Nangia Andersen LLP

Communiqué

Your Quarterly TP Tabloid

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Foreword

India is reeling under a catastrophic second wave of the coronavirus that has bought the health infrastructure to its knees with the country reporting the world's highest number of new infections as hospitals and patients beg for fast-diminishing oxygen supplies and other emergency aid. While the government has been trying to control the alarming spread of infection through lockdowns or strict restrictions, the whole eco-system still remains overwhelmed.

Recently, in a significant move, the Government of India's announced to open the vaccination program for all persons above 18 years from 1st May, which raises hopes of regaining normality in the near future. However, till then businesses continue to face a difficult retrieval phase as India fights a more virulent second wave. In such times, like in most other countries, India Authorities have also been forthcoming to extend compliance timelines and provide other reliefs to aid businesses.

So, with an aim to keep you updated with the current developments in the Transfer Pricing ("TP") landscape at both Indian and global fronts, we have come up with this quarterly issue.

At India level, we have discussed the key takeaways from budget 2021 in the area of TP, protocols issued by Central Board of Direct Taxes ("CBDT") in case of treaty-exchanged data breach, India's response to United States ("US") against criticism of Equalisation levy ("EL"), Updates on Advance Pricing Agreements ("APAs") entered into by India, extension of certain deadlines in the light of COVID-19 and other happenings. Furthermore, we have discussed significant Indian rulings pronounced in the previous quarter that keeping setting principles in key areas of litigation.

At global level, the Organisation for Economic Co-operation and Development ("OECD") has released its new Practical Toolkit to support the implementation of effective TP documentation requirements by developing countries. Further, OECD has published report on final batch of Stage 1 peer review in order to assess progress in implementing OECD/ G20 Base Erosion and profit Shifting ("BEPS") Action Plan 14's minimum standard on dispute resolution between jurisdictions and conducted consultation meeting to improve Mutual Agreement Procedure ("MAP") process. Also, there have been some interesting developments all over the world due to the impact of pandemic and some landmark judgements which would form basis of future litigation. All this and much more has been discussed in this issue.

Accordingly, towards our objective of being your value-added partners, we discuss the above significant events/ happenings in this quarterly issue as tabulated below:

Topic	Page No.
1. Key takeaways: Budget 2021	2
2. Updates on APA	3
3. CBDT issues protocols in case of treaty-exchanged data breach	3
4. India's response to S 301 Report of U.S. on EL	3
5. Extension of certain deadlines	3
6. Other happenings	4
7. Indian tax Rulings	5
8. OECD Updates	16
9. Global TP News	17
10. Global TP Cases Laws	21

We hope that our publications are beneficial and help you in understanding the potential impact (if any) of the changes with respect to your business in India. We look forward to your suggestions or feedback that you would like to share with us, at query@nangia-andersen.com. Kindly note that information contained within this issue is of general nature and reliance on the same should not be placed without seeking professional advice, especially on litigation matters.

Wish everyone safe and healthy days ahead.

Rakesh Nangia
Chairman,
Nangia Andersen India Private Limited

01 Indian Updates

Key takeaways: Budget 2021

The Hon'ble Finance Minister Smt. Nirmala Sitharaman, presented the Union Budget of India for the financial year 2021-22 on February 1, 2021. Against the backdrop of COVID-19 pandemic and consequent contraction of the Gross Domestic Product ("GDP") by 7.7 percent, this was a crucial Budget for the Government. Further, the Finance Bill, 2021, has received the assent of the President, Shri Ram Nath Kovind, on March 28, 2021. Below are the key takeaways from Budget 2021:

Reduction in TP audit time limit:

The time limit for the completion of assessment proceedings has been proposed to be reduced by three months. Accordingly, for AY 2021-22 and onwards, time limit to complete assessments involving TP reference will be 21 months from the end of the relevant assessment year. This amendment will be effective from April 1, 2021.

Rationalization of provisions of Minimum Alternate Tax ("MAT"):

The MAT computation for the additional income arising out of the APAs or secondary adjustments for previous years is to be recomputed in the prescribed manner based on the application made by the taxpayer to the Assessing Officer ("AO"). The procedure and time periods applicable for "rectification proceedings" shall be applicable. This amendment will be effective from April 1, 2021.

Income Tax Appellate Tribunal ("ITAT" or "the Tribunal") to go faceless:

It has been proposed to launch a scheme for faceless ITAT proceedings on the same lines as the faceless appeal proceedings before Commissioner of Income-tax (Appeals) ["CIT(A)"] and penalty schemes. In relation to this, Section 255 of the Income-Tax Act, 1961 ("the Act") - 'Procedure of Appellate Tribunal' has been amended to introduce the faceless ITAT proceedings. This has been proposed to impart greater efficiency, transparency and accountability by eliminating the interface between ITAT and parties to the appeal to the extent technologically feasible; optimizing utilization of resources through economies of scale and functional specialization; and introducing an appellate system with dynamic jurisdiction. The proposed amendment will be applicable from April 1, 2021.

Finance Bill provides clarifications in EL; Exclusion of Royalty and Fees for Technical Services payments from EL ambit:

Erstwhile there was ambiguity as to taxation under the Act and EL for eligible transaction undertaken between April 1, 2020 and March 31, 2021. Budget 2021 has sought to provide that consideration received or receivable for specified services and consideration received or receivable for e-commerce supply or services shall not include consideration which are taxable as royalty or fees for technical services in India under the Act read with the relevant Double Taxation Avoidance Agreement. Further, clarifications were provided while defining 'Online sale of goods' or 'online provision of services' to include any of the following online activities: acceptance of offer for sale; placing of purchase order; acceptance of purchase order; and payment of consideration.

The detailed finance bill can be accessed at the below link:

https://bit.ly/3omMSpu

Update on APA

- Recently on March 22, 2021, the CBDT has signed a Unilateral APA with a US-headquartered company involved in distribution of sports equipment. This was among the first few instances, wherein, the CBDT has allowed COVID-19 relief adjustment while agreeing on the arm's length pricing. Under this relief, the CBDT through this APA prescribed different arm's length margin for years impacted by COVID-19 and years not impacted due to pandemic.

  This is a welcome move to the taxpayers as it reflects Government's preparedness to appreciate that pandemic has definitely impacted various industries and their arm's length margins, which cannot be harmonised up with the regular years.

CBDT issues protocols in case of treaty-exchanged data breach

On January 6, 2021, Breach Protocol was circulated by Foreign Tax & Tax Research Division of CBDT that is to be followed by the income tax department in case of breach of data exchanged under tax treaties.

Prepared as per the international standards and approved by Information Security Committee, the breach protocol was circulated to all the offices of Income Tax Department handling information exchanged under a treaty. The Protocol shall get triggered in the event of an incident of inappropriate access, disclosure, use of confidential information, or failure to safeguard data. Under the Information Security Committee, constituted breach management task force will identify the source, contain the immediate impact by removing the attackers' access to the system. Consequently, the action will be followed by strengthening or removing the vulnerabilities in the system.

