

Recommendations for a model
Advance Pricing Agreement
scheme in India



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Deloitte is pleased to announce the release of its latest transfer pricing white paper – “RECOMMENDATIONS FOR A MODEL ADVANCE PRICING AGREEMENT (APA) SCHEME in INDIA”. In particular, this white paper is in support of the introduction by the Government of India of The Direct Taxes Code, 2010 (Bill No.110 of 2010) and the provisions in that Bill (proposed new s.118) for the use of APAs to address compliance with India’s transfer pricing rules.

At the outset, Deloitte welcomes the introduction of APA measures. Similar measures are already in operation in many of the tax systems of India’s trading partners, investors, and it is Deloitte’s experience that such measures successfully deliver benefits such as reduced cost of compliance, reduced risk of audit and penalty, reduced tax litigation, tax certainty, fairness, simplicity and efficiency to the taxpayers that conclude APAs. It is understood that tax authorities involved in APAs consider similar benefits are derived by them.

This white paper draws on Deloitte’s extensive international knowledge and experience of APAs, and best practice in the operation of such arrangements, with a view to making recommendations for the scheme of agreements to be employed in India. Accordingly, while we recommend this white paper to you and trust that it provides useful and practical insights for your business, we also trust that the recommendations will be useful for tax authorities when framing an APA scheme for India.

Deloitte remains committed to being a knowledge-driven organization. We aim to develop cogent thought papers which look at issues and deliver useful insights to those issues. If you want deeper insights on any or all of the topics we have presented, please do not hesitate to contact us with any questions or comments.

Table of Abbreviations

APA	Advance Pricing Agreement/Arrangement
BAPA	Bilateral Advance Pricing Agreement
CBDT	Central Board of Direct Taxation
DTC	Direct Taxes Code, 2010
MAP	Mutual Agreement Procedure
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
TNMM	Transactional Net Margin Method
TPM	Transfer Pricing Methodology
TPO	Transfer Pricing Officer

Executive summary

The prospect of APAs is provided for in proposed new s.118 of the Direct Taxes Code, Bill 2010 (DTC) which is likely to be in effect from April 1, 2012. Since the objective of an APA is to deliver certainty, for both the taxpayer and the tax authorities, an APA scheme is a welcome change that will usher in greater certainty in the transfer pricing regime in India which has seen an increasing volume of disputes and litigation in recent times.

One objective of this white paper is to provide a general overview of the performance and conduct of APAs in other jurisdictions. India is a unique and dynamic economy and we recognize that the APA rules in India will need to be constituted keeping in mind the requirements of the law and business environment in India. Nonetheless, the experience of APA rules in other jurisdictions can be useful in formulating the rules in the Indian context.

This white paper presents a background of APAs as discussed in the OECD Transfer Pricing Guidelines and provides some observations on the performance of APAs in some key jurisdictions across the globe. Several tax authorities publish summary statistics on their respective APA schemes discussing the number of APAs filed and completed, the key issues emerging in APAs, the time taken for concluding unilateral as well as bilateral APAs as well as the primary transfer pricing methodologies that are the subject of an APA. These statistics have been compiled and presented in this white paper and the key takeaways from the data summarized.

A second objective of this white paper is to provide our recommendations to the tax authorities as they formulate the APA rules in the Indian context. We have provided a background discussion leading to "Suggested Recommendations" for all the relevant aspects of an

APA scheme in the Indian context. Our intent is not to be pedantic and we hope that it will not be perceived as such.

An APA scheme is a great tool for improving certainty for transfer pricing issues in the Indian context. However, there is no reason why this initiative cannot be rolled out to include Customs valuation and VAT issues where the key area of dispute is often overlapping with the transfer pricing question. We provide some suggestions on how an APA scheme may be enhanced in scope to include issues beyond transfer pricing.

Deloitte is a key player in assisting its clients on APAs globally, and we have included a survey response from some of the Deloitte global APA experts on the success parameters and possible impediments to implementing an APA scheme in their countries. Some of the respondents have been erstwhile formulators of APA rules in their respective jurisdictions prior to their current role in Deloitte and have gone through the process of drafting and implementing APA rules in their countries. We believe this feedback may be useful to the Indian tax authorities involved in drafting the APA rules in India.

Finally, we have also provided a summary of the APA rules in all the major jurisdictions where an APA scheme exists.

Introduction

An Advance Pricing Agreement (APA) (or “arrangements” – as referred to by the OECD in its 2010 Transfer Pricing Guidelines, and by various other countries) is a framework for the tax administration and a taxpayer to agree that, provided the taxpayer files its tax return in accordance with the agreed APA conditions for the APA covered years, the tax administration accepts the tax outcomes as being consistent with arm’s length outcomes, and thereby refrains from auditing the taxpayer’s international transaction(s) covered by the APA.

The objective of an APA is to deliver certainty, for both the taxpayer and the tax authorities, of the tax outcomes of the taxpayer’s international transactions by agreeing in advance the arm’s length pricing methodology (ies) to apply to the taxpayer’s international transactions¹ covered by the APA. An APA may thus remove an audit threat (eliminate the need for an audit), deliver a particular tax outcome based on the terms of the agreement, and often substantially reduce compliance costs over the term of the APA. This enables a more efficient and effective management of transfer pricing compliance requirements by bringing fairness, simplicity and efficiency, which may otherwise lead to protracted and disputed dealings between a taxpayer and the tax authorities, including difficulties involved in resolving economic double taxation. Thus, for a taxpayer, an APA can be an effective tool for better managing the tax risks arising from international transactions. For tax authorities, an APA can similarly be an effective tool for better and more efficient administration of the transfer pricing laws. Consequently, APAs provide a win-win situation for all the parties involved.

The prospect of advance pricing agreements is provided for in proposed new s.118 of the Direct Taxes Code, 2010 (DTC). While s.118 (the APA provision) is contained within Part F, Chapter XI (Special Provisions Relating to Avoidance of Tax), together with the transfer pricing measures and the general anti-avoidance rule, APAs are in fact a measure designed to facilitate compliance with the transfer pricing rules and do not impose any further tax liability on a taxpayer. Even then, the APA concept as recommended by the OECD and as adopted by other countries which have APA

“schemes” in place, is voluntary and cannot be imposed on a taxpayer. Therefore, APAs should not be regarded as anti-avoidance measures but, rather, as tools to help with the voluntary compliance of those tax laws that are generally regarded as the most complex for both taxpayers and tax authorities. Perhaps, therefore, a better position for the APA provisions would be within Part G (Tax Management), which deals with assessment, appeal, revision and tax administration.

This white paper discusses the OECD’s Transfer Pricing Guidelines on APAs and provides an assessment of the performance and conduct of APAs in other jurisdictions. India is a unique economy and we recognize that the APA rules in India will need to be constituted keeping in mind the requirements of the law and business environment in India. Nonetheless, experience of APA rules in other jurisdictions can be useful in formulating the rules in the Indian context and it is with this intent that we have included some of the statistics as well as country specific updates on key issues that have been relevant in implementing and administering the APA schemes in these countries.

¹ The term “International transaction” includes transactions between the related parties (called “associated enterprises” under the Income Tax Act, 1961)



OECD transfer pricing guidelines on APAs²

Definition and Concept of APAs

APAs are the subject of extensive discussion in the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereafter referred to as the "Transfer Pricing Guidelines") in Chapter IV, Section F.

The OECD defines an APA as an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events, etc.) for the determination of the arm's length price for those transactions over an agreed period of time. An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. APAs are intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues. They may be most useful when traditional mechanisms fail or are difficult to apply. Detailed guidelines for conducting APAs under the mutual agreement procedure ("MAP APAs") were adopted in October 1999 and are found as an Annex to Chapter IV of the OECD guidelines³.

The concept of APAs also may be useful in resolving issues raised under Article 7 of the OECD Model Tax Convention relating to allocation problems, permanent establishments, and branch operations⁴. An APA may cover all of the transfer pricing issues of a taxpayer (as is preferred by some countries) or may provide a flexibility to the taxpayer to limit the APA request to specified affiliates and certain specific intercompany transactions. An APA would apply to prospective years and transactions and the actual term would depend on the industry, products

or transactions involved. The associated enterprises may limit their request to specified prospective tax years. An APA can provide an opportunity to apply the agreed transfer pricing methodology to resolve similar transfer pricing issues in open prior years. However, this application would require the agreement of the tax administration, the taxpayer, and, where appropriate, the treaty partner⁵.

Types of APAs – Unilateral, Bilateral, or Multilateral

Some countries allow for unilateral arrangements where the tax administration and the taxpayer meet and finalize an arrangement. A unilateral APA, however, may affect the tax liability of associated enterprises in other tax jurisdictions. Where unilateral APAs are permitted, the competent authorities of other interested jurisdictions should be given an option to determine whether they are willing and able to consider a bilateral arrangement under the mutual agreement procedure. In any event, countries should not include in any unilateral APA, concluded with a taxpayer, a requirement that the taxpayer waive access to the mutual agreement procedure if a transfer pricing dispute arises. Also, if another country raises a transfer pricing adjustment with respect to a transaction or issue covered by the unilateral APA, the first country is encouraged to consider the appropriateness of a corresponding adjustment and not to view the unilateral APA as an irreversible settlement⁶.

The OECD guidelines provide that because of concerns over double taxation, most countries prefer bilateral or multilateral APAs, and some countries will not grant a unilateral APA to taxpayers in their jurisdiction. The

- 2 OECD 2010 Regulations –Chapter IV titled "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes", Para F.
- 3 Para 4.123 of 2010 OECD Guidelines
- 4 Para 4.131 of 2010 OECD Guidelines
- 5 Para 4.136 of 2010 OECD Guidelines
- 6 Para 4.129 of 2010 OECD Guidelines

bilateral approach is far more likely to ensure that the arrangements will reduce the risk of double taxation, will be equitable to all tax administrations and taxpayers involved, and will provide greater certainty to the taxpayers concerned.

Unilateral APAs are one-sided tools addressing issues with bilateral implications. Bilateral APAs offer greater tax certainty and address the full scope of a transaction and are therefore favored over unilateral APAs. Although unilateral APAs may be useful in certain circumstances, such as covering issues or transactions where no applicable tax convention exists, they may prove to have limited utility where both tax administrations actively review the type of transactions being covered. As mentioned earlier, it is a best practice for both taxpayers and tax administrations to avoid the inclusion of a waiver of access to MAP in audit settlements. Since MAP involves bilateral issues it is inappropriate to have two parties (the taxpayer and one tax administration) not include a third involved party (the other tax administration) in the final resolution of an issue. First of all, taxpayers may not realize the potential implications of double taxation and the fact that an adjustment by the other tax administration may complicate the issue. Secondly, tax administrations should consider the issues of cooperation and reciprocity as well as the fact that one-sided settlements will not serve tax administrations well in the long run. As for unilateral APAs, if a foreign adjustment is raised against a transaction or issue covered by a unilateral APA, the unilateral APA should be treated as the taxpayer's filing and therefore eligible for MAP and adjustable, as opposed to an irreversible settlement⁷.

Wherever possible, an APA should be concluded on a bilateral or multilateral basis between competent authorities through the mutual agreement procedure of the relevant treaty. A bilateral APA carries less risk of taxpayers feeling compelled to enter into an APA or to accept a non-arm's length agreement in order to avoid expensive and prolonged enquiries and possible penalties. A bilateral APA also significantly reduces the chance of any profits either escaping tax altogether or being doubly taxed. Moreover, concluding an APA through the mutual agreement procedure may be the only form that can be adopted by a tax administration

which lacks domestic legislation to conclude binding agreements directly with the taxpayer⁸.

Guidelines for Conducting APAs under the Mutual Agreement Procedure ("MAP APAs")

The development of working arrangements between competent authorities is considered in the Annex to Chapter IV of the Guidelines. In particular, paragraph 4.164 states:

"Between those countries that use APAs, greater uniformity in APA practices could be beneficial to both tax administrations and taxpayers. Accordingly, the tax administrations of such countries may wish to consider working agreements with the competent authorities for the undertaking of APAs. These agreements may set forth general guidelines and understandings for the reaching of mutual agreement in cases where a taxpayer has requested an APA involving transfer pricing issues."

The objective of the Annex is to improve the consistency of application of APAs by providing guidance to tax administrations on how to conduct mutual agreement procedures involving APAs. Although the focus of the Annex is on the role of tax administrations, there is also a discussion as to how best the taxpayer can contribute to the process. This guidance is intended for use by both OECD member and non-member countries that wish to use APAs.

Definition of MAP APAs

It is the bilateral or multilateral APAs, which are the main subject of this Annex – these APAs are referred to as "MAP APAs". However, in some cases where a bilateral APA has been sought and the treaty is not appropriate, or where a treaty is not applicable, the competent authorities of some countries may nevertheless conclude an arrangement using the executive power conferred on the heads of tax authorities. The term MAP APA should be interpreted, with the necessary adaptations, as including such exceptional agreements⁹.

Eligibility for MAP APA

MAP APAs are governed by the mutual agreement procedure of the applicable double tax agreement, Article 25 of the OECD Model Tax Convention, and

- 7 OECD Best Practice # 19 "Avoid blocking MAP access via audit settlements or unilateral APAs"
- 8 Para 4.162 of 2010 OECD Guidelines
- 9 Para 7 of the Annex

are administered at the discretion of the relevant tax administrations. The guidelines provide that if a taxpayer does not request a MAP APA, then the reason should be reviewed, and wherever possible, tax authorities should encourage the taxpayer to request a MAP APA if the circumstances are suitable.

The negotiation of MAP APAs requires the consent of the relevant competent authorities. In some cases the taxpayer might voluntarily take the initiative by making simultaneous requests to the affected competent authorities. However, Article 25 does not oblige the competent authorities to enter into MAP APAs at the request of the taxpayer. The willingness to enter into MAP APAs will depend on the particular policy of a country and how it interprets the mutual agreement article of its bilateral treaties. The desire of the taxpayer for certainty of treatment is therefore not, in isolation, sufficient to execute MAP APAs. Other competent authorities apply a less restrictive threshold for entering into MAP APAs, based on their view that any MAP APA process should be encouraged. Additionally, the taxpayer must qualify for the benefit of a particular treaty (e.g. by qualifying as a taxpayer of one of the Contracting States) and must satisfy any other criteria contained in the Mutual Agreement Article¹⁰.

The fact that a taxpayer may be under audit or examination should not prevent the taxpayer from requesting a MAP APA in respect of prospective transactions. The audit or examination and the mutual agreement procedure are separate processes and generally can be resolved separately. Audit or examination activities would not normally be suspended by a tax administration whilst the MAP APA is being considered, unless it is agreed by all parties that the audit or examination should be held in abeyance because the obtaining of the MAP APA would assist with the completion of the audit or examination.

For multilateral APAs, the taxpayers can approach the various competent authorities with the suggestion that it would be more desirable if the negotiations take place on a multilateral basis involving all the affected jurisdictions rather than with each authority on an isolated manner. Though this process may provide more certainty and entail cost savings to the taxpayer, it is to be noted that it might not always be possible to apply a single transfer pricing methodology to the wide variety of facts and circumstances, transactions

MAP APAs are governed by the mutual agreement procedure of the applicable double tax agreement, Article 25 of the OECD Model Tax Convention, and are administered at the discretion of the relevant tax administrations. The guidelines provide that if a taxpayer does not request a MAP APA, then the reason should be reviewed, and wherever possible, tax authorities should encourage the taxpayer to request a MAP APA if the circumstances are suitable.

and countries likely to be the subject of a multilateral MAP APA. Therefore, care would need to be taken by all the participating jurisdictions to ensure that the methodology, even after such adaptation, represents a proper application of the arm's length principle in the conditions found in their country. However the development of multilateral MAP APAs is at a relatively early stage, except perhaps in the global trading field. In cases where global trading is conducted on a fully integrated basis (i.e. the trading and risk management of a book of financial products takes place in a number of different locations, usually at least three), a multilateral, and not a bilateral, APA has become the norm¹¹.

Process of Execution of MAP APAs

The OECD Guidelines provide for extensive involvement and interaction between the taxpayers and tax authorities in the process of executing a MAP APA. Some of the important considerations are set out below:

1. Preliminary discussions between the taxpayer and the tax administration to discuss the type of APA, the extent and type of information required and the scope of any analyses required for the completion of successful APA kick start the process of executing a MAP APA. Based on these discussions, a taxpayer will make a decision whether this route should be pursued or not;
2. If the taxpayer wishes to pursue a MAP APA request, then the second stage is to make a detailed proposal to the relevant tax administration, pursuant to any domestic procedural requirements, e.g. a requirement to file the request with a designated part of the domestic tax administration. For a

¹⁰ Para 16 of the Annex

¹¹ For more details see OECD Document : The Taxation of Global Trading of Financial Instruments (1998)

MAP APA, the purpose of the taxpayer's proposal is to give the relevant competent authorities all the information needed to evaluate the proposal and to undertake mutual agreement discussions. In certain countries, the taxpayer is able to make the proposal directly to the competent authority whereas in other cases a copy of the domestic APA proposal can be made available to the other participating jurisdictions;

3. The exact form and content of the MAP APA proposal should be established between the taxpayer and tax administration based on preliminary meetings. The MAP APA proposal may cover all of the transfer pricing issues of a taxpayer (or of the members of a MNE group) or may be more limited, for example to a particular transaction, sets of transactions, product lines or to only some members of a MNE group. Further, the content of the proposal and the extent of the necessary supporting information and documentation will depend on the facts and circumstances of each case and the requirements of the individual participating tax administrations. It is therefore not considered practicable to list or define exactly what should be provided. The guiding principle, however, should be to provide the information and documentation necessary to explain the facts relevant to the proposed methodology and to demonstrate its application in accordance with the appropriate article of the relevant treaty. The proposal should therefore be consistent with any general guidance given by the Commentary of the OECD Model Tax Convention on the corresponding articles, together with the guidance on the application of the arm's length principle of Article 9 given by the Transfer Pricing Guidelines in cases involving transfer pricing between associated enterprises;
4. The term of an APA is generally negotiated between the competent authorities on a case-by-case basis. Experience to date has shown that a MAP APA might, on average, last for three to five years;
5. Once a taxpayer's proposal has been received by the tax administrations, they should mutually agree on the co-ordination of the review, evaluation and negotiation of the MAP APA. The MAP APA process is broken up into two main stages; (1) fact finding, review and evaluation and (2) the competent authority discussions. The taxpayers can withdraw from the MAP APA at any time but any late withdrawal is generally discouraged;
6. Once the MAP APA has been finally agreed, the participating tax authorities give effect to the same by executing an agreement in their own jurisdiction. The tax administrations should enter into some kind of a confirmation or agreement with their respective taxpayers consistent with the mutual agreement entered into by the participating competent authorities. This agreement would provide the taxpayer with the certainty that the transfer pricing transactions covered by the MAP APA would not be adjusted, so long as the taxpayer complies with the terms and conditions of the mutual agreement, as reflected in the domestic confirmation or agreement, and provided the taxpayer has not made materially false or misleading statements during the process, including statements made in annual compliance reports. The terms and conditions would include certain assumptions which, if not met, might require an adjustment to be made or the agreement to be reconsidered; and
7. The tax administrations and the taxpayer are not bound to apply the methodology agreed upon as part of the MAP APA to tax years ending prior to the first year of the MAP APA (often referred to as "rolling back").

Performance of APAS in other countries

The frontrunners in the implementation of formal APA schemes, almost two decades ago, included countries such as USA, Canada, Japan and Australia. The OECD introduced guidelines on APAs in 1995 (an update to which was published in 1999). A number of countries started entering into APA schemes throughout the 1990s, and the end of 1990s saw the UK, Belgium and France introduce their APA schemes. This was followed by other European countries such as Netherlands, Germany and Spain, and the spread of APAs to South American and Asian countries such as Mexico, Venezuela, China and Korea in the last decade.

India can benefit from the global APA knowledge bank built over two decades. What follows is a brief overview of some of the more mature APA regimes such as USA, Canada, Japan and the UK. There are important takeaways for India embedded in the analysis as it looks to tread the APA route starting next year.

United States

The APA scheme was initiated in USA in 1991. Since then the governing APA procedures have been updated and modified four times. The APA process is currently governed by Revenue Procedure 2006-09.

Takeaways

Annual Reports on the USA APA scheme churn out certain interesting facts. Among the APA options available, BAPAs account for the lion's share¹² (the focus on BAPAs has been observed across the APA regimes analyzed herewith). The sale of tangible property into the US has been the most common type of related party transaction subject to an APA (similar to dominance of APAs involving tangible property transactions in other jurisdictions as observed below). For the methods used, Comparable Profits Method has been dominant. For 2010, the top three industries covered by APAs were wholesale trade (durable goods), computer and electronic product manufacturing and professional, scientific and technical services.

Canada

Canada's APA scheme formally came into force in July 1993. The CRA's Information Circular (IC) 94-4R provides comprehensive guidance on APAs, and the procedures and guidelines for obtaining APAs in Canada.

Takeaways

Canada's APA scheme Reports reveal certain statistics not too different from those in the USA. For all the APAs completed or in progress, the BAPAs account for the majority by a considerable margin. For transactions subject to APAs, transfers of tangible property dominate. However, APAs involving intangible property and intra-group services have been recording a fair share too. From the industrial sector perspective, APAs are concentrated in the automotive, natural resources and 'high-tech' sectors. Further, a substantial percentage of the APAs involve the application of TNMM and Profit Split Method.

¹² Statistics presented are based on APAs executed.





UK

HM Revenue & Customs (“HMRC”) have operated an APA scheme in the UK since 1999. The APA rules are present in Sections 218 – 230 of the Taxation (International and Other Provisions) Act 2010 (“TIOPA 2010”). Further, practical guidance is available in Statement of Practice 2/10.

Takeaways

The taxpayers’ experiences over the years reveal that HMRC have been cooperative with the taxpayers. HMRC have accepted applications based on the complexity threshold. However, taxpayers have expressed concerns on vagueness of the ‘complexity threshold’ definition. HMRC seem to regard a transfer pricing issue as ‘complex’ when it is unclear on the arm’s length standard to be applied or where there is absence of reliable market comparables. These are broad indications by any standards.

During the APA process, HMRC are also open to addressing pre-existing issues. Thus a taxpayer might be able to resolve open issues. Most APAs in the UK are still bilateral, indicating HMRC’s preference for BAPAs.

In addition to the above, in UK an APA mechanism for thin capitalization agreements is in place aimed to achieve certainty on the level of inter-company debt and the rate of interest paid on inter-company debt.

