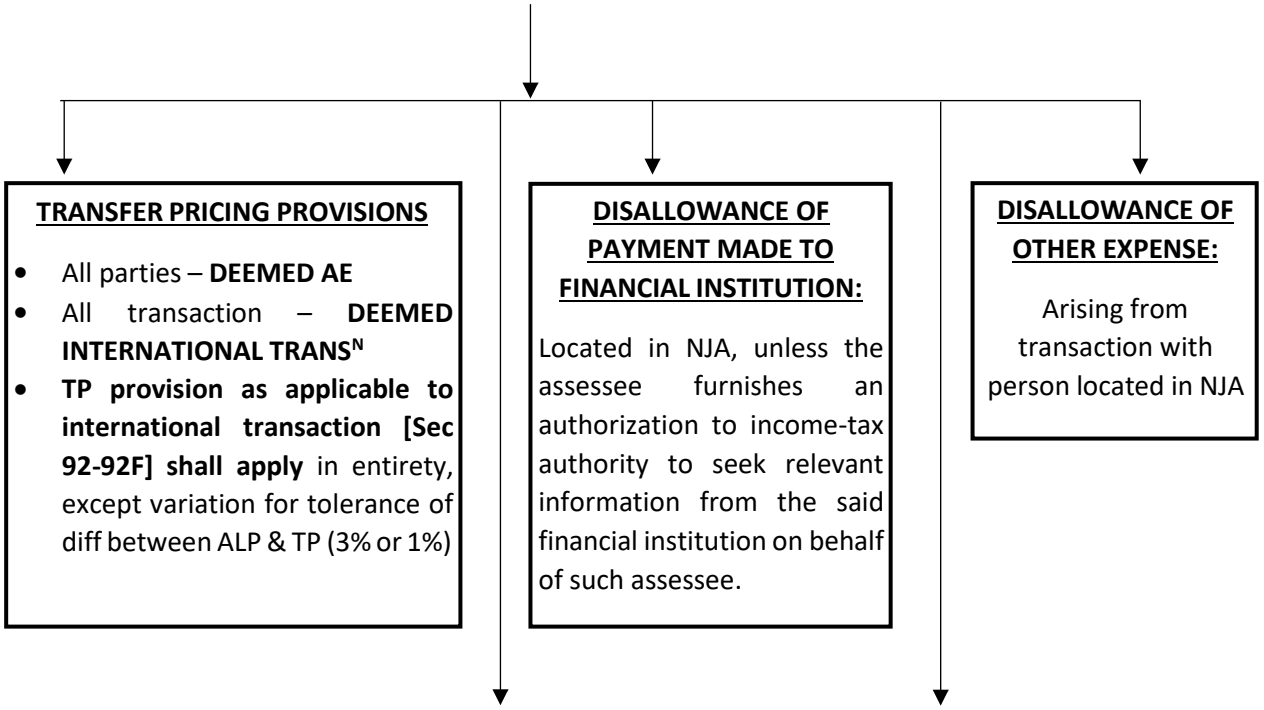
Cyprus has been removed from the list of "Notified Jurisdictional areas" under section 94A of the Income

Transfer Pricing

CA Prerna Peshori

➢ **Section 94A(2): Applicability of Transfer Pricing Regulations:**

If an assessee enters into a transaction where one of the parties to the transaction is a person located in a NJA then following implications arises:-



AMT RECEIVED OR CREDITED FROM NJA WILL BE DEEMED AS INCOME, IF:

- **Assessee DOES NOT PROVIDE explanation for source of income**
- **Explanation provided by assessee, IS NOT SATISFACTORY**, in opinion of AO.