India's response to S 301 Report of U.S. on EL

On January 07, 2021, India published its response emphasizing that the EL is not discriminatory, in fact its purpose is to ensure fair competition, reasonableness and exercise the ability of governments to tax businesses that have a close nexus with the Indian market through their digital operations. The Indian government defended its position on stands such as no retrospective element since the levy was enacted before the 1st day of April 2020 which is the effective date of the levy. Moreover, it does not have extra territorial application as it applies only on the revenue generated from India. In addition, EL was one of the methods suggested by 2015 OECD/ G20 Report on Action 1 of BEPS Project which was aimed at tackling the taxation challenges arising out of digitization of the economy.

The detailed response can be accessed through the link stated below:

https://bit.ly/3hvecjW

Extension of certain deadlines

In view of the severe Covid-19 pandemic raging unabated across the country affecting the lives of our people, Central Government has extended time limits for regulatory and compliance purposes.

The details of the same has been tabulated hereunder:

S. No.	Particulars/ Extension of timeline	Actual date of compliance	Revised date of compliance	Source
1	Application before CIT(A) and filing of Objections before the Dispute Resolution Panel ("DRP")	April 1, 2021 or thereafter	Allowed timeline or May 31, 2021, whichever is later	https://bit.ly/3yjT-gCn
2	Filing of Income tax return in response to notice issued under Section 148 of the Act			
3	Filing of belated and revised return under Assessment Year 2020-21	On or before March 31, 2021	On or before May 31, 2021	
4	Filing declaration under Direct Tax Vivad se Vishwas Act, 2020 (VsV)	February 28, 2021	March 31, 2021	https://bit.ly/3fre-SEe
5	Making payment under the third and fourth columns of table under section 3 of VsV	March 31, 2021 and April 1, 2021	June 30, 2021 and July 1, 2021	https://bit.ly/3oo-jaR1 https://bit.ly/2SM-LiS0
6	Linking Aadhar Number with PAN under the Act	March 31, 2021	June 30, 2021	https://bit.ly/3eRP6dx
7	• Passing of any order for assessment or reassessment under the Act • Time limit for passing an order consequent to direction of DRP • Time limit for issuance of notice under section 148 of the Act for reopening the assessment where income has escaped assessment • Time Limit for sending intimation of processing of EL under sub-section (1) of section 168 of the Finance Act 2016	April 30, 2021	June 30, 2021	https://bit.ly/3ooO5wl

Other happenings

- **CBDT notifies faceless penalty scheme** - Moving one step ahead in implementing the digital transparent taxation platform, CBDT vide Notification No. 02 /2021 has notified the Faceless Penalty Scheme 2021. It has become effective from January 13, 2021.

  https://bit.ly/3hwG0Vk

- **Faceless assessment (amendment) scheme -** CBDT vide Notification No. 06 /2021 notified the Faceless Assessment (1st Amendment) Scheme, 2021 that aims to amend the faceless assessment scheme of 2019 through certain amendments in definitions in respect of no personal appearance in the centres or units and substituted procedure for assessment.

  The notification notifying this scheme can be accessed through the link stated below:

  https://bit.ly/2SWxTqL

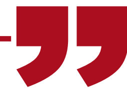
02 India Tax Rulings

▪ Ruling on tenability of shifting in tested party stand in the course of assessment proceedings

1. M/s Virtusa Consulting Services Private Limited vs The Deputy Commissioner of Income Tax – T.C.A. No. 996 of 2018.

Madras High Court ("HC") for Assessment Year ("AY") 2011-12 negated the decision of the ITAT and acknowledged the plea of the Assessee (engaged in the business of software development services globally) wherein it held that the Assessee's election as a tested party in its TP documentation doesn't preclude the Assessee from treating its foreign Associate Enterprise ("AE") as a tested party in the course of TP assessment proceedings. Against the Revenue's contention that the Assessee resorting to foreign AE as tested party in contrary to the position undertaken in its TP documentation & auditor's certificate will tantamount to change in *'goal post'* without filing a revised return, HC observed that the Form 3CEB pertains only to transaction claim and has got nothing to do with the tested party and hence the Revenue cannot compare the case of the Assessee with that of the Taxpayer who fails to claim deduction or benefit in his Return of Income ("RoI"). Further, the HC noted that the Transfer Pricing Officer ("TPO") had rejected the benchmarking analysis undertaken by the Assessee in its TP documentation and conducted the fresh search to arrive at comparables, accordingly, held that where the TPO itself has not attached any sanctity to the TP documentation it cannot debar the Assessee from considering its AE as least complex entity. On the ITAT's factual finding that the Assessee failed to establish the functional profile and risk assumed by the overseas AE's, the HC held that sufficient material evidence/document were furnished to demonstrate the least complex nature of foreign AE. Further, on ITAT's finding that the definition of enterprise as defined in Section 92F(iii) of the Act reading in consonance with Rules 10B(1)(e) of the Income Tax Rules, 1962 ("the Rules") which use the term 'enterprise' for application of TNMM, will construe *'Enterprise'* as the Assessee and the *'Associated enterprise'* as foreign AE and accordingly the foreign AE cannot be considered as tested party, the HC referred to Section 92F(iii) and the definition of AE as defined in Section 92A of the Act which exhibit that the statue does not indicate Assessee as enterprise and AE as other party. The HC further placed reliance on *Yamaha Motors India Limited vs ACIT [2014 (50) Taxman.com 444 (Delhi-trib).]* wherein it was held that the words Enterprise and Associated Enterprise has been used interchangeably. Furthermore, the HC rejected the ITAT treatment of distinguishing the Assessee's reliance on Delhi ITAT ruling in the case of *Ranbaxy Laboratories Limited vs ACIT [2016 (68) Taxman.com 322 (Delhi-Trib.)]* and noted that in the said decision the Tribunal has held that the tested party should be a least complex entity and there is no bar neither in the Act nor in the guidelines on TP for the selection of tested party. Also, considering that the TPO for subsequent AY has accepted the foreign AE as tested party under similar circumstances, has remanded the matter back to the TPO for a fresh decision.

Nangia Andersen LLP's Take



This HC pronouncement surely to great extent will settle the conundrum existed across various benches of the ITAT while dealing with the selection of foreign AE as tested party as there has been a contradictory judgment on the same. The Indian TP regulation does not lay down any mandate on the selection of tested party, however from the past signed APA it has been observed that CBDT has principally approved selecting the foreign AE as tested party. Further, global TP guidance such as OECD and United Nation ("UN") TP Manual has always advocated on the selection of tested party as the least complex of the controlled taxpayers where reliable economic analysis can be undertaken. Further, the above ruling also reaffirmed to the fact that the Assessee is not barred to recourse to an alternative option before the Tax authorities. To emphasize, it boils down to how comprehensive and robust TP documentation has been maintained by the Assesse along with relevant documents such as inter service agreement, reconciliation of overseas credits earned by the overseas etc., to substantiate it claim.