Japan

Japan was the first country to introduce a formal APA scheme in 1987. Japan has made significant improvements in its APA scheme since, more recent being establishment of two new APA sections within its MAP office and an APA division in the Osaka Regional Taxation Bureau.

Takeaways

Along with the other benefits, the APA scheme in Japan brings certain unique advantages. For example, in a BAPA the taxpayer is more likely to obtain acceptance of certain concepts and pricing methods that are not generally accepted under the domestic transfer pricing rules in Japan, such as the use of multiple-year data and the interquartile range. Further, Japanese tax authorities may not tend to use secret comparables during the APA process.

A study of the APA scheme Reports¹³ reveals that the manufacturing industry has accounted for the majority of the APAs. However, there has been an increase in APAs for ‘wholesale/retail’ industries over years. In terms of transactions, there has been an increase in APAs covering intercompany services transactions and intangible transactions even though inventory transactions continue to make up the majority. As regards the methods used, there has been a surge in the use of TNMM and Profit Split Method, with the APAs using TNMM being remarkably high in later years.

Annexure 1 contains a detailed summary of the APA schemes in various countries across the globe. This table provides a summary of whether APAs are available, whether one can opt for a bilateral or a unilateral APA, the fee requirement and the tenure of an APA.

Performance of APAs in Various Countries: Statistical Summary

Several tax authorities publish detailed statistics on their respective APA schemes. We have collated the data for the countries and tabulated them for ease of comparison and analysis. The tables below present the following:

1. Number of APAs concluded (by country) including renewals of existing APAs
2. Average completion time for unilateral and bilateral APAs
3. Types of transactions that are commonly covered in an APA
4. The transfer pricing method(s) most commonly applied for an APA

We have also provided the key findings from the data following each table.

13 APA scheme Reports have the analysis based on BAPAs disposed

i) No of APAs Signed Country-wise (includes renewals)

Name of the Country/ Year	Australia	Canada	China	Japan	Korea	USA
2010	39	16	NA	105	NA	69
2009	29	10	12	91	NA	63
2008	49	8	7	82	30	68
2007	31	9	10	84	20	81
2006	27	10	10	65	24	82
2005	38	17	14	49	7	53
Consolidated till date (total APAs signed ever since inception of APA Scheme in the respective countries)	344	142	53	476	106	973

*NA denotes data not available

- There has been an increasing trend in number of APAs year on year. Japan and USA, being the first countries to introduce APA schemes, have till date signed the most number of APAs compared to other countries.
- Year on year increase in numbers indicate that MNEs are considering APAs as one of the preferred methods to resolve transfer pricing disputes as it gives certainty to the taxpayers.

ii) Average APA completion time

Average time for Completion (in months)-**Unilateral**

Name of the Country/Year	Australia	Canada	China	Japan	Korea	USA
2010	5	18.5	NA	NA	NA	26.0
2009	9.5	40.3	NA	NA	NA	25.5
2008	8	12.3	NA	NA	18	23.7
2007	13	23.7	NA	NA	20	18.7
2006	7	11.3	NA	NA	NA	22.0
2005	13	NA	NA	NA	NA	17.9

*NA denotes data not available

Average time for completion (in months)-**Bilateral/ Multilateral**

Name of the Country/Year	Australia		Canada	China	Italy	Japan	Korea	USA
	BAPA	MAPA	BAPA/ MAPA	BAPA	BAPA/ MAPA	BAPA/ MAPA (approx)	BAPA	BAPA/ MAPA
2010	24	NA	48.8	NA	NA	24.7	NA	43.6
2009	12	20	42.2	NA	NA	24	NA	45.4
2008	16	NA	32.8	NA	NA	24	27	42.4
2007	17.5	NA	39.9	NA	NA	24	17	44.7
2006	16	NA	44.1	NA	NA	24	NA	43.6
2005	22	NA	NA	NA	NA	24	NA	51.0

*NA denotes data not available

- The above tables denote the average time taken by the authorities to conclude APAs. Average time taken for completion of a bilateral or a multilateral APA is much higher than what is taken for a unilateral APA, essentially because more than one country/tax authority is involved in bilateral and multilateral APAs.
- Different countries have different APA completion times partly reflecting the efficiency at which the APA schemes work in those countries.
- The average time to complete APAs in Australia is lowest (less than one year for unilateral APAs and 18 months to two years for bilateral APAs) followed by Japan and Korea.
- The average time taken by US and Canada is the highest.
- There are various factors possibly contributing to the time lag in completion of APA such as nature of APA (i.e. unilateral, bilateral or multilateral), turnaround time taken by the taxpayers, transaction for which APA is sought by the taxpayer, complexities involved, etc.
- The time lag taken in completing APA is one of the major factors considered by taxpayers while opting for an APA scheme.

iii) Transaction Type

Transaction Type (**No. of APAs completed by Transaction Type of APA Scheme in the respective countries**)

Name of the Country/ Transaction Type	Australia*	Canada	China	Japan**	Korea	USA#
Tangible	67%	54%	62%	55%	73%	45%
Intangible	8%	20%	19%	24%	7%	20%
Provision of Services (includes Financing)	26%	25%	19%	21%	21%	31%
Others	NA	NA	NA	NA	NA	5%

NA denotes data not available

*Data only for 2009-10

**Data only for 2008-09

#Data for the period 2009-2007

- The above statistics indicate number of APAs completed for various types of intra-group transactions.
- The statistics reveal that transactions pertaining to tangible property are the subject matter of majority of APAs in most all the countries followed by service transactions and intangibles.

iv) Transfer Pricing Method Applied

Transfer Pricing Method Applied (**No. of APAs completed by Method Applied since inception of APA scheme in the respective countries**)

Name of the Country/ Transfer Pricing Method	Australia*	Canada	China	Japan**	Korea	USA#
Comparable Uncontrollable Price Method	-	15%	7%	5%	1%	10%
Cost Plus Method	22%	13%	26%	18%	5%	NA
Resale Price Method	NA	8%	-	4%	5%	NA
Profit Split Method	8%	24%	3%	5%	4%	9%
Transactional Net Margin Method	70%	39%	60%	66%	81%	70%
Any Other Method	NA	NA	3%	NA	5%	11%

NA denotes data not available

*Data only for 2009-10

**Data only for 2008-09

#Data for the period 2010-2007

- The above statistics indicate number of APAs completed under various types of transfer pricing methods prescribed under transfer pricing regulations of each country.
- TNMM is the most preferred method for concluded APAs.
- The transactional methods (i.e., CUP, Resale Price and Cost Plus) are the least adopted methods in all countries.

Challenges and considerations in implementing an APA scheme

The analysis above portrays certain emerging trends and some key interesting takeaways. Across the countries covered, the APA schemes are focused to a considerable extent on the BAPAs. APAs covering tangible property transactions dominate the statistics. Having said that, APAs involving intangible property and intra-group services are also displaying noteworthy numbers. This demonstrates to some extent the broadening reach of the APA schemes in the respective countries. Further, there has been a surge in the APAs using TNMM and Profit Split Method, with the TNMM being the most adopted transfer pricing method in all countries.

It is expected that India's APA scheme will draw heavily from the schemes that have been in operation for many years in countries such as the USA, UK, Canada, Japan and Australia. However, India has much to learn from the experiences of countries like China and perhaps other Asian countries, because of economic similarity and cultural proximity. It is more likely that some of the issues faced by a country like China in its APA process may be applicable to India as well.

The achievement of an APA involves extensive negotiation between the taxpayer and tax authorities in a collaborative environment. The introduction of an APA scheme must be accompanied by the development of an environment conducive to the success of a continuous negotiation process throughout an APA. All the stakeholders in the scheme must assume equal responsibility to enable a collaborative environment to develop.

There is no doubt that only bilateral and multilateral APAs can really achieve the goal of resolving potential double taxation disputes. However, in some countries during the initial years of introducing an APA scheme there was a prevalence of unilateral APAs rather than bilateral or multilateral APAs. An example is China, where an APA scheme was introduced in 2004 and

where, by the end of 2008, only three bilateral APAs had been concluded whereas, anecdotally, many unilateral APAs had been successfully concluded in the same time period. Unilateral APAs are also quite popular in Australia where over 50% of all APAs are unilateral. MNEs choose this option because of cost benefits and the ease of resolution. Many unilateral APA applicants have annual turnovers less than AUD 250 million, where the tax payers are small subsidiaries of a global group where bilateral APAs have been settled in respect of the parent company and the major subsidiaries. These MNEs still want certainty in Australia but cannot justify the cost of a bilateral APA.

Finally, it might be a challenge to administer the entire APA scheme. In order to mitigate or effectively control this challenge, authorities should put in place a competent and sufficiently large team of professionals who are equipped to work on the APA system, ensure arrangement of specialist APA training for these professionals, and effective coordination between the APA staff with the staff in CA office. The communication process between the taxpayer and the tax authorities also needs to be encouraged and it would be the responsibility of all parties concerned to induce a collaborative approach for the success of the APA process. The monitoring of the APA process post conclusion need not be onerous on either the taxpayer or the tax authorities. For example, Australia has a self-assessment system but annual reports are required from those taxpayers who have executed APAs. This process is completed along with the lodgment of annual returns. A small investment by the tax authorities for in house monitoring of these reports has been sufficient to ensure the integrity of the APA scheme. This has minimized the cost to both parties.

APA scheme in India

APAs are a tool to facilitate voluntary compliance with India's transfer pricing rules. An APA can deliver significant benefits to both a taxpayer and the tax authorities in terms of certainty of outcomes and efficiencies with compliance and administration. Moreover, both parties may achieve savings in compliance and administrative costs that inevitably arise from transfer pricing rules. Therefore, having regard to the mutual benefits that derive from an APA, it is further recommended that each party should approach the APA process in a spirit of cooperation and openness and with an intention to achieve a win-win outcome for each party.

The APA framework for India as laid out in proposed new s.118 contains the following features:

Central Government approval (s.118(1)): The Central Board of Direct Taxes ("CBDT") is required to obtain approval from the Central Government to enter into an APA – this would seem to indicate the Government's desire to monitor and control the APAs and, in particular, evaluate the impact on revenue of the agreements being entered between the taxpayers and tax authorities. The other possibility is that the legislation is looking for two tiered structure where the ground work is done by the offices subordinate to the CBDT, while the finality is reached at only after the agreement gets the approval of the Central Government, which would mean by an authority so designated for this purpose.

Prospective transactions (s.118(1)): An APA is to apply in respect of transactions "to be entered into" by the taxpayer – this is generally consistent with APA schemes in other countries. While APA schemes are forward looking, other countries also generally extend a degree of flexibility with regard to the requirement that the covered transactions be prospective. In particular, APA schemes will accept transactions that are prospective as at the date of application for the APA, but which occur during the process of negotiating and concluding the APA. This often extends to transactions that are prospective at the time a taxpayer may first approach a tax authority to discuss the prospect of an APA but which have occurred by the time a formal APA

application is submitted to the tax authorities. Further, many tax authorities accept "roll back" arrangements for APAs to deal with transactions that have occurred in periods prior to the period formally covered by the APA – see later comments on the concept of roll-back.

Any transfer pricing method (s.118(2)): Any method may be adopted to determine an arm's length price – thus, a taxpayer and the tax authorities are not limited to the prescribed methods. This affords a degree of flexibility to both the taxpayer and the tax authorities to agree a method that is considered to deliver an arm's length outcome, particularly having regard to the circumstances of the transaction. In effect, this reflects the fact that APAs are often the best tool for both a taxpayer and the tax authorities to deal with difficult scenarios where prescribed methods may not best reflect an arm's length outcome.

APA determines "the arm's length price"

(s.118(3)): This provision would seem to ensure that the price determined by an APA is conclusive of the price being "the arm's length price" for the purpose of proposed new s.116 (the transfer pricing provisions). This would therefore obviate any requirement for a TPO to audit a taxpayer's transfer pricing agreements covered by an APA.

APA may cover up to 5 years (s.118(4)): The five year coverage for an APA is consistent with the coverage of APAs in other countries. Generally, APAs are entered

into for periods between three to five years, depending on factors such as the anticipated stability of the conditions affecting the price of the covered transaction, anticipated changes to the taxpayer's business that may impact the transaction, etc.

APA is binding on all parties to the APA

(s.118(5)): This reflects the contractual nature of an APA whereby both parties are contractually bound by the terms agreed in the APA. That having been noted, it is prudent for both parties to ensure that minor infringements do not lead to outcomes where either or both of the parties are denied the benefits that would otherwise flow from the APA. Therefore, rather than abandon an APA it may often be more productive to renegotiate the APA with the aim of rescuing the benefits. This approach may, in fact, be an appropriate course of action in the event the condition referred to in s.118(6) was to arise (i.e., an amendment to the DTC that has a bearing on the APA).

Voidable if fraud or misrepresentation (s.118(7)):

This common sense clause exists in all other APA schemes in other countries, and serves to remind taxpayers of the need to truthfully and accurately represent the facts surrounding transactions covered by an APA. The following provisions in s.118(8) are also a common sense response from the tax authorities – in effect, these provisions enable the tax authorities to resort to their otherwise normal approach for administering the transfer pricing rules.

Board may frame an APA "program" (s.118(9)):

The provisions contained in the preceding provisions serve to lay down only the basics for India's APA arrangements. This clause allows for the issuance of a more detailed guidance and direction for both the tax authorities and taxpayers on how the APA arrangements may work in India.

The following parts of this white paper address the many issues that need to be considered in framing a "scheme" for India's APA arrangements. This white paper also includes a range of recommendations which we trust can be adopted in the proposed APA scheme.

The purpose and content of an APA scheme for India

Discussion: Proposed new s.118 of the DTC provides that "... may, by notification, frame a scheme ..." for

India's new APA arrangements. That is, while new s.118 contains the legislative authorization for APAs, and certain features of the proposed APA arrangements, it does not provide any guidelines for taxpayers and the tax authorities as to how these APAs are to be affected and administered. The promulgation of APA guidelines for taxpayers and the tax authorities in India would be consistent with the approaches taken in other countries which have APA arrangements in place.

APA schemes are binding on both taxpayers and tax authorities. This is important in the context of APAs because both parties need to know and understand the "rules" each must adhere to in the course of seeking, negotiating and executing an agreement between the parties.

The content of the APA scheme should be sufficiently broad to provide practical guidance on most matters relating to an APA arrangement. While the scheme's coverage may not be exhaustive, it should cover matters such as –

- Types of APAs to be covered
- Eligibility of taxpayers
- Process for obtaining an APA
- Confidentiality
- Forms and information requirements
- Compliance requirements
- Fees
- Consequences of an APA
- Public reporting

Suggested Recommendation for APA Rules:

This APA scheme is authorized under the provisions of s.118 (9) of the DTC 2010 and provides guidelines to taxpayers and tax authorities when giving effect to the APA provisions in s.118. In particular, taxpayers and tax authorities are required to adhere to the guidelines and it is recommended that any departure from the guidelines should only be for the purpose of giving better effect to the APA provisions in s.118, and then only by agreement between the relevant taxpayer and tax authorities in India. This approach is also consistent with the treaty MAP article allowing for consultations or deviations in situations not specifically provided for in the relevant tax treaty.

APAs are a tool to facilitate voluntary compliance with India's transfer pricing rules. An APA can deliver significant benefits to both a taxpayer and the tax



authorities in terms of certainty of outcomes and efficiencies with compliance and administration. Moreover, both parties may achieve savings in compliance and administrative costs that inevitably arise from transfer pricing rules. Therefore, having regard to the mutual benefits that derive from an APA, it is further recommended that each party should approach the APA process in a spirit of cooperation and openness and with an intention to achieve a win-win outcome for each party.

Characteristics of an APA

Discussion: An APA is described in the OECD's Transfer Pricing Guidelines as "an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time." This definition is broadly consistent with the direction taken in s.118 of the DTC 2010, although the direction in s.118 is very much towards the achievement of an outcome that the parties to the APA would agree to be representative of an arm's length outcome. In particular, s.118(2) effectively requires that adjustments or variations may be made to "the most appropriate method" (s.117(1)) for the purpose of determining an arm's length price. The inclusion of the words "as may be necessary or expedient to do so" in s.118 (2) is very much indicative, therefore, of affording the parties to an APA to be sufficiently flexible when applying a particular methodology so that an agreed arm's length outcome may be achieved.

An APA does not necessarily have to cover all of a taxpayer's international related party transactions.

Importantly, given the voluntary nature of an APA, a taxpayer may also prescribe the transactions which are to be covered by the APA. Of course, the extent of coverage of a taxpayer's international related party transactions may be a matter to be discussed between the taxpayer and the tax authorities at the time when the taxpayer makes an application for the APA

The prospective nature of an APA is also found in the OECD's definition and the provisions in s.118. The comparability analysis with third parties can be established for past periods only, as undertaking a future analysis based on a past period analysis may prove to be a challenge. For example, any benchmarking of a taxpayer's agreements with third party agreements can therefore only be retrospective, thus raising questions about future events which may otherwise cause outcomes to be different from the retrospective analysis. The OECD's definition incorporates words to accommodate this type of scenario. That is, an APA should determine "critical assumptions as to future events". While the concept of "critical assumptions" will be addressed in greater detail later in this paper, it is appropriate to note that international best practice with APAs is to allow the critical assumptions to be carefully defined so as to not effectively eliminate the benefits that the parties seek to achieve from an APA. For example, if the critical assumptions included a requirement that a third party comparable's operating net margin did not change beyond a very limited range, then the APA would likely offer very little certainty for the taxpayer (or the tax authorities) and would necessitate similar annual analysis as would otherwise be required without the APA.



An APA is also defined in the context of the time period covered by the APA. S.118 provides for no more than five years and this is the normal period adopted by other countries. That is, most APAs are entered into for periods between three and five years. Anything less than three years is generally regarded as not able to generate the return given the initial investment of time by the taxpayer and tax authorities to achieve the APA, and anything more than five years gives rise to issues because of changing circumstances in the taxpayer's business and the businesses of the entities which would serve as arm's length benchmarks. One of the concerns that could arise is if the negotiation process takes longer than five years then it needs to be seen whether the period of five years would suffice or whether a longer period can be considered. However, most countries' APA schemes enable APAs to be renewed or rolled-over into subsequent periods, thus giving both parties the opportunity to exploit the benefits from the initial APA. This is discussed further in subsequent parts of this paper.

Suggested Recommendation for APA Rules: An APA is an agreement between the taxpayer and the tax authorities which specifies the manner in which the arm's length price is to be determined in respect of the taxpayer's international related party dealings covered by the agreement. The agreement is prospective in nature and may cover a period of up to five years.

An APA does not necessarily have to cover all of a taxpayer's international related party transactions. Importantly, given the voluntary nature of an APA, a taxpayer may also prescribe the transactions which are to be covered by the APA. Of course, the extent of coverage of a taxpayer's international related party

transactions may be a matter to be discussed between the taxpayer and the tax authorities at the time when the taxpayer makes an application for the APA.

The method that may be used to determine the arm's length price may be any method, including any of the prescribed methods (i.e., the traditional transaction methods - comparable uncontrolled price, resale price and cost plus - and the transactional profit methods - transaction net margin method and transaction profit split method). Therefore, taxpayers and the tax authorities are not limited to the prescribed methods for the purpose of determining an arm's length price. The method used, however, should demonstrably be the most appropriate method given the nature and circumstances relating to the transaction covered by the APA.

Generally, APAs covering periods of three to five years would be within the scope of India's APA agreements. The actual period to be covered should be agreed between the parties to the APA. Circumstances might arise where transactions may be entered into within the proposed period of the APA but before the agreement has been finalized. Such circumstances and the approach for dealing with these circumstances are discussed later in this document. Also discussed later are arrangements where the terms of an APA are sought to be applied to periods prior to the period of the APA.

Given the prospective nature of an APA, certain assumptions might be made to address the inevitable uncertainty of events that may occur during the period of the APA. These assumptions - to be referred to as "critical assumptions" - should be agreed between the parties to the APA, and are discussed in more detail in later parts of this description of India's APA scheme.

India's APA scheme should embrace both unilateral APAs (i.e., agreements between an Indian taxpayer and the Indian tax authorities), and APAs that involve agreements with foreign tax authorities. These latter APAs may be bilateral (i.e., involving agreements between Indian the tax authorities and the tax authorities of a tax treaty partner country) or multilateral (i.e., involving agreements between the Indian tax authorities and two or more tax authorities of tax treaty partner countries). Such agreements should be made using the mutual agreement procedures and/or exchange of information articles of India's relevant tax treaties and are conveniently referred to as MAP APAs.

An APA is a voluntary arrangement

Discussion: Proposed new s.118 (1) states that the CBDT "... may enter into an (APA) ..." (emphasis added). This prerogative available to the tax authorities is common to APA schemes in other countries. Clearly, the tax authorities cannot be "forced" to negotiate an APA at the whim of a taxpayer. Consistent with the arrangements in other countries, it would be appropriate for India's APA scheme to be voluntary on the part of the taxpayer. Further, the proposition to enter into an APA should be at the instigation of the taxpayer.

Suggested Recommendation for APA Rules: India's APA arrangements are to be voluntary on the part of both the tax authorities and taxpayers. This means that a taxpayer may not be directed or required by the tax authorities to enter into an APA and, similarly, the tax authorities may not be obligated to enter into an APA following a request from a taxpayer.

Types of APAs to be covered by the arrangements

Discussion: Proposed new s.118 of the DTC 2010 provides that the Indian tax authorities may enter into an APA "with any person". Therefore, there are two broad categories of APAs that could be covered by the measures in s.118: (1) unilateral – that is, an APA that consists of an agreement between the Indian taxpayer and the Indian tax authorities; and (2) bilateral or multilateral – that is, an APA that consists of agreements between the Indian taxpayer and the tax authorities, and between Indian and foreign tax authorities. Each of these types of APAs is discussed below.

A unilateral APA is best suited to those cases where it is either unnecessary to involve a foreign tax authority in the APA process (e.g., where the counter-party to an Indian resident's international related party transaction is a taxpayer in a country which does not have a tax treaty with India), or where it is considered that there is very little attendant tax risk for the counter-party from the transfer pricing method being proposed for the APA. A unilateral APA would also be appropriate where a foreign tax authority declines to participate in what would otherwise be a bilateral APA.

Unilateral APAs would therefore involve only the Indian taxpayer and the tax authorities. This limited involvement of parties to the APA means that a unilateral APA is likely to be able to be finalized in a relatively brief period of time compared to an APA that would necessitate the involvement of another tax authority. While there can be no guarantee as to how long a unilateral APA would take to finalize, international experience suggests a period of approximately three to 18 months from the date of formal application.

