

# TAX FLASH NEWS

## CBDT revises and updates guidance for selection and referral of transfer pricing cases for assessments

### Background

The Central Board of Direct Taxes (CBDT) issued Instruction No. 15/2015 on 16 October 2015, replacing Instruction No. 3 dated 20 May 2003, providing guidance to the Assessing Officers (AO) and Transfer Pricing Officers (TPO) regarding administration of Transfer Pricing (TP) assessments. The guidelines issued are applicable predominantly for international transactions and provide that not more than 50 cases should be assigned to the TPOs being, Additional/Joint Commissioner of Income Tax (CIT).

The guidelines specify that cases for TP assessments should not be selected for scrutiny based on the value of international transactions reported by the taxpayers in the Accountants Report i.e. Form No. 3CEB, but should be based on risk parameters.

### Key highlights of the guidance

- Once the AO is satisfied that the taxpayer has entered into international transaction(s) with Associated Enterprises (AEs) based on factual information in Form No. 3CEB filed by the taxpayer, the AO can arrive at a prima facie belief whether or not a reference to the TPO is necessary. No detailed enquiry needs to be carried out by the AO at this stage.
- In the above situations where the AO is satisfied that international transactions exist i.e. in cases involving TP issues and those which are selected for scrutiny on non-TP issues i.e. in scrutiny cases, the AO shall

adopt the following approach for reference to the TPO to determine the Arm's Length Price (ALP):

(A)	(B)
<b>Cases - Involving TP issue</b>	<b>Scrutiny cases</b>
As a jurisdictional requirement, the AO in the following <b>three situations</b> , must record his/her satisfaction that there is an income or potentiality of an income arising and/or being affected on determination of the ALP, before proceeding to determine the ALP or making a reference to the TPO	If the case is selected for scrutiny on account of a non-TP issue but includes international transaction(s), there is no requirement to make a reference to the TPO based on the value of international transaction(s), except in the following <b>two situations</b>
i. The AO notices that international transaction(s) have been entered into by the taxpayer but the Accountant's Report has not been filed	i. The AO notices that international transaction(s) have been entered into by the taxpayer but the Accountant's Report has not been filed;
ii. One or more international transaction(s) are not disclosed in the Accountant's Report filed by the taxpayer	ii. One or more international transaction(s) are not disclosed by the taxpayer in the Accountant's Report filed by the taxpayer

(A)	(B)
Cases - Involving TP issue	Scrutiny cases
iii. There are qualifying remarks declared by the taxpayer in the Accountant's Report stating that such transaction(s) are not international transaction(s) or that it does not impact the taxpayers income	

- In all the above situations i.e. both in cases involving TP issues and other scrutiny cases, the AO must provide an opportunity of being heard to the taxpayer before recording his/her satisfaction or otherwise.
- In cases where no objection is raised by the taxpayer to the applicability of Chapter X (Section 92-92F) of the Income-tax Act, 1961 (the Act), the prima facie view of the AO would be sufficient before making a reference to the TPO.
- In cases where the taxpayer objects to the applicability of Chapter X of the Act, the taxpayers' objection should be considered and specifically dealt with by the AO in the interest of natural justice.
- Approval from the Principal Commissioner or Commissioner is to be necessarily sought before making a reference to the TPO to determine the ALP of international transaction(s).
- TP cases would be selected for scrutiny on the basis of risk parameters and not on the basis of the value of international transaction(s).
- Taking into consideration all the relevant facts and data available with him/her, the TPO shall determine the ALP and pass a speaking order after seeking the necessary approvals.
- The TPO's, being the Additional/Joint CIT shall be assigned not more than 50 cases depending on the importance and complexity involved. It has been emphasised that the TPO shall document adequate reasons and supporting analysis to support the determination of ALP, in light of the fact that the same shall be subject to judicial scrutiny.
- In addition to the above, the TPO shall be responsible for conducting the compliance audit of Advance Pricing Agreements (APA) and performing a scrutiny for the cases referred to him/her by the AO with respect to taxpayers opting for Safe Harbour Provisions.

- Similar guidelines are under consideration with the CBDT for Specified Domestic Transactions (SDTs) as well. However, till the time these guidelines are finalised, the approach as per column (B) to the above table shall be applicable to cases selected for assessment having SDTs.
- It has been emphasised that the CIT (TP) shall ensure the expeditious resolution of cases referred by the AO to the TPO in their respective jurisdictions and accurate records of the same will be maintained in a specified format. It is endeavored by the CBDT to use this database for determination of the ALP in identical/substantially identical cases.

## Our comments

The Indian TP regulations have been a significant area of controversy between the tax department and taxpayers in India. Huge amounts of tax demands and prolonged litigations in TP were believed to have negatively impacted foreign investments in India. A number of corrective measures like Safe Harbor regime, APA and APA rollback programme, etc. have already been announced to dissipate the negative sentiments and elevate an investor friendly environment.

It appears that the Indian Revenue Authorities are moving their focus and resources towards high risk cases rather than chasing every multinational who crosses a certain threshold of transaction value. This approach to some extent falls in line with the global developments on Base Erosion and Profit Shifting (BEPS) project finalised recently by the Organisation of Economic and Commercial Development (OECD). Even the OECD has advised countries to conduct a risk assessment of cases before they are selected for audit, so that efforts and limited resources of the tax authorities as well as the taxpayers are focussed on high risk cases and unnecessary burden is not created on taxpayers leading to an unpromising business environment.

The release of these revised guidelines is a shot in the arm and demonstrates the inclination and determination of the Indian Government to develop a superior taxation regime, which can go a long way in the overall economic development of the country.

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