▪ Ruling on items to be considered as operating in nature for the purpose of Profit Level Indicator ("PLI") computation

2. MTU India Private Limited vs DCIT – ITA No. 157/PUN/2018

Pune ITAT endorsing with the claim of the Assessee, has encompassed the commission income amounting to INR 5.65 crores characterized as *'prior period item'* in the operating revenue base for determination of Arm's Length Price ("ALP") with respect to marketing support services under distribution segment for AY 2013-14. Brief fact of the case being, Assessee was engaged in the purchase of Detroit diesel, diesel engines and spare parts from its AE and sell it to non AE's against the receipt of commission income on such sale. During the impugned year, the Assessee amended its accounting practice and changed the reference point for recognizing the commission income on sale from the receipt of the credit note from the group AE to the raising of invoice by the AE. For the concerned amount of INR 5.65 crores, the credit note was issued during the Financial Year ("FY") 2012-13 for which the invoice was raised by the AE in the FY 2010-11. As the event of raising the invoice already got over in the year 2010 and the income was not recognized earlier due to non-issuance of credit note by the AE as per the then best practice, the Assessee recorded the commission income in the subject year as prior period item. In course of TP proceedings, the TPO has excluded the said prior period item from the operating base and accordingly determine the TP adjustment. The Tribunal noted that for the purpose of ALP determination under Transactional Net Margin Method ("TNMM") the operating margin of the Assessee is to be computed after reducing all the operating cost pertaining to an *international transaction* from all the operating revenue of the *international transaction*. ITAT, further state that in order to determine as to whether a particular item of operating revenue is in relation to an underlying international transaction is by first identifying the scope of the transaction which in turn can be ascertained from the agreement. The Tribunal held that for the coverage of the period of ALP determination, it is the period of continuation of international transaction and not the year in which its get completed. Accordingly, on the examination of the agreement, the Tribunal observed that the underlying international transaction broadly commence with the undertaking background work for sale, followed by actual sale and ends with realization of the invoice value by the AE from the Indian customer as step three which spills over to two year. Thus, its only on the completion of step three that the concerned international transaction gets completed resulting into accrual of income and thereafter consequential ALP determination. Accordingly, the Tribunal held that all the operating cost/ revenue pertaining to broad activities of international transaction are to be considered for ALP and set aside the issue to TPO/AO to adjudicate fresh.

Nangia Andersen LLP's Take

The Indian TP regulation does not stipulate any detailed guidance with respect to consideration of an item as an operating or non-operating in nature. However, as the general principle operating items are those which relate to the currency of international transaction under consideration. Such issue might be congested in the current COVID pandemic situation, where the business operation got disrupted, there might be instances where part of rendering of service remained undelivered for the part of the year which gets completed in the next year, accordingly, resulting into accrual of income in the next year. Given the treatment of prior period item being fact specific exercise, the Taxpayer has to undertake due diligence in maintaining the backup document reasoning the currency of international transaction over a single year through detailed inter service agreement, emails etc.

3. Rieter India Private Limited vs DCIT – ITA No. 2371/PUN/2017

Pune ITAT has adjudicated on the inclusion of Voluntary Retirement Scheme ("VRS") expense in the operating cost base of the comparables for an Assessee (engaged in manufacture of textile machines and related parts and components) for AY 2013-14. The Assessee, vide additional ground of appeal contented before the Tribunal to include the VRS expense in the operating base of one of the comparable as the similar treatment has been undertaken in computing the PLI of the Assessee. The Tribunal opined that in principle there cannot be any dispute with VRS expense incurred by any company forms part of operating cost base. Accordingly, the ITAT held that once such expense has been included in the Assessee's cost base then parallel treatment should also be given to the comparables. However, since the Assessee did not readily had copy of the working of the PLI of the comparable as computed by the TPO, the ITAT set aside the impugned order and restore the matter back to TPO/AO with the direction to include the VRS expense in the operating cost base if not already included. Separately, the ITAT restrict the TP adjustment to international transaction in the backdrop of provision to Section 92(1) of the Act and thereby direct the TPO/AO to restrict the TP adjustment to international transaction rather than the entity level transactions.

Nangia Andersen LLP's Take

Treatment of one-time expenses has always been a subject matter of debate. In this environment of pandemic times, there may be various expenses which the Indian Taxpayer may have to incur in order to keep the operations going. The actual delineation for such expenses can only be achieved if proper robust documentation is maintained to demonstrate 1) the inter-linkage of such expenses with India Taxpayer operations and 2) documentary evidence between AEs and Indian Taxpayer to demonstrate that such expenses were mutually agreed and decided between parties and Indian Taxpayer has actually borne such costs. In absence of such back up evidence, it may be difficult to demonstrate the actual character of the transaction from defense perspective.

▪ Ruling on re-characterization of international transaction as provision of intra group services

4. Tata Coffee Limited vs DCIT – IT(TP)A Nos. 568 & 729/Bang/2015

Bangalore ITAT in the case of Assessee (engaged in business of growing, curing of coffee and tea & manufacture of tea products) has endorsed with the reasoning of the DRP in re-characterizing the international transaction of reimbursement of expense as provision of Intra Group Services ("IGS") for AY 2010-11. Brief fact of the case being, Assessee intended to acquire an offshore entity based in Russia and in the process incurred expense to carried out due diligence exercise in the nature of pre-acquisition activities. However due to change in group's business strategy the said acquisition was undertaken by one of the AE of the Assessee and subsequently raised a debit note on the AE which was paid in full. While furnishing the Form 3CEB, the Assessee mentioned the said amount as *'Refund of Advance'* only to modify its position before the TPO as *'Reimbursement of expenses'*. The TPO concluded that the said sequence of events does not neither illustrate rendering any IGS to its AE nor the expenditure has anything to do with the AE. Accordingly applying the CUP method, the TPO determined the ALP at NIL. In a divergent view, the DRP has held the said transaction to be in the nature of IGS as in uncontrolled circumstances, the Assessee would have charged a markup from the third party on its investment in the form of resources, infrastructure, skills, time etc. Therefore, held that the TP adjustment should be restricted to markup amount in relation to expense incurred and accordingly determined the markup of 10% on the basis of operating profit of the Assessee. The Tribunal on the perusal of record, decided that the said expense cannot be held to be incurred on behalf of the AE as it is not a case where AE intended to acquire the entity from the beginning. Hence, placing reliance on the DRP rational, rejected the Assessee contention and held the said transaction would cover within the ambit TP regulation. However, with regards to markup determination, held that ALP has to be computed in accordance with one of the methods prescribed in the TP provision and accordingly restore the file TPO/AO for fresh examination.

Nangia Andersen LLP's Take

Centralized group procurement is a common phenomenon within MNE set up. While nomenclature of transactions can lead to a different connotation, accurate delineation of international transaction entered into between the AEs with regard to the actual conduct of parties is one of the foremost steps required for establishing the arm's length principle. Accordingly, every taxpayer should deep dive into every cost-to-cost basis of international transaction in order to determine whether there has been an element of service provision involved in such international transaction. Going by the time value of money concept, in an independent scenario, an independent third party would have evaluated 'Option Realistically Available' for undertaking such transaction and possibility of charging of mark up for such said provision of services may not be ruled out. Having said that, where there are group synergies and mutual benefit element involved in a particular transaction, appropriately analysis should be undertaken to document such benefits which can then demonstrate a no markup position.