A bilateral or multilateral APA would require the involvement of at least one other tax authority in the APA process. This involvement would occur under the provisions of the mutual agreement procedures article and/or the exchange of information article in India's tax treaty with the other relevant country. This type of APA is often referred to as mutual agreement procedures (MAP APA). A MAP APA is therefore best suited where the Indian resident's international related party transaction(s) occurs with a related party

that is a taxpayer in a tax treaty partner country. The agreement with the foreign tax authority ensures there is no economic double taxation in respect of the transaction(s) covered by the APA.

A MAP APA generally consists of at least three agreements – (1) between the Indian tax authorities and the foreign tax authority, (2) between the Indian taxpayer and the Indian tax authorities, and (3) between the foreign tax authority and the related party in the foreign country. The involvement of the foreign tax authority inevitably adds additional time to the period for finalizing a MAP APA relative to a unilateral APA. International experience suggests a period of at least 18 months – 30 months to finalize a MAP APA.

With regard to the type of APA applications to be considered – i.e., whether unilateral or MAP APAs – it should be appropriate to make clear at the outset whether one type or other would be accepted. For example, some countries make it clear that they prefer a MAP APA in cases where the related party on the other side of a transaction is a taxpayer in a country with which the particular country has a tax treaty. In such cases, it is a matter of discussion and negotiation between the applicant and the tax authorities as to whether to proceed with a unilateral APA with its attendant risks. Some countries also prefer to initiate their APA schemes with unilateral APAs, notwithstanding the attendant risks for the taxpayers concerned in the event the country on the other side of the transaction adopts an arm's length price different from that determined by the unilateral APA.

Given India's wide network of tax treaties, it seems appropriate for India to accept all types of applications into its APA scheme. In the event that applications are made for MAP APAs in the first year of the scheme's operation, then such applications will immediately address any attendant risks that would arise from a unilateral APA with the Indian applicant. On the other hand, if a unilateral APA application is made and the counter-party to the transactions is a taxpayer in a treaty partner country, then any attendant risks should be canvassed by the applicant and the Indian tax authorities in the initial stage of the APA process. This would be preferred to denying the applicant the unilateral APA.

If an Indian taxpayer enters into a unilateral APA, and the tax authorities of another country subsequently take an

action that either gives rise or may give rise to economic double taxation in respect of the transactions covered by the unilateral APA, then the question arises as to how that double taxation avoidance treaty could be alleviated. If the other country is a country with which India has a double taxation treaty, then it would be reasonable for the Indian tax authorities to entertain a request from the taxpayer for commencement of mutual agreement procedures under that tax treaty. Refusal to do so on the basis that a unilateral APA binds the Indian tax authorities to the outcomes determined by that APA would ignore the over-riding characteristics of the tax treaty. Moreover, from a commercial perspective, such an approach would cause Indian taxpayers to be extremely cautious about entering into unilateral APAs and make unilateral APAs an unpalatable approach for managing an Indian taxpayer's transfer pricing issues. Therefore, in such situations, Indian taxpayers should be assured that the mutual agreement procedure would remain open for them in the event economic double taxation arises.

Suggested Recommendation for APA Rules: India's APA scheme should embrace both unilateral APAs (i.e., agreements between an Indian taxpayer and the Indian tax authorities), and APAs that involve agreements with foreign tax authorities. These latter APAs may be bilateral (i.e., involving agreements between Indian the tax authorities and the tax authorities of a tax treaty partner country) or multilateral (i.e., involving agreements between the Indian tax authorities and two or more tax authorities of tax treaty partner countries). Such agreements should be made using the mutual agreement procedures and/or exchange of information articles of India's relevant tax treaties and are conveniently referred to as MAP APAs.

Where the counter-party in an Indian resident's international related party transaction is a taxpayer in a country with which India has a comprehensive tax treaty, the Indian tax authorities may prefer the APA to include an agreement with the tax authorities of the country in which that counter-party is tax resident. This preference should be discussed between the Indian taxpayer and the Indian tax authorities at the time the APA application is being made. Both parties may agree to not involve the foreign tax authorities in the APA.

A unilateral APA between an Indian taxpayer and the Indian tax authorities may not preclude the adoption of

mutual agreement procedures in the event a foreign tax authority takes an action in respect of an international related party transaction covered by the unilateral APA that may give rise to economic double taxation.

Eligibility Criteria

Discussion: Proposed new s.118 provides an APA may be entered into “with any person”, subject to the approval of the Central Government. This all-encompassing coverage of the APA arrangements is generally consistent with the arrangements adopted by other countries with APA arrangements in place. In fact, in many countries, there are no criteria by which the tax authorities determine whether an APA applicant should be accepted into that country’s APA scheme, or denied an APA. In those countries, provided the applicant can supply the required information and comply with the laid down process, APA applications are processed as and when received.

At least one country (Taiwan) prefers applications only from those taxpayers with a good tax-paying history. There are pros and cons to this type of approach. On the positive side, this approach would give comfort to the tax authorities that the applicant will be focused on continuing its good tax-paying record, and likely to be cooperative throughout the APA process. On the other hand, such an approach denies opportunities to address difficult cross-border issues for taxpayers who may frequently contest the tax authorities’ rulings and assessments. Such taxpayers are less likely to have a good tax-paying history and, if denied access to the APA scheme, their difficult cross-border issues would continue to be addressed through the more confrontational processes of appeals and tax tribunals, courts, etc. Access to the APA scheme for such taxpayers would provide an opportunity for those taxpayers to develop a good tax-paying history, and work cooperatively with the tax authorities.

Understandably, issues such as a tax authority’s availability of resources, and the tax authority’s preparedness to enter into MAP APAs will determine the number of APA applications able to be processed, and the type of APA applications that would be considered. Unlike the logistical arrangements adopted in India for considering transfer pricing issues in taxpayers’ income tax returns – where reasonable estimations were able to be made of the number of cases to be considered, and the number of resources (TPOs) required to handle those cases – reasonable estimations of the number and

type of APA applications will only be feasible after two or three years of operation of the APA arrangements. Therefore, in the initial years of operation of the APA arrangements, it would seem appropriate to not cap the number of APA applications able to be lodged.

Suggested Recommendation for APA Rules:

Consistent with the broad coverage of India’s APA provisions, it is not proposed to place any limiting criteria for applicants for an APA. Rather, any application from an Indian taxpayer may be considered. Whether an APA application results in an APA being processed will generally depend on a number of factors. Those factors would include, for example, the applicant’s ability to submit the required information and data relevant to the APA application, the degree of cooperation extended by the applicant to the team from the tax authorities that is handling the APA request, the ability of the tax authorities to make sufficient resources available to process the application in a timely manner and, in the case of an application for a MAP APA, the preparedness of the relevant foreign tax authorities to participate in the APA.

In view of the above, the tax authorities may reserve the right, however, to prioritize applications for APAs where the number of applications received places unreasonable pressures on the available resources. Having said that, it is recommended that the tax authorities should make every endeavour to allocate sufficient resources to the APA scheme to handle the applications received.

Departmental arrangements

Discussion: The adoption of an APA scheme adds a new and somewhat different area of activity for any tax authority. Given that some of the main objectives of an APA scheme from a tax authority’s perspective are:

- to facilitate voluntary compliance with the country’s transfer pricing rules,
- to minimize levels of disputation, and
- to gain certainty in respect of tax outcomes from the covered international related party transactions,

It would be hoped that no more resources, and possibly even less resources would be required in administering the APA scheme than would otherwise be required if a scheme were not in place. That being said, an APA scheme nevertheless requires an allocation of particular resources to the scheme and a particular structure and procedures developed to administer the scheme.

While each stage is important, the time and resource commitment may vary substantially from stage to stage. For example, in some cases, the pre-lodgment/filing stage (first stage) may consume most of the taxpayer applicant's time and resources and, often, also the relevant tax authority's time and resources. On the other hand, with many MAP APAs, the review and evaluation stage (third stage) may consume most of the relevant tax authorities' time and resources while the applicant taxpayers may have little to do in this stage.

All countries with APA schemes in place seem to have specialized resources appointed to administer the schemes. The structures adopted by the various countries could be broadly categorized into three types of structures, namely:

Centralized – where the APA scheme is managed and resourced centrally within the particular tax authority's administrative arrangements;

Decentralized – where the APA scheme is managed and resourced by the various local offices within the particular tax authority's administrative arrangements, with some direction and guidance being given from a central office; and

Centralized management and control/local administration – where most of the resources for administering the APA scheme are drawn from local offices, but where the direction and control of the scheme comes from a centralized office.

Perhaps the most commonly adopted of the structures is the third structure. Centralized management and control of an APA scheme enables the development

and adoption of standardized procedures, identification and training of the most appropriate resources, consistency of approaches and methodologies across industries, monitoring of times being taken to complete APAs, direction and guidance on matters relating to roll-back and roll-over (extension/renewal) of APAs and, particularly with regard to MAP APAs, liaison with the Indian Competent Authority and with foreign tax authorities.

While it is prudent to have the management and control of an APA scheme centralized within a tax authority's administrative arrangements, it is also important to source APA teams from local/regional offices. These teams may be the most likely to interact regularly with the applicant taxpayers, subject to whether the APA is a MAP APA that necessitates a higher degree of involvement from the central office and the Competent Authority's office. Even then, local/regional office team members will often retain a major involvement with the APA.

Suggested Recommendation for APA Rules: India's APA scheme may be managed and controlled by the tax authorities, in liaison with Competent Authority's office and various other regional/local offices. In particular, each APA application may be assigned a central office manager and an APA team may be appointed from the applicant's relevant regional/local office to process the APA application. It is further suggested that specialized APA training for the persons who may form part of an APA team should be conducted and guidelines and directions for the various APA team members should be developed and promulgated.

The successful completion of an APA would require a range of skills and experiences. For example, individuals well versed in the spirit, object and procedures of the treaty are required to successfully negotiate a resolution. Individuals with strong technical skills are required to conduct the transfer pricing analyses and evaluate competing positions. In addition, individuals are required to possess a good understanding of the book and records of a potential applicant, the nature of information that may be available and useful for the analyses as well as relevant understanding of the industry. Often this combination of experiences is usually collected through a combination of barristers, economists and accountants/examiners situated at the headquarters level, as well as situated in competent authority and the local/regional offices. In such cases

Careful consideration should be given to composition of APA teams and the roles and responsibilities of each team member and the stage of involvement.

Where an application is made for a MAP APA, the assigned manager should immediately liaise with the Indian Competent Authority's office for the purpose of determining the appropriateness of the application and the approach to be taken in processing the application. Subject to the specific needs of the application, the Competent Authority's office may assign a person to form part of the APA team in respect of that application.

Stages of an APA

Discussion: International experience with APA schemes shows there are five main stages in the life of an APA. Those stages are:

- Pre-lodgment/filing stage
- Formal lodgment/filing
- Review and evaluation stage
- Finalization/formal agreement
- Monitoring/annual reporting

While each stage is important, the time and resource commitment may vary substantially from stage to stage. For example, in some cases, the pre-lodgment/filing stage (First stage) may consume most of the taxpayer applicant's time and resources and, often, also the relevant tax authority's time and resources. On the other hand, with many MAP APAs, the review and evaluation stage (third stage) may consume most of the relevant tax authorities' time and resources while the applicant taxpayers may have little to do in this stage.

The following are relatively brief explanations of the objectives and activities that occur at each of the five stages mentioned above.

Pre-lodgment/filing stage: The main objectives for a taxpayer at this stage are to determine whether it would be advantageous for the taxpayer to obtain an APA in respect of a particular international related party transaction or group(s) of transactions and, if so, whether the relevant tax authority (or tax authorities, in the case of a MAP APA) would be prepared to proceed with an APA application. In order for the latter objective to be determined, it is often necessary to approach the relevant tax authority with the proposition for an APA. When that occurs, the main objectives for that tax authority are to determine whether the taxpayer's

APA proposition is feasible and whether the available resources would enable the APA to be achieved within the proposed time frame. In the Indian context, it is noted that the broad intent of the relevant APA provisions (proposed s.118 of the DTC 2010) is that the APA facility should be available to taxpayers. Therefore, it would not be an objective to determine whether it is in the tax authorities' interest to have an APA but, rather, whether the APA as proposed could be achievable.

The principal activities of the taxpayer during the pre-lodgment/filing stage are to:

- Identify the relevant international related party transaction (s) that would be covered by an APA;
- Identify the relevant related party and country that would be the counter-party – in particular, whether that foreign country has a comprehensive tax treaty with India;
- Evaluate whether the APA should be unilateral or a MAP APA that involves the other country – if that country is a treaty partner country and a unilateral APA is proposed, evaluate the attendant risks if the treaty partner country were to not accept the transfer pricing outcomes produced by the unilateral APA – consider the reasons to be submitted as to why a unilateral APA is preferred;
- Identify and then evaluate the transfer pricing methodology to be used in the APA – establish why it would be considered the most appropriate method



- and how it conforms to the arm's length principle. It is important to note that this would be required in any case when preparing annual TP documentation;
- Identify any third party benchmarks (comparables) that would be tabled for use with the selected transfer pricing methodology, and any profit level indicators that may be required in an application of any profits based methodology;
 - Consider what factors may impact the business and the pricing of the covered transactions – evaluate these factors and develop them as “critical assumptions” as to the continuing applicability of the proposed transfer pricing methodology;
 - Consider the period to be proposed for the APA – articulate the reasons for proposing a particular period, having regard to the maximum 5 year period in the legislation;
 - Consider the resources and commitment of senior management within the company to achieving the APA;
 - Consider the requirement for tabling information with the Indian tax authorities and any relevant foreign tax authority – while much of this information would be similar to information ordinarily required under current compliance requirements, consider also the need to table forecasted financial data over the period of the proposed APA; and importantly
 - Consider the company's preparedness to work cooperatively to achieve a WIN-WIN outcome for both the company and the tax authorities.

When a taxpayer has worked through the various elements mentioned above, the procedure commonly adopted in other countries is for the taxpayer to make an approach (formal or informal) to the relevant tax authorities and initiate discussions about the prospect of securing an APA. Some countries enable such approaches by taxpayers to be undertaken on an anonymous basis whereby the taxpayer's name is not disclosed to the tax authorities. Other countries do not entertain such approaches and require the name of the proposed APA applicant to be known when an approach is made. From a practical perspective, the concept of anonymity may not always achieve its desired result, particularly where the initial discussions require matters such as the name of the industry, type of transactions, etc. to be disclosed in order for the tax authorities to reasonably appreciate the feasibility of the proposed APA. Nevertheless, by enabling anonymous approaches to be made, some taxpayers may

be more inclined to explore the prospect of an APA than they would otherwise have done if their identity had to be revealed at this very early stage.

From an Indian perspective, it would seem reasonable to provide taxpayers with some options as to how an initial approach could be made. For example, taxpayers could be allowed to approach either the TPO who has handled the taxpayer's transfer pricing issues in the recent past or to any nominated person or Competent Authority's office (this approach could be taken where anonymity is not sought.). The approach could be initiated with a phone call or a letter, but it would seem appropriate for the details of what is being proposed to be delivered and presented in person at a meeting with the relevant officials. These officials could include the manager assigned to the matter if that assignment is able to be achieved in time for the designated meeting.

The pre-lodgment/filing processes that seem to work most efficiently in other countries are those that explore the proposed APA in some depth. That is, while the tax authorities may require some time to consider the taxpayer's proposition after it is initially tabled and explained, an effective and efficient process from there is one where the tax authorities and the taxpayer pursue further dialogue (where necessary) about matters that would warrant further attention or change by the taxpayer. Where this dialogue proceeds constructively, it is reasonable for both parties to strengthen their respective views on the likelihood of the APA being achievable. On the other hand, where seemingly insurmountable barriers arise during this dialogue, either or both party may resolve to not continue with the proposed APA application.

The pre-lodgment/filing process is also important in that it enables the tax authorities to explain what further information (if any) will be required for the formal APA application. The tax authorities are also able to outline the composition of the team that would handle the APA application, the likely time frame for completing the APA application and, in the case of a MAP APA, the steps that would be followed in dealing with any foreign tax authority.

Formal lodgment/filing: It is important that a taxpayer's formal APA application is drafted in the manner as directed/suggested by the relevant tax authority. It is also particularly important that the



application is completed and lodged/ filed in accordance with the time frame agreed with the tax authority. Both these matters should be discussed and agreed during the pre-lodgment/ filing stage.

Where a taxpayer finds that a formal application document is taking longer than anticipated to prepare, it is prudent for the taxpayer to inform the tax authority as soon as possible after it becomes apparent that the agreed date for lodging/ filing the document is not going to be met. This enables the tax authority to re-schedule activities or resources and, at time, the tax authority may be able to make suggestions to the taxpayer that could alleviate the problem being experienced in finalizing the application. Importantly, however, early notification of any likely delay reinforces the spirit of cooperation between the taxpayer and the tax authority during the APA process.

An APA application need not be something completely new to a taxpayer or the tax authorities. In fact, an APA application is a document that consists substantially of similar material as developed by a taxpayer for the purpose of documenting the taxpayer's compliance with the arm's length principle in respect of the taxpayer's international related party transactions. That is, an APA application should normally comprise the following elements:

- Name and address of the taxpayer (applicant)
- Name and contact details of the person responsible for the APA application
- Description of the international related party transactions to be covered by the APA
- Name and address, and country of tax residence of the international related party with whom the taxpayer is transacting (or is going to transact)
- Proposed APA – unilateral, or MAP APA
- Period of proposed APA (in most cases, a maximum period of five years)
- Description of the taxpayer's business, with particular reference to the international related party transactions to be covered by the APA – include also any relevant charts depicting the entities in the taxpayer's business structure
- Description of the industry in which the taxpayer's business operates
- Description of the proposed transfer pricing methodology (TPM) and reasons why the methodology is considered to be the most appropriate arm's length transfer pricing methodology

- Details of third party benchmarks and the method(s) used for selecting those benchmarks
- Details of the financial and economic analyses demonstrating the application of the proposed TPM and, where appropriate, the expected arm's length outcomes over the period of the APA. Note: At either this stage, or earlier in the application, it would be appropriate to table any financial forecasts developed within the taxpayer's business that are relevant to the covered transactions
- Details of critical assumptions that, if not met, would compromise the integrity of the proposed TPM.
- Proposed arrangements for making any adjustments to the taxpayer's tax results (compensating adjustments) where the taxpayer's actual financial results differ from those that would be achieved given the application of the proposed TPM.

As indicated in the discussion of the Pre-lodgment/ filing stage, most of the matters to be addressed in the formal application should be discussed between the taxpayer and the tax authorities during that stage of the APA process.

Review and evaluation stage: Subject to the extent of agreement reached between the taxpayer and the tax authorities during the Pre-lodgment/ filing stage, the Review and evaluation stage may not be a lengthy part of the APA process. For example, if the formal application substantially conforms with the agreed understanding between the parties prior to the formal lodgment/ filing occurring, then the activities of the tax authorities may be limited to a checking of the details in the formal application. On the other hand, if matters such as final agreement on the third party benchmarks, or the financial and economic analyses had not been fully discussed and agreed prior to formal lodgment/ filing, then it would be understandable that the tax authorities may require substantial time to fully evaluate the APA application.

It is important during this review and evaluation stage that any information requests made by the tax authorities are responded to in a timely manner by the taxpayer. Similarly, it is important that the tax authorities adhere to understandings with the taxpayer as to the allocation of appropriate resources to evaluate the APA application, and maintain regular contact with the taxpayer to keep the taxpayer informed about the progress of the APA application.

Where the APA application is for a MAP APA, the tax authorities will necessarily need to establish a dialogue with their counterparts in the relevant foreign country. Such dialogue occurs under the terms of the relevant comprehensive tax treaty between the countries. Understandably, such matters add further time to the processing of an APA application, particularly if discussions between the tax authorities are decided to occur face-to-face. The key issue for the taxpayer in these circumstances is to ensure the tax authorities are provided with any required information in an accurate and timely manner. Also, it is important that the same information is provided by the taxpayer to each of the tax authorities involved in the MAP discussions.

Finalization/formal agreement: Formal agreement may or may not be in the same terms as proposed in the APA application. In the case of a unilateral APA, the tax authorities and the taxpayer may have agreed on a different methodology or outcome during the review and evaluation stage, and it is then up to the tax authorities to draw up an appropriate agreement that recognizes this particular outcome. In the case of a MAP APA, a similar process would be followed where the relevant tax authorities agree on a TPM or outcomes different from that proposed in the APA applications.

The formal agreement is generally documented by the tax authorities in a manner consistent with the laws of that country relating to contractual arrangements and having regard to provisions in the tax law relating to advance rulings, etc. In that regard, it would be prudent for the taxpayer to consult with its advisers as to the appropriateness of the agreement proposed by the tax authorities. This agreement will be binding on both the taxpayers and tax authorities. If any tax demand is raised as a result of the normal TP audit process on any subject matter of the APA, the same should not be

enforced till the execution of the APA.

Monitoring/annual reporting: The formal agreement may also extend beyond what is proposed in the APA application and include arrangements for matters such as regular monitoring of the APA outcomes, annual APA compliance reports, etc. That is, countries typically require taxpayers who have finalized an APA to demonstrate that the international related party transactions covered by the APA have been conducted in the manner agreed within the APA and that the outcomes were as agreed in the APA. This does not mean that the relevant taxpayers are subjected to similar annual compliance activities as they may otherwise be subjected in the absence of the APA (e.g., annual documentation, etc.) but, rather, the taxpayers must provide regular (e.g., annual) reports to the relevant tax authorities that evidence compliance with the terms of the APA.

An annual compliance report may comprise a two or three page document, together with any relevant financial statements, that:

- provide details of the actual related party international transactions undertaken during the relevant financial year and that are covered by the



APA;

- confirm the use of the TPM agreed in the APA;
- provide evidence of the application of the agreed TPM and the results of the application of that TPM;
- details of any compensating adjustments (see later section headed "Compensating Adjustments") and, where appropriate, details of any adjustments to withholding taxes paid; and
- confirm that the critical assumptions were not breached during the relevant financial year.

Any annual compliance report should be completed and lodged/filed in a timely manner (as provided by the APA).

Suggested Recommendation for APA Rules: India's APA scheme may generally follow a five-step process, each of those steps being as follows:

1. Pre-lodgment/filing
2. Formal lodgment/filing
3. Review and Evaluation
4. Finalization/formal agreement
5. Monitoring/annual reporting.

