

A SHORT NOTE ON PERSUASIVE POWER OF APA ENTERED INTO IN SUBSEQUENT YEARS

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Advance Pricing Agreements (APA) were introduced through the Finance Act 2012 inserted Sec 92CC to the Income Tax Act to provide certainty in terms of taxation of international transactions undertaken by taxpayers with their AE's.

Meaning of APA -

APA is an agreement entered between the taxpayer and the tax authority to determine the transfer pricing methodology for pricing the taxpayer's international transactions with its associated enterprises (AEs) for future years. **It other words it is an arrangement to determine the Arm's Length Price (ALP) by determining the method/manner of determining ALP for international Transactions.**

Types of APA -

- **Unilateral APA** - An agreement that involves only the taxpayer and concerned authority.
- **Bilateral APA** - An agreement which includes the taxpayer, the AE of the taxpayer in foreign country, the concerned authority of the taxpayer and foreign equivalent of the AE.
- **Multilateral APA** - An agreement which involves the taxpayer, two or more AE of the taxpayer, the concerned authority of the taxpayer and tax authorities of AE.

APA Mechanism -

Sections 92CC and 92 CD in the Act w.e.f 1 July 2012, read with Rules 10F to 10T and Rule 44GA provide the framework for APA including filing of pre-filing consultation application, pre-filing consultation, fees, the filing of APA application, processing of the application, amendment of application, withdrawal of application, terms and conditions, filing of Annual Compliance Report, Compliance Audit, revision, cancellation and renewal of the APA. The CBDT further issued a "Guidance with FAQs"¹ on the APA scheme. A taxpayer can request an APA for a maximum period of five years. Further, **rollback provisions** for 4 years were introduced in sub-section (9A)

¹ CBDT FAQ on APA [https://www.incometaxindia.gov.in/booklets%20%20pamphlets/advance-pricing-agreement-guidance-with-faqs-\(tpi-43\).pdf](https://www.incometaxindia.gov.in/booklets%20%20pamphlets/advance-pricing-agreement-guidance-with-faqs-(tpi-43).pdf)

in section 92CC inserted by the Finance (No.2) Act, 2014 with the relevant Rules 10MA and 10RA and a CBDT Circular No. 10/2015 was issued explaining the provisions of the rollback of the APA. The primary condition for the rollback of the APA is that the FAR analysis of the rollback year(s) shall not differ materially from the FAR analysis validated for the APA years. Thus, in short, a taxpayer would be able to have certainty in TP matters for a maximum period of 9 years (APA 5 years, rollback 4 years).

Persuasive Power of subsequent year APA on previous years (even without rollback being applied for) -

Now, the question arises as to whether the APA entered into subsequent years has persuasive value on previous years *irrespective* of the whether the rollback provisions were applied for or not.

Though there is no specific provision in the Income Tax Act 1961 and Income Tax Rules 1962 to apply the APA retrospectively unless rollback/clawback option was chosen in the APA application, various Courts and Tribunals have held that **as long as Function, Asset and Risk (FAR) remains the same** in the years intended to apply retrospectively the APA as compared to the years the APA was agreed for, **such a retrospective application of APA is permissible.**

In the case of **PCIT v. JP Morgan & Chase**² held that “6. *Counsel for the assessee had produced a copy of an Advance Pricing Agreement between the assessee and the CBDT for the later assessment year, in which following observations were made;*

"AND WHEREAS the outcome agreed under the Mutual Agreement with US for Applicants international transactions with US AEs would also be applied to its transactions with Non-US AEs and the Applicant has conveyed its acceptance of the same."

7. *To this, learned Counsel for the revenue stated that the position projected by the learned Counsel for the assessee is correct, however, this was the situation for the later assessment year and cannot be accepted for the present assessment year. In our opinion, two significant features therefore arise in the present Appeal; firstly, the MAP has been drawn after the consideration of relevant aspects giving rise to transfer pricing adjustment and **secondly, the CBDT in the later year agreed that such transfer pricing consideration in relation to US based transactions can be***

² ITA No. 4 of 2017

safely adopted for the purpose of the assessee's non-US based transactions. In the present year, therefore it would be wholly inappropriate to allow the revenue to argue to the contrary."

Thus the court concluded that if there is similarity between the circumstances and the nature of transactions, both APA and MAP results can provide persuasive value before the courts. But that cannot be considered automatic or mechanical.

In the case of **PCIT v. Ameriprise India Pvt Ltd**³ the Hon'ble Delhi High Court, held that *"5. Additionally, it is pointed out by Mr Deepak Chopra, learned counsel for the Assessee, that for the subsequent AYs an Advance Pricing Agreement has been entered into between the Assess. and the Central Board of Direct Taxes under Section 92CC of the Act on 22th January 2016 where under the aforementioned 'cost plus pricing methodology has been implicitly accepted. Therefore, in the facts of the present case, the Court is of the view that no substantial question of law arises."*

In the case of **Metal One Corporation India Pvt. v. DCIT**⁴ on the issue of whether APA has persuasive value to the current year stated that *"We find that the additional ground of appeal raised by the assessee is to be admitted being a legal issue. Various Benches of the Tribunal have held that the conclusion reached in APA proceedings deserves to be applied in case facts and circumstances, FAR are similar to the subsequent years. Similar view has been applied in the case of Pune Bench of the Tribunal in M/S. Honeywell Automation India Ltd. vs ACIT, Circle-7, Pune in ITA No.359/Pune/2013 vide order dated 02.11.2018 and also in Ranbaxy Laboratories Ltd. Vs. ACIT in ITA No.196/Del/2013 vide order dated 25.04.2016. Applying the said parity of reasoning, we hold that once the APA has been concluded in the hands of the assessee then the same approach/basis is to be adopted for instant Assessment Year. Accordingly, the Assessing Officer/TPO is directed to follow the approach/basis of APA applied for the subsequent year to the instant Assessment Year."*

Conclusion -

Thus, in conclusion even though rollback provisions have not been exercised and no provision is there specifically in the Act, as long as FAR (function, assets and risks) are the same, the APA entered into subsequent years has persuasive value in current/previous years.

³ ITA No. 206/2016

⁴ ITA No 1761/Del/2015