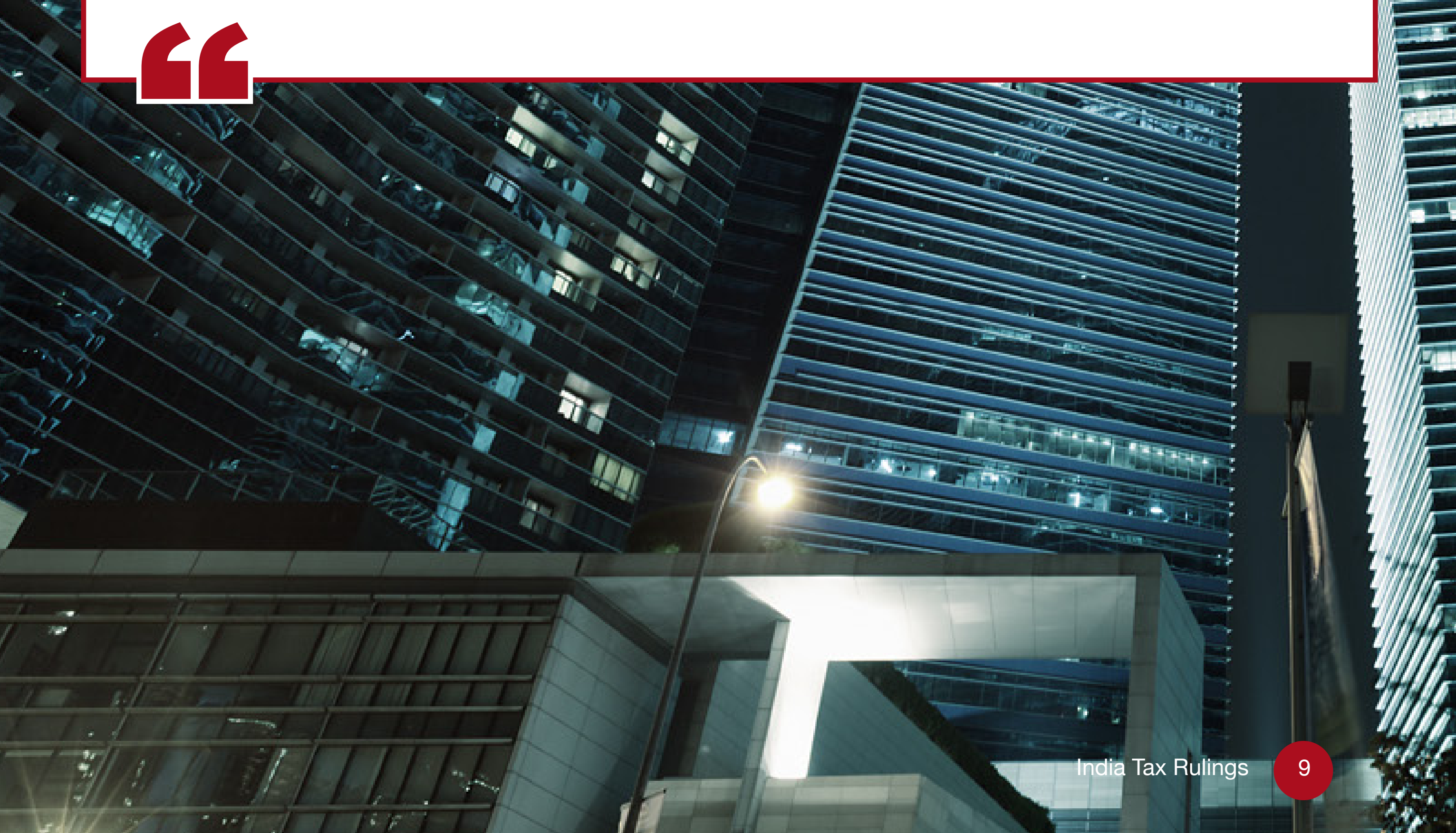
▪ Ruling on determination of arm's length margin of overseas AEs for rendering marketing function

5. The DCIT Vs Sitel India Ltd - ITA No. 561/Mum/2011

Mumbai ITAT discounting the Revenue's appeal, has sustained the Commissioner of Income Tax (Appeal) ("CIT(A)") decision of determining the ALP margin @ 6% for provision of marketing support service rendered by the AEs to the Assessee (engaged in providing contract center services in the nature of ITeS for customers based in USA and UK) for AY 2005-06. Brief background being, Assessee on its own has no overseas client and depends upon its foreign AE based in USA & UK to arrange for end customers. Accordingly, based on agreement, the AEs retained on an average 12% of the gross revenue from the end customers against its marketing services. In the course of TP assessment proceedings, the TPO rejected the benchmarking analysis adopted by the Assessee against the by rejecting idle capacity adjustment proposed the Assessee on the ground that Assessee being a captive service provider the idle capacity is only on account of AEs not giving enough business to the Assessee and besides rejecting certain comparables proceeded with TP adjustment. Before the first appellate authority, the Assessee demonstrated via submission of additional evidence that its AEs retained margin from gross revenue against its marketing function earned from the end customers for various projects which ranges from negligible profits to 20.93%. CIT(A) on examination of various submission held that ALP margin @ 6% (based on margins generally ranges from 5% to 7% in a place where AEs was located) could be considered at ALP and accordingly any amount paid to AEs exceeding 6% warrants TP adjustment. The Tribunal observed that the AEs indeed have earned variable margins which in some project has ran for losses. Accordingly, Mumbai ITAT held that compared to the marketing function performed and the cost incurred in that behalf, the profit margins earned by the AEs retained out of gross revenue cannot be inferred as unreasonably high. Further, the Tribunal noted that for AY 2004-05, similar adjustment proposed by the TPO were restored by the coordinate bench. Hence, the Tribunal upheld the ALP margin determination as decided by the CIT(A).

Nangia Andersen LLP's Take

Choice of foreign AE as tested party for TP benchmarking has been well established specially in case of non-risk bearing marketing functions by overseas AE. This ruling reinforces the fundamental cardinal point that there is no estoppel in having foreign AE results for the purpose of demonstrating the Arm's length nature arrangement between two AEs. However, every taxpayer should be mindful that that appropriate availability of required data, authenticity and reliability of such data and appropriate segmental accounts, in case applicable, should be in proper order to substantiate the claim by Indian Taxpayers.



▪ Ruling on applicability of TP provision on outstanding receivables

6. Techbooks International Pvt. Ltd. vs ACIT – MA No. 244/Del/2020 (In ITA No. 6402/Del/2016)

Delhi ITAT in the case of Assessee (engaged in rendering ITES services) dismissed the Miscellaneous Application ("MA") filed against the coordinate bench decision on the grounds of outstanding receivable from AE and held that such outstanding receivable with the AE is in excess to Assessee's Reserve & Surplus ("R&S) balance which is akin to dividend payment. Before the Tribunal, vide MA filed, the Assessee contented that the coordinate bench on merit has rejected the impact of working capital adjustment on outstanding receivables with the AE (in the backdrop of jurisdictional ruling relied upon by the Assessee in the case of Kusum healthcare private Limited vs ACIT [ITA No. 6814/del/2014] which was later upheld by the Delhi HC and various other rulings) on the inference that outstanding receivable being in excess of Assessee's shareholder funds implies that outstanding receivable was not originated from the sale of goods/services. Further, the Assessee argued that the coordinate bench advertently omitted to take cognizance of the fact through the submission of AE's financial statement that the AE is incurring substantial losses over past few years and faced genuine cash crunch and hence the delay in making the outstanding payment good. The Tribunal after perusal of records held that TP analysis warrants analysis of the margins of the Assessee and the comparables and accordingly the financial situation of the AE becomes redundant. Also, given the fact that AE has taken the whole money lying as R&S in the hand of the Assessee, the Tribunal was of the view that it was the device employed by the Assessee to avoid the payment of Dividend Distribution Tax ("DDT") in India and hence, rejected the MA filed by the Assessee.