Pre-lodgment/filing

The tax authorities should welcome approaches from any taxpayer for an APA. Such approaches should be made, in the first instance, to the regional/local office, or directly to the Competent Authority's office. These approaches may be anonymous if desired by the taxpayer.

An initial approach to discuss the prospects for an APA may be accompanied with the following information to evaluate whether the proposed APA is feasible:

- Description of the international related party transaction (s) that would be covered by an APA;
- Details of the relevant related party (subject to anonymity requirements, including the Indian taxpayer) and country that would be the counterparty – in particular, whether that foreign country has a comprehensive tax treaty with India;
- Whether the APA would be unilateral or a MAP APA that involves the other country – if that country is a treaty partner country and a unilateral APA is proposed, a brief commentary on any attendant risks if the treaty partner country were to not accept the transfer pricing outcomes produced by the unilateral APA – reasons why a unilateral APA is preferred;
- Description of the proposed transfer pricing

methodology to be used in the APA, why it is considered the most appropriate method and how it conforms with the arm's length principle;

- Details of any third party benchmarks (comparables) that would be tabled for use with the selected transfer pricing methodology, and any profit level indicators that may be required in an application of any profits based methodology;
- Views on any "critical assumptions" to be built into the APA – i.e., factors that may impact the business and the pricing of the covered transactions and which would affect the continuing applicability of the proposed transfer pricing methodology;
- Length of the proposed APA – articulate the reasons for proposing a particular period, having regard to the maximum five year period in the legislation;
- Affirmation of the taxpayer's commitment to providing any requested and relevant information to the tax authorities and any relevant foreign tax authority, including any forecasted financial data over the period of the proposed APA; and importantly
- Affirmation of the company's preparedness to work cooperatively to achieve a WIN-WIN outcome for both the company and the tax authorities.

The tax authorities may undertake to respond within a limited period, say 30 days, of the receipt of a taxpayer's approach for an APA and, subject to whether there are any ongoing discussions on the taxpayer's approach, to advise whether the tax authorities would be prepared to process a formal APA application from the taxpayer. Where it is agreed that an APA is feasible, the tax authorities may advise the taxpayer of the APA Case Manager assigned to the matter and provide details of the information required for the submission of a formal APA application. The tax authorities may also provide a preliminary timeline for the processing of the APA application.

The tax authorities may also engage in discussions or negotiations with relevant foreign tax authorities, including the sharing of formal position papers and the conduct of face to face meetings with the officials. On a conclusion of these discussions, the Indian tax authorities may enter into a separate agreement with the relevant foreign tax authorities.

Formal lodgment/filing

The tax authorities may require a formal application

The tax authorities may clarify that, when applying for an APA, a taxpayer should identify any factors that would have a significant impact on the viability of the proposed TPM or the outcomes of the proposed TPM. These factors – to be referred to as “critical assumptions” – should be incorporated into the APA application. The tax authorities may consider these critical assumptions in the course of its review and evaluation of the APA application and, where considered appropriate, the tax authorities may also suggest other critical assumptions to the taxpayer for inclusion in the APA.

for an APA to be lodged/filed with them in order for an APA to be fully considered. The application should contain the specified information (see later section titled “Forms and Information Requirements”) and be lodged/filed with the local/regional offices or directly with the Competent Authority’s office.

Review and Evaluation

The taxpayer’s APA application would be considered by the tax authorities, and, where necessary, recourse to the taxpayer will be had to obtain further explanations or information. Any such requests should be responded to in a timely manner to ensure adherence to the projected timeline for processing the APA application. During this stage of the processing of the APA application, the tax authorities and the taxpayer may need to meet to discuss and resolve any issues that arise during the evaluation of the APA application.

In the case of a MAP APA, the tax authorities may discuss and agree a particular TPM or outcome with the relevant foreign tax authority that is different from that proposed by the taxpayer. Where that occurs, the taxpayer should be given the option of either accepting or rejecting the outcome agreed between the Indian tax authority and the foreign tax authority. If the taxpayer rejects that outcome, then no further action may be taken with the taxpayer’s APA application. Of course, the tax authorities would then retain the right to deal with the taxpayer’s relevant international related party transactions in whatever manner is considered to reflect an arm’s length outcome.

Finalization/formal agreement

When the review and evaluation of the taxpayer’s APA application is finalized, and has reached agreement with

the taxpayer, the tax authorities may then prepare a formal agreement to reflect the agreement reached with the taxpayer. This formal agreement may be submitted to the taxpayer for signature. The agreement will be binding on both the taxpayer and the tax authorities. If any tax demand is raised as a result of the normal TP audit process on any subject matter of the APA, the same should not be enforced till the execution of the APA.

In the case of a MAP APA, the tax authorities may enter into a separate agreement with the relevant foreign tax authority. The taxpayer may not be a party to this agreement, and, a copy of that agreement may not be provided to the taxpayer.

Monitoring/annual reporting

The formal agreement with the taxpayer may include a monitoring and annual reporting requirement on the taxpayer. In particular, the taxpayer will be required to monitor the events and circumstances agreed as “Critical Assumptions” in the APA and advise the tax authorities in a timely manner of any situations where it is considered any of the critical assumptions may have been breached. A more detailed discussion on the consequences of a breach of a critical assumption is provided in the section headed “Critical Assumptions”.

Further, the formal agreement with the taxpayer may include a requirement for the taxpayer to provide annual reports on compliance with the terms of the APA. In particular, an APA’s annual report will include the following:

- details of the actual related party international transactions undertaken during the relevant financial year that are covered by the APA;

- confirmation of the use of the TPM agreed in the APA;
- evidence of the application of the agreed TPM and the results of the application of that TPM (this will frequently require the tabling of certain financial data);
- details of any compensating adjustments (see later section headed “Compensating Adjustments”) made in the accounts and, where appropriate, details of any adjustments to withholding taxes; and
- confirmation that the critical assumptions were not breached during the relevant financial year.

The annual compliance report should be completed and lodged/filed in a timely manner (as provided by the APA’s formal agreement).

Involvement of the taxpayer in the APA process

Discussion: A taxpayer should expect to have a significant involvement throughout the entire APA process. This involvement would include discussions with the tax authorities’ team assigned to handle the APA and may extend to hosting the tax authorities’ team in onsite inspections of the taxpayer’s business operations to enable the officials to gain a deeper insight to the factors that impact the business and the pricing of the transactions covered by the APA application.

In the case of a MAP APA, however, the taxpayer should not expect to be involved in any government-to-government discussions or correspondence. Where requested, the taxpayer should be prepared to attend meetings between officials and to provide any requested information or explanations in a timely manner. Importantly, in a MAP APA, the taxpayer should ensure there is effective and regular communication with the relevant foreign related party. This facilitates the flow of information to the relevant tax authorities that is consistent and accurate.

Suggested Recommendation for APA Rules: The tax authorities should welcome the involvement of the taxpayer throughout the APA process. It should be noted, however, in the case of a MAP APA, the taxpayer may not be involved in any discussions or correspondence between the Indian tax authorities and the relevant foreign tax authority. At the same time, the tax authorities should undertake to keep the taxpayer informed on progress of any discussions or dialogue

with the foreign tax authority subject of course to ensuring that confidentiality is retained in respect of any information to which the taxpayer would not be entitled to receive under the confidentiality and/or secrecy provisions of the relevant tax laws.

Forms and information requirements

Discussion: Some of the foreign tax authorities which have APA schemes in place have prescribed forms for various elements of the APA process. Certainly, all of them prescribe the type of information required for an APA application. In that regard, a summary of the typical information requirements was provided earlier in the section headed “Stages of an APA: Formal lodgment/filing”. Those requirements are repeated below:

- Name and address of the taxpayer (applicant)
- Name and contact details of the person responsible for the APA application
- Description of the international related party transactions to be covered by the APA
- Name and address, and country of tax residence of the international related party with whom the taxpayer is transacting (or is going to transact)
- Proposed APA – unilateral, or MAP APA
- Period of proposed APA (max. 5 years)
- Description of the taxpayer’s business, with particular reference to the international related party transactions to be covered by the APA – include also any relevant charts depicting the entities in the taxpayer’s business structure
- Description of the industry in which the taxpayer’s business operates
- Description of the proposed transfer pricing methodology (TPM) and reasons why the methodology is considered to be the most appropriate arm’s length transfer pricing methodology

- Details of third party benchmarks and the method(s) used for selecting those benchmarks
- Details of the financial and economic analyses demonstrating the application of the proposed TPM and, where appropriate, the expected arm's length outcomes over the period of the APA. Note: At either this stage, or earlier in the application, it would be appropriate to table any financial forecasts developed within the taxpayer's business that are relevant to the covered transactions
- Details of critical assumptions that, if not met, would compromise the integrity of the proposed TPM.
- Proposed arrangements for making any adjustments to the taxpayer's tax results (compensating adjustments) where the taxpayer's actual financial results differ from those that would be achieved given the application of the proposed TPM.

In addition to these requirements, APAs typically have a monitoring and annual reporting requirement. This requirement was discussed previously.

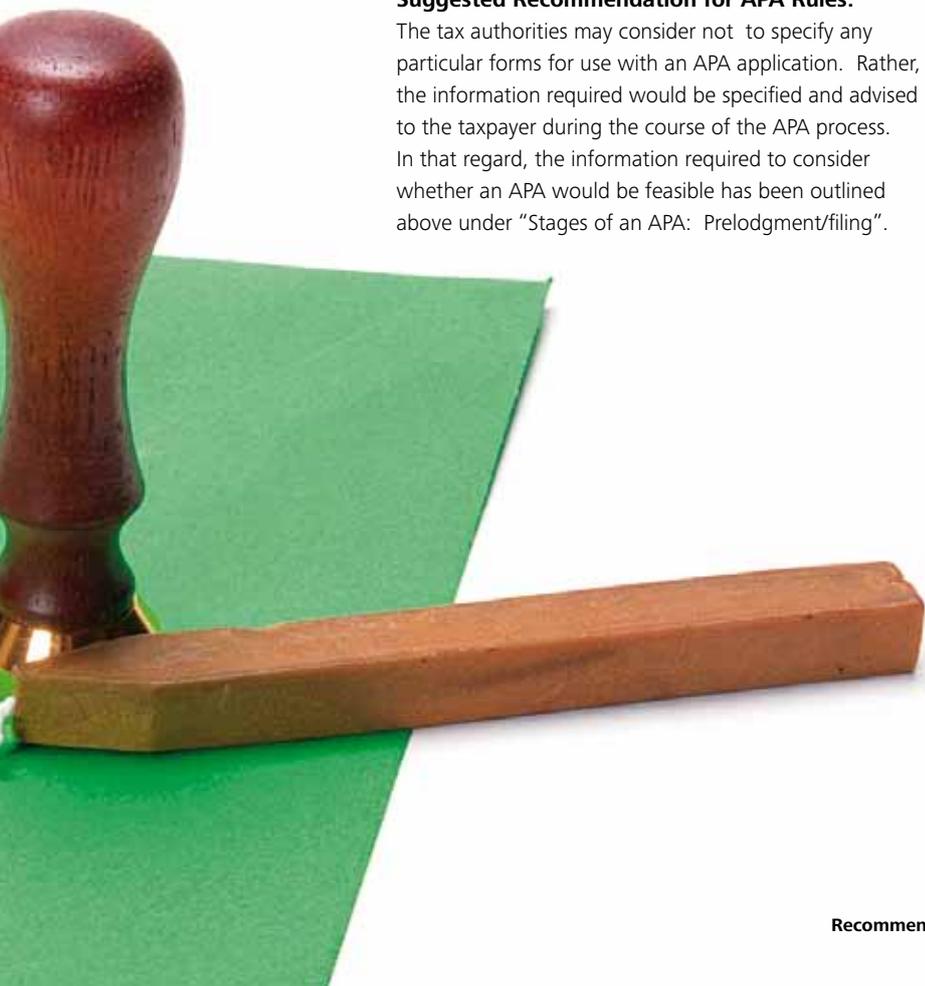
Suggested Recommendation for APA Rules:

The tax authorities may consider not to specify any particular forms for use with an APA application. Rather, the information required would be specified and advised to the taxpayer during the course of the APA process. In that regard, the information required to consider whether an APA would be feasible has been outlined above under "Stages of an APA: Prelodgment/filing".

The information that could be expected to be required in a formal application for an APA would include the following:

- Name and address of the taxpayer (applicant)
- Name and contact details of the person responsible for the APA application
- Description of the international related party transactions to be covered by the APA
- Name and address, and country of tax residence of the international related party with whom the taxpayer is transacting (or is going to transact)
- Proposed APA – unilateral, or MAP APA
- Period of proposed APA (max. 5 years)
- Description of the taxpayer's business, with particular reference to the international related party transactions to be covered by the APA – include also any relevant charts depicting the entities in the taxpayer's business structure
- Description of the industry in which the taxpayer's business operates
- Description of the proposed transfer pricing methodology (TPM) and reasons why the methodology is considered to be the most appropriate arm's length transfer pricing methodology
- Details of third party benchmarks and the method(s) used for selecting those benchmarks
- Details of the financial and economic analyses demonstrating the application of the proposed TPM and, where appropriate, the expected arm's length outcomes over the period of the APA. Note: At either this stage, or earlier in the application, it would be appropriate to table any financial forecasts developed within the taxpayer's business that are relevant to the covered transactions
- Details of critical assumptions that, if not met, would compromise the integrity of the proposed TPM.
- Proposed arrangements for making any adjustments to the taxpayer's tax results (compensating adjustments) where the taxpayer's actual financial results differ from those that would be achieved given the application of the proposed TPM.

Information that could be expected to be provided as part of the taxpayer's obligations with regard to monitoring and annual reporting has been outline above under "Stages of an APA: Monitoring/Annual Reporting".



During the course of the APA process, that is, prior to conclusion of a formal agreement between the parties, either party (i.e., taxpayer or the tax authority) may withdraw from the process at any time. It may be clarified that if the tax authorities decide to withdraw from an APA it should provide at the time of withdrawal a written explanation to the taxpayer setting out its reasons for withdrawing from the process.

Critical Assumptions

Discussion: The prospective nature of an APA means that decisions relating to arm's length pricing outcomes are made in advance of the actual transactions occurring. This is not a flaw that attaches to an APA but, rather, it requires a careful consideration of factors that could render the proposed TPM, or the outcomes from an application of that TPM, inconsistent with arm's length pricing approaches or outcomes.

For example, the TNMM is often used in the case of an importer/distributor of goods (the "tested party"), whereby the net margin achieved by that tested party in respect of those goods is compared against the net margins achieved by comparable third party importers/distributors. An arm's length price in respect of those imported goods is considered to have been achieved where the tested party's net margin is within an acceptable range developed from the comparable third parties' net margins.

The use of TNMM in this manner would remain valid into future years provided a number of features of this analysis remained substantially intact. For example, what if the tested party's purchase of imported goods increased very substantially (e.g., doubled)? The reasons for this could be many and varied (e.g., increased demand because of price reductions by the supplier, or because of enhanced technology in the goods) and it would be reasonable to question whether the targeted net margin derived from the

comparable third party importers/distributors remained valid. Therefore, in the APA it may be appropriate to incorporate a "critical assumption" to the effect that the tested party's level of imported goods remained substantially the same (i.e., no more than 25% variance, year on year).

Various other critical assumptions should be considered for incorporation into the APA. While each taxpayer's circumstances would determine the critical assumptions to be incorporated, some which are frequently adopted include assumptions around the extent of movement in any relevant foreign exchange rates, changes to the relative functions and risks that occur within the taxpayer's business model, changes that occur within any particular third party benchmark or groups of third party benchmarks, etc.

APA schemes typically require the applicant taxpayer to nominate any critical assumptions that the taxpayer wishes to incorporate into the APA. These critical assumptions are then reviewed by the tax authority and in many cases, a tax authority may submit other critical assumptions to be included. In both cases, the critical assumptions are part of the matters that have to be agreed between the taxpayer and the tax authorities.

Where a critical assumption is breached, APA schemes typically provide that either party has the option to cancel the APA in respect of the year in which the breach occurs and in respect of any future years in the APA. While this option is available, in practice, a breach of an APA becomes an opportunity to assess whether the APA may be continued, but in a slightly different form. If achievable, the revised APA preserves the value that the parties sought to achieve when the APA was first agreed.

Suggested Recommendation for APA Rules: The tax authorities may clarify that, when applying for an APA, a taxpayer should identify any factors that would have a significant impact on the viability of the proposed TPM or the outcomes of the proposed TPM. These factors – to be referred to as "critical assumptions" – should be incorporated into the APA application. The tax authorities may consider these critical assumptions in the course of its review and evaluation of the APA application and, where considered appropriate, the tax authorities may also suggest other critical assumptions to the taxpayer for inclusion in the APA.

A critical assumption is any fact (whether or not within the control of the taxpayer) related to the taxpayer, a third party, an industry, or business and economic conditions. While entering into an APA it should be remembered that the business activities, functions, risks, assets, accounting methods and estimates of the taxpayer shall remain materially the same for the period of the APA. The critical assumptions could be broadly categorized as operational, legal, tax, financial, accounting and economic conditions.

Where a critical assumption is breached, either party to the APA may cancel the APA with effect from the income year in which the breach occurs. Before cancelling an APA following a breach of a critical assumption, the tax authorities may first discuss the breach with the taxpayer (and with the foreign tax authority, in the case of a MAP APA) with a view to establishing whether the APA may be continued, albeit in a revised form.

Where the taxpayer becomes aware of a breach of a critical assumption, it must report that breach in a timely manner.

Confidentiality

Discussion: Typically, confidentiality or secrecy provisions in the various tax codes mean that any information tabled by a taxpayer with a particular tax authority retains its confidentiality and is not released to persons otherwise not authorized to receive that information. This extends to more general disclosures, such as whether a particular taxpayer is a participant in an APA scheme (see also later comments under “Public Reporting”).

In practice, however, some taxpayers seek assurance from the relevant tax authorities about certain disclosures, particularly given the prospective nature of an APA. For example, if an APA relates to future transactions that provide a competitive advantage to a taxpayer (e.g., prospective new technology), taxpayers may want to have an APA incorporate specific assurances about the tax authority’s preservation of strict confidentiality in respect of those transactions. Such assurances often do no more than restate the existing general confidentiality provisions of the relevant country’s tax laws.

In the case of MAP APAs, certain information provided to a particular tax authority may be supplied to another

tax authority under the terms of any relevant exchange of information article in a tax treaty between the relevant countries.

Suggested Recommendation for APA Rules:

Apart from the confidentiality/secrecy provisions that India already has in existence, the tax authorities may incorporate additional specific assurances in respect of confidentiality of information in an APA.

Withdrawal from the APA process

Discussion: APA schemes typically enable either party – taxpayer or tax authority – to withdraw from an APA process at any time. There are, of course, potential consequences for either party if such an event occurs.

If a taxpayer withdraws from an APA process, any information supplied by the taxpayer to the tax authorities in the course of the APA discussions, etc. may be used by the tax authority in its administration of the tax laws, including the transfer pricing provisions.

If a tax authority withdraws from an APA process, and if the taxpayer is aggrieved by the withdrawal, there is a risk the taxpayer could publicize the tax authority’s reluctance to proceed with the APA. This is termed a “risk” because it could deter other taxpayers from entering the APA process and generally undermine the integrity of the APA scheme.

Suggested Recommendation for APA Rules:

During the course of the APA process, that is, prior to conclusion of a formal agreement between the parties, either party (i.e., taxpayer or the tax authority) may withdraw from the process at any time. It may be clarified that if the tax authorities decide to withdraw from an APA it should provide at the time of withdrawal a written explanation to the taxpayer setting out its reasons for withdrawing from the process.

Compensating Adjustments

Discussion: A compensating adjustment is an adjustment to either income or expenditure which will bring the actual results in respect of an international related party transaction to within the arm’s length price range agreed in the APA. Compensating adjustments will not be required where the actual pricing reflects the agreed arm’s length pricing in the APA. However, in many cases a taxpayer’s actual results may vary from the agreed outcomes and an adjustment will need to be made.



Questions sometimes arise as to whether a compensating adjustment may be made where the compensating would have the effect of reducing the amount of taxable income that is subject to tax. Where the tax laws of a country do not specifically prohibit such an adjustment, the typical approach taken by other countries is to allow the adjustment to be made, in the same way as an adjustment would be made if it had the effect of increasing the taxable income subject to tax.

In cases where the adjustment is to an item that has been subjected to a withholding tax – e.g., payment of interest or royalty – and the adjustment would have the effect of lessening the incidence of that withholding, the operation of the country’s tax laws in relation to providing a refund of overpaid withholding tax would need to be considered.

Where a compensating adjustment is made, however, it is generally made after the end of the particular year of income. The extent of the adjustment could be lessened if a mid-year review of the APA were to be done and any adjustment is identified at that time. Nevertheless, where an end-of-year compensating adjustment is required to be made, it should be made and reflected in the tax results for the income year to which the adjustment relates.

Any compensating adjustments made, including cases where a refund of withholding tax is sought, should be reported in the taxpayer’s APA annual report.

Suggested Recommendation for APA Rules: Where a taxpayer’s review of its actual results against those outcomes agreed in the APA shows that an adjustment would be required to bring the actual results into line with the APA’s agreed outcomes, any such compensating adjustment should be reflected in either the taxpayer’s assessable income or deducted expenditures (as the

case may be) when lodging/filing the taxpayer’s income tax return for the applicable income year. Any such compensating adjustment should also be reported in the taxpayer’s APA annual report.

In a case where the item requiring adjustment is a payment that was subjected to a withholding tax (e.g., interest or royalty), any further payment of withholding tax should be effected prior to lodging/filing the taxpayer’s income tax return for the applicable year. Where the adjustment requires a refund of withholding tax, an application for the refund of that withholding tax should be made within the taxpayer’s APA annual report.

Fees

Discussion: Of the 36 countries which are understood to have APA schemes (or similar arrangements) in place, only 9 countries have some form of fee requirement applicable to an APA. The fee arrangements vary between flat fees payable on application for an APA, to fee arrangements based on certain actual costs incurred by the tax authorities in processing the APA application (e.g., travel and accommodation costs).

The flat fee arrangements range from minimal fee requirements (e.g., Czech Republic: CZK 10,000 [approx. USD500]; Denmark: DKK 300; Mexico: USD360) to more substantial fee requirements (e.g., Hungary: USD22,700 – USD91,000; Poland: 1% of transaction value; Turkey: USD17,000; USA: USD22,500 – USD50,000).