TDS AT HIGHER OF:

- **Rates in Force** (Rate under Finance Act or rate under DTAA)
- **Rate specified under Act**
- **30%**

ACRONYMS USED:

Transaction:	Transn
Amount:	Amt

10. Transfer of Income to Non-residents [Section 93]

Section 93 hits at transactions which are effected with a view to avoiding liability to taxation. For the purpose, the word "non-resident" also includes a person who is not-ordinarily resident. In order to attract the provisions of this section, all the following conditions must be satisfied:

a) There is a transfer of assets - whether movable or immovable and whether tangible or intangible.
b) The transfer is made by any person in India or outside irrespective of his residential status or citizenship.
c) The transfer is made either alone or in connection with associated operations.
d) The assets transferred directly yield income chargeable to tax under this Act.
e) The transfer of assets is effected in such a manner that the income becomes payable to a person outside India who is either a non-resident or a not ordinarily resident in India.
f) The transferor acquires any right by virtue of which he gets the power to enjoy the income whether immediately or in future.
g) The Assessing Officer is satisfied that avoidance of liability to tax in India is the purpose of the transfers.

In particular, this section deems any income of a non-resident person which, if it were the income ofa resident person, would be chargeable to tax in India (in the absence of this Section), as the income of the resident person in India for all purposes of the Act provided that all the conditions stated aboveare satisfied. This section also covers a variety of transactions constituting a transfer including cases where assets are transferred to a non-resident person and the transferor indirectly derives income under the guise of obtaining loans or repayment of loans. If the aforesaid conditions are fulfilled, the income from the assets transferred should be treated as the income of the transferor and wouldaccordingly be taxable in his hands. Therefore, where assets are transferred to a body corporate outside India, in consideration of shares allotted by it to the transferor, he (the transferor), will become assessable under this section in respect of the income of the company derived by it from those assets. This section will not, however, apply to cases where it is shown to the satisfaction of the Assessing Officer that (i) neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation or (ii) it is provided to the satisfaction of the Assessing Officer that the transfer was effected for bonafide commercial purpose and with no intent to avoid tax.

The income which is deemed to be that of the transferor under this section may also arise as a result of the transfer in connection with associated operations. However, in this case also, the treatment of the income would be the same.

Meaning of "associated operation": The expression 'associated operation," in relation to a transfer, means an operation of any kind effected by any person in relation to:

(i) any of the assets transferred;

(ii) any assets representing, whether directly or indirectly, any of the assets transferred;

(iii) any income arising from such assets;

(iv) any assets representing, whether directly or indirectly, the accumulation of income arising from such assets.

Meaning of “Assets”: It includes property or rights of any kind.

Meaning of “transfer”: In relation to rights, transfer includes the creation of those rights.

Meaning of “benefit”: It includes a payment of any kind.

In order to determine the liability of the assessee in respect of the deemed income it is immaterial if the income or benefits from the transfer (i) are actually received or not or (ii) are received or are receivable in cash or kind or (iii) are receivable directly or indirectly. For purposes of this section, a person is deemed to have the power to enjoy the income of a non-resident if:

i. the income, in fact, so dealt with by any person as to be calculated at some point of time to enure for the benefit of the transferor, whether in the same form of the income or otherwise;
ii. the receipt or accrual of the income operates to increase value of any assets held by the transferor or for his direct or indirect benefit;
iii. the transferor receives or is entitled to receive at any time any benefit out of the income or out of any money available for the purpose by reason of the effect or successive effects of the associated operations on that income and the assets which represent that income;
iv. the transferor is in a position to obtain for himself the beneficial enjoyment of the income by exercising any power of appointment or power of revocation or otherwise, whether with or without the consent of any other person, or
v. the transferor is able to control directly or indirectly the application of the income in any manner whatsoever.

However, in determining whether a person has the power to enjoy the income due regard shall be had to the substantial result and effect of the transfer and any associated operations must be taken into consideration irrespective of the nature or form of the benefits.

It may be noted that where an assessee has been charged to tax in respect of a sum deemed to be his income under this section, the subsequent receipt of that sum by the assessee, whether as incomeor in any other form, shall not be liable to tax in his hands at the time of receipt.