Nangia Andersen LLP's Take

The Indian Taxpayer in the higher judicial forum has experienced a plethora of contradictory pronouncement wherein some benches have recognized outstanding receivable as separate international transaction while others have acknowledged the effect of working capital adjustment in subsuming the accounting receivable. However, in the instant case being one of its kind, it would be interesting to envisage how the judicial forum in the similar situation would now reach to its conclusion given the fact that DDT has become redundant in the hands of the Assessee company. TP being a fact finding exercise and given the record that the Assessee's AE was facing financial hardship for some years, the said ruling might be debatable. Nonetheless, it becomes crucial on the part of Assessee to maintain and keep a proper analysis of working capital difference between the Taxpayer and the comparables and ensure the inter-company agreement in terms of payments are in consonance to third party conditions.

▪ Ruling on applicability of TP provisions on Free of Cost ("FOC") import services and allowance of working capital adjustment

7. Cavium Networks India Pvt. Ltd. vs ACIT – ITA 1700/Hyd/2019 & SA 118/H/2020 (Arising out of ITA 1700/H/19)

Hyderabad ITTA has adjudicated on the issue of allowing working capital adjustment and the application of TP regulation for provision of FOC transaction in the case of Assessee (engaged in software development services) for AY 2015-16. On account of allowance of working capital adjustment, the Tribunal relying on the decision of Yahoo Software Development India Pvt. Ltd vs JCIT to distinguish the ruling of Mobis India Limited

[ITA 2112/Mds/2011] (reliance placed by Revenue) held that the corresponding Assessee in the case of Mobis India (supra) have failed to provide details of working capital analysis which is not the case in hand and accordingly accept the working capital adjustment in principle and directs the TPO to verify the facts. Separately, on TP adjustment proposed by the TPO in matter of FOC transaction wherein the Assessee has imported FOC software for the purpose of testing, the Tribunal agreeing with the Revenue's argument FCO transaction indeed form international transaction in accordance with provision of the Act. However, the Tribunal observed that the impugned addition has been undertaken by the TPO without considering any comparables or any of the method(s) prescribed in the Act. Accordingly, the Tribunal deleted the TP adjustment.

Nangia Andersen LLP's Take

Establishing the necessity for procuring free of cost assets/goods for the purpose of executing the delivery functions vs doing it otherwise with the intent of profit shifting has always been a challenging item for demonstration. In numerous instances, the receipt of FOC basis of assets/goods are a natural and genuine requirement from Indian Taxpayer perspective and failing to have these assets(which may be primarily for testing and overall delivery of services/contract) may lead non-delivery of performance under contract (which may be even applicable for a third party entity as well). Accordingly, there exists very fine thread to establish the genuineness of such transactions from business requirements and industry practices standpoint for an Indian Taxpayer.

▪ Ruling on interlinking of sub-Section (1) & (2) of Section 92A

8. PCIT & DCIT Vs M/s Page Industries Ltd- I.T.A No. 285 of 2017

Karnataka HC in the case of Assessee (engaged in the business of manufacture and sale of ready-made garments) for the AY 2010-2011, dismissed the Revenue's plea and pronounced that subsection (1) and (2) of Section 92A of the Act are interlinked and hence to be read in conjunction for establishing AE relationship. The Assessee was a licensee of the brand name 'Jockey' for the marketing of Jockey readymade garments against which the Assessee paid royalty @ 5% of sales as a form of consideration in pursuant to license agreement with Jockey International Inc. ("JII"). In the course of assessment proceedings, the TPO considered the Assessee and the JII as AE in accordance with the terms of clause (g) to Section 92A(2) under the notion that provision of Section 92A(1) and (2) has to be read independently and accordingly proceeded with the TP adjustment. Against which, the Assessee filed objections before DRP which in turn DRP rejected the Assessee's objection. The Tribunal held that since the requirements laid down in section 92A(1) has not been fulfilled under the given circumstances, therefore, the provision of Section 92A is not attracted. Consequently, Revenue preferred an appeal before the HC. Karnataka HC examine the Memorandum of Finance bill, 2002, and construe that the amendment to Section 92A(2) was brought to clarify that mere fact of participation by one enterprise/common person in the management or control or capital of the other enterprise shall not establish AE relationship, unless the criteria specified in sub section(2) gets fulfilled. Further, the HC held that reading the provision of subsection (1) and (2) will render one of the provisions ineffective which is impermissible in law. Hence, the HC dismissed the Revenue's appeal.

Nangia Andersen LLP's Take

A close analysis of provision of subsection (1) of Section 92A of the Act will give the impression of definition of term AE being general in nature which is based on the concept of 'participation in the management, control or capital'. On contrary, subsection (2) stipulates the specified criteria for defining the two enterprise as AE. Accordingly, it would be reasonable to state that AE relationship needs to be analyzed basis of specific scenarios mentioned in Section 92A(2). Further, the CBDT has also issued Circular No.8 dated 27 August 2008 which clarified that both the sub-section has to be read in aggregation. Hence, the intent of CBDT is also in line with the legislature which are legally binding on Revenue. Also, in the case of Kaybee Private Limited [ITA No. 2165/Mum/15], the Mumbai Tribunal while delivering its judgement has taken cognizance of the Bangalore Tribunal ruling in the Assessee's own case [TS-6458-ITAT-2016(BANGALORE)-O] stating for the combined interpretation of subsection (1) and (2) which was further recognized by the HC. Accordingly, with the instant pronouncement along with the Gujrat HC ruling in the case of Veer Gems (2017) 249 Taxman 264 (GUJ) it appears that the ambiguity of interpretation of definition of AE is reaching to its conclusion.

▪ Ruling on selection of Berry ratio as a PLI for benchmarking freight - receipt and expense services