Canada requires a “deposit” based on the estimated out-of-pocket costs of the CRA and refunds any excess of the deposit over the actual costs. Canada also requires a flat fee of CND5,000 for Small Business APAs. New Zealand charges a minimal fee for unilateral APAs, no fees for a bilateral APA, but seeks to recover any out-of-pocket expenses incurred by the NZ IRD.

While the “user pays” principle adopted by some countries may be appropriate in those countries, the bulk of the countries with APA schemes in place do not charge a fee or seek reimbursement of the out-of-pocket costs incurred by the tax authorities in processing APA applications. While a “no fee” approach is unlikely to cause difficulties for tax authorities in the course of processing unilateral APAs, the costs incurred with air travel and accommodation may cause difficulties for some tax authorities that process MAP APAs. The argument that taxpayers should bear the burden of such costs because the taxpayers benefit from the APA arrangements agreed between the tax authorities, is compromised by the same reasoning in respect of the benefits that flow to the tax authorities from an APA.

Suggested Recommendation for APA Rules: The tax authorities may not charge a fee for the formal application of an APA. However, in the case of MAP APAs, the tax authorities may agree on an administrative fee depending on the complexity of transactions involved, time spent in the case, materiality of the amounts involved, costs incurred in discussing and negotiating a MAP APA with another tax authority.

Time frames for the APA process

Discussion: As discussed previously, the time frame for completing an APA often depends on the type of APA – i.e., whether unilateral or a MAP APA – and the complexity of the issues in the APA. Many tax authorities target a particular time for completing an APA and measure their performance against those targets. As a general “rule of thumb”, a unilateral APA may take between 3 and 12 months to be completed, whereas a bilateral APA may take anywhere between 18 months and 3 years to be completed.

International “good practice” with respect to the time frames for the APA process seems to be the ability of the tax authorities and the taxpayer to discuss and agree a proposed time frame for the completion of the APA. This is best done at the pre-lodgment/filing stage and regular monitoring of progress against that timeframe serves to help in ensuring that the APA process does not become overly drawn-out.

While the time frames are relevant from the perspective of when the tax certainty benefit from the APA becomes a reality, they are also relevant from the perspective of the APAs treatment of those periods of time that expire

from the date the APA application is made to the date the APA becomes a formal agreement. This matter is discussed later under the heading “Roll Back of an APA”.

Suggested Recommendation for APA Rules:

Though the tax authorities might be unable to provide assurances to taxpayers as to the time it may take to finalize an APA following the formal application, they may, however, undertake to discuss and agree a proposed timetable with the taxpayer at the time of any pre-lodgment/filing discussions.

Consequences of an APA

Discussion: While the principal benefit from an APA is the certainty that can be achieved in respect of the tax outcomes of a taxpayer’s international related party transactions, other significant benefits are the improved efficiency in annual transfer pricing compliance reporting, and removal of the “threat” of ongoing audit activities. Typically, countries with APA schemes in place provide assurances to taxpayers with APAs in place that:

- annual transfer pricing documentation reports are not required in respect of the covered transactions; and
- the covered transactions will not be subjected to audit or other lines of enquiry while the terms of the APA are complied with.

Such assurances are given on the proviso that the taxpayers adhere to the terms of the APA, including any annual APA compliance reports.

Questions sometimes arise as to whether an APA can serve to resolve an ongoing enquiry or audit in respect of pre-APA periods. This matter is discussed later under the heading “Roll Back of an APA”.

Suggested Recommendation for APA Rules: The taxpayer shall not be required to maintain or submit annual transfer pricing documentation in respect of the transactions covered by the APA and during the term of the APA. Further, the tax authorities would not undertake an audit or other lines of enquiry in respect of transactions covered by the APA and during the term of the APA. Such assurances can be subject to the taxpayer’s ongoing compliance with the terms of the APA, through the APA annual reporting requirement. The taxpayer would also be required to furnish an annual certificate, in the prescribed format, duly attested by a chartered accountant, confirming that the

The tax authorities may consider the production of annual reports on the activities of India's APA scheme. This report may contain information such as the number of APA applications filed, number of APAs taken into the scheme and executed, types of APAs (unilateral, bilateral), methodologies used, etc. The tax authorities may entertain a request from a taxpayer for the taxpayer's APA to be publicized by the taxpayer. The tax authorities may not agree, however, to any publication of information that breaches the confidentiality requirements of India's tax laws.

conditions agreed in the APA are being adhered to in the relevant year of reporting.

Renewal of an APA

Discussion: International experience with APAs suggests that "best practice" involves arrangements that enable APAs to be renewed. That is, when an APA is drawing to a close, the parties agree to enter into further discussions or negotiations with a view to extending the APA beyond the period originally provided. Any such extended arrangement is concluded as a new APA.

There are substantial benefits to all parties by renewing an APA. In particular, the tax certainty is extended for the agreed further term and, therefore, the voluntary compliance objectives are enhanced. In terms of costs associated with a renewal process, it is generally the case that far less time and resources are required to renew an APA than were required for the initial APA.

Of course, a renewal of an APA requires a careful re-examination of all the factors involved with the original APA. These matters will often be well understood by both the taxpayer and the tax authorities through the APA annual reporting process and the re-examination will often not involve an exhaustive process.

From a timing perspective, the renewal of an APA should commence within the final year of the existing APA.

Suggested Recommendation for APA Rules: The taxpayers should be encouraged to consider the renewal of an APA, particularly where an APA has proved to deliver the benefits that both parties sought from the APA. To ensure continuity from one APA period to

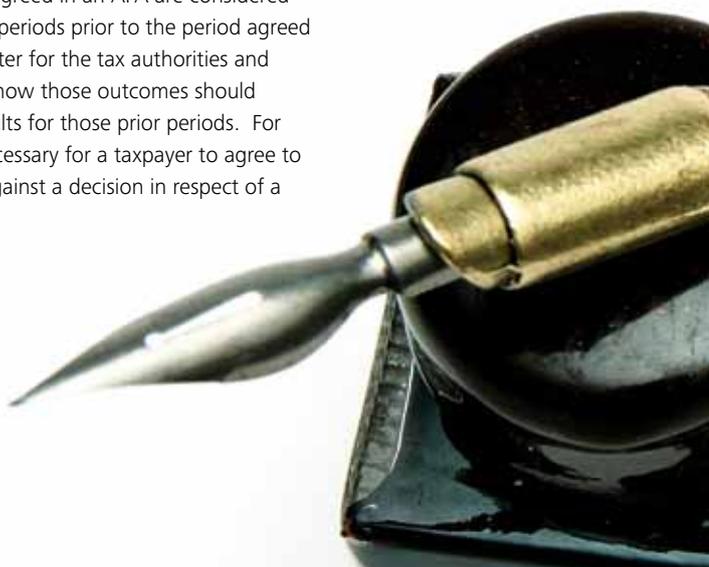
the next, taxpayers should make representations for a renewal well before the expiration of the existing APA.

Roll-back of an APA

Discussion: While an APA is prospective in that it addresses transactions to occur in the future, it is frequently the case that an APA may address issues that are either under review (audit) or in dispute in respect of periods prior to the commencement of the APA. In such cases, the outcomes discussed and agreed in the APA may be suitable to be applied (or "rolled back") to the transactions in the prior periods.

There is also the situation where discussions/ negotiations for an APA extend well into the period initially intended to be covered by the APA. This is often the case with MAP APAs which can take several years to finalize. In such situations, tax authorities typically agree that the APA applies from the date originally intended, albeit that date may have passed by a year or more.

Where the outcomes agreed in an APA are considered to have application to periods prior to the period agreed for the APA, it is a matter for the tax authorities and the taxpayer to agree how those outcomes should be reflected in the results for those prior periods. For example, it may be necessary for a taxpayer to agree to withdraw an appeal against a decision in respect of a prior period.



Suggested Recommendation for APA Rules: Where the process of negotiating an APA results in the APA being concluded after the proposed commencement date of the APA, the tax authorities should be prepared to accept that the APA may apply from that original commencement date. Further, the tax authorities should be prepared to consider representations from a taxpayer to the effect that the TPM and/or outcomes agreed in the APA may be applicable to transactions that occurred in a period or periods prior to the commencement date of the APA. Clearly, sufficient similarity needs to be present between the APA arrangements and the arrangements in the prior period(s).

Public reporting

Discussion: Some countries with APA schemes in place produce annual reports of their APA schemes (e.g., USA, Japan, Australia). These annual reports provide statistics as to the number and types of APA applications received and of those processed, completed and an inventory of work in progress. The identity of the taxpayers involved is not revealed.

In some cases, public announcements are made by the taxpayers themselves about the completion of an APA. Such announcements are seen by the taxpayers as positive to the taxpayer's image and are generally welcomed by the relevant tax authorities because it also provides a positive image of the tax authorities. It is understood that any public announcements are discussed beforehand between the taxpayer and the relevant tax authorities and agreement is reached before an announcement is made.

Suggested Recommendation for APA Rules: The tax authorities may consider the production of annual reports on the activities of India's APA scheme. This report may contain information such as the number of APA applications filed, number of APAs taken into the scheme and executed, types of APAs (unilateral, bilateral), methodologies used, etc. The tax authorities may entertain a request from a taxpayer for the taxpayer's APA to be publicized by the taxpayer. The tax authorities may not agree, however, to any publication of information that breaches the confidentiality requirements of India's tax laws.



Other considerations

The impact of APAs on stakeholders

The stakeholders for the purposes of evaluating the impact of APA in the framework of the broad tax system can be divided into two broad groups. First, there are the participants in the APA scheme: the taxpayers who are a party to an APA, and the relevant tax authority or authorities. Second, there are the non-participants in the APA scheme: those taxpayers with transfer pricing issues who do not enter into the program. Accordingly, each of the categories is examined below:

1. The participating taxpayer

Advantages

- Resolution of uncertainty on a prospective basis;
- Prevention of double taxation;
- Avoidance of a possible audit along with penalties and litigation costs;
- The abilities to deal with real time issues as well as complex matters which might otherwise not be considered;
- Ability to deal with contentious issues in “open years” (i.e., where those issues are similar to issues addressed in the APA);
- Potentially lower compliance costs; and
- Development of a cooperative, non-confrontational and constructive relationship with the tax authorities

Disadvantages

- Potentially high up-front investment costs in securing an APA – i.e., management time, external advisors’ costs and out-of-pockets (travel, etc.);
- Uncertainty of time to complete an APA, particularly MAP APAs that involve multiple jurisdictions and tax authorities;
- Uncertainty of final outcome negotiated between affected tax authorities and the taxpayer; and
- Concern about voluntarily opening relevant parts of an MNE’s business to scrutiny by the tax authorities (however, tax authorities will always provide confidentiality guarantees with respect to any business processes, etc. reviewed during the APA process)

2. The Government bodies

Advantages

- An APA scheme is a close fit with the government’s strategic direction of developing a cooperative compliance model with taxpayers;

- Potential increase in foreign direct investment as a result of obtaining more certainty around TP matters;
- Reduced administration and enforcement costs over the duration of an APA;
- Removal of potential for disputes and any consequential litigation time and costs;
- Ability to deal with contentious issues in “open years” (i.e., where those issues are similar to issues addressed in the APA); and
- Experience gained from APA schemes potentially helps with future improvements in the substantive regulations

Disadvantages

- Potentially high up-front investment costs in securing an APA – i.e., management time, external advisors’ costs and out-of-pockets (travel, etc.)
- Uncertainty of time to complete an APA, particularly MAP APAs that involve multiple jurisdictions and tax authorities; and
 - Uncertainty of final outcome negotiated between affected tax authorities and the taxpayer

3. The Non-participating taxpayer

Advantages

- Avoidance of any potentially high up-front APA investment costs, particularly where acceptable outcomes are being achieved through routine (non-APA) approaches to TP compliance;
- Avoidance of any risks from voluntary disclosure of information

Disadvantages

- The non-participating taxpayer would have to deal with the uncertainty on their tax position for the exact same transaction as a participating taxpayer (who would be covered by the APA);
- Would be subject to audit and investigation by tax authorities (and the attendant compliance costs) and would have to justify the arm’s length price for the same transaction as a participating taxpayer; and
- Retention of a potentially confrontational/adversarial approach in dealing with the tax authorities in respect of TP matters

Notwithstanding the differing outcomes for participating and non-participating taxpayers in an APA scheme, an APA scheme provides a flexible and

efficient mechanism to address the tax treatment of transfer pricing transactions in a non-controversial environment. An APA promotes common understanding not only between the taxpayer and its domestic tax administration, but also between different countries involved in the agreement. Furthermore, our experiences have shown that the introduction of APAs has promoted voluntary compliance and reduced the administrative burdens of both the taxpayer and tax administrations. Accordingly, the APA scheme should be widely accepted and play an important role under the DTC regime.

Harmonization of transfer pricing rules under Income Tax, VAT and Customs using APA

While the importance of transfer pricing is increasingly appreciated globally, the focus has traditionally been mostly on the relationship of transfer pricing in corporate taxation. In the past decade, however, a growing focus has developed on the relationship between transfer pricing and the determination and collection of customs duties and VAT, both of which can have a significant impact on a MNE's profits and on government revenues.

In most jurisdictions including India, there are basically three separate regimes of tax, namely - income tax, customs, and VAT - which are affected by inter-company pricing. Although they share policy objectives and terminology, and sometimes borrow methodologies from one another, their approach to addressing inter-company pricing arrangements is not in harmony. In theory, both transfer pricing regulations and custom valuation rules are guided by the arm's length principle. In practice, however, the articulation and application of these regulations and rules are generally incompatible. The consequences are such that, for example, TPOs (or transfer pricing auditors) will test an alleged arm's length price with a view to lowering the transfer price of imports so as to increase taxable income in the country of importation. On the other hand, customs authorities will test an alleged arm's length price with a view to increasing the imported value so as to increase the custom duties. This also applies to the collection of inland taxes (e.g. VAT and excise) when calculated on the basis of the customs value of the imported goods. MNEs find this lack of harmony costly and problematical and are faced with the burden to use multiple sets of rules about the value of goods and services and try to

make them align using various adjustments to prices. Recently government, practitioners and judicial bodies have attempted to bring the varying regulations and rules into harmony with a view to seeing whether information resulting from customs can be used for transfer pricing or whether valuation for transfer pricing could be used for customs. There has been an increased concern among the Indian tax authorities, tax practitioners and taxpayers in recent years on the subject of tax harmonization. Till date, in India there has been no jurisprudence on acceptance of customs valuation for transfer pricing purposes and vice versa. Even in the US and other countries where, in practice, customs valuations have generally not been accepted for transfer pricing purposes, an increasing collaboration is noticeable between tax and customs authorities. This is resulting in the exchange and sharing of information, increasing audit scrutiny and review of penalties for non-compliance

While the proposed APA process in India should lead to a reduction of the costs of compliance and risk of audit from a corporate tax perspective, the APA scheme as proposed does not address the inherent conflict of transfer pricing with the VAT and customs regimes. In other words, transfer prices for international transactions agreed under an APA with corporate tax authorities might not be acceptable to customs authorities, and an APA would thus not alleviate the existing potential burden of audit and penalties in the event the customs authorities were to challenge the imported (arm's length) price.

Considering this limitation, the APA scheme could broaden its scope to address the corporate tax as well as the customs and VAT implications of transfer pricing transactions in a non-controversial environment. It is a reasonable expectation that taxpayers and the government (including the respective regulatory bodies) should be able to agree on a common pricing mechanism for all the disciplines thereby avoiding disputes, minimizing the burden of audits and providing certainty to the taxpayer across all spheres of transfer pricing analysis in India. Of course, it would be quite an uphill task to get all the bodies to agree on a common price to be charged, but the flexibility of an APA scheme allows all parties involved to explain their points of view and ensure that the final agreement in place addresses the specific circumstances of the case.

16 *Ross Glove Co. v. Commissioner*, 60 T.C. 568 (1973)

APAs and Financial Services

Financial service companies have faced peculiar issues when developing transfer pricing policies that can be globally applied. Technological changes and financial deregulation have dramatically globalized the financial markets. Financial firms are organized in the trading of financial products 24 hours a day across all markets. This phenomenon of global trading challenges taxpayers and tax administrators to come up with a fair way of allocating and taxing the profits in each country where global trading is carried on. The rules and guidance covering these sorts of financial transactions have not been clearly defined or consistent across countries.

Tax administrations, MNEs and practitioners continue to work closely to provide guidance on the applicability of general transfer pricing principles to complex situations such as financial services, global trading and thin capitalization. Since most of the global financial services entities and banks are headquartered in US, the UK or Japan, these countries have seen the highest level of activity in the development of APAs which deal with financial services transactions. It is no coincidence that two of the first four APAs concluded by the IRS deal with the global trading of financial instruments. The UK has also experienced a large number of financial service related transfer pricing cases where the parties

concerned have subsequently opted for an APA to reduce litigation prospects and obtain certainty (the UK introduced APAs for thin capitalization agreements in 2007).

In recent years the "credit crunch" has compelled MNEs to scout for alternate source of funds and reduce their borrowing costs by implementing well-structured intra group financial arrangements with the objective of utilizing the groups' excess cash. In India we have witnessed a number of overseas acquisitions and takeovers by large Indian corporates, which has given rise to cases involving complex issues on pricing intra-group financial transactions. With the phenomenal growth of Indian MNEs in the past few years there has been a surge of issues concerning financial services transfer pricing. The introduction of an APA scheme could be significant for Indian MNEs having intra group funding arrangements, corporate guarantee charges, cash pooling arrangements, etc. The lack of transfer pricing guidelines which deal specifically with the treatment of financial services should make the implementation of an APA mechanism all the more welcome since MNEs will then have an opportunity to obtain tax certainty on their intra group funding activities and tax planning.



APAs and International Experiences – Questions and Answers with International APA Experts

Note: The following section provides responses from various transfer pricing experts in some of the countries where APA schemes are in place. While the responses have been provided by experts from Deloitte, the comments and views expressed by these experts are their personal views and should not be taken to represent the view of Deloitte or the member firm to which the particular expert is attached.

United States of America

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

The United States formally launched its APA scheme in 1991 in response to concerns by the Internal Revenue Service ("IRS") and taxpayers that the existing methods to enforce transfer pricing rules were becoming too adversarial and unproductive. The IRS APA scheme was created and designed to resolve actual or potential transfer pricing disputes in a principled, cooperative manner, as an alternative to the traditional examination process.

Is the team administering the APA scheme different from the team administering the other TP issues? How do you ensure the confidentiality of the information shared during the APA discussion process?

The APA scheme is a division of the IRS National Office of the Associate Chief Counsel (International) and is independent from the IRS examination division. Notwithstanding this, APA requests are generally processed and negotiated by a team consisting of a team leader from the APA scheme, an economist from the APA scheme, an international examiner from the examination division, and a counsel from the examination division. For bilateral APAs, the IRS team also includes an analyst from the U.S. Competent Authority Office. The competent authority analyst has the authority to conclude bilateral APAs with treaty partners pursuant to the Mutual Agreement Procedure article under the relevant tax treaties. The APA scheme is bound to implement the terms of such bilateral APAs. In 2011, in order to address a large case inventory and long processing times, the IRS began assigning competent authority analysts to the team leader and economist roles which were traditionally staffed from the APA scheme.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

The IRS does not limit the number of taxpayers accepted into the APA scheme. During 2010, the IRS received 144 requests for APAs. As of December 31, 2010, the IRS had 400 APAs in its in-process inventory.

What have been the key enablers driving the success of the APA regime in your country?

From its inception in 1991 through 2010, the IRS APA scheme has negotiated 973 APAs. Its success is based on taxpayers' experience that the IRS APA scheme is



able to resolve transfer pricing disputes in a principled, cooperative manner. This is primarily attributable to the organizational structure of the APA scheme, which is independent of the IRS examination function. In addition, the evolving nature of the IRS APA scheme, has allowed it to implement new and modify existing policies to improve the process, including the formation of industry/transaction specialization teams, the use of case plans to keep negotiations on schedule, and the formation of ad hoc committees to research and review new issues such as down economy adjustments.

What are two/three key challenges faced in the APA regime in your country?

In the short term, the key challenge facing the IRS APA scheme is ensuring that it has adequate resources (both personnel and financial) to efficiently process and negotiate the increasing caseload. The IRS APA scheme has become a victim of its own success. In 2010, the scheme received 144 APA requests and had an in-process inventory of 400 cases, both all-time highs. Unfortunately, for various reasons, the personnel assigned to the IRS APA

scheme have not kept up with the increasing caseload, which has caused case processing times to increase. The median amount of time to complete a bilateral APA now exceeds three years, which may deter taxpayers from utilizing the program. Taxpayer groups, including the American Bar Association have publicly commented on the need for additional resources. The IRS is has acknowledged these concerns and has pledged to dedicate additional resources to the APA scheme..

In the long term, the key challenge will be to transform the APA process, which historically has focused on bilateral trade flows, to adapt to a changing global economy based on multilateral trade flows. As multinational taxpayers globalize their supply chains in search of emerging markets and lower cost bases, it is increasingly common for local country affiliates to engage in intercompany transactions (tangible goods, licenses, services and financing) with affiliates in several countries. This will put pressure on global competent authority and APA procedures as a transfer pricing adjustment in one country will have varying corresponding effects on

Kerwin Chung

Director

Washington, DC
 Tel: 202-879-3108
 Fax: 202-661-1126
 kechung@deloitte.com



Kerwin Chung is a Director in Deloitte Tax LLP's Washington National Tax Office, and leader of the firm's National Advance Pricing Agreement (APA) and Competent Authority (CA) Group. Mr. Chung has more than 16 years of transfer pricing experience, specializing in APAs, CA, planning, examinations, and Customs matters. He has served as the taxpayer's lead negotiator for more than 50 APAs and has represented more than 40 taxpayers in the CA process. His clients include U.S. and foreign-based multinationals in numerous industries, including apparel, auto parts, chemicals, computers, computer peripherals, construction equipment, consumer electronics, electronic components, food and beverage, industrial machinery, insurance,

logistics, office products, pharmaceuticals, photography, professional services, and publishing.

- Mr. Chung's practice has involved complex transfer pricing issues, including:
- Negotiating a bilateral APA and rollback for a pharmaceutical company that resulted in the withdrawal of a \$113 million IRS transfer pricing adjustment and penalty assessment.
- Negotiating a bilateral APA and rollback to eliminate double taxation resulting from post-year-end transfer pricing adjustments paid to a U.S. subsidiary that were not deductible in the foreign tax jurisdiction;
- Negotiating a bilateral APA in conjunction with a Customs ruling request to obtain both transfer pricing and Customs valuation certainty; and
- Representing taxpayers in the CA process between the United States and India to resolve withholding tax and double tax issues.

