

Taxpayer info to remain confidential: CIC

The identity of taxpayers who opt for an advance pricing agreement (APA) in the field of transfer pricing will continue to remain confidential. Such information cannot be made available under the provisions of the Right to Information Act (RTI), according to the Central Information Commission (CIC).

However, responding to a second appeal filed by RTI activist Venkatesh Nayak, information relating to the estimated amount of transactions covered by each of the first five APAs entered into by India and the functional currencies relating to these transactions was made available. These transactions in aggregate amounted to Rs 10,819 crore and the related currencies included the euro and the US dollar.

The CIC order also pointed out that the annual tax revenue likely to be earned by the Central Board of Direct Taxes (CBDT) as a result of these APAs cannot be forecasted. "Tax is a functional derivative of the total profits and gains from business of a company, whereas the APA is towards determining the profit margin of certain transactions only," it explained.

At the time of filing the RTI application, India had signed five unilateral APAs with taxpayers. Subsequently, last December, India also signed its first bilateral agreement with a Japanese company.

"The stance taken by the CBDT and supported by the CIC that the identity of the taxpayer cannot be disclosed even on request under RTI is extremely disturbing to say the very least. That the identity of one party to the APA agreement - CBDT - is known but that of the other party cannot be disclosed borders on absurdity," says Nayak.

"Similarly, to state that the goods and services which APA covers will not be disclosed is also difficult to understand unless the rationale is presented in a manner as to clearly indicate the real harm (as opposed to imagined harm) that will be caused to the commercial interests of the private entity (taxpayer). This is a matter relating to taxation and it is common knowledge that tax evasion is a serious issue in India," he adds. Nayak says he did not receive any notice of hearing of this matter and was thus prevented from making verbal submissions to the CIC.

However, tax professionals say that the CIC's order is on a par with international practices where the identity of the taxpayer is confidential, such as in the US, Canada, China or Australia. The US guarantees complete confidentiality to taxpayers by defining the APA and information related to it as 'tax return information', which is subject to strict protection under section 6103 of the Internal Revenue Code. "Only generic information is made publicly available in the USA via periodical reports - such as statistical details of the number of APA applications filed, APAs pending, number of APAs executed, nature of the industries covered, or types of transactions covered," explains Hitesh Gajaria, a chartered accountant and transfer pricing specialist.

"Often, information on business models, innovations, trade practices et al that provide competitive advantages to the taxpayers may need to be disclosed during APA negotiations. If inadvertently such sensitive information comes into public domain, it may lead to a significant loss of business opportunities for the affected taxpayer. To allay this apprehension, the APA officials have reiterated at various forums that no information provided by taxpayers at any stage would be put in the public domain as the Indian tax law prohibits it (section 138 of the Indian Income-tax Act, 1961, prohibits disclosure of taxpayer information to third parties)," adds Gajaria.

As in the US, generic APA related information has always been available whether by way of the MOF's annual report or press releases, says a government official. For example, when the first five APAs were signed, the press release detailed the nature of the transactions and the industry sectors. Further, the APA process is itself a deterrent to tax evasion, as any attempt to hide material facts results in the agreement becoming void, this official added.

Transfer pricing litigation is a major concern of MNCs operating in India with their subsidiaries or group companies, with transfer pricing adjustments on India Inc for the year ended March 31, 2015 aggregating to Rs 46,465 crore.

APAs entered into between the taxpayer (eg: an Indian company which has cross-border transactions with related parties such as a foreign parent company) and the Indian tax authorities provides transfer pricing certainty for a nine year period (with rollback). In case of bilateral APAs, the foreign related party and the tax authorities of the foreign country are also involved. Since its inception in 2012, APA applications have been increasing, from 146 applications in the first year to around 600 applications till date.

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