9. Agility Logistics Private Limited vs DCIT – ITA No. 7199/Mum/2017 & ITA No. 6679/Mum/2018

Mumbai ITAT has adjudicated on the primary issue of examining the appropriateness in selection of Operating Profit/Value Added Expense ("OP/VAE") as a PLI by the Assessee (engaged in providing logistic services offering a specialized freight handling services) for AY 2013-14 and AY 2014-15. During the impugned AY's, the Assessee entered into international transaction with its AE in the nature of freight receipt, freight expense among other transactions. In the process of rendering its services, the Assessee bifurcated the business cost into 'direct cost' and 'VAE cost' wherein the Assessee has incurred direct cost in procuring services from a third party service providers viz. shippers/airliners etc., on which no value was added by the Assessee and merely acted as an agent. Accordingly, Assessee adopted external TNMM with berry ratio as a PLI for benchmarking analysis. Against which, the TPO in its assessment proceedings rejected the OP/VAE as PLI and determined the Operating Profit/Total Cost ("OP/TC") as the most appropriate PLI. The TPO in its observation held that the Assessee were performing significant function with reference to freight charges through negotiations with air and shipping companies and in turn were earning markup on the same. Accordingly, the said cost cannot be construed as third party cost and should be included in the operating cost base of the Assessee and hence the adoption OP/TC as a PLI. The DRP agreeing with reason of the TPO discounted the Assessee's claim. The Tribunal in order to arrive at its decision relied on the decision of DHL Logistics Private Limited vs DCIT (ITA No. 1030/Mum/2015) wherein it was concluded after analyzing the Assessee's business modus operandi along with the agreements, that cost incurred by the Assessee for obtaining services from third party does not involved any service element of the Assessee nor it had carried any risk or employed any assets. Accordingly, the net margin realized by the Assessee are to be determined only with respect to the cost directly incurred by the Assessee. Thus, the Tribunal finding force in the Assessee's claim held that the inclusion of freight cost in the total cost base is not permissible and sustained the adoption of berry ratio as a PLI. Additionally, on another issue raised by Assessee with regards to TPO is obligated to consider only the operating cost attributable to AE sales while performing TP adjustment, the Tribunal under the light of various judicial pronouncement held that TP adjustment as envisaged in Chapter X is only with respect to international transaction and cannot be extended to transaction entered into withunrelated third parties. Accordingly, restore the matter to the file of the TPO/AO for limited purpose of working out the TP adjustment.

Nangia Andersen LLP's Take

Though the application of Berry ratio is permitted to be allowed in the OECD guidelines and UN TP Manual, the Indian TP regulations still remain silent in this context. In India, use of berry ratio has been a subject matter of litigation and the higher appellate forum has mostly accepted the Berry ratio as a PLI in case of Sogo Shosha Assessee. Further Rule 10B(1)(e)(i) of the Rules, mandates that the net profit margin realized could be computed having regard to any other relevant base. Accordingly, for the Assessee to sail through with the application of Berry ratio, it must prepare a robust FAR where its remuneration model is function of cost and it must showcase that it's not exposed to significant risk nor involvement in any unique intangibles.

Nangia Andersen LLP's Take

In India, the completion of assessment proceedings is barred by time limitation to which Section 153 of the Act specifies the time limit within which the assessment proceeding is required to be completed. Similarly, for certain proceedings where the AO has referred the matter to the TPO in the light of TP provisions, Section 153(4) extends the time limitation by 12 months. In the instant case, on the matter of fact, for the second order issued by the TPO, the AO failed to communicate the case to the TPO and hence the said order shall not hold any legality in the light of limitation provisions.

▪ Ruling on whether letter of comfort can be construe as corporate guarantee

11. Asian Paints Limited vs ACIT – I.T.A. No. 2754/Mum/2014

Mumbai ITAT in the case of Assessee (engaged in the manufacture of paints and synthetic enamel) deletes the TP adjustment proposed by the Revenue which hold the letter of comfort/ support issued by the Assessee to banks towards the loan availed by its foreign AE's as corporate guarantee for AY 2009-10. During the assessment proceedings, the TPO observed that the Assessee had issued certain non-contractual letter of comfort/ support to banks without charging any fee from its AE's. The TPO opined that in an uncontrolled economic circumstances such services would not have been rendered without any remuneration. Accordingly, the TPO determined the arms-length to be at 1.41% of the loan availed and thereby proceeded with TP adjustment. Before the first appellate authority, the CIT(A) held such provision of letter of comfort as an international transaction and equated the same to corporate guarantee and thus upheld the TP adjustment, however reduced the adjustment amount. The Tribunal on perusal of letter of comfort held that there is no liability or responsibility fastened with the Assessee for making good the liability of the AE in case of any default. Besides, no evidence suggest that in case of any default by the AE, the outstanding loan will be recovered from the Assessee as the only promise made by the Assessee is, it will not make any divestment of the shares during the currency of the loan. Further, the Tribunal held that provision of letter of comfort/ support cannot be termed as international transaction within the meaning as specified in Section 92B of the Act. Consequently, deleted the TP adjustment.

Nangia Andersen LLP's Take

Letter of comfort/ support does not create any legally enforceable right which may create any sort of financial obligation in the hands of the issuer. Further, the Letter of comfort merely indicate the appellant assurance that the respondent would comply with terms of the financial transaction without guaranteeing the performance in the event of default. Further, in the OECD guidance on financial transaction such letter of comfort has described as lesser form of credit support which does not involve any explicit assumption of risk and therefore no compensation is warranted.

▪ Ruling on aggregation of two distinct international transaction for the purpose of benchmarking analysis

12. Piaggio Vehicles Private Limited vs ACIT – ITA No. 3029/PUN/2017

Pune ITAT for AY 2013-14 has ruled in determining the correctness of the TPO treatment in aggregating the international transactions undertaken by the Assessee (engaged in the manufacture and sale of motor vehicle) in the nature of export of service spares to its AE's & non-AE's and transaction of sourcing and export of spares/ components only to AE's for the purpose of benchmarking. The TPO, in the course of assessment proceedings has benchmarked the aforementioned transaction in aggregation by using the internal TNMM and thereafter proceeded with the TP adjustment (over-riding the Tribunal decision ruled in favor of the Assessee's for earlier AY on the pretext that Revenue has preferred an appeal before the HC on question of law). Later on, the DRP also upheld the TPO's action. In an appeal before the ITAT, the Assessee contented that the two kind of transactions are not comparable citing functional and economic differences involved and hence no credible internal comparables can be used. The Tribunal in order to arrive at its decision has relied on co-ordinate bench ruling in the Assessee's own case for AY 2006-07 wherein it was held that while carrying out the TP study it is imperative that a comparison is made with the similarly placed transactions to the extent possible having regards to relevant factors affecting the transaction undertaken vis-à-vis transactions sought to be compared. The Tribunal further held that the transaction with regards to export of service spares to both AE and non-AE purely falls under the realm of *'after-sale distribution'* whereas transaction of souring and export of spare to AE is equivalent to logistic services. The Tribunal acknowledged the impact of functional difference on net profit margins and accordingly deleted the TPO's aggregation approach. Accordingly, for transaction of export of service spare, the Tribunal similar to previous AY decision allowed the application of internal TNMM and for the transaction of sourcing and export of spares negating the use of internal TNMM restore the matter back to TPO/AO for fresh verification/adjudication and re-determine the ALP.

Nangia Andersen LLP's take

Remuneration should be appropriately commensurate with the FAR profile of the parties involved to a transaction. Each transaction has its own uniqueness in terms of key value drivers, complexities involved etc., which involves different functions and risks. Further in accordance with Rule 10C(2) of the Rules, one of the important factors in selection of Most Appropriate Method ("MAM") is the degree of comparability exist between the international transaction and uncontrolled transaction. Accordingly, in the instant case, the two transaction being different in class, the TPO has erred in combining the two transaction for the purpose of benchmarking. Hence, it becomes crucial for the Taxpayer to vigilantly draft its FAR analysis capturing all the key components to a transaction and accurately linking with its economic analysis in selection of MAM and its ALP determination.