Mr. Chung has co-authored numerous publications, including:

- "Competently Negotiating the U.S. Competent Authority Process," 59 Tax Executive No. 3, p. 257 (May/June 2007);
- "Annual Report Provides Transparency into U.S. APA Process," 46 Tax Notes Int'l No. 7, p. 725 (May 14, 2007); and
- Transfer Pricing Rules and Compliance Handbook, (CCH 2006).

Mr. Chung has been recognized several times as one of the "World's Leading Transfer Pricing Advisers" by Euromoney Magazine. He is an active member of the ABA Tax Section Transfer Pricing Committee and moderated a panel discussing transfer pricing in a down economy at the ABA Tax Section meeting in New Orleans in January 2009.

Education

- J.D. (Cum Laude), Harvard Law School
- B.B.A. (Accounting and Real Estate), University of Hawaii

Bar Admissions

- New York and the District of Columbia

Paul S. Epstein

Tax Director

Washington National Tax
- International
Tel: 202-758-1390
Fax: 202-661-1234
Pepstein@deloitte.com



Paul Epstein is a Tax Director in Deloitte's Washington National Tax International practice. He joined Deloitte from the IRS National Office after servicing nearly 12 years as the Senior Technical Reviewer in the IRS Office of Associate Chief Counsel (International), Branch 5, where he was in charge of developing and authoring international tax regulations related to financial institutions & products. He has practiced international tax for 25 years. In the transfer pricing area, Paul was the principal National Office reviewer and developer of the financial services industry Advance Pricing Agreements and Competent Authority position papers as well as adviser to exam on controversies outside the program. He co-authored the 1998 global securities dealing regulations with the Treasury department and was a member of the U.S. delegation to the OECD's Working

Party 6, participating in the development and drafting over 9 years to completion of the final 2006 and 2008 Reports on Attribution of Profits to Permanent Establishments. He developed and expanded the continuing efforts in coordination with Treasury to reissue global dealing regulations in conformity with the final Attribution of Profits Report, which remains pending at Treasury.

In addition to his transfer pricing work, Paul co-authored the interest allocation regulations applicable to foreign corporations, the Derivative securities trading safe harbor regulations primarily applicable to the hedge and investment fund industry, Notice 2004-52 concerning the characterization and source of Credit Default Swap transactions, and the final securities lending regulations and Notice 97-66 in which he coordinated the development of forthcoming rules that are reflected in the current 2010 HIRE Act on dividend equivalent payments. Paul also was in charge of issuing private letter rulings to the foreign banking industry where additional regulatory efforts were undertaken. He also participated in a number of U.S. treaty matters related

to the adoption of newer OECD principles pertaining to permanent establishments and associated enterprises including the 2006 U.S. Model, U.S.-Canada and current U.S.-Germany Protocols.

At Deloitte, Paul is continuing his role in these same areas and serves as a Washington National Tax advisor on Deloitte's international financial product transfer pricing engagements as well as with respect to the structuring of cross-border operations of financial services industry entities. He advises on all aspects of financial institution and product taxation and coordinates between the transfer pricing and general international tax disciplines. Paul also continues to liaise with the IRS National Office and Treasury on tax regulatory and other matters of significant current interest to the financial services industry. Paul is a member of the New York Bar.

Education

- New York University School of Law, LL.M. Taxation – 1989
- Benjamin N. Cardozo School of Law, J.D. – 1985
- New York University, Gallatin School, B.A. (Business and Political Science), 1982

affiliates several countries. While multilateral procedures exist, in practice they have been slow to resolve disputes as the involvement of more than two tax authorities significantly increases the complexity of the case.

What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

The main measure of success is the number of requests for APAs submitted by taxpayers.

The IRS is subject to special laws that do not permit evaluations and awards for the number of cases closed or the amount of income allocated to U.S. taxation.

Briefly discuss the specific provisions, if any, that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

The IRS APA scheme has established guidelines which make the scheme much more accessible than the term "Advance" suggests. For instance, an APA may be requested after the close of the tax year so long as the request is filed before the tax return is filed. In addition, taxpayers are allowed to file a user fee check as a placeholder for the full APA request submission so long as the full submission is filed within 120 days of the due date for the tax return. This often means that the full submission is filed more than a year after the close of the tax year. In addition, APAs may be rolled back to open tax years regardless of whether such tax years are under audit by the IRS examination function.

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

Canada's APA scheme began as a pilot scheme project in 1990 with the IRS but was formally launched in 1993. Following the formal launch, PATA adopted the guidelines for BAPAs. In December 1994 the Canadian Revenue Authority ("CRA" – earlier known as "Revenue Canada") issued its official guidance on APAs. The primary motivation for pursuing APAs to resolve double tax in advance of a contentious audit. It was intended to try and create efficiencies for both the CRA and the taxpayers (i.e. avoid having to spend hours raising an adjustment and then spend hours resolving the adjustment after the work).

Is the team administering the APA scheme different from the team administering the other TP issues? How do you ensure the confidentiality of the information shared during the APA discussion process?

In Canada, the APA scheme is administered, by the Competent Authority Services Division (CASD) while transfer pricing audits are carried out by the local tax services office but supported by International Tax Directorate (ITD). Both these divisions are housed under the International Large Business Directorate, but maintain their own independent resources (economists, analysts, team leads, etc.) and may take different approaches to the conclusion of files given their different objectives (i.e. Resolution of double tax under the treaty vs. upholding the domestic legislation and interpretations). That said the two groups do collaborate/consult on policy matters. More recently due to resource constraints both there has been sharing of economists from ITD to CASD.

The APA scheme is covered by s.241 of the Income Tax Act. Section 241 is designed to ensure the confidentiality of information.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

Historically, there has not been any effort to restrict the number of taxpayers entering the APA program. Candidates have been accepted solely based on the merits of the application and suitability of their candidature for an APA. This has led to significant resourcing pressures and resultant delays in the conclusion of

cases. Given that a significant number of Canada's APAs involve the U.S. and are now subject to arbitration there has been more concern about the growth in APAs and tax administrations' ability to deliver on a timely basis. But the response has been to try and build efficiencies and secure additional resources rather than purely limit the number of APAs.

That said, of late, the CRA has, on a number of occasions, chosen not to pursue certain APAs, but these have been due to specific circumstances. Looking at the Canadian APA statistics, it seems that on average APA's negotiations are concluded well before the four year mark and the negotiations themselves generally take less than two years. Also the APA statistics indicates that there have only been four unresolved cases since the inception of the program. Only one of these is in the last five years and two in the last ten years (remaining two occur in year 11). There have been a number of withdrawals, but these usually involve specific and unique circumstances, like sale of the business, reorganization, change in facts rendering the APA less suitable etc.

Restrictions to the acceptance of APAs are more centered on issues. It is expected that a number of the APA applications that have not moved forward are due to business restructurings. Following the financial crisis and downturn in the economy, a number of MNE's have undergone business restructurings, the circular specifically states that the CRA will entertain APA's for current and future transactions that are not hypothetical. This could lead to the interpretation that one-time transactions, where a restructuring has taken place or a transaction where a restructuring is proposed may not be eligible. In the instance where a proposed covered transaction, or an underlying transaction is subject to the recharacterization provision of the legislation and there is a sense that this will affect the APA it is possible the CRA would decline to pursue an APA.

In recent years the CRA has been much more proactive about providing and documenting feedback to applicants regarding the extent of information that will be required in processing their APA request. This has been a gradual outcome on the CRA's part that comes from the tax agency's increasing experience with APAs. In part it also serves to articulate the necessary information under the Arbitration provisions, so arbitration may have a role to play in this aspect of the



CRA's approach. If the information requests are too demanding then applicants are more likely to withdraw than the CRA declining such a request. The process is such that the CRA will accept the request contingent on availability of certain information, so if the information is not available, then the CRA will decline. However, this would happen much further along the process after a submission is made. Rationally, one would likely make that assessment before investing in a submission.

Restrictions to the acceptance of APAs are more centered on issues. I expect that a number of What

have been the key enablers driving the success of the APA regime in your country?

Some of the key enablers of the scheme are as follows:

- Focus on resolving double tax and high success ratio, rather than adjustments;
- Environment of collaboration, cooperation and transparency with the other government and the taxpayer, which leads to a less adversarial process for the taxpayer;.
- Highly qualified, and experienced professional staff;
- High growth in the transfer pricing audit scheme in terms of resources and audits completed which

has led to greater uncertainty risk for taxpayers, and which has made APAs more viable;

- Fin 48, Sarbanes Oxley and other regulatory requirements which have made APAs a more desirable solution; and
- Increased resourcing and audit scrutiny in other jurisdictions.

What are two/three key challenges faced in the APA regime in your country?

Some of the key challenges have been as follows:

- Availability of resources to deal with the number of request;
- The internal division of workload between economists and analysts has been an issue. This is typically tied to the learning and development, the steep learning curve, and the lack of availability of truly experienced personnel; and
- Canada is primarily a subsidiary country which leads to an unbalanced relationship with treaty partners.

What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

While APA schemes incorporate some consideration of recoveries, measuring recoveries alone can be dangerous or risky. Some alternate useful measures might include number of files completed, complexity of files being brought to the program, time to completion. File quality reviews to establish the extent to which files are resolved on an appropriate basis may also be useful.

While CASD does internally evaluate its program, there is not much in the form of formal recognition and reward unique to the APA program. All employees of the CRA are eligible for various forms formal recognition. Criteria may include performance, commitment

Shiraj Keshvani

Partner, Tax

Ottawa, ON, Canada
Deloitte & Touche LLP
Tel: 613-751-5293
skeshvani@deloitte.ca



Shiraj Keshvani is a partner in Deloitte's Global Transfer Pricing and Tax Controversy Practice. Shiraj holds Bachelors (honours) and Masters of Arts degrees in Economics and, prior to joining Deloitte, was the Chief Economist for Canada Revenue Agency's (CRA) Competent Authority Services Division and the national APA Coordinator. He has a deep understanding of competent authority policies and procedures as well as CRA's broader policies and procedures. In addition Shiraj has an excellent understanding of the CRA perspective and focus on many contentious issues.

With 15 years of service with the CRA, primarily in the area of international taxation and transfer pricing, Shiraj first served with the Assistant Deputy Minister of the Verification, Enforcement, and Compliance Research Branch. Since, Shiraj

has held progressively senior positions in the Compliance Research Directorate, the Assistant Commissioner's Office of the Compliance Programs Branch and the International and Large Business Directorate. In 1999, Shiraj joined the International Tax Division as a Transfer Pricing Economist where he was involved in providing support to the field in the course of transfer pricing audits. He was subsequently appointed to the position of Senior Transfer Pricing Economist, and in May 2007, began serving, on an interim basis, as the APA Coordinator and Chief Economist. Shiraj was permanently appointed to that position in 2009. As the APA Coordinator and Chief Economist, Shiraj took a leadership role in setting priorities, establishing policies and issuing guidance for Canada's APA scheme. On the global front, Shiraj was involved in developing Canada's position in international initiatives such as the OECD's work on the taxation of multinational enterprises and, having spent the greater portion of his career with Competent Authority, gained significant experience reconciling Canadian views on transfer pricing with that of other countries to resolve double tax. More recently, as

part of the management team and having responsibility for policy and procedures for the Advance Pricing Arrangement Program, he was actively involved in negotiating the mode of application for the arbitration provisions under the 5th protocol to the Canada-US Treaty. Shiraj was also one of a few individuals working with the Advisory Panel on Canada's System of International Tax on specific transfer pricing and competent authority issues. Within the CRA, Shiraj developed and delivered a number of training initiatives to personnel in the field and has on a number of occasions been involved in facilitating the resolution of highly complex or controversial audits.

Outside, of the area of international tax, Shiraj was responsible for leading a program analysis initiative that involved the development of a resource allocation model for Revenue Canada; analysing the federal government's policy on contract reporting, an initiative that led to the introduction of T4A reporting for government service contracts; and modelling taxpayer behaviour to establish a baseline for use in risk assessment and the identification of non-compliance.

and such factors. Of course, these factors may also contribute to an individual's success in competing for a promotion. Informally, some reward mechanisms include level of independence, nature and complexity of files, opportunities to work on scheme procedures, policies, and represent the CASD in public fora.

Some useful measures to evaluate the success of the APA scheme might include: number of files completed, complexity of files being brought to the program, time to completion etc.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

Rollback are only available, for those years for which a request for contemporaneous documentation has not been made by the audit function;

- Unilateral APAs only apply to first year for which a tax return has not been filed;

- Small Business APAs are available for small taxpayers (revenues of less than X\$), but the transaction cannot involve intangibles;
- The CRA APA scheme is delivered on a cost recovery basis—for Small Business there is a flat fee of \$5000. For the full APA scheme it is based on out of pocket expenses payable up front for travel for site visits, negotiations and for experts where required. Any amounts not used are refundable;
- The CRA has embarked on extensive pre-acceptance procedures to determine suitability and set forth information requirements to ensure applicants will be successful. These requirements are formalized and acceptance is a condition of these; and
- A representative of the field audit team is a formal member of the APA team and plays a key role in developing the facts and initial position.

Australia

14 Secrecy rules in Australia's tax laws would ordinarily preclude the name of a taxpayer being disclosed. In this case, however, the parties to this bilateral APA (Apple Inc, its Australian associated entity, ATO and IRS) agreed to publicly reveal certain information about the concluded APA, including the name of the taxpayers involved.

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

In the early 1990s when the OECD was debating changes to its transfer pricing guidelines, certain key Australian Taxation Office ("ATO") personnel were involved in this debate as representatives of the Australian government. At the same time ATO was restructuring its work force to give a greater focus in international issues. ATO was also starting to consider its view of key transfer pricing concepts. These views were to be published in the form of tax rulings. An early example of this was TR 94/14 which was published in 1994. During this period ATO became involved in discussions with Apple Inc.¹⁴ and the IRS about ways to settle the future cross border dealing of this company between USA and Australia. The outcome was the world's first bilateral APA.

In 1994 the restructuring of ATO resulted in the formation of the International Tax Division (ITD) within

the ATO. Some very significant transfer pricing audits, which had arisen from a decision by ATO in late 1988 to audit Australia's top 100 companies, now came under the watchful eye of transfer pricing experts in ITD.

The OECD issued its revised Transfer Pricing Guidelines in 1995 and ATO continued to publish its view on transfer pricing concepts. Some of the key rulings were TR 95/23 on APAs, TR 97/20 on methodologies and TR 98/11 on documentation. ATO was interested in developing an APA program and a team was dispatched to look at the approach to APAs in USA, Canada and UK. In the period up to the issue of TR 98/11 on documentation ATO had continued to conduct audits and agree the occasional APA. By June 1998 ATO had less than 10 companies in the APA

Following the release of the documentation ruling TR 98/11, ATO decided it should test the current level of contemporaneous documentation held by MNCs and the degree to which they satisfied the requirements

Dave Lewis

National Director

Competent Authority Practice

Direct: 0416 061 816

dlewis@deloitte.com.au



Dave Lewis joined Deloitte in November 2002 after a career in the Australian Taxation Office (ATO) spanning 38 years.

While Dave's service with the ATO included senior positions in the complex audit areas, he is particularly experienced in matters dealing with international taxation. In 1994 he was appointed to a national leadership position in the ATO's International Tax Division as Assistant Commissioner International Compliance and Strategy. The key task of this position was as Australia's Competent Authority where he had responsibility for relationships, Exchange of Information and the Mutual Agreement Procedures with other countries' tax authorities. Dave led Australia's delegation

in key international meetings such as the Pacific Association of Tax Administrators (PATA), the OECD's Working Party 8 on Tax Avoidance and Evasion and the OECD Forum on Harmful Tax Practices.

Dave had responsibility for the ATO's Transfer Pricing program. He chaired the National Tax Liaison Group (Transfer Pricing Sub-Committee) where key Transfer Pricing representatives from the public and private sectors discussed matters of importance regarding ATO policy and practice. He introduced changes in procedure that have made the APA scheme more user-friendly. These changes and his personal promotion of the APA program led to a substantial increase in the number of companies seeking and successfully concluding APAs. He also introduced quality control measures on proposed audit adjustments to ensure that they aligned with the ATO's published view.

In respect of Mutual Agreement Procedures, Dave personally led many of

the negotiations with other Tax Authorities on double tax cases, especially those with USA and Japan. He achieved considerable success in alleviating double taxation. Dave was also instrumental in considerably reducing time frames to achieve consensus in the alleviation of double taxation. He changed ATO practice to ensure that taxpayers were kept informed and as far as possible involved in the progress of their MAP cases. The good relationships Dave fostered during his 8.5 years as Competent Authority contributed considerably to the successful resolution of MAP cases.

Since joining Deloitte Dave has played a key role in a number of Audit and APA cases. His understanding of the approach of the ATO and other tax administrations to significant transfer pricing issues has been invaluable in achieving the best outcome for our clients. The knowledge he has transferred to Deloitte personnel has improved the capability of our practice to deliver quality advice to our clients.

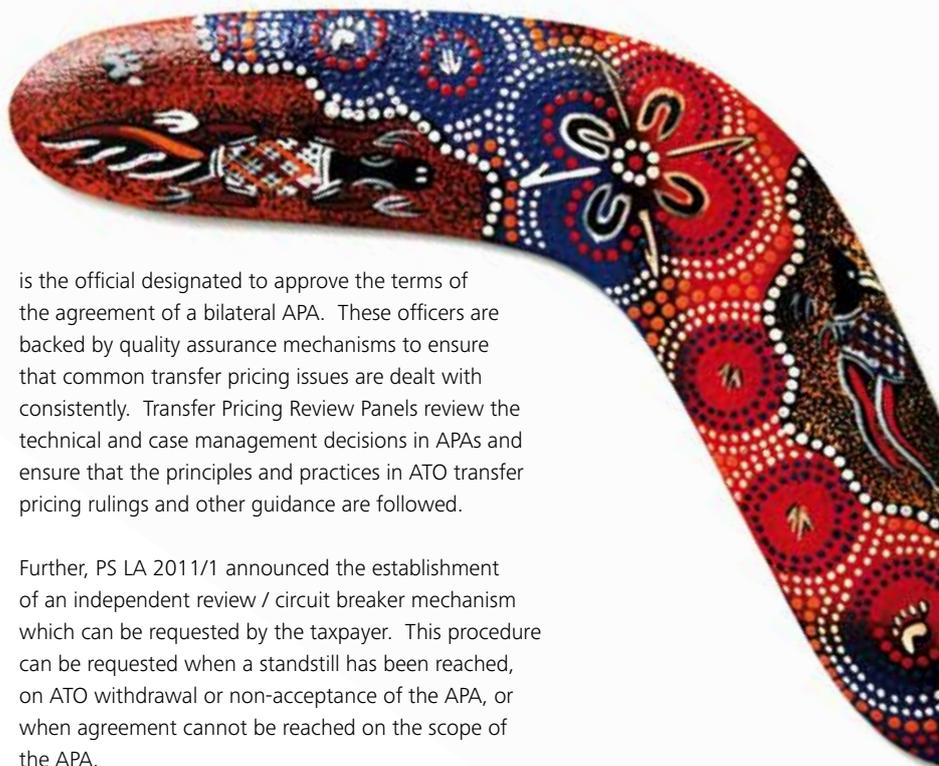
of TR 98/11. A new audit “product”, Transfer Pricing Record Review (TPRR) was developed. Additional staff were funded for a compliance program which became known as the “207 project”, based on the 207 companies (mainly loss makers) that were selected for a review. The project required that where the documentation did not meet the required standard the next step was to conduct an audit and possibly make adjustments to taxable income. The Commissioner decided that any MNC which did not meet the required documentation standard should be offered the opportunity to enter the APA program and that in appropriate cases the APA outcome should be rolled back to some previous (open) years. It was found that many MNCs did not meet the required standard of contemporaneous documentation and the APA program took off. There has been a continuous flow of APA applicants from 1999 onwards. The 2010 APA Report published by ATO showed that 39 APAs were completed in that year, another 60 had been lodged and in progress, while a further 17 were at the pre-lodgment stage. Many of those completed and in progress would have included APA rollovers¹⁵. The number of rollover APAs suggests some degree of satisfaction with the APA program.

Is the team administering the APA program different from the team administering the other TP issues? How do you ensure the confidentiality of the information shared during the APA discussion process?

The ATO practice statement on ATO’s Advance Pricing Arrangement program (PS LA 2011/1) sets out at Chapter 11 details of APA team structures. The APA case leader will be a specialist from the Transfer Pricing Network and have sufficient technical transfer pricing expertise and project management capabilities to run the APA. The APA case officer/s has carriage of day to day activities of the APA. The economist from the ATO’s Economist Practice provides economic advice to the APA team on transfer pricing matters including the characterization of the transactions/business via functional analysis, advice and analysis on transfer pricing methodologies, and analysis of comparability and benchmarking techniques.

The APA specialist provides transfer pricing advice and technical direction to the ATO case team and ensures consistency with wider ATO practice.

In bilateral APAs the Competent Authority delegate



is the official designated to approve the terms of the agreement of a bilateral APA. These officers are backed by quality assurance mechanisms to ensure that common transfer pricing issues are dealt with consistently. Transfer Pricing Review Panels review the technical and case management decisions in APAs and ensure that the principles and practices in ATO transfer pricing rulings and other guidance are followed.

Further, PS LA 2011/1 announced the establishment of an independent review / circuit breaker mechanism which can be requested by the taxpayer. This procedure can be requested when a standstill has been reached, on ATO withdrawal or non-acceptance of the APA, or when agreement cannot be reached on the scope of the APA.

Confidentiality has never been a problem for the Australian APA program. The secrecy provisions of the Assessment Act and the Double Tax Agreements have been sufficient to date. Moreover, it is standard practice that, during the initial pre-lodgment meetings between the taxpayer and the ATO’s APA Case Team, the Case Team leader will provide an oral assurance to the taxpayer to the effect that any and all information obtained by the Case Team is treated under the strict confidentiality requirements of the secrecy provisions in Australia’s tax laws.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the program in any given year?

ATO has no rules about the number of APA that can be accepted. At various times some Assistant Commissioners have argued that APAs are a low priority for them. Resourcing APAs requests can be an issue, however, because successive Tax Commissioners have strongly supported the program and few APA requests get rejected. However, that is not to say that frustrating delays and deadlocks don’t arise. The response to these situations is to get the right people from the ATO involved in the APA program.

What have been the key enablers driving the success of the APA regime in your country?

