

**F.No. 500/9/2015-APA-II
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
Foreign Tax and Tax Research Division-I
APA-II Section**

New Delhi, dated 10th March, 2016

**Subject: Guidelines for Implementation of Transfer Pricing Provisions –
Replacement of Instruction No. 15/2015 - Regarding**

The provisions relating to transfer pricing are contained in Sections 92 to 92F in Chapter X of the Income-tax Act, 1961. These provisions came into force w.e.f. Assessment Year 2002-2003 and have seen a number of amendments over the years, including the insertion of Safe Harbour and Advance Pricing Agreement provisions and the extension of the applicability of transfer pricing provisions to Specified Domestic Transactions.

2. In terms of the provisions, any income arising from an international transaction or specified domestic transaction between two or more associated enterprises shall be computed having regard to the Arm's Length Price. Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers (TPOs) and the Assessing Officers (AOs) to operationalise the transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. After the issuance of Instruction No. 15/2015, the Board has received some suggestions and queries, which have been examined in detail. Accordingly, this Instruction is being issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises. The guidelines on various issues are as follows:

3. **Reference to Transfer Pricing Officer (TPO)**

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard – for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

- (a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;
- (b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;
- where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and
- where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the

principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

3.5 In addition to the cases to be referred as per paragraphs 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the TPO for determination of the ALP.

3.6 Since the provisions of Section 92CA of the Act, *inter-alia*, refer to the computation of the ALP of the international transaction or specified domestic transaction, it is imperative for the AO to ensure that all international transactions or relevant specified domestic transactions or both, as the case may be, are explicitly mentioned in the letter through which the reference is made to the TPO. In this regard, guidelines as under may be followed:

- (a) If a case has been selected for scrutiny on a TP risk parameter pertaining to international transactions only, then the international transactions shall alone be referred to the TPO;
- (b) If a case has been selected for scrutiny on a TP risk parameter pertaining to specified domestic transactions only, then the specified domestic transactions shall alone be referred to the TPO; and
- (c) If a case has been selected for scrutiny on the basis of TP risk parameters pertaining to both international transactions and specified domestic transactions, then the international transactions and the specified domestic transactions shall together be referred to the TPO.

Since international transactions may be benchmarked together at the entity level due to the inter-linkages amongst them, if a case has been selected for scrutiny on a TP risk parameter pertaining to one or more international transactions, then all the international transactions entered into by the taxpayer – except those about which the AO has decided not to make a reference as per paragraph 3.4 - shall be referred to the TPO.

3.7 For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, determination of ALP should not be carried out at all by the AO in a case

where reference is not made to the TPO. However, in such cases, the AO must record in the body of the assessment order that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined at all.

4. **Role of Transfer Pricing Officer (TPO)**

4.1 The role of the TPO begins after a reference is received from the AO. In terms of Section 92CA, this role is limited to the determination of the ALP in relation to international transactions or specified domestic transactions referred to him by the AO. However, if any other international transaction comes to the notice of the TPO during the course of the proceedings before him, then he is empowered to determine the ALP of such other international transactions also by virtue of Section 92CA (2A) and (2B). The transfer price has to be determined by the TPO in terms of Section 92C. The price has to be determined by using any one of the methods stipulated in sub-section (1) of Section 92C and by applying the most appropriate method referred to in Sub-section (2) thereof. There may be occasions where application of the most appropriate method provides results which are different but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in Rule 10C. The TPO, after taking into account all relevant facts and data available to him, shall determine the ALP and pass a speaking order.

4.2 The TPO's order should contain details of the data used, reasons for arriving at a certain price and the applicability of methods. It may be emphasised that the application of method including the application of the most appropriate method, the data used, factors governing the applicability of respective methods, computation of price under a given method will all be subjected to judicial scrutiny. It is, therefore, necessary that the order of the TPO contains adequate reasons on all these counts. Copies of the documents or the relevant data used in arriving at the arm's length price should be made available to the AO for his records and the use at subsequent stages of appellate or penal proceedings.

4.3 The TPO, being an Additional/Joint CIT, shall obtain the approval of the jurisdictional CIT (Transfer Pricing) before passing the order. On the other hand, the TPO, being a Deputy/Assistant CIT, shall obtain the approval of

the jurisdictional Additional/Joint CIT before passing the order. The jurisdictional CIT (TP) should assign a limited number of important and complex cases, not exceeding 50, to the Additional/Joint CsIT (TPOs) working in the same jurisdiction. For the selection of such important and complex cases by the CsIT (TP), the concerned CCsIT (International Taxation) shall frame appropriate guidelines.

4.4 In addition to the above, the TPO is required to carry out the Compliance Audit of the Advance Pricing Agreements (APAs) entered into by the Board and the taxpayers in accordance with Rule 10P of the Income-tax Rules.

4.5 The TPO is also required to play an important role in respect of Safe Harbour provisions. Whenever a reference is made to the TPO under sub-rule (4) or sub-rule (10) of Rule 10TE of the Income-tax Rules, the TPO has to carefully examine all the facts and circumstances of the taxpayer's exercise of an option for Safe Harbour and pass an order in writing as mandated in sub-rule (6) or sub-rule (11) of the said Rule, respectively.

5. **Role of the AO after Determination of ALP by the TPO**

Under sub-section (4) of Section 92C (read with sub-section (4) of Section 92CA), the AO has to compute the total income of the assessee in conformity with the ALP determined by the TPO under sub-section (3) of Section 92CA.

6. **Maintenance of Data Base**

It is to be ensured by the CIT (TP) that the references received from the AOs by the TPOs in his jurisdiction are dealt with expeditiously and accurate record of all events connected with the whole process of determination of ALP is maintained. This record is to be maintained by each TPO, separately for international transactions and specified domestic transactions, in the formats enclosed as Annexure-I and Annexure-II to this Instruction and the same shall be maintained electronically on the Department's ITBA system as and when the same becomes fully functional. These formats will serve as an important database for future action and also help in bringing about uniformity in the determination of the ALP in identical or substantially identical cases. The CsIT (TP) must ensure that a consolidated report for the entire Charge is generated and stored after the completion of each transfer pricing audit cycle.

7. This issues under Section 119 of the Income-tax Act, 1961 and replaces Instruction No. 15 of 2015 with immediate effect. References made to TPOs u/s 92CA of the Act after the issuance of Instruction No. 15/2015, which are not in conformity with this Instruction, may be withdrawn by the concerned PCIT or CIT.


[Sobhan Kar]
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To,

Pr. CCsIT/Pr. DsGIT/CCsIT/DsGIT, with a request to circulate among all Officers in their Region/Charge.

Copy to,

(a) Chairman, Members and all other Officers of the Central Board of Direct Taxes.

(b) ITCC Section of CBDT.

✓ (c) Database Cell for uploading on "www.irsufficiersonline.gov.in".


[Sobhan Kar] 10/3/16
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