OECD Updates

▪ Released Practical Toolkit to Implement Effective TP Documentation

On January 19, 2021, a joint initiative of International Monetary Fund, OECD, UN and the World Bank i.e. The Platform for Collaboration on Tax released its new Practical Toolkit to support the implementation of effective TP documentation requirements by developing countries. The Toolkit serves as the guidance sourcebook, compiling essential information on TP documentation and provides policy choices and legislative options to developing countries based on practices followed in more than 30 countries.

The Toolkit can be accessed at:

https://bit.ly/2Rr6xZp

▪ OECD published final batch of Stage 1 peer review report on dispute resolution

On February 16, 2021, OECD released Stage 1 peer review report for 13 countries namely Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Qatar, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, United Arab Emirates and Vietnam in order to assess their progress in implementing OECD/G20 BEPS Action Plan 14's minimum standard on dispute resolution between jurisdictions. The published reports incorporate MAP statistics from 2016-19 and altogether contain ~340 target recommendations to be evaluated in stage 2 of the peer review assessment. Copies of country-wise detailed peer review assessment report can be accessed at:

https://bit.ly/3foHnm7

▪ Released Practical Toolkit to Implement Effective TP Documentation

On February 1, 2021, OECD held public consultation meeting on the 2020 review of BEPS Action Plan 14 on proposals to improve MAP process. This is subsequent to the response received by Inclusive Framework on public comments invited on 2020 Review of BEPS Action 14, wherein around 30 contributors that includes advisory firms, business associations, and some individual businesses in pharmaceuticals, IT etc. industry have responded in over 200 pages.

The public comments received on the 2020 Review of BEPS Action 14 - OECD can be accessed at:

https://bit.ly/3bzh0ZH

Further, the live streaming of the virtual public consultation meeting on the 2020 Review of BEPS Action 14 - OECD can be viewed at:

https://bit.ly/3wacqbX

04

Global Update

Global TP news

▪ US

On March 30, 2021, Internal Revenue Services ("IRS") published 2020 APA statistics. A summary of the key findings of the APA program for the period from January 1, 2020 to December 31, 2020 is provided here:

- Out of the total of 121 APAs filed in 2020, 103 were bilateral APAs, with 11% as India's share;
- Out of the total of 127 APAs executed in 2020, 75 were renewals and 105 were bilateral APAs;
- As of December 31, 2020, over half of the pending bilateral APA requests involved either Japan (25%), India (20%), or Canada (11%);
- Majority of the transactions covered in APAs executed in 2020 involved the sale of tangible goods or the provision of services and in line with previous years ~25% involved the use of intangible property, which IRS claims to be the most challenging transactions;
- Median time taken to complete an APA (both unilateral and bilateral) in 2020 further decreased to 32.7 months (from 38.8 months and 40.2 months in 2019 and 2018 respectively);
- Majority of tested parties in 2020, as in the previous years, were US distributors/ manufacturers/ service providers;
- Similar to prior years, more than 50% of the APAs executed in 2020 involved transactions between non-US parents and US subsidiaries.

Detailed IRS Annual report on APA can be accessed at:

https://www.irs.gov/pub/irs-drop/a-21-06.pdf

Further, US IRS has recently signed a competent authority agreement with Argentina for exchange of Country by Country Reports ("CbCRs"), wherein the Argentine entities with ultimate parent entity in US, fulfilling the CbCR filing requirements, are not required to file CbCR in Argentina.

▪ United Kingdom ("UK")

On March 23, 2021, the Her Majesty Revenue and Customs Authority ("HMRC") published tax policy paper for consultation, due on June 1, 2021, with proposed changes to examine the requirement for large businesses with CbCR applicability to maintain TP documentation i.e., master file and local file. Further, the HMRC examines the requirement to report the related party dealings through international dealings schedule with specific information in their annual tax returns.

The HMRC's consultation on TP Documentation can be accessed at:

https://www.gov.uk/government/consultations/transfer-pricing-documentation

HMRC has also updated the CbCR Schema to XML 2.0 version in line with OECD for CbCR filings in UK w.e.f. January 1, 2021 with mandatory disclosure of reporting period start date, validation field on Reporting role i.e., Ultimate Parent Entity, Surrogate Parent Entity, Local Filing in the framework of an international exchange or Local Filing with Incomplete Information, amongst others.

Singapore

On March 19, 2021, the Inland Revenue Authority of Singapore ("IRAS") published TP guidelines on centralised activities by Singapore Headquarters ("HQs") in MNE groups, divided in two parts namely:

- Discusses the economic value contributions of centralised activities by Singapore HQs and their importance in an MNE group; and
- Provides guidance on how to analyse such activities carried out in Singapore between related parties, the factors that may affect the transfer price and the appropriate TP methods for these activities.

The TP guide classifies the HQ's centralised functions into four broad categories and provides examples of services in each category:

- Principal in distribution, manufacturing, or research and development arrangements, carrying out risk taking and decision making;
- Activities relating to core business processes that correlate to revenues or profits of the MNE group (e.g., procurement, highly technical backend operations for regulatory compliance, sales, etc.);
- Activities relating to administrative, technical, financial, commercial, management, coordination, and control functions, not part of the supply chain of goods or services but supporting the smooth operation of the MNE group; and
- Shareholder activities, not benefitting the group entities, for which no service fee could be charged.

The TP guide also provides examples of the assets that may be utilized and risks likely to be assumed by the Singapore HQs, depending on their role within the value chain; which the guide states is imperative to determine the arm's length transfer price. Copy of the detailed IRAS e-Tax Guide on 'Centralised Activities in Multinational Enterprise Groups' can be accessed at:

https://bit.ly/3tSMy2X

Korea

Recently, Korea enacted its 2021 tax reforms wherein:

- For the APA applications filed on or after January 1, 2021, the rollback period is extended from five to seven years for bilateral APAs and from three to five years for unilateral APAs.
- Taxpayers required to submit master file and local file are required to file TP disclosure form latest by six months from the fiscal year end.
- Master file, local file and APA annual report needs to be filed by the taxpayers latest by 12 months from the next day of the fiscal year end.

Denmark

Recently, Danish parliament introduced new rules for mandatory filing of contemporaneously prepared TP documentation (i.e., master file and local file) to Danish tax authority within 60 days from income tax return due date for fiscal years beginning from January 1, 2021. Further, Danish tax authority has also established new enforcement office to analysing the taxpayers' data, which is likely to increase the TP audit risk.

Spain

On January 19, 2021, Spanish tax authorities announced TP as key priority for tax enforcement with specific focus on intragroup transfer of intangible assets, financial transactions, attribution of profits to permanent establishments, intragroup payments such as payment of royalties or management services cross-charges, manufacturing or distribution activities carried out by group companies characterised as limited risk entities, etc. The TP risk assessment by Spanish tax authorities would be carried out by the use of data through automatic exchange such as CbCR, MAPs, APAs, simultaneous audits, etc. Further, Spain is aligned with the OECD's guidance on TP issues created by the COVID-19 pandemic.

▪ Thailand

On January 14, 2021, Thai tax authorities issued notification requiring taxpayers to mandatorily submit their TP disclosure forms online for or fiscal years on or after January 1, 2020, in order to facilitate the selection of cases for TP audit by the authorities.