¹⁵ The ATO’s transfer pricing specialist group is a relatively small and discrete group of people who specialise in transfer pricing matters. The group is located in some (but not all) of the ATO’s offices and provides guidance and direction to audit teams and teams convened to deal with APAs.

The key to a successful APA and the development of a successful APA program is to ensure that appropriately motivated and skilled people are directing the program and are involved in the program at all levels. APA team members should aim to get a complete understanding of the business of the MNC, the cross border transactions and the approach being proposed in the APA. They should be people who look for solutions, not problems (i.e., “can do” people). This attribute is also essential for the MNC and its representatives.

Flexibility is also a key ingredient for success. Some APAs become bogged down because neither party will move their position. It is then essential to have a way of breaking the impasse. Compromise is a key ingredient

Preparation is always an essential part of any task. It is important to examine all the issues from both sides. Pre-lodgement meetings are a good way to flesh out whether any preconceived ideas about the business or transactions are present as these preconceptions may be a blocker to success.

The publication of expected time times for the completion of APAs and the reporting of annual performance has the boosted confidence of potential applicants that the process can be completed in a timely and cost effective way. For instance PS LA 2011/1 sets out the desired timelines at paragraph 16 as follows-

Simplified Unilateral	9 months
Standard Unilateral	12 months
Standard Bilateral	18-24 months
Complex Unilateral/ Bilateral	24 months

The APA program report on developments in 2009-10 issued on 11 November 2010 reported that on an average the prelodgment process took 12 months to complete each of the 39 APAs in 2009-10 (unilateral 5 months, bilateral 25 months). On an average, the pre-lodgment process took four months. Thirteen percent of APAs (5) took in excess of 36 months to complete. Transparency of this nature has built trust in the ATO’s capacity to deliver on its promises.

What are two/three key challenges faced in the APA regime in your country?

The key challenge for both ATO and practitioners is to maintain the integrity of the APA program and to

continue to build trust that a fair outcome can be achieved by negotiation. There is no doubt that when the integrity and trust is high applicants will come.

It is important that the ATO properly resources the program, that it’s staff be highly skilled and that they have an attitude compatible with achieving a fair outcome for all.

What metric would you suggest as apt to evaluate the success of an APA program (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

While the ATO had a performance pay system for some years there was no direct link to APAs completed, revenue raised, etc. The ATO has always considered that such reward systems are likely to distort performance and produce unintended consequences, particularly public criticism. In recent times performance pay has been rolled into the normal pay. The ATO has a performance feedback system which covers a broad range of corporate goals.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

Australia’s APA regime is not unique. It is based on the US system and tailored to Australian conditions. Successive Commissioners of Taxation have strongly supported the APA program - this top level support is critical. Strong leadership of the program is also essential. The use of regular consultative forums that involve key TP practitioners, representatives from business (MNEs) and members of the ATO leadership to discuss current issues and to joint develop solutions to problems is also very important. These forums have developed a mutual trust such that APA scheme problems can be discussed and resolved.

Singapore



Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

The main motivation for the introduction of APA regime has been to provide certainty to taxpayers on transfer pricing positions, and avoid transfer pricing audits/disputes.

2. Is the team administering the APA scheme different from the team administering the other TP issues? How do you ensure the confidentiality of the information shared during the APA discussion process?

Yes, the Competent Authority ("CA") team is separate from the tax audit team. Informally, the Inland Revenue Authority of Singapore ("IRAS") has given assurance that information submitted during an APA discussion process will not be shared with the tax audit team, but there are no official rules on this matter.

3. Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

No, there are neither formal nor informal rules regarding the number of APAs to be accepted in any given year. The

quantum of APA cases handled by IRAS can be gauged from the speed with which the IRAS responds to any APA application filed by a taxpayer, i.e. the more the load the slower will be the response time.

What have been the key enablers driving the success of the APA regime in your country?

Some of the key enablers have been a) existence of APAs over the past 20 years have made all the parties experienced, and b) pro-active and business-minded competent authority that enjoys a good standing amongst other (of other countries) competent authorities.

What are two/three key challenges faced in the APA regime in your country?

The key challenges have been a) lack of resources in CA office, b) APA not possible with USA at the moment, as there is no treaty, and c) need to include exit tax issues in APA discussions.

6. What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

The key metrics would be a) number of completed cases, b) timeline for completion of cases and number of renewals sought by the taxpayers. There is no incentive system at the moment.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

None

See Jee Chang

Partner, Tax, Deloitte Singapore



("IRAS") for more than 10 years.

While with the IRAS, he served as Singapore's Competent Authority, and was vitally involved in developing the Singapore transfer pricing guidelines that were issued in 2006. Jee Chang has substantial experience in resolving transfer pricing issues involving intangibles and know-how, cost sharing arrangements and service charges, and supply chain restructuring.

His clients comprise many Singapore-based regional HQs of multinational companies, who are also recipients of tax incentives from the Singapore Government. Jee Chang has a Bachelor of Accountancy from the Nanyang Technological University (Singapore) and a Master of Business Administration from INSEAD. He is a regular speaker at seminars, and has been nominated as leading Singapore tax advisors by International Tax Review.

Jee Chang heads the transfer pricing practice in Deloitte Singapore and has more than 14 years of experience in taxation. He had previously worked for the Inland Revenue Authority of Singapore

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

The main motivation for the introduction of APA regime, dating as early as in 1986, was lack of guidance on the issue of the calculation of an arm's length price. Accordingly, in order to provide taxpayers a way to increase future predictability, APA was introduced.

Is the team administering the APA scheme different from the team administering the other TP issues? How do you ensure the confidentiality of the information shared during the APA discussion process?

In principle, the APA review team and the TP audit team are organizationally separated in the regional tax bureaus. For example, in the Tokyo Regional Taxation Bureau, the APA reviews are conducted by Transfer Pricing Division No.2 and the TP audits are conducted by Transfer Pricing Division No.1.

It is important to keep the confidentiality of data submitted for an APA. To ensure that data should not be used in the audits for the taxpayer directly, there is a guidance to prohibit TP auditors from making an adjustment based on the data which a taxpayer has specifically provided during the purpose of APA discussions. However, the data which only describes facts are not included in the aforementioned limitation rule.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

The National Tax Agency ("NTA") has not articulated any limitation on the number of APA applications to be accepted, however, as a result of increasing number of cases of APA applications, the APA reviewers at local level sometimes express their hope to shrink the scope of APA in terms of limitation of human resources.

Koichiro Fujimori

Managing Partner

Tax C&M Country Leader

Deloitte Tohmatsu Tax Co.

Phone: (03) 6213 – 3751

Fax: (050) 3116 - 1792

koichiro.fujimori@tohmatsu.co.jp



Koichiro Fujimori is one of the managing partners of Deloitte's Japanese tax firm, Deloitte Tohmatsu Tax Co, while he is also one of the most experienced and well-recognized experts in Japan, specializing in transfer pricing. He has been selected three times by Euromoney as one of the world's leading transfer pricing advisers. He began his career as a transfer-pricing specialist with Deloitte's Tokyo-based transfer-pricing group in 1996. He was also with Deloitte's global transfer pricing group in Washington DC's national office from 2001 until he returned to the Tokyo office in 2004.

Both in Japan and the US, Mr Fujimori has provided transfer-pricing documentations,

risk assessments, planning, due diligence, benchmarking, unilateral and bilateral advanced pricing agreements (APAs), competent authority (CA) negotiations and audit defence-related services for numerous Japanese, Chinese, European, and US multinational clients in industries including automobiles, machinery, chemicals, medical equipment, software, publishing, computers, electronics, pharmaceuticals, printing, and trading. He currently serves two Japan-based automanufacturers and many of their part-suppliers.

Mr Fujimori has managed numerous bilateral APA projects and has negotiated various complex APA cases with Japan's National Tax Agency, the US. Internal Revenue Service and Chinese State Tax Administration.

Mr Fujimori grew up in Japan and the US, and is an English and Japanese native speaker. He is a frequent lecturer at external seminars in Japan and the US on transfer-pricing issues. He has also served as a

transfer pricing instructor for tax examiner trainings of the Japanese and Chinese tax authorities. His articles on transfer pricing have appeared in such publications as Nihon Keizai Shinbun, Tax Note International, Worldwide Tax Daily, BNA's Transfer Pricing Report, Nikkei Business, Sozeikenkyu, Kokusai Zeimu (Kaigaijyoho Network), Zeiri and Deloitte & Touche JSG Tax News. He authored "Jitsumu Guidance Itenkakaku Zeisei", Chuokeizaisha, co-authored "Transfer Pricing Manual", BNA International, "Tyugoku Shin Kigyosyotokuzeihou no Jitsumu", Seibunsha and "Side-by-Side Comparison of APA Procedures: The United States and Japan," Tax Notes International (January 31 2005) and "A Single Solution for US Transfer Pricing and Customs Issues," Tax Notes International (August 26 2002).

Mr Fujimori holds a master's degree from Hitotsubashi Graduate School of Law and a bachelor's degree in economic law from Hitotsubashi University in Tokyo, Japan.



Masahiko Kobayashi

Partner

Tokyo, Japan

Tel: 81-3-4218-4939

Fax: 81-3-4243-3695

masahiko.kobayashi@tohmatu.co.jp



Masahiko Kobayashi has twenty-six year experience as a tax official in various departments in National Tax Agency (NTA), including Tokyo Regional Taxation Bureau (TRTB), National Tax College and Local Tax Offices, among which having three year experience in Ministry of Finance.

Among those careers, most notable one is more than ten-year experience in the International Taxation area, mainly Transfer Pricing and APA. In particular, more than five year experience as a Deputy Director in the Office of Mutual Agreement Procedures (OMAP) in the NTA.

In the OMAP, having dealt with a wide variety of cases between Japan and various foreign Competent Authorities, including major European countries and some Asian developing countries, successfully

concluded most of those double taxation cases.

Among those cases, particularly notable types are:

- Transfer Pricing Taxation and APA cases on Global trading of financial derivative products,
- Transfer Pricing Taxation and APA cases on pharmaceutical industry
- PE taxation cases of foreign company doing business in Japan, and those of Japanese company doing business in foreign developing countries

In addition, in the Office of International Operations, NTA, having two year experience to deal with discussions in the Committee on Fiscal Affairs in the OECD, mainly with those in WP6. Also having been involved the project of drafting the Japanese Transfer Pricing Guidelines while serving as an official of TRTB in 1999.

Education

- B.A. in Economics, Waseda University, Apr. 1976 – Mar. 1980

Professional Accreditation and Certifications

- Authorised Tax Practitioner

What have been the key enablers driving the success of the APA regime in your country?

One of the key enablers has been the strategy adopted by the NTA to enhance taxpayers' compliance, which is, conducting TP audits aggressively while taking flexible positions in reviewing APAs. This has forced many taxpayers to opt for APAs rather than face the rigors of TP audits.

What are two/three key challenges faced in the APA regime in your country?

Some of the key challenges have been:

- Requests of the business community to speed up the review process;
- Increase in cases but with only scarce resources; and
- Increase in cases with more difficult issues and increased difficulty in reaching mutual agreement on BAPAs with some treaty partners.

What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

Some of the key metrics could be – a) number of cases of application, conclusion and under-review of APAs, b) average time per case from application to conclusion, and c) the number of officials to be involved can also be a good measure. These are among the indicators in the annual evaluation of performance of the NTA

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

Japan is the first country that introduced APAs. We strongly recommend bilateral APAs, if available, as in Japan most of the APAs have been bilateral.

Tomohiko Kaneko

Partner

Tokyo, Japan
Tel: +81 3 6213 3839 (direct)
Fax: +81 50 3101 9528
tomohiko.kaneko@tohmatu.co.jp



Tomohiko Kaneko is a partner with the Transfer Pricing group of Deloitte Tohmatsu Tax Co., the Japan member firm of Deloitte Touche Tohmatsu, and is based in the Tokyo office. He is a recognized authority on both transfer pricing and international tax issues. Mr. Kaneko has worked extensively with the firm's first-tier multinational clients from Europe, Japan, and the United States on transfer pricing and related issues.

Relevant Projects

Mr. Kaneko has served clients from a broad range of industries, including the financial, pharmaceuticals, medical equipment, electronic, automotive, industrial equipment, computer software/hardware, trading services, and electronic trading sectors. He has managed cases involving documentation studies, audit defense, and the appeals process. He has organized projects, business strategy reviews, and advance pricing arrangements (APAs). Mr. Kaneko has completed an extensive analysis of the Japanese National Tax Agency, in which he studied the agency's position toward the use of the profit split method and other profit-based methods, in Competent Authority, and in APAs.

Awards, Recognitions, Achievements, Publication

One of the World's Leading Tax Advisers since 2000 (Euromoney)
Lecturer at National Tax College, National Tax Agency (2000-2004)

Education

Bachelor's degree (Economics), Keio University
Certified Public Accountant
Authorized Tax Practitioner

United Kingdom (“UK”)

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

A few triggers for the introduction of APA regime have been the following:

- HM Revenue and Customs’ (“HMRC”) intention to have a proactive and cooperative arrangement with taxpayers
- To reflect the wishes of taxpayers to take advantage of APA regimes available elsewhere but where there was also TP risk in the UK
- To provide certainty to taxpayers on transfer pricing positions, and avoid transfer pricing audits/disputes.

Is the team administering the APA scheme different from the team administering the other TP issues?

How do you ensure the confidentiality of the information shared during the APA discussion process?

Yes, the APA team is separate from the tax audit team. Currently there are three teams in HMRC which are a) APA team, b) Competent Authority (CA) team, and c) TP Audit team. The first two teams are part of HMRC Head Office. There are approximately four to five personnel forming the core APA team at the Head office and there is a separate CA team who take the lead in any

government to government negotiations. The APA team might work together with the routine TP audit teams to form the UK position before government to government negotiations. Even if the individuals at Head Office sometimes operate across multiple teams the roles in any APA are always clearly defined and the CA role is paramount. HMRC ensures that the information shared during the APA process is strictly kept confidential. However, any information received as part of an APA request will be treated in precisely the same way of any other information which comes into the possession of HMRC.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the program in any given year?

No, there are neither formal nor informal rules regarding the number of APAs to be accepted in any given year. Applications filed by every taxpayer would be thoroughly reviewed and the applications that are not suitable or that do not contain sufficiently complex issues could be rejected by the APA team. However, HMRC stress the importance of an informal approach being made so that the suitability for an APA can be considered upfront and in an open a manner as possible.



Edward Morris

Director

London

Tel: +44 2070076568

Fax: +44 207 007 0169

edmorris@deloitte.co.uk



Edward served as a Delegated Competent Authority for Mutual Agreement Procedures and Advance Pricing Agreements in the International Section of Her Majesty's Revenue and Customs (HMRC), was seconded to the EU Commission to work on APAs and the Arbitration Convention and joined Deloitte in December 2008. He has attended OECD for both the UK and the EU. He demonstrates a unique track record in the world of transfer pricing dispute resolution and dispute avoidance. Edward is a well-known figure to the Competent Authorities of many of the world's Finance Ministries.

Edward came to Deloitte after a 12 year career in the Head Office International section of HMRC. This work involved dispute resolution on MAPs as well as

dispute avoidance work on APAs with Fiscal Authorities around the world. Edward was also involved in the whole range of international tax issues and problems but specialized in transfer pricing, PEs and treaty matters. Edward also represented the UK and the EU Commission at OECD and was heavily involved in the OECD work on International Dispute Resolution (helping to draft the new Arbitration clause in the Model Treaty) and Business Restructuring.

Building on his experience of APAs (including the largest Multi-lateral APA entered into by the UK) while in Government, Edward has led several APAs for Deloitte clients, including two pan-European multi-lateral procedures.

While in HMRC, Edward worked on all of the UK's MAP cases and achieved a 100% track record for eliminating double taxation. This record has been maintained during his time at Deloitte where he has also advised on pan-European Arbitration Convention proceedings.

Edward led some of HMRC's most complex

and major transfer pricing audits, including involvement in litigation work before the UK courts. This work has given Edward a great depth of insight into various industries, including IT, telecommunications, pharmaceutical, motor, high technology, oil and gas, entertainment, distribution, manufacturing and R&D.

While at HMRC, Edward enjoyed a two and half year secondment to Brussels where he advised the EU Commission on APAs and transfer pricing matters. Edward was responsible for steering the EU APA Guidelines through the EU Council.

Edward's eminence in the wider international tax field was recognized by the OECD when he was asked to speak at the 50th anniversary celebration of the OECD model tax convention.

Edward has a BA in Medieval and Renaissance history from Warwick University. He is happy to advise on the rise and fall of the Italian City States in the Quattrocento should the opportunity arise.

What have been the key enablers driving the success of the APA regime in your country?

Not a lot of APAs have been executed in UK. Based on our current level of experience, some of the key enablers have been a) cooperative engagement between the UK government and the taxpayers, and b) pro-active and experienced competent authority, and c) short turnaround time with which the APAs are executed by the CAs.

What are two/three key challenges faced in the APA regime in your country?

The key challenges have been a) lack of resources in APA team, and b) similar lack of resources in other countries.

What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed,

others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

The key metrics would be a) number of applications received and number of settlements reached, b) timeline for completion of cases and number of renewals sought by the tax payers, and c) extent of elimination of double taxation. There is no incentive system at the moment.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

None in particular except that there is no filing fee charged for any APA application.

Germany

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

A few triggers for the introduction of APA regime have been the following:

- Tax authorities' intention to have a proactive and cooperative arrangement with taxpayers having complicated issues;
- To provide certainty to taxpayers on transfer pricing positions, and avoid transfer pricing audits/disputes; and
- Increased pressure from other tax authorities like UK that already had an APA regime in place.

Is the team administering the APA scheme different from the team administering the other TP issues? How do you ensure the confidentiality of the information shared during the APA discussion process?

Yes, there is a special team located in Bonn that negotiates both APAs and mutual agreement procedures. There are approximately a total of 20-25 personnel and there is a plan to hire more professionals.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

No, there are no formal rules regarding the number of APAs to be accepted in any given year. Generally the APA team is quite open and willing to discuss APA applications but currently they are a bit reluctant to accept more cases.

The tax authorities in Germany have not set any prescribed rules regarding the number of APAs to be accepted in any given year. Generally the APA team is quite open and willing to discuss APA applications but currently they are a bit reluctant to accept more cases. The team has limited capacity as there are more than 500 of CA cases open needing resolution reducing the scope to take on more APA cases.

Dr. Axel Nientimp

Partner

Germany

Tel.: +49 211 8772-3584

Fax: +49 211 8772-2260

anientimp@deloitte.de



Dr. Axel Nientimp is a Transfer Pricing Partner in Deloitte's Düsseldorf Office. He has more than 12 years of experience in international taxation and transfer pricing. Extensively involved in providing planning and documentation solutions to companies with cross border transactions, he advises clients in tax matters that are often associated with cross border transactions, including permanent

establishment issues, effective tax rate calculations, among others. Dr. Nientimp has vast experience in defending multinational enterprises in transfer pricing tax audits and Competent Authorities Procedures.

He has provided consulting services to a broad range of industries, especially in the life science industry. His client list includes a broad diversity of multinational corporations located in Europe, Asia and the U.S.

Dr. Nientimp is a member of the Tax Advisors Association. He has published a volume on the profit allocation of multinational enterprises and various articles on transfer pricing for professional journals. He is the co-editor

of Germany's leading compilation of transfer pricing laws and regulations. He is a regular speaker at national and international conferences and seminars. International Tax Review has named Dr. Nientimp as a leading German transfer pricing advisor in 2008 and 2009.

Dr. Nientimp is a Certified Tax Advisor (Steuerberater) and multiple graduate of the University of Bochum, having received his Ph.D. in Business Taxation, and Diploma in Business Economics (Diplom-Ökonom) from the university. He is a lecturer for corporate and international business taxation at the University of Duisburg-Essen.



What have been the key enablers driving the success of the APA regime in your country?

Some of the key enablers have been the effectiveness of bilateral/multilateral APAs

What are two/three key challenges faced in the APA regime in your country?

The key challenges have been lack of capacity to take on more cases by the team, and the limited success in hiring trained resources.

What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

The key metrics would be the number of applications received and number of settlements reached. There is no incentive system at the moment.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

None in particular and the German APA regime is comparable to any other APA regime in the world.

Roland Pfeiffer

Senior Manager

Germany

Tel.: +49 211 8772-2287

Fax: +49 211 8772-2260

anientimp@deloitte.de



Roland Pfeiffer is a Transfer Pricing Senior Manager in Deloitte's Düsseldorf Office. He has more than 8 years of experience in international taxation and transfer pricing. Extensively involved in various transfer pricing projects, he provides planning and documentation solutions to companies with cross border transactions, including restructuring issues and exit taxation calculations, permanent establishment issues as well as aspects related to secondments. Roland Pfeiffer has significant experience in defending multinational enterprises in transfer pricing tax audits and mutual agreement procedures.

He has provided consulting services to a broad range of industries, especially in the manufacturing industry. His client list includes a broad diversity of multinational corporations in both, inbound and outbound cases.

Roland Pfeiffer has published various articles on transfer pricing for professional journals. He is a Lawyer (Rechtsanwalt) specialized in tax law (Fachanwalt für Steuerrecht) and graduate of the University of Trier.

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

The key motivation for an APA regime in China is to find mutual agreements on unresolved audit cases, as well as to provide guidance on taxation on future transactions and profitability. Unilateral APAs can be concluded by local tax bureaus without the involvement of the State Administration of Tax ("SAT"), while bilateral or multilateral APAs have to be concluded by SAT.

Is the team administering the APA scheme different from the team administering the other TP issues?

Yes, they are the same team. Some confidential provisions are already included in the APA terms and are generally followed by the APA team. In addition, we believe the tax bureaus have their internal confidentiality

rules, which defines the limitation of information sharing for the APA teams. However, in practice, TP examiners in different cities or provinces may know the cases through internal training and sharing process.

How do you ensure the confidentiality of the information shared during the APA discussion process?

The SAT emphasizes on the importance of the confidentiality of the taxpayer information and the information shared during the APA discussions will be kept confidential and will not be shared with any third party including other teams.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

There are no formal rules. The acceptance of new APA submissions depends primarily on their capacity and interest in those new cases. However, the chances of acceptance increase if the taxpayer is in an industry that the SAT is particularly interested in (e.g., high tech company that has R&D involvement) or if the covered transaction is relatively new to the Chinese tax authorities.

What have been the key enablers driving the success of the APA regime in your country?

