

## How advance pricing agreement helps India-Singapore business ties

The ties between India and Singapore have a deep rooted history of commercial and cultural links.

The strength of the business connection between the two countries is also reflected in their growing trade. According to a report *India-Singapore Relations* released by the ministry of external affairs of India in September 2017, Singapore is the 10th largest bilateral trade partner of India and the second largest among the Association of South East Asian Nations (Asean).

It also said that the total foreign direct investments (FDI) flow from Singapore to India was 16.8% of the total FDI inflow (till June 2017). On the other hand, Singapore is one of the top destinations for Indian investments.

The future of India-Singapore trade relations appears to be bright and promising. A senior official from the Federation of Indian Export Organisations (FIEO) was quoted in a local newspaper in September 2017 as saying that bilateral trade between India and Singapore is expected to achieve a target of \$25 billion by 2019-20.

Globally, there has been a concern that multinational companies (MNCs), with their large operations and global reach, are able to structure their operations in a manner that profits could be shifted from high-tax to low-tax jurisdictions.

Accordingly, transfer pricing (TP) has been a matter of dispute and litigation across the world, with tax authorities fighting to get their due share of taxes in their respective tax jurisdictions.

In India, revenue authorities have adopted a tough stand and, hence, the transfer pricing regime since inception has been quite litigious and has added to the concerns of global companies.

Uncertainty caused by such positions has been one of the key concerns of global companies and acted as a deterrent for foreign investment into India.

Given the fact that approximately 60% of global trade takes place between group companies and the inherent subjectivity or perceived subjectivity involved in pricing the transactions between associated enterprises (AEs), the importance of an advance agreement between the taxpayer and the tax authorities for related party transactions cannot be understated.

To give a boost to foreign investments and provide certainty and clarity to foreign firms, the Indian government launched the advance pricing agreement (APA) programme in 2012. Further, the year 2014 saw the introduction of a roll-back scheme. The said programme has helped in achieving tax certainty with respect to inter-company transactions for up to nine years (five future and four roll-back years).

An APA, simply put, is an agreement between the taxpayer and the tax authority determining the arm's length price or specifying the manner in which the arm's length price is to be determined, in relation to transaction(s) between related parties.

An APA could be unilateral, bilateral or multilateral. A unilateral APA is agreed between a taxpayer and the tax authority of his country, where as a bilateral or multilateral APA is an agreement between the taxpayer, AEs, and their respective tax authorities.

An APA is formally initiated by the taxpayer and involves submission of detailed documentation, discussions around the nature and facts of a transaction and negotiations to mutually agree the

price of transaction by both the taxpayer and tax authority.

The advantages of an APA include tax certainty for businesses with respect to its international transactions and avoidance of costly and time-consuming dispute and litigation, which in the Indian context could take over a decade to reach finality.

Further, bilateral and multilateral APAs substantially reduce or eliminate the possibility of double taxation since all the relevant countries participate. For example, in a bilateral APA, the ALP of a cross border transaction of sale of goods shall be agreed at Rs1,000, by the seller, purchaser and the tax authorities of both the selling and the purchasing country. However, in a unilateral APA, the ALP is agreed between the seller and his tax authority at Rs1,000. In such a case, there is a possibility that the purchasing country's tax authorities may make a downward adjustment to the purchase price by say Rs200, allowing a deduction of Rs800 only. This leads to double taxation of Rs200. Such a situation can be avoided in a bilateral or a multilateral arrangement.

Since its very inception, the APA programme has been a success in India as a dispute avoidance mechanism. According to the press release issued by the Central Board of Direct Taxes (CBDT) on 1 March, the total number of APAs signed till date has reached an impressive milestone of 203.

The transactions that form the subject matter of these APAs are entered into with the AEs located in more than 100 countries. However, for a majority of the unilateral APAs signed in India, the AEs are located in the US, UK, China and Singapore. Singapore had signed 44 APAs with India till March 2017.

To encourage bilateral APAs, the government recently opened up its mutual agreement procedure (MAP) and bilateral APAs where Article 9(2) of the Double Taxation Avoidance Agreement (DTAA) that relates to corresponding adjustment is absent.

Article 9(2) provides that in case of a TP adjustment on the profits of a company situated in a country, the revenue authorities of the other country would provide a corresponding adjustment to the tax liability of the AE situated in such other country, in order to eliminate economic double taxation.

Till recently, the Indian government had taken the stand to not entertain MAP or bilateral APAs with a country, in the absence of the express provisions of article 9(2) or "corresponding adjustment" in the tax treaty signed with that country.

However, a clarification released by the government of India dated 27 November 2017, stated that CBDT has decided to accept transfer pricing MAP and bilateral APA applications regardless of the presence or otherwise of Article 9(2) in the DTAA's.

This has opened doors for Indian taxpayers to enter into bilateral APAs with countries like Singapore, Belgium, France and Germany as Article 9(2) was absent in the DTAA's with these countries. The move bears testimony to the intent of the government to create a non-adversarial and taxpayer-friendly tax regime. One can certainly expect a boost in the bilateral APAs with Singapore in the near future.

The pragmatic approach adopted by the APA authorities and relatively speedier disposal of cases are the key factors that have contributed to widespread popularity of the APA regime.

Another salient feature of the Indian APA is that the taxpayer can withdraw from the APA process and opt for the normal process of revenue audits at any time before the signing of the APA if the taxpayer does not want to accept the approach of the tax authorities. This has further added to the

positive sentiments among the taxpayers with regard to APA.

The Indian APA programme has evolved over the years and demonstrated the government's commitment to make the APA programme a success shall go a long way in creating a favourable environment for MNCs to do business in India.

Businesses have also accepted the APA programme as an effective tool to avoid protracted litigation, resolve complex transfer pricing issues and obtain certainty on the transfer pricing front. Companies in Singapore having their presence in India can use the APA as a remedial measure to avoid tax disputes and concentrate their time and resources in efficiently conducting their business.

The APA process involves the following:

- The process for APA starts with a pre-filing consultation meeting. The meeting is held with the objective of determining the scope of the agreement, understanding the transfer pricing issues involved and examining the suitability of the international transactions for the APA. Once the pre-filing consultation is complete, a formal application is filed.
- Upon acceptance of the formal application by the APA authorities, the APA team will hold meetings to discuss and analyse the transactions in detail and negotiate the terms of the transactions. The APA team may also undertake a site visit to verify the information in the application.
- Thereafter, the APA authorities shall share a draft report with the competent authority (in case of bilateral or multilateral APA) or DGIT ("Director General of Income Tax") in case of unilateral APA). Comments are invited on the same from the taxpayer. After the exchange of comments, the final terms and conditions are agreed and the APA is finalised. Accordingly, an effect is given to the roll back years covered under the APA.

## **2. What is the statutory fees payable for filing the APA application?**

The APA filing fees is based on the amount of the proposed covered transactions as below:

- Rs 10 lakh for international transactions up to Rs 100 crore
- Rs 15 lakh for international transactions up to Rs 200 crore
- Rs 20 lakh for international transactions greater than Rs 200 crore

## **3.Can a unilateral APA be converted into Bilateral APA?**

Yes. Taxpayers have an option to convert unilateral APA applications to Bilateral before they are agreed or concluded.

While converting a unilateral APA application to a bilateral APA application, the applicant or its AE needs to make a similar request with the competent authority of the other country. The bilateral request of the applicant shall be forwarded to the competent authority of India. The competent authority of India shall decide whether the bilateral request is allowable under the existing regulations.

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