▪ Luxembourg

On March 11, 2021, the Luxembourg tax authorities updated its circular on implementation of the MAP, i.e., starting from the initiation request till the termination of the MAP under the bilateral tax treaties concluded by Luxembourg, explaining interaction with other procedures and legal remedies.

▪ Serbia

On March 19, 2021, the Serbia's Ministry of Finance released the rulebook on arm's length interest rate on related party loan related expense/ income for 2021 separately for banks and financial leasing companies as well as other companies, which are effective from March 27, 2021.

▪ Greece

On March 10, 2021, the Greek tax authority issued guidance, in line with OECD, on four priority areas namely comparability analysis, government assistance programs, losses and the allocation of COVID-19 specific costs, and APAs.

▪ Zambia

Zambia made amendments to its domestic regulations implementing CbCR requirements, in line with BEPS Action Plan 13, w.e.f. January 1, 2021 applicable for years of assessment ending on or after December 31, 2021.

▪ Belarus

In January 2021, Belarus proposed amendments to its TP provisions effective from 2021 onwards with introduction of inter-quartile range, clarification on the list of information sources for conducting benchmark studies, expansion in the possibility to use independent valuations to determine the arm's length prices and reduced instances for requirement to maintain TP documentation.

▪ Bahrain

On February 4, 2021, Bahrain has introduced CbCR rules for fiscal years beginning on or after 1 January 2021, in line with BEPS Action Plan 13, for MNE groups operating in Bahrain with group consolidated revenue of BHD 342 mn (~ Euro 750 mn) in the preceding fiscal year. Constituent Entity in Bahrain will be required to submit a notification latest by the last day of the reporting fiscal year of the MNE group and reporting entity (i.e., Ultimate Parent Entity) in Bahrain need to file its CbC report latest by 12 months from the last day of the reporting fiscal year of the MNE group, failing which stringent penalties have been prescribed.

▪ Qatar

In February 2021, Qatar's General Tax Authority ("GTA") released guidance for taxpayers with cross border transactions to submit TP declaration form with 2020 tax return i.e., latest by April 30, 2021 for taxpayers with year ending December 31, 2020. Further, entity with total revenues/ assets exceeding QAR 50 mn for the year ending December 31, 2020 and at least one group entity outside Qatar need to submit master file and local file to the GTA by August 31, 2021.

Additionally, on February 16, 2021, OECD in its 10th peer review report on BEPS Action Plan 14 to improve tax dispute resolution mechanisms assessed that Qatar meets majority of the minimum standards laid down and in Stage 2 of the peer review, OECD will monitor Qatar's efforts in addressing any shortcomings identified in its Stage 1 peer review report.

Virgin Islands

Virgin Islands' International Tax Authority notified that all reporting obligations by reporting entities/ constituent entities needs to be fulfilled latest by January 13, 2021 in version 1.0 schema, post which filing needs to be made in OECD's new version 2.0 schema.

Important Rulings across the Globe

▪ South Africa Tax Court upheld TP adjustment by tax authorities

On January 7, 2021, South African Tax Court upheld TP adjustment made by South African Revenue Service ("SARS") due to lack of TP documentation for Financial Year ("FY") 2011. The assessee purchased raw material from international related party for manufacture of catalytic converters sold to third parties in South Africa. In the absence of TP documentation, SARS conducted its own analysis on external database using TNMM as the MAM with Net Cost Plus Mark-up as the PLI and made TP adjustment by increasing the assessee's margin to the median of the comparables selected, which was subsequently upheld by Tax Court in its judicial review. The Tax Court observes that burden of proof lies with the assessee, however, if the assessee fails the burden shifts to the tax authority exposing the assessee to higher risk on its TP position being challenges based on the TP analysis conducted by SARS. The Tax Court further held that in this case SARS correctly demonstrated TNMM as the MAM since the assessee's argument on applicability of Comparable Uncontrolled Price ("CUP") was incomprehensive. The copy of the ruling can be accessed at:

https://bit.ly/3ePThX9

▪ Danish Supreme Court ruling in case of Tetra Pak Processing Systems A/S

On April 26, 2021, Danish Supreme Court ("SC") upheld Tax Agency's discretionary estimated assessment due to inadequate TP documentation maintained by Tetra Pak Processing Systems A/S (the Assessee) for the tax years 2005-09. The SC held that the TP documentation for the Assessee's trading transaction with its group sales companies was deficient and thus equated with missing TP documentation since neither did it state the basis of determination of prices between related parties nor any comparability analysis as required under domestic TP regulations. Further, the SC held that there was no basis for overriding the Tax Agency's discretionary estimated assessment since the Assessee could neither prove that the Tax Agency's adjustment was based on deficient/ incorrect basis, nor that the adjustment was made based on manifestly unreasonable result. The translated copy of the ruling can be accessed at:

https://bit.ly/3foKPx5

▪ Spanish National Court upheld TP adjustment in case of Biomerieux España SA

On February 4, 2021, the Spanish National Court ("NC") upheld TP adjustment made by tax authorities in case of bioMérieux España SA's non arm's length purchase of instruments and consumables from its related parties, namely bioMérieux SA and bioMérieux Inc., for distribution during FY 2008. The NC observed that *"2008 was a year of outstanding economic results for the bioMérieux Group, as well as for bioMérieux Spain in terms of sales growth, according to the report. However, this situation of increased results for the Group is not reflected in the income statement of bioMérieux Spain's distribution business, whose profitability fell from 8% in 2007 to 4.47% in 2008. This is not consistent either with the Group's results or with the market remuneration for performing the same functions in 2007 and 2008, a market which has not been shown to have seen its margins of free competition reduced."* Further, *"applicant submits that the Spanish authorities have reached an amicable agreement with the French authorities and have fixed the agreed mark-up as market rate at 6.20 %. What is sought is to apply the same margin in relation to the US company, in respect of which there is no amicable procedure. The tax authorities opposes this argument, reasoning that the transfer price agreed with France in an amicable procedure is the result of a negotiation between sovereign entities involving considerations of international public law, and therefore its results cannot be extrapolated."*, which was upheld by the NC. Thus, the NC in agreement with the principles laid down in the OECD TP Guidelines for MNEs ruled that the comparable analysis conducted by the tax authorities provides the arm's length results instead of that proposed by bioMérieux España SA. The translated copy of the ruling can be accessed at:

https://bit.ly/33MYfO7

▪ Danish Tax Tribunal ruling in case of Tetra Pak Processing Systems A/S

On January 18, 2021, Danish National Tax Tribunal ("NTT") upheld Tax Agency's discretionary assessment due to insufficient TP documentation maintained by H Borrower and Lender A/S (the Assessee) for the tax year 2009. The Tax Agency alleged that the Assessee had placed deposits and received loans from H4, a group treasury company, wherein the interest rate received on the deposits was substantially lower than the interest rate paid on the loans. The Tax Agency concluded that the Assessee could not establish the arm's length nature of interest rate on its deposits with H4 using the CUP analysis due to inappropriate comparables, stating that the substantial profits earned by H4 are not justified by its limited functions on account of interest rate differential. Thus, the NTT upheld Tax Agency's discretionary assessment to adjust the interest rate on the loans based on the interest rate received on the deposits. The translated copy of the ruling can be accessed at:

https://bit.ly/3eT40QI

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