Some of the key enablers have been: a) It has been easier to conclude an APA since first, the tax authorities (SAT and the foreign tax authorities in case of bilateral and multilateral APAs) hold similar technical positions; b), based on the technical position these tax authorities find a practical solution that balances their benefits, c), the covered transaction and the industry involved is interesting to the SAT, and d) lastly, smooth and frequent communications with the SAT.

What are two/three key challenges faced in the APA regime in your country?

The primary challenge is lack of communications between the tax authorities and the taxpayers. Secondly, from APA administration aspect, there may be conflicts between tax goals and other countries policies (e.g., incentive of in-bound foreign investment). Lastly, the still improving technical capacity may be another challenge.

Eunice Kuo

Partner - Tax

China

Tel: +86 21 6141 1308

Fax: +86 21 6141 0003

eunicekuo@deloitte.com.cn



Eunice Kuo, a Tax partner of Deloitte China, is the National Leader for Transfer Pricing Service, in charge of various transfer pricing and global tax structuring services.

Experience

Eunice has 24 years experiences in providing tax service. Before entering Deloitte China, she was the operation leader of tax department and in charge account of transfer pricing and international tax services of Deloitte Taiwan.

Eunice has many years of providing transfer pricing services, having worked for preparation of transfer pricing report, planning for cross-border transfer pricing risks on the association between enterprises, assisting enterprises to negotiate transfer pricing agreements and tax adjustments, and providing tax planning for process architecture of cross-border transactions.

Professional qualifications, affiliations, accomplishments

Eunice is Taiwanese CPA as well as Chinese CPA. Eunice has been named the leading TP advisor in Taiwan consecutively every year by Euromoney since Taiwan was included in the Euromoney survey. She was also named the best female TP advisor.



What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in your country that rewards the APA team? If so, what is the basis for such award and recognition?

Revenue based and time to completion would be the metric for evaluation of success of APA scheme. We believe that on an individual basis, their performance closely ties to such metric.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that

makes it unique to other APA regimes in other parts of the globe.

Compared with other countries that have adopted the APA regime, the Chinese tax authorities emphasize more on the pre-filing and pre-negotiation stages before the formal acceptance of the APA submissions. Thus the time and effort involved in the pre-filing stage can be more significant. In addition, the Chinese tax authorities tend to accept APA submissions for companies that are already in TP audit or even under MAP procedure. Lastly, the government bureaucracy can have more obvious and critical influence through the whole APA procedure.

Malaysia

Please provide briefly the motivation or triggers that led to the introduction of an APA regime in your country.

Even with the introduction of transfer pricing guidelines in July 2003, the general observation of the Inland Revenue Board ("IRB") has been that the rate of transfer pricing compliance among the taxpayers has not seen much increase. Accordingly, the main motivation of the IRB for the introduction of APAs was to encourage the taxpayers to voluntarily comply with the arm's length standards.

Is the team administering the APA scheme different from the team administering the other TP issues?

Yes, the IRB's APA team is different from the routine TP audit teams. The Multinational Tax Department of IRB has four divisions headed by four different directors. However, all of them report to a common Head of the Multinational Tax Department

How do you ensure the confidentiality of the information shared during the APA discussion process?

The IRB has given their assurance that the taxpayer information shared during the APA discussions will be

kept confidential and will not be shared with any third party including other teams.

Does the APA regime formally or informally follow any rules regarding the number of APAs to be accepted in the scheme in any given year?

The IRB has not set any formal rules on the number of APA cases to be accepted per year. In fact, they informally check with the taxpayers periodically on the potential number of cases that the taxpayers plan on submitting so that the IRB can adequately plan for the staffing of the APA team.

What have been the key enablers driving the success of the APA regime in your country?

The APA regime is fairly new in Malaysia. A few key enablers driving the success of the APA regime have been as follows:

- Promotion and organization of joint seminars by consulting firms with the IRB during 2007-2008 time frame for the promotion of the APA regime showcasing the advantages of the same;
- Supportive APA team staff as well as the directors heading the multinational tax department; and



- Continuous and successful sharing of information of APA regimes of other countries enabling IRB to learn from the experiences of other tax authorities.

What are two/three key challenges faced in the APA regime in your country?

One of the key challenges faced by the APA regime has been that taxpayers are still adopting a wait and watch attitude and are still not fully cognizant about the intricacies of the TP issues. The main reason for this is probably the fact that the detailed TP Rules and revised TP Guidelines have not been issued in Malaysia yet.

What metric would you suggest as apt to evaluate the success of an APA scheme (e.g. revenue based, time to completion, number of APAs executed, others)? In this regard, is there an existing incentive mechanism followed by the tax administration in

your country that rewards the APA team? If so, what is the basis for such award and recognition?

Some of the possible metrics could be a) the number of APAs executed; b) time taken to execute the APAs would be good criteria to evaluate the success of the APA scheme. We are not aware of any reward or incentive mechanism currently in place for the APA team but they have been given certain key performance indicators to meet on an annual basis.

Briefly discuss the specific provisions, if any that are present in the APA regime in your country that makes it unique to other APA regimes in other parts of the globe.

The detailed APA rules have yet to be issued - the terms that we negotiated are fact specific and are applicable only to the particular case.

Theresa Goh

Partner, Transfer Pricing

Kuala Lumpur, Malaysia
Tel: + 603 77125135
Email: tgoh@deloitte.com



acquisition. She has performed TP studies for clients in numerous industries and provided assistance to clients in developing strategies for the application for APA's as well as transfer pricing audit defence.

- Theresa Goh led Deloitte Malaysia to win the Malaysia transfer pricing firm of the year award provided by International Tax Review 2008
- Voted as a leading tax advisor by International Tax Review 2008/2009
- Voted recently as World's Leading Transfer Pricing Adviser by Euromoney
- Theresa sits on the Council of the Malaysian Institute of Certified Public Accountants (MICPA) and is a member of its Tax Committee
- Theresa is a frequent speaker at conferences nationally and abroad focusing on transfer pricing and tax. She has presented an APA paper in Tokyo jointly with the MIRB

Theresa Goh is the National Transfer Pricing Leader of Deloitte Malaysia's Transfer Pricing Team, which has been awarded the International Tax Review Award of Best Transfer Pricing Advisor in Malaysia in 2009. She is based in Kuala Lumpur and her experience covers tax audits and investigations and tax planning and advisory for clients in a wide range of industries, including manufacturing, services and oil & gas sectors.

Professional experience:

Theresa has more than 20 years of tax and transfer pricing experience covering a wide range of taxation. She has extensive experience in successfully completing many tax planning and consulting assignments in areas such as restructuring, mergers and

Projects:

Key projects handled include:-

- Transfer pricing documentation projects for manufacturing, distribution and service companies, including fast moving consumer goods, technology related products, branded apparel, lifestyle goods, food & beverages and oil & gas.
- Transfer pricing audit defense projects which span various industries, including telecommunication, oil and gas, tobacco, pharmaceutical, consumer electronic and semiconductor industries.
- APA applications including Malaysia's first unilateral APA application to the Malaysian Inland Revenue Board (MIRB).

Awards, recognitions, achievements, and publications:

Professional qualifications and affiliations:

- Certified Public Accountant, Malaysia
- Chartered Accountant, Malaysia
- Fellow: Malaysian Institute of Taxation (MIT)
- Licensed tax agent under the Malaysian Income Tax Act, 1967

Annexure 1: Summary of APA schemes in certain key jurisdictions

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Australia	Yes, under Taxation Ruling TR 95/23. Practice Statement PS LA 2011/1 that explains the principles and procedures of the APA scheme was released in March 2011.	1992	Unilateral/ Bilateral/ Multilateral	There is no fee for filing an APA request.	Generally three to five years forward
Belgium	APAs are available under Law of 21.06.2004 introducing new ruling regime and (in the case of bilateral APAs) under MAP of applicable double tax treaty.	January 1, 2005	Unilateral/ Bilateral/ Multilateral	No fee	Maximum term of five years, potentially renewable. Terms commonly range between one and three years.
Brazil	No. Brazilian rules do not contemplate APAs. However, a taxpayer is allowed to request, based on proper studies and analysis, modifications of the statutory margins tested.	Not applicable	Not applicable	Not applicable	Not applicable
Canada	Information Circular 94-4R (International Transfer Pricing: Advance Pricing Arrangements. Information Circular 94-4R (Special Release) issued March 18, 2005, entitled Advance Pricing Arrangements for Small Businesses.	1993	Unilateral/ Bilateral/ Multilateral. For Small Businesses Unilateral APAs only.	A nonrefundable user charge for each accepted APA request or renewal to cover estimated "out-of-pocket" costs, such as travel and accommodation expenses, is charged. Any amount paid in excess of actual costs will be refunded to the taxpayer. For Small Business APAs, a flat fee of CAN \$5,000 will be charged.	Depending on the proposal, industry, and the transactions involved, the term is usually three to five years, but may vary depending on facts, circumstances, and the resolution of the particular case. Can only roll back to taxation years that are not under audit or for which a documentation request letter has not been received. Rollbacks are not permitted for Small Business APAs.
China	APAs are allowed under Chapter 6 of the State Administration of Taxation on the Issuance of the Implementation Measures for Special Tax Adjustments (Trial Implementation) (Guo Shui Fa [2009] No. 2). With the issuance of China's APA Annual Report [2009] in January 2011, the Chinese tax authorities have signaled their willingness to accept more APA applications going forward.	In September 2004 formal APA rules were released.	Unilateral/ Bilateral/ Multilateral	No fee	Generally three to five years forward; rollback available subject to approval from the tax authorities.

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Colombia	APAs are available	Available for fiscal year 2006 and subsequent years.	Unilateral	No regulations on this issue to date	Up to three years forward and the year of request.
Czech Republic	APAs are available	Available since January 1, 2006.	Unilateral/ Bilateral	CZK 10,000 (approx. USD 500 , EUR 375)	Maximum three years
Denmark	Yes	In accordance with Danish DTAs	Unilateral/ Bilateral/ Multilateral	The filing fee for unilateral APAs is DKK 300; for bilateral APAs there is no filing fee.	No stated term
France	Yes	Introduced in 1999	Bilateral and unilateral agreements are available (in specific cases). Multilateral agreements may be possible.	No fee	Three to five years forward
Germany	APAs are available	Details on the implementation of APAs are outlined in the Federal Ministry of Finance's ordinance of October 5, 2006.	Bilateral/ Multilateral	There is €20,000 application fee.	The Federal Ministry of Finance ordinance states that the APA term should be no less than three years, but should not exceed five years.
Hungary	APAs are available	2007	Unilateral/ Bilateral/ Multilateral	The fees for unilateral APAs are as follows: HUF 500,000-HUF 2 million if the arm's length price can be determined with the CUP, Resale Minus, or Cost-Plus methods; HUF 2 million - HUF 7 million if the arm's length price can be determined by using other methods; The fees for bilateral APAs are HUF 3 million-HUF 8 million, and for multilateral APAs HUF 5 million-HUF 10 million.	Three to five years. The term could be extended by an additional three years.

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Indonesia	Yes	Regulation of DGT No. PER 69/PJ/2010 regarding APAs was issued on 31 December 2010.	Unilateral/ Bilateral	Not specified	An APA may be applied for a maximum of three years, starting from the tax year in which the APA is agreed. An APA can also be applied for a year before the APA is agreed, as long as the annual income tax return for that tax year has not been audited, no objection or appeal on it has been filed and there is no indication of criminal conduct in taxation.
Israel	According to Article 85a, APAs are available.	2006	Unilateral	Not Specified	Not Specified
Italy	According to Article 8 of Law Decree n. 269/2003, taxpayers with international business activities may apply for an "International Tax Ruling" regarding transfer prices, interest, dividends, and royalties. The Revenue Agency released instructions for the application of the ruling procedure in July 2004.	2004	Unilateral	Not applicable	Once signed, the agreement would remain in force for three years (including the year in which it is signed), unless new facts emerge that would change the conditions regarding the transactions covered by the agreement.
Japan	APAs are available	1987	Unilateral/ Bilateral. The NTA prefers bilateral APAs.	There is no fee for an APA application.	Generally, three to five years forward; rollback is available on bilateral APAs (TP commissioner's directive). In practice, APA terms vary.
Korea	APAs are available	1996	Unilateral/ Bilateral/ Multilateral	There is no fee for filing an APA application.	There is no limitation on APA period. The taxpayer shall specify the fiscal years for which the APA would apply.
Luxembourg	There is no formal APA procedure. Taxpayers may request a unilateral tax clearance from the Luxembourg Tax Authority for guidance on the application of Luxembourg tax law.	Not applicable	Not applicable	There is no fee.	There is no stated term.

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Malaysia	APA provisions have been enacted under section 138C of the Income Tax Act. APA rules are expected to be released soon. The IRB has accepted a number of unilateral APA applications, and the first one was finalized in January 2011.	Provisions enacted under section 138C, effective January 1, 2009.	Unilateral/ Bilateral	Not fixed at the moment	The standard term will be included in the APA rules that are expected to be issued soon. The IRB will accept a three-to-five-year term depending on the nature of business.
Mexico	Federal Fiscal Code Article 34-A provides for APAs.	1995	Unilateral/ Bilateral	Approximately US\$ 780 for filing the request, US\$ 156 for submission of annual report during the APA term. The amount is periodically updated for inflation.	Up to three years forward, one year back, and the issuing year. The term can be longer if negotiated under the mutual agreement procedure in accordance with a tax treaty.
Netherlands	A pre-filing meeting is available upon request. Small business taxpayer APAs are available. A case management plan is established for every APA request, including a time schedule for processing and finalizing the APA request.	2001	Unilateral/ Bilateral/ Multilateral	No fee	Four to five years. Longer terms may be possible in case of long-term contracts. Rollback is possible if the relevant fact and circumstances have not changed, or if accurate adjustments can be made.
New Zealand	APAs are available	Available under Section 91 E of the Tax Administration Act of 1994 or under the mutual agreement procedure.	Unilateral/ Bilateral	No fee for a Bilateral APA, and a minimal application fee for a Unilateral APA.	No stated term
OECD	Chapter IV.F; Annex "Guidelines for Conducting Advance Pricing Arrangements under the Mutual Agreement Procedure."	Guidelines were issued in 1995, an update of which was issued in 1999.	Unilateral/ Bilateral/ Multilateral	Depends on local law. He OECD Transfer Pricing Guidelines recognize that APA user fees may be charged, but do not have to be.	Depends on local law.
Norway	APAs are available only for the pricing of natural gas.	Not applicable	Not applicable	Not applicable	Not applicable

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Peru	Although the Income Tax Law establishes the possibility for taxpayers and the CA to determine valuation methods by means of advance agreements, this possibility is now limited to taxpayers with international operations.	2006	Unilateral	Not specified	The fiscal year in which the APA is approved and three years thereafter.
Philippines	APAs are available under the draft transfer pricing rules.	Not applicable	Not specified	Not applicable	The proposed regulations limit the application of the APA to prospective years and transactions, and the actual term will depend on the industry, products, or transactions involved.
Poland	APAs are available, including for foreign entrepreneurs operating through a permanent establishment in Poland.	APA procedure was introduced in 2006.	Unilateral/ Bilateral/ Multilateral	In general, 1 percent of the transaction value, with the following thresholds: domestic unilateral agreement: PLN 5,000-50,000; foreign unilateral agreement: PLN 20,000-100,000; bilateral/multilateral foreign agreements: PLN 50,000-200,000.	Five years, but the term may be extended for further unlimited five-year periods.
Portugal	APAs have been available through Ministerial Order # 620-A/2008.	July 2008	Not specified	The filing fee for an APA application is between €3,150 and €35,000, depending on taxpayer turnover. These fees are reduced by 50 percent for renewals or revisions of existing APAs.	Maximum term of three years. Taxpayers may seek renewal.
Romania	According to Government Decision no. 529 / 2007 regarding the approval of APAs and advance fiscal solutions.	June 2007	Unilateral/ Bilateral/ Multilateral	Between €10,000 and €20,000. The fee for the modification of an existing APA is set between €6,000 and €15,000.	Up to five years.

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Singapore	Yes	The Transfer Pricing Guidelines issued in February 2006 provide guidance on making an APA request.	Unilateral/ Bilateral/ Multilateral	No fee	Generally three to five years forward. Rollback may be allowed on a case-by-case basis.
South Africa	APAs are not available.	Not applicable	Not applicable	Not applicable	Not applicable
Spain	Yes, there is a specific regulation that includes provisions on: Information and documentation requirements, procedure, Competent Authority, terms and timing, modifications and extensions, resolutions, and multilateral APAs.	APAs were incorporated into Spanish Legislation through the 1995 Corporate Tax Law.	Unilateral/ Bilateral/ Multilateral	Not applicable	Up to four fiscal years following the year of approval, the negotiation year itself, and one year rollback in some cases. Maximum term is six years.
Sweden	Yes	January 1, 2010	Bilateral/ Multilateral	The fee for filing APA is approximately €15,000. The fee for filing for renewal of an APA is approximately €10,000. The fee for filing for a renewal with changes is approximately € 12,500.	Generally three to five years
Switzerland	The contents of the application follow the guidance provided in the OECD Transfer Pricing Guidelines.	Not applicable	Unilateral/ Bilateral/ Multilateral	No fee	Subject to negotiation, generally three to five years forward.
Taiwan	APAs are allowed for taxpayers who meet the criteria defined in the Transfer Pricing Guidelines. Eligible taxpayers must file an application to the tax authorities by the end of the first year in which the transactions covered in the APA were conducted.	Application criteria and procedures are set out in Articles 23 to 32 of Transfer pricing Guidelines issued in July 2003.	Not specified	No fee	An APA will be effective for a period of three to five years, or the duration of the covered transactions, whichever is shorter. An extension of up to five years may be allowed.

Country	Are APAs Available	APAs Available Since	APA Options Available	APA Filing Fee	APA Term of Agreement
Thailand	According to Departmental Instruction No. Paw. 113/2545 (Clause 5), APAs are available. However, based on current practice, the Thai Revenue Department is not willing to accept applications for unilateral APAs. Bilateral agreements may be applied for under the mutual agreement procedure of treaties. The Thai Revenue Department has issued a booklet including guidance for bilateral APAs.	April 2010	Bilateral	No fee	The term of bilateral APAs may be three to five years.
Turkey	Yes. There is an APA unit within the Turkish Revenue Administration.	TP decrees officially announced on 6 December 2007 and 13 April 2008.	Unilateral/ Bilateral/ Multilateral	The APA application fee is 33,172 TL (approx. €16,500) and 26,537 TL (approx. €13,270) for subsequent renewals.	Up to a maximum period of three years.
United Kingdom	Yes	1999	Unilateral/ Bilateral/ Multilateral	No fee	Generally three to five years forward; either the taxpayer or HMRC may seek rollback.
United States	Yes	1991	Unilateral/ Bilateral/ Multilateral	The fee is \$50,000 for original APA requests and \$35,000 for routine renewal requests; \$22,500 for small business taxpayer APA original and renewal requests; and \$10,000 for amending APA requests or a completed APA.	Generally, the term is five years. Longer terms may be considered as appropriate. Either the taxpayer or the IRS may seek rollback to open tax years.
Venezuela	Yes	2000	Unilateral/ Bilateral	Not specified. Taxpayer must bear the cost of an APA application.	The ITL specifies only that APAs may be longer as a result of a friendly procedure under the terms of a tax treaty.

Annexure 2- Draft DTC on APA

- 118.**(1) The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person, specifying the manner in which arm's length price is to be determined in relation to an international transaction, to be entered into by that person.
- (2) The manner of determination of arm's length price referred to in sub-section (1) may be any method including one of the prescribed methods, as referred to in sub-section (1) of section 117, with such adjustments or variations, as may be necessary or expedient so to do.
- (3) The arm's length price of any international transaction, in respect of which the advance pricing agreement has been entered into, notwithstanding anything in this Chapter, shall be determined in accordance with the advance pricing agreement so entered.
- (4) The agreement referred to in sub-section (1) shall be valid for such financial years as specified in the agreement which in no case shall exceed five consecutive financial years.
- (5) The advance pricing agreement entered into shall be binding—
- (a) only on the person in whose case the agreement has been entered into;
 - (b) only in respect of the transaction in relation to which the agreement has been entered into; and
 - (c) on the Commissioner, and the income-tax authorities subordinate to him, only in respect of the said person and the said transaction.
- (6) The agreement referred to in sub-section (1) shall not be binding, if there is any amendment to the Code having bearing on the agreement so entered.
- (7) The Board may, by order, declare an agreement to be void ab initio, if it finds that the agreement has been obtained by the person by fraud or misrepresentation of facts.
- (8) Upon declaring the agreement void ab initio, the provisions of this Code shall, after excluding the period beginning with the date of such agreement and ending with the date of order under sub-section (7), apply to the person as if such agreement had never been entered into.
- (9) For the purposes of this section, the Board may, by notification, frame a scheme for advance pricing agreement in respect of an international transaction.

Contributors

Ankit Arora

Fahad Khalid

Joy Mukherjee

Parikshit Datta

Peter Blackwood

Priya Gopalakrishnan

Richa Gupta

S. P. Singh

Samir Gandhi

Sandeep Ahuja

Setu Mankad

Shanto Ghosh

Vishweshwar Mudigonda

Viswanathan Subramaniam

Contacts

Mumbai

264-265, Vaswani Chambers,
Dr. Annie Besant Road,
Worli, Mumbai 400 030.
Tel: + 91 (022) 6619 8600
Fax: + 91 (022) 6619 8401

Ahmedabad

"Heritage" 3rd Floor,
Near Gujarat Vidyapith,
Off Ashram Road,
Ahmedabad – 380 014
Tel: + 91 (079) 2758 2542
Fax: + 91 (079) 2758 2551

Vadodara

Chandralok,
31, Nutan Bharat Society,
Alkapuri, Vadodara – 390 007
Tel: + 91 (0265) 233 3776
Fax: +91 (0265) 233 9729

Delhi/Gurgaon

Building 10, Tower B,
7th Floor, DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Chennai

No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar, Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5019

Hyderabad

1-8-384 & 385, 3rd Floor,
Gowra Grand S.P.Road, Begumpet,
Secunderabad – 500 003.
Tel: +91 (040) 4031 2600
Fax: +91 (040) 4031 2714

Bangalore

Deloitte Centre, Anchorage II,
100/2, Richmond Road,
Bangalore 560 025.
Tel: +91 (080) 6627 6000
Fax: +91 (080) 6627 6409

Kolkata

Bengal Intelligent Park Building,
Alpha, 1st floor, Plot No –A2,
M2 & N2, Block – EP & GP
Sector – V, Salt Lake Electronics
Complex, Kolkata - 700